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Default Localism, Or: How Many Laboratories Does It Take to Make a Movement

Kathleen Claussen

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DEFAULT LOCALISM, OR: HOW MANY LABORATORIES DOES IT TAKE TO MAKE A MOVEMENT?

KATHLEEN CLAUSSEN†

TABLE OF CONTENTS

I. SKETCHING THE PROBLEM: AN OVERVIEW OF THE ISSUES AND THE LITERATURE	464
II. MENU FOR ADDRESSING OVERLAPPING SOVEREIGNTY	467
III. THE HISTORY OF THE FEDERAL HOUSING PROGRAM	470
A. Creating a "National" Program	470
B. Section 8	474
IV. ENDING DISCRIMINATION AT THE FEDERAL LEVEL	477
A. Fair Housing and Civil Rights in Congress	477
B. The Fair Housing Act, Its Progeny, and the First Retraction	479
C. Fighting Private Discrimination on the Basis of Section 8 Assistance	482
V. LOST IN TRANSITION: THE DISAPPEARANCE OF FEDERAL PROTECTION	487
VI. STATES AND LOCALITIES TAKE ACTION	491
VII. A SCATTERED MAP	499
A. Patterns	499
B. Guidance from the Courts	505
VIII. REALIZING A RESPONSIBILITY TO PROTECT....	506
A. Politics or Principles	507
IX. CONCLUSION	518

[Federal] legislation cannot properly cover the whole domain of rights appertaining to life, liberty, and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make

† The author would like to thank Robert Post, Judith Resnik, Reva Siegel, and the members of the Yale Constitutional Law Seminar for their comments on earlier drafts.

Congress take the place of the State legislatures and to supersede them.

—Justice Joseph Bradley¹

The first major housing legislation in the United States, the United States Housing Act of 1937,² part of the New Deal, was intended to remedy a severe housing shortage, particularly for the urban poor.³ Though it was amended and supplemented nearly a hundred times in the next several decades, it created from its inception a system that implicated multiple levels of governance. Since that time, the federal government has developed public housing policy in the United States, while state and local governments have directed that policy's implementation. Taken together, the structural scheme for public housing has relied upon a high degree of cooperation among the governmental layers.⁴

Alongside the structure of the public housing program, federal, state, and local governments are all engaged in efforts to ensure access to these programs. The concept of "fair housing" entered policymaking vocabulary in the late 1960s when legislators recognized integrated neighborhoods as critical components for ending race-based discrimination.⁵ The Fair Housing Act,⁶ which outlawed discrimination in both public and private housing, was the centerpiece of this discussion, though some states had their own fair housing laws far earlier.⁷ Twenty years after the first Fair Housing Act came into effect, Congress passed the Fair Housing Amendments Act of 1988⁸ to expand the scope of the original federal legislation. Like their struc-

1. The Civil Rights Cases, 109 U.S. 3, 13 (1883).

2. Pub. L. No. 75-412, 50 Stat. 888 (1937) (codified and omitted at 42 U.S.C. § 1401 (1974)).

3. United States Housing Act of 1937, Pub. L. No. 75-412, 50 Stat. 888 (1937) (codified and omitted at 42 U.S.C. § 1401 (1974)).

4. See generally Daniel J. Elazar, *Cooperative Federalism*, in *COMPETITION AMONG STATES AND LOCAL GOVERNMENTS* 66 (Daphne A. Kenyon & John Kincaid eds., 1991) (discussing the difficulties of separating state from federal spheres in recent years).

5. See Drew S. Days, III, *Rethinking the Integrative Ideal: Housing*, 33 *MCGEORGE L. REV.* 459, 462-65 (2002); John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 *U. MIAMI L. REV.* 1067, 1070 (1998).

6. Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended in 42 U.S.C. §§ 3601-3619 (1988)).

7. See 114 *CONG. REC.* S2530-32 (daily ed. Feb. 7, 1968) (statement of Sen. Tydings) (summarizing fair housing legislation in twenty-three states as of September 1, 1967). In Illinois, the legislature enacted the State Housing Act of 1933, codified as amended at 310 *ILL. COMP. STAT.* 5/1-5/47 (2008 & Supp. 2014), to provide for the establishment of a State Housing Board, with specific powers to study housing needs and conditions throughout the state, to prepare programs for the correction of such conditions.

8. Pub. L. No. 100-430, 102 Stat. 1619 (1988) (codified at 42 U.S.C. §§ 3601-3619 (1988)).

tural counterparts, these federal fair housing laws were promulgated at the national level but enforced in local settings.⁹

Despite the introduction of these major pieces of legislation designed to “provide . . . for fair housing throughout the United States,”¹⁰ housing was not made available on an equal playing field for all in need. In 1974, Congress eliminated statutory language that had prohibited discrimination by public authorities against the recipients of housing subsidies.¹¹ Although that language was brought back in 1988 to give low-income residents equal access, in a repeat performance in 1998, Congress eliminated the protection a second time.¹²

This Article analyzes how public housing policy has developed in the United States by examining two areas within the public housing scheme: (1) the policies governing the provision and administration of low-income housing programming (“structural policies”); and, (2) the policies prohibiting discrimination by landlords against prospective low-income tenants (“antidiscrimination policies”). The former are well-entrenched policies through which the federal, state, and local governments regularly work together and communicate about the creation and implementation of structural policies. In that way, structural housing policies are the paradigm case for proponents of federalism as an effective, cooperative model for governance. Antidiscrimination policies, on the other hand, are both highly indeterminate in their form and difficult to characterize with respect to their interactions across federal and subfederal actors. As a general matter, since the New Deal, the federal government has promulgated structural policies, while states and localities have implemented them, whereas antidiscrimination policies have been initiated at all levels.¹³

9. This was done in concert with local and state laws already in force. For a discussion of the federal fair housing laws in practice, see, Jean Eberhart Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L.J. 149 (1969). See also Leland B. Ware, *New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act*, 7 ADMIN. L.J. AM. U. 59 (1993).

10. 42 U.S.C. § 3601 (2012).

11. Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (1974) (codified as amended in scattered sections of 12 U.S.C., 20 U.S.C., and 42 U.S.C.).

12. Housing and Community Development Act of 1987, Pub. L. No. 100-242, 105 Stat. 1815 (1988) (codified as amended in scattered sections of 12 U.S.C. and 42 U.S.C.); Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, Pub. L. No. 105-276, 112 Stat. 2461 (1998) (repealing 1988 amendment’s antidiscrimination provision at 42 U.S.C. § 12705a).

13. Importantly, when examining which level of government controls or ought to control either set of policies, one must differentiate between the promulgation of a rule or scheme on the one hand, and the actual enforcement or implementation of the rule or scheme on the other.

This Article presents a data set that defies the models of federalism—old and new. The progressive federalists of today emphasize the potentialities of local governance.¹⁴ After briefly reviewing the federalist models in menu-like fashion, I argue that policymakers addressing fair housing for people with low incomes, an area of unknown or overlapping sovereignty¹⁵ open to local, state, and federal governance, have failed to maximize these potentialities. In so doing, the Article shifts the narrative from models to analyses for policymaking purposes. It has been acknowledged that multiplicity is part of federalism in which sometimes local communities and states compete and sometimes they cooperate; federalism produces dynamic and uneven results.¹⁶ This Article asks what underlies these crescendos and diminuendos to push tendencies in one direction or the other. I invite further investigation as to the conditions that make areas of unknown sovereignty such as this nuanced discrimination ripe for social movements. While this could be another piece of scholarship to add to the many about federalism, or a lesser-read article about housing policy, instead, it contests the academic modelling practice and seeks to empower policymakers to explore the potentialities of federalism to achieve meaningful change.

I. SKETCHING THE PROBLEM: AN OVERVIEW OF THE ISSUES

A. TWO HOUSING POLICIES

The two sets of housing policies I delineate are distinct in both their entrenchment and their scale. Both are open for legislators at the local, state, and national levels to create laws that provide or en-

14. Megan Quattlebaum raises the same queries implicated in this Article regarding this statement. See Megan Quattlebaum, *States Lead – Will the Feds Follow?*, HUFFINGTON POST (Sept. 9, 2014), http://www.huffingtonpost.com/megan-quattlebaum/states-lead-will-the-feds_b_5780764.html; but see Aaron Chatterji, *Don't Look to States for New Ideas*, N.Y. TIMES (Jan. 11, 2015), http://www.nytimes.com/2015/01/12/opinion/dont-look-to-states-for-new-ideas.html?_r=0.

15. See Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 4 (2007) (discussing the “truism [] that the federal and state governments have largely overlapping jurisdictions”). For overlapping sovereignty generally, see Neil MacCormick, *Beyond the Sovereign State*, 56 MOD. L. REV. 1 (1993). Cf. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (“Federalism was our Nation’s own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.”).

16. See, e.g., Abbe Gluck, *Our [National] Federalism*, 123 YALE L. J. 1996, 2043 (2014).

able access to fair housing. These areas of undefined sovereignty¹⁷ are ripe for study to help policymakers conceptualize how to maximize the potential of federalism to deliver a coherent and productive outcome to constituents.

Structural housing policy and antidiscrimination housing statutes are situated in different sections of the United States Code, though there is no obvious reason that they would need to be treated separately. Their respective locations in the Code are more likely the result of different framing and their introductions at different moments in time as I show below.¹⁸ In fact, the early structural policy for low-income housing included some antidiscrimination language prohibiting government authorities from discriminating against families on the basis of their receipt of public assistance.¹⁹ That law was replaced with a statute that lacked the same protection in 1974.²⁰ Since that time, the federal government has continued to support low-income housing through elaborate funding mechanisms and complex tri-level schemes implicating federal, state, and local resources.²¹ Antidiscrimination measures have remained outside the structural scheme, however. This Article asks why and how the antidiscrimination policies that have materialized have ricocheted across levels of government in contrast to their structural counterparts.

B. FEDERALISM THEORY AND PRACTICE

While I focus on how actors manage their overlapping sovereignty in the complex low-income housing system, my project also draws broader conclusions for other areas of overlapping sovereignty. The analysis undertaken here has relevance for practitioners and scholars seeking to understand how power is shared, developed, and divided among and between the federal government and the states and their political subdivisions by examining the contexts in which traditional models have been deployed. Federal and subfederal entities have ne-

17. See Judith Resnik, *Afterword: Federalism's Options*, 14 *YALE L. & POL'Y REV.* 465, 466 (1996) [hereinafter *Afterword: Federalism's Options*] (discussing the existence of "overlapping regulatory regimes and judicial decision making").

18. Congress used different powers to enact each scheme. Most notable is that the original antidiscrimination provision Congress enacted against private actors was part of a housing bill under its general welfare power. See Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended in 42 U.S.C. §§ 3601-3619 (1988)). The provision was never challenged in court on this basis; I highlight this to point out the potential for additional discrimination legislation to be developed under that premise.

19. See Housing Act of 1949, Pub. L. No. 81-171, § 301(8)(c), 63 Stat. 413, 423 (1949) (codified as amended in scattered sections of 42 U.S.C.).

20. See Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (1974) (codified as amended in scattered sections of 12 U.S.C., 20 U.S.C., and 42 U.S.C.); see also 42 U.S.C. § 1437(a) (2006).

21. See Pub. L. No. 93-383, 88 Stat. 633.

gotiated their shared power in such other areas as education and environmental protection, leading scholars to create descriptive labels and models for their interaction such as dialogic federalism, cooperative federalism, or polyphonic federalism. Commentators from inside and outside the law have relied on these descriptive and explanatory models along with metaphors like “marble cake federalism” or “picket fence federalism” to capture the interdependence among governing bodies.

The low-income housing policy struggles surface at the intersection of federalism and individual rights—two principal structural and substantive constitutional values. My focus on antidiscrimination highlights the way in which individual rights in an area of overlapping sovereignty are parsed by the federalist system. The structure of the system allows for introduction of and experimentation with norms and ideas that are debated in public spheres of different sizes and shapes. This experimentation is one of the promises of federalism. As a construct, federalism can facilitate exchange and cross-institutional, cross-jurisdictional learning; as an ideology, it can empower democracy. In the area of public housing policy, it has enabled a range of legislative responses to discrimination.

Federalism scholarship²² has steered clear of this specific debate and instead typically takes up interaction among judiciaries.²³ My project is centered on the legislative allocation of power, but courts are also significant players in the narrative. Most of the federalism literature treats courts as arbiters of the allocation question.²⁴ In this way,

22. For simplification, I define federalism as encapsulating the structure and relationship between federal, state, and local levels of governance. The literature in this area is vast, although few have noticed the unique dynamics of the housing area. Awareness regarding source-of-income discrimination is growing, however. See Kinara Flagg, *Mending the Safety Net Through Source of Income Protections: The Nexus Between Antidiscrimination and Social Welfare Law*, 20 COLUM. J. GENDER & L. 201 (2011); Tamica H. Daniel, Note, *Bringing Real Choice to the Housing Choice Voucher Program: Addressing Voucher Discrimination under the Federal Fair Housing Act*, 98 GEO. L.J. 769 (2010); Jenna Bernstein, Note, *Section 8, Source of Income Discrimination, and Federal Preemption: Setting the Record Straight*, 31 CARDOZO L. REV. 1407 (2010); Laura Bacon, Note, *Godinez v. Sullivan-Lackey: Creating a Meaningful Choice for Housing Voucher Holders*, 55 DEPAUL L. REV. 1273 (2006); Paula Beck, *Fighting Section 8 Discrimination: The Fair Housing Act's New Frontier*, 31 HARV. C.R.-C.L. L. REV. 155 (1996).

23. See Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010).

24. See, e.g., Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 826 (1996); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 935 (1994) (discussing the Supreme Court's willingness to protect states from preemption); James F. Blumstein, *Federalism and Civil Rights: Complementary and Competing Paradigms*, 47 VAND. L. REV. 1251, 1272-80 (1994) (discussing the Supreme Court's role as arbiter of federalism questions); Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1349 (2001)

it accords courts a substantial degree of authority. The public housing discrimination story demonstrates the limits of that analysis. This Article evaluates the role of courts in negotiating the federal and state protective measures and concludes that rather than having delineated appropriate areas of authority, courts have muddied the waters, defying legislative intent.

Separate from those who focus on the judiciary, some federalism scholars tend to treat federal, state, and local governments as single institutional actors whereas their interactions take place within bureaucratic, representative, or participatory structures, from the governor to the state legislature, from professionalized state bureaucracies to the independently elected attorney general.²⁵ Federalism theory has not given sufficient attention to these facts. I examine the participation of a range of local, state, and federal legislative actors, quasi-governmental bodies, executive authorities, and federal and state judiciaries insofar as each contributes to this narrative.

In what follows, I first sketch the contours of overlapping sovereignty and offer a menu of options for approaching such areas where the contours of authority are not fixed. I then turn to the history of structural housing policy, its aims, and its reliance on federalism, before deconstructing the history of the fair housing legislative agenda. Next, I explore the proliferation of the prohibition on “source-of-income” discrimination through a transfederalist lens. I conclude with an analysis of the resulting cartography and its implications. Lastly, I set out preliminary thoughts that broach some of the normative issues lurking behind the complex legal and governance relationships central to this Article.

II. MENU FOR ADDRESSING OVERLAPPING SOVEREIGNTY

Federalism scholarship is wrought with descriptive and explanatory models examining federalist processes at work, the constitutional and statutory distributions of powers, and their implications. Here, I present three menu options for policymakers confronted with a novel issue, the authority over which is not immediately apparent based on past practice or the limits of the federal structure, or an issue for which that authority is called into question. The two sets of housing policies I study here have both been taken up or could be taken up at

(“[T]he Rehnquist Court has been engaged in an attempt to revive the notion of judicially-enforceable limits on national power.”); *but see* Hills, *supra* note 15, at 32-40 (describing how judicial anti-preemption decisions would encourage and improve congressional discussion on the scope of state powers).

25. *See* Gerken, *supra* note 23; *see also* *Afterword: Federalism’s Options*, *supra* note 17.

any level, that is, by federal, state, or local policymakers. After outlining the menu, I argue that the structural policies have evolved according to the communication approach, whereas the antidiscrimination policies have moved along the spectrum between the communication and default approaches as they have evolved.

A. ASSIGNMENT

Under the assignment approach, one level of government makes an overt expression of authority over an issue area through a governance measure or measures, as if to stake a claim, and maintains fairly exclusive control. As a result, the issue is “assigned” or “categorized.” Today, categorical federalism is no longer the dominant construct it once was among scholars,²⁶ though government actors frequently stake claims. Below, I turn to the alternative approaches that have overtaken the assignment approach. It is worth considering, nevertheless, the possibilities for assignment within the context of low-income housing. In the case of discrimination in public housing, for example, there may be some utility to centralizing antidiscrimination lawmaking at the federal level to fall in step with the structural housing legislation; alternatively, localization by way of devolution might make sense so that each local community could implement antidiscrimination provisions where necessary and enforce them just as each community implements structural federal housing policy. As I will show below, the legislation has developed such that neither area belongs exclusively to one level of government.

B. COMMUNICATION

According to the communication approach, federal and subfederal levels engage in purposeful allocation of authority and enforcement. This approach incorporates the dialogic model of federalism advocated by scholars like Catherine Powell and the cooperative models of

26. See Edward A. Purcell, Jr., *Evolving Understandings of American Federalism: Some Shifting Parameters*, 50 N.Y.L. SCH. L. REV. 635, 675-82 (2006) (arguing that “the line between the ‘local’ and the ‘national’ grew increasingly hypothetical and arbitrary”); Judith Resnik, Joshua Civin & Joseph Frueh, *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709, 781 (2008) (discussing how categorical federalism can no longer serve as a descriptive label); see also Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 804 (2010); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 622 (2001) (discussing harms of categorical federalism); Judith Resnik, *The Internationalism of American Federalism: Missouri and Holland*, 73 MO. L. REV. 1105, 1143-44 (2008).

Robert Schapiro and others.²⁷ These dialogic and interactive descriptive models of federalism have largely replaced the previously entrenched dual or categorical federalism models.²⁸ In brief, dialogic federalism “links national and subnational governments in a dialogue about rights by ‘creat[ing] areas of overlap in which neither system can claim total sovereignty.’”²⁹ It identifies substantive collaboration between and among actors of multiple levels of government. For example, the federal government might provide a floor upon which state and local governments could build additional regulation or guidance. Alternatively, the federal government might promulgate a rule, to be enforced by subfederal actors. Communication need not be collaborative, however, and may be more aptly referred to as “combative” in some instances.³⁰ Under this model, issues percolate, borrow, and have centripetal force.

C. DEFAULT

The default approach represents a natural “falling of the chips.” Where there is no communication, no mechanism for dialogue, or no political will to generate broad, coordinated legislative attention to an issue at any level, the default is that which a single level adopts unilaterally. Policies creep into the interstices, wherever there is enough support for them to do so, in the absence of concerted effort. For discrimination in public housing programs, this approach is reflective of the status quo. In the face of silence since 1998 from the federal government, and no social movement to encourage legislative initiative in this area, state statutes and local ordinances are the only prohibitions on discrimination against low income residents.³¹ This piecemeal implementation results in spotty and scattered prohibitions, specific to each jurisdiction. Note that this example shows default by way of fed-

27. See Hills, *supra* note 15; *Afterword: Federalism’s Options*, *supra* note 17. See also Robert Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243 (2005).

28. See *supra* notes 15, 17. See *infra* note 32.

29. Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245, 249 (2001) (quoting Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1048 (1977)).

30. Gerken writes:

[D]ialogue is too anodyne a term to attach to this phenomenon, as it suggests that states are simply engaging the federal government in a polite conversation, ready to offer their docile obedience if the center rejects their claims. Rebellious state policymaking is distinct from the dominant modalities of federal-state dialogue – speaking and lobbying. What many federalism scholars call ‘dialogue,’ in short, is often a fight.

Gerken, *supra* note 23, at 67.

31. See, e.g., MASS. GEN. LAWS ch. 151B, § 1(11) (2010); ANN ARBOR, MICH., CODE § 9:150 (2008).

eral silence and state action, but the opposite could also be true and qualify as "default."³²

These three approaches are not to be exclusive or limited; rather, they comprise a spectrum of options along which federal and sub-federal activity takes place, according to scholars. Further, the spectrum is not unidimensional. For example, somewhere between the default and communication models one might situate a coordinated effort among actors at a single level, such as subfederal players engaging in horizontal federalism.

Applied here, I seek to locate antidiscrimination policymaking along the multidimensional spectrum and understand in what contexts local governance remains local as opposed to others in which it motivates the development of a national norm. As a result of the bifurcation in the law and the disappearance of federal protection, an array of transfederal litigation in the courts with sundry outcomes has implicated state and local housing antidiscrimination law alongside claims arising under the federal housing program with additional implications for the legislative approach adopted.³³

III. THE HISTORY OF THE FEDERAL HOUSING PROGRAM

In this Part, I present an overview of the history and evolution of the low-income housing program in the United States. Lawmaking in this area has developed through a high degree of communication and collaboration among policymakers at multiple levels of government.

A. CREATING A "NATIONAL" PROGRAM

The idea of public housing evolved over years of experimentation by local communities.³⁴ The federal government first examined housing conditions in 1892, with a focus on urban slum areas;³⁵ it would be another forty years before Congress passed the first housing legislation designed to improve the plight of those suffering the effects of the

32. Though I do not take it up here, a potential problem that arises in areas of overlapping sovereignty, and would most appropriately fall in the default approach, is a collective action challenge whereby each level defers to others to address the issue.

33. See, e.g., cases discussed *infra* Parts III-V.

34. As early as 1867, New York City passed the first tenement housing law, see, 1867 N.Y. Laws 2265, in an effort to check the insanitation and overcrowding in privately owned housing.

35. *HUD Historical Background*, U.S. DEP'T OF HOUS. & URBAN DEV. (May 18, 2007), <http://www.hud.gov/offices/adm/about/admguides/history.cfm>; see also Harold A. McDougall, *Affordable Housing for the 1990's*, 20 U. MICH. J.L. REFORM 727, 727 n.1 (1987).

Great Depression. The Emergency Relief and Construction Act of 1932,³⁶ designed to combat widespread unemployment and financial collapse, created the Reconstruction Finance Corporation (“RFC”). The RFC assisted low-income families by making loans to private corporations that provided housing to those families.³⁷ Two years later, without having seen much improvement for individual homebuyers, the government took additional action. As the Depression ended, Congress passed the United States Housing Act of 1934³⁸ to stimulate the release of private credit for home repairs and construction. Both of these acts focused largely on home finance and mortgage support, creating institutions to oversee the initiatives and supervise their implementation. However, this institutional infrastructure merely put programs in motion — large schemes designed, in these cases, to provide the administrative infrastructure for the housing industry. These institutions did little for those most in need: low-income families struggling to get back on their feet in the wake of the Depression.³⁹

The United States Housing Act of 1937⁴⁰ filled this void by establishing the nation’s first public housing program.⁴¹ It intended to “promote the general welfare of the Nation by employing its funds and credit . . . to assist the several states and their political subdivisions . . . to remedy the unsafe and unsanitary housing conditions . . . for families of low income.”⁴² To administer this policy it created a National Housing Authority. The role of the federal government, however, was limited to providing financial assistance for local projects.⁴³ The Act was blatant about empowering a federalist structure; its fun-

36. Pub. L. No. 72-301, 47 Stat. 709 (1932).

37. See Emergency Relief and Construction Act of 1932, Pub. L. No. 72-301, 47 Stat. 709 (1932) (codified as amended at 12 U.S.C. § 1148 (1949)).

38. Pub. L. No. 73-479, 48 Stat. 1246 (1934) (codified and omitted at 42 U.S.C. § 1401 (1974)).

39. See DOLORES HAYDEN, *BUILDING SUBURBIA: GREEN FIELDS AND URBAN GROWTH, 1820-2000*, 121-25 (Vintage Books 2003).

40. Pub. L. No. 75-412, 50 Stat. 888 (1937) (codified and omitted at 42 U.S.C. § 1401 (1974)).

41. See generally TIMOTHY L. McDONNELL, *THE WAGNER HOUSING ACT: A CASE STUDY OF THE LEGISLATIVE PROCESS* (1957) (detailing the political and legislative history of the Housing Act of 1937).

42. Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 2, 88 Stat. 633, 635 (1974) (codified as amended at 42 U.S.C. § 1437 (1974)).

43. Arguing against the Act were those who felt housing assistance should be focused on the suffering middle class; still stronger opponents objected to the subsidy-based design, equating it with socialism. See Peter Dreier, *Federal Housing Subsidies: Who Benefits and Why?*, in *A RIGHT TO HOUSING: FOUNDATION FOR A NEW SOCIAL AGENDA* 105, 113 (Rachel G. Bratt, Michael E. Stone & Chester Hartman eds., 2006).

damental purpose was to enable states and municipalities to improve conditions in their own jurisdictions.⁴⁴

In fact, by 1937, twenty-nine states had already passed laws permitting communities to form local housing authorities with the powers needed to meet the requirements for federal assistance; forty-six such authorities had been established pursuant to the state legislation, but only a few had undertaken projects prior to 1937.⁴⁵ Cities have also played a major role in national policymaking in this area since the Progressive Era when many reformers focused their attention on city improvement. During this period of social improvement—before the rise of the welfare state and the federal apparatus that governed it—cities became the main players in progressive change as they obtained federal funds.⁴⁶

The 1937 Act shaped the foundation of housing programs in the United States. It guided the direction of programs to come, including the urban renewal program, the Section 8 housing assistance program, and others that aimed to improve housing conditions for low and moderate income families. Notably, its emphasis on the devolution of responsibility to the states and their political subdivisions for the amelioration of unsafe housing conditions set into motion a scheme that would govern housing programs over the next seventy years, to the present day. This early federal legislation stressed financial aid to the states. Since its inception, however, national housing policy has faced tensions about just how much responsibility states and municipalities may exercise in their management of federal grants.⁴⁷

A dozen years later, the federal government changed the scope of its role in overseeing housing in America.⁴⁸ The inadequacies of the 1937 program were made apparent by an increased reliance on state and local programs.⁴⁹ Thus, in a departure from the emphasis placed

44. In fact, the authority of local governments over these public housing agencies varies from state to state, but more often than not, it is a very tenuous link. The agencies are instrumentalities of the federal government, though independent corporations.

45. See NATHANIEL S. KEITH, *POLITICS AND THE HOUSING CRISIS SINCE 1930*, 29 (1973).

46. Richard Schragger, *The Progressive City*, in *WHY THE LOCAL MATTERS: FEDERALISM, LOCALISM, AND PUBLIC INTEREST ADVOCACY*, PAPERS FROM THE ELEVENTH ANNUAL LIMAN PUBLIC INTEREST PROGRAM COLLOQUIUM 44 (Kathleen Claussen, et al. eds., 2009), available at http://www.law.yale.edu/documents/pdf/liman_whyTheLocalMatters.pdf.

47. See Otto J. Hetzel, *Asserted Federal Devolution of Public Housing Policy and Administration: Myth or Reality*, 3 WASH. U. J.L. & POL'Y 415, 417 (2000).

48. Housing Act of 1949, Pub. L. No. 81-171, 63 Stat. 413 (1949) (codified as amended in scattered sections of 42 U.S.C.).

49. See Housing Act of 1949 § 101(b).

on the states in the language of the 1937 Act, the 1949 Act⁵⁰ was intended “[t]o establish a *national* housing objective.”⁵¹ It set forward a declaration of the new centralized housing policy: “The Congress hereby declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage”⁵²

By realizing “the goal of a decent home and a suitable living environment for every American family,”⁵³ the Act purported to contribute “to the advancement of the growth, wealth, and security of the Nation.”⁵⁴ The Act created a policy “to provide federal aid to assist . . . low-rent public housing projects initiated by local agencies”⁵⁵ and encouraged local housing authorities to undertake programs that would assist in the development of integrated and affordable housing for low-income people.⁵⁶ The use of the term “local agency” is slightly misleading insofar as these local authorities were not governmental bodies either under the aegis of local or federal governments.⁵⁷ Federal and state legislation empowered their creation, while local government directed their work. Still, the overall effect of the Act was a slight shift from a program premised on federal money filtered through the state with a large degree of autonomy on the part of the state, to one in which federal money was funneled directly to the local level with a higher degree of local ownership. Both of these structures reflect a high degree of cooperation and communication among the levels.

50. Housing Act of 1949, Pub. L. No. 81-171, 63 Stat. 413 (1949) (codified as amended in scattered sections of 42 U.S.C.).

51. *Id.* pmb. (emphasis added).

52. *Id.* § 2.

53. *Id.*

54. *Id.* Note, in particular, the Act’s invocation of Congress’s Article 1, Section 8, Clause 1 authority to provide for the general welfare: “The Congress hereby declares that the general welfare and security of the Nation . . . require housing production and related community development”; *see also* U.S. CONST. art. I, § 8, cl. 1.

55. Pub. L. No. 81-171, pmb., § 101, 63 Stat. 413, 413-14.

56. *See id.* § 2.

57. Rather, public housing authorities are entities incorporated under state law. *See, e.g.*, CONN. GEN. STAT. § 8-40 (1955).

In each municipality of the state there is created a public body corporate and politic to be known as the ‘housing authority’ of the municipality; provided such authority shall not transact any business or exercise its powers hereunder until the governing body of the municipality by resolution declares that there is need for a housing authority in the municipality

Id. Other housing authorities refer to themselves as “quasi-governmental.” *See, e.g.*, GREENSBORO HOUS. AUTH., <http://www.gha-nc.org/> (last visited Feb. 28, 2015); HOUS. AUTH. OF THE CITY OF GREENVILLE, <http://www.ghanc.net/> (last visited Feb. 28, 2015); HOUS. AUTH. OF THE CITY OF TULSA, <http://www.tulsa-housing.org/> (last visited Feb. 28, 2015).

Thus, while the precise contours of the devolved components of the federal programs have fluctuated, the policy's cooperative federal-to-subfederal structure has remained intact. The federal government has empowered local agencies to administer the program with little friction. Title III of the 1949 Act focused exclusively on low-rent public housing, amending the 1937 Housing Act.⁵⁸ While the structure for aid to the poor was created by this Act, it would be another twenty years before protections against discrimination could be put into place for the recipients of this aid, as part of the Section 8 voucher program.⁵⁹

B. SECTION 8

Congress first established the Section 8 housing program through the Housing and Community Development Act of 1974⁶⁰ “[f]or the purpose of aiding lower-income families in obtaining a decent place to live and of promoting economically mixed housing”⁶¹ The name “Section 8” comes from the section of the original 1937 Act under which low-income housing support is authorized.⁶² The Section 8 system originally had two main parts: the certificate program and the voucher program.⁶³

The certificate program, authorized by Congress and administered by the Department of Housing and Urban Development (“HUD”), provided rental assistance payments to owners of residential rental properties on behalf of low-income tenants.⁶⁴ Under the program, a family applied for participation directly to the local public housing authority (“PHA”)⁶⁵ which would then determine that family's eligibility and, if warranted, issue the family a Certificate of Family Participation. It was then the family's responsibility to seek an appropriate dwelling—a privately owned apartment that they could rent at or below a locally established fair market rent—that met the criteria of the PHA. When a suitable unit was found and after the

58. Pub. L. No. 81-171, §§ 301-07, 63 Stat. 413, 422-31.

59. *See, e.g., Section 8 Housing Choice Voucher Program*, CONN. DEP'T OF HOUS., <http://www.ct.gov/doh/cwp/view.asp?a=4513&q=530586> (describing Section 8 housing choice vouchers as “the government's major program for assisting very-low-income families to afford decent, safe, and sanitary housing in the private market”).

60. Pub. L. No. 93-383, 88 Stat. 633 (1974) (codified as amended in scattered sections of 12 U.S.C., 20 U.S.C., and 42 U.S.C.).

61. Pub. L. No. 93-383, § 201(a), 88 Stat. 633, 662 (codified as amended at 42 U.S.C. § 1437 (2006)).

62. United States Housing Act of 1937, Pub. L. No. 75-412, § 8, 50 Stat. 888, 891 (1937) (codified and omitted at 42 U.S.C. § 1401 (1974)).

63. Pub. L. No. 75-412, § 8, 50 Stat. 888, 891 (codified and omitted at 42 U.S.C. § 1401 (1974)).

64. *See* 42 U.S.C. § 1437f(a) (2012).

65. *See* 42 U.S.C. § 1437c-1 (2012).

PHA had approved the family's selected unit, the family would sign a lease with the landlord. At the same time, the PHA would sign a contract with the property owner committing to subsidize the tenant family's rent. The PHA paid the contract rent, minus the tenant family's rent payment (thirty percent of the household income).⁶⁶ In return, landlords had to keep Section 8 rental units in compliance with HUD's housing quality standards.⁶⁷ Certificate holders had a limited period to locate a qualifying apartment, after which time the certificate would revert back to the local housing agency.⁶⁸

Similar to the certificate program, the Section 8 voucher program was established in 1983,⁶⁹ in part to allow tenants greater choice in locating apartments.⁷⁰ The two programs were consolidated in 1998 and today operate under a single voucher system. A voucher may either be "project-based"—where its use is limited to a specific apartment unit—or "tenant-based"—where the tenant is free to choose a unit in the private sector.⁷¹ Under the tenant-based voucher provisions, HUD contracts with PHAs to run the program. Applicants apply to the PHA for vouchers⁷² and then are responsible for finding housing. After an apartment is found and inspected, the PHA contracts with the owner to provide assistance payments. Landlords collect the remainder of the rent from the Section 8 tenant, which normally comes to thirty percent of their income.⁷³ The flexibility provided to tenants under this system allows them to live where they choose, paying more than thirty percent of their income toward an above-market-price rent, rather than in units selected by Section 8.⁷⁴ Alternatively, they may find a unit for less than the fair market rent and reserve their savings.

Several reforms and attempted reforms have been made to the Section 8 scheme since its creation. One of the most significant reforms was the Multifamily Assisted Housing Reform and Affordability

66. See HELEN HERSHKOFF & STEPHEN LOFFREDO, *THE RIGHTS OF THE POOR: THE AUTHORITATIVE ACLU GUIDE TO POOR PEOPLE'S RIGHTS* 225 (1997).

67. 24 C.F.R. § 982.401 (2015).

68. *Salute v. Stratford Greens (Salute II)*, 918 F. Supp. 660, 662 (E.D.N.Y. 1996).

69. Housing and Urban-Rural Recovery Act of 1983, Pub. L. No. 98-181, 97 Stat. 1183 (codified as amended at 42 U.S.C. § 1437f (2006)); see also 24 C.F.R. §§ 882.101-.102 (1995).

70. See Paula Beck, *Fighting Section 8 Discrimination: The Fair Housing Act's New Frontier*, 31 HARV. C.R.-C.L. L. REV. 155, 157 (1996).

71. See 42 U.S.C. § 1437e (2006); 24 C.F.R. § 882.701-716 (1998). This C.F.R. has also been "reserved."

72. 42 U.S.C. § 1437f(o) (2006); see also 24 C.F.R. §§ 882, 887, 982, 983 (2008); HERSHKOFF & LOFFREDO, *supra* note 66, at 255.

73. 42 U.S.C. § 1437f(o)(2)(A) (2006).

74. See HERSHKOFF & LOFFREDO, *supra* note 66, at 225-26.

Act of 1997⁷⁵ (“MAHRAA”). The purpose of MAHRAA was to protect tenants affected by the termination of expiring project-based Section 8 contracts and to prevent their displacement⁷⁶ by providing those tenants with vouchers. In addition to consolidating the certificate and voucher programs, MAHRAA redeveloped the system so that vouchers attach to a particular individual rather than to the rental property, making the vouchers more portable, but also putting a greater onus on the prospective tenant to find appropriate housing independently.⁷⁷

The most recent major attempted reform was the Section 8 Voucher Reform Act of 2007⁷⁸ (“SEVRA”). Under bipartisan and diverse geographic sponsorship,⁷⁹ SEVRA received widespread support in the House of Representatives and passed out of the House on July 12, 2007.⁸⁰ The bill would have made procedural changes to the manner in which housing was approved by local housing authorities as well as some income calculation adjustments.⁸¹ It also purported to change the criteria for eligibility in the program⁸² and to establish a Housing Innovation Program to provide PHAs and HUD with additional “flexibility to design and evaluate innovative approaches to providing housing assistance.”⁸³ On July 16, 2007, the bill was referred to the Senate Committee on Banking, Housing and Urban Affairs where it stalled for the remainder of the session.⁸⁴

75. Pub. L. No. 105-65, 111 Stat. 1384 (1997) (codified as amended at 42 U.S.C. § 1437f (2006)).

76. 42 U.S.C. § 1437f(a).

77. See 42 U.S.C. § 1437f(f)(6)-(7).

78. H.R. 1851, 110th Cong. (2007). More recently, smaller inroads have been made. Under the American Recovery & Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 215 (2009), for example, owners of certain units are not permitted to discriminate against voucher holders.

79. The bill was sponsored by: Maxine Waters (CA); Barney Frank (MA); Christopher Shays (CT); Judy Biggert (IL); Donald Payne (NJ), William Delahunt (MA), and Danny Davis (IL).

80. See H.R. REP. NO. 110-216 (2007); 153 CONG. REC. 18888 (2007). The bill passed by a margin of 333 in favor and 83 opposed.

81. H.R. 1851 § 1-3.

82. *Id.* § 5.

83. *Id.* § 16.

84. 153 CONG. REC. 19016 (2007). In the absence of comprehensive coverage, the federal government has used pieces of its structural programs to achieve some degree of protection for voucher holders. Voucher non-discrimination provisions can be found within smaller HUD-related programmatic statutes such as within the HOME Program legislation, the Low-Income Housing Tax Credit Program, and with respect to HUD-administered mortgages. See, e.g., 26 U.S.C. § 42(h)(6)(b)(iv) (2012); 26 C.F.R. § 1.42-5(c)(1)(xi) (2000) (LIHTC); 42 U.S.C. § 12745(a)(1)(D) (2012); 24 C.F.R. § 92.252(d) (2002); HUD PIH Notice 2001-2(HA) (Jan. 18, 2001) (HOME program); 42 U.S.C. § 1437f, note (1998); 24 C.F.R. § 401.556 (2015) (Mark to Market); 12 U.S.C. § 1701z (2012); 24 C.F.R. §§ 290.19, 290.39; PIH 2002-15(HAs) (Multifamily properties purchased from HUD).

Today, the Section 8 program supports more than 1.4 million households,⁸⁵ and a bill introduced, but not passed, in 2009 would have authorized the allocation of 150,000 more vouchers to “help meet the housing needs of low-income families.”⁸⁶ Nevertheless, the provision of vouchers is not itself a solution. Some landlords adamantly refuse to participate in the program on the basis of the intrusion of the PHA in carrying out inspections; some may fear that Section 8 tenants will not be responsible tenants; some intend to charge rent above the fair market rent; and some may be disinclined to abide by HUD’s more stringent eviction provisions (as compared to some state laws). On the other hand, some landlords may see the Section 8 program as beneficial to their business as a result of the pool of potential renters (the waiting lists for Section 8 tenants are typically lengthy), or because they value the prompt and regular payments from the PHA for its share of the rent.

Although the Section 8 program, like its predecessors, reflects a cooperative approach among the levels of government in the United States to the provision of low-income housing, fair housing initiatives have been less cooperative. Despite the apparent parallelism in these two issues, their evolutions in our federal system have followed divergent paths.

IV. ENDING DISCRIMINATION AT THE FEDERAL LEVEL

This Part and the one that follows it will demonstrate how the cooperative federalism made manifest in the structure of the national housing program outlined above has not been replicated in the antidiscrimination context; rather, antidiscrimination initiatives have been left by default to any local or state community that will take up the cause.

A. FAIR HOUSING AND CIVIL RIGHTS IN CONGRESS

Beginning in the 1960s, fair housing laws developed independently from the system-creating laws that provide and regulate public housing assistance. Prior to that time, one subsection of a structural programmatic statute afforded protection from discrimination by the PHA. The Housing Act of 1949⁸⁷ included a single provision that pro-

85. U.S. DEP’T OF HOUS. AND URBAN DEV., HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK (2001), available at http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/programs/hcv/forms/guidebook; *Section 8 Rental Certificate Program*, U.S. DEP’T OF HOUS. AND URBAN DEV., available at <http://portal.hud.gov/hudportal/HUD?src=/programdescription/cert8>.

86. H.R. 168, 111th Cong. (2009).

87. Pub. L. No. 81-171, 63 Stat. 413 (1949) (codified as amended in scattered sections of 42 U.S.C.).

hibited discrimination by public authorities in their distribution of housing benefits to low-income applicants on the basis of their income.⁸⁸ The Act provided that "in the selection of tenants (i) the public housing agency shall not discriminate against families, otherwise eligible for admission to such housing, because their incomes are derived in whole or in part from public assistance . . ."⁸⁹ The proliferation of separate statutes with the label of "fair housing" accompanied the civil rights movement nearly twenty years later.⁹⁰

Attempts to do more at the time of the 1949 Act's passage—the start of a time of great importance for public policy and civil rights in the United States—failed. In the final days before the vote on the Act, Senators John Bricker (R-Ohio) and Henry Cain (R-Washington) co-sponsored an amendment forbidding racial and other forms of discrimination in housing,⁹¹ however, the Cain-Bricker Amendment was not a friendly one—neither in terms of the legislative meaning of the word nor in the colloquial sense with reference to fair housing advocates. For almost three years, the "omnibus housing act" had undergone debate in Congress. Just as it appeared close to passage, Bricker and Cain brought an amendment to the floor in an effort to defeat it.⁹² Their goal was to eliminate all regulations on affordable housing because, they believed, "the market [could] produce a sufficient supply of affordable housing [units]."⁹³ Cain and Bricker intended their amendment to divide proponents of the bill—splitting urban liberals and southern segregationists—so as to thwart its passage.⁹⁴

The Cain-Bricker Amendment would have declared the policy of the Congress to support "equality of treatment of all people . . . in housing of Government credit" and that "all housing, owned and operated by the United States, or aided or subsidized in any manner, directly or indirectly shall be operated without such discrimination."⁹⁵ The Amendment, which would eventually be rejected by the Senate Banking and Commerce Committee by a vote of 10-2,⁹⁶ would have required property owners in violation to pay up to \$10,000 or to be

88. Housing Act of 1949, Pub. L. No. 81-171, § 301, 63 Stat. 413, 422 (1949) (codified as amended in scattered sections of 42 U.S.C.).

89. Pub. L. No. 81-171, § 301, 63 Stat. 413, 423.

90. See, e.g., Fair Housing Act, Pub. L. No. 90-284, § 801, 82 Stat. 81, 81 (1968) (codified as amended at 42 U.S.C. §§ 3601-3619 (2006)).

91. See A. SCOTT HENDERSON, HOUSING AND THE DEMOCRATIC IDEAL: THE LIFE AND THOUGHT OF CHARLES ABRAMS 153-54 (2000).

92. *Id.*

93. *Id.* at 153.

94. *Id.* at 154.

95. *In the Nation's Capital*, ATLANTA DAILY WORLD, Apr. 19, 1949, at 6 (internal quotation marks omitted).

96. It was believed that Senator Bricker introduced the amendment in an effort to defeat the entirety of the national housing legislation. See *id.*

imprisoned for up to one year, or both. In an editorial comment in the *Atlanta Daily World* around that time, the spirit of the amendment was defended as necessary for the United States to “maintain its place of moral merit leadership” and for “squar[ing] its practices with its preachments.”⁹⁷ The authors of the comment noted that since Congress had passed no legislative civil rights package since 1875, this sort of integration into a bill addressing housing would be “a necessary implementation” of a movement already underway through the United States Supreme Court to eliminate segregation in housing.⁹⁸ The Amendment was defeated on April 21, 1949, while the housing legislation survived.⁹⁹

Ironically, the Cain-Bricker incident began a noticeable trend of integrating rights-promoting and protective measures into the organic statutes of structural federal programs. In the years that followed, legislators opposed to public housing programs developed and introduced similar amendments to housing bills, “illustrating how civil rights riders could become tools of those who wished to defeat, not enact legislation.”¹⁰⁰ At the same time, some of the nation’s major influential figures believed that discrimination would be fought through building more low-income housing, not through antidiscrimination laws themselves.¹⁰¹

B. THE FAIR HOUSING ACT, ITS PROGENY, AND THE FIRST RETRACTION

As the civil rights movement grew in force, pushing Congress to action in the early 1960s, draft legislation circulated that expressed the social concern of not only providing decent housing to all, but also ensuring that such housing was made available and accessible to all. In that spirit, President John F. Kennedy issued Executive Order 11063 on Equal Opportunity in Housing¹⁰² on November 20, 1962.¹⁰³ The Order, urged by the federal Civil Rights Commission and its affiliated advocates,¹⁰⁴ represented the first major effort by a branch of the federal government to address civil rights in housing. The text of the

97. *Id.*

98. *Id.*

99. See 95 CONG. REC. 4831 (1949); 95 CONG. REC. D221 (daily ed. Apr. 21, 1949).

100. HENDERSON, *supra* note 91, at 154.

101. *Id.* at 155.

102. Exec. Order No. 11,063, 24 C.F.R. § 107.10 (1962).

103. President Kennedy issued this Order just two days before he was assassinated.

104. See *Weaver Calls for Discrimination Ban in Housing*, DAILY CAPITAL NEWS (Jefferson City, Mo.), Apr. 13, 1962, at 3.

Order is almost identical to the language used by Congress in the Fair Housing Act¹⁰⁵ six years later.

The Fair Housing Act was the first Congressional effort to combat discrimination in the private housing context; it took shape in Title VIII of the Civil Rights Act of 1968.¹⁰⁶ The law made it “unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race, color, religion, sex, handicap, familial status, or national origin.”¹⁰⁷ This federal protection was added to protections already in force by way of state and local legislation.¹⁰⁸ In the passage of the federal law, legislators made reference to the state and local laws in force, again engaging with other levels of government, even if just by reference.¹⁰⁹ The conversations on the floor of the House and Senate acknowledged the proliferation of state support for protection against discrimination on the basis of race and other factors.¹¹⁰ The passage of the federal act would codify the growth of the burgeoning national norm which had been taken up by the states.

By passing the Fair Housing Act (“the Act”), Congress took a major step toward protecting certain classes of individuals from discrimination in the housing market across the country. In the first few years after it entered into force, hundreds of claims were adjudicated.¹¹¹ Nevertheless, the Act was quickly criticized as being insufficient in terms of the protection it provided, particularly with respect to its limited enforcement mechanism and the unavailability of relief

105. Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. §§ 3601-3619 (1996)).

106. It was preceded by Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 241, 252 (1964) (codified at 42 U.S.C. § 2000d (1964)), which prohibits discrimination on the basis of “race, color, or national origin” in programs and activities receiving federal aid.

107. 42 U.S.C. §§ 3604-3605 (2006).

108. Michael H. Schill, *Implementing the Federal Fair Housing Act: The Adjudication of Complaints*, in *FRAGILE RIGHTS WITHIN CITIES: GOVERNMENT, HOUSING, AND FAIRNESS* 143, 144 (John Goering ed., 2007) (“[S]everal states and localities had already adopted laws forbidding discrimination in privately owned housing . . .”). Today, 39 states have fair housing acts. See *State and Local Fair Housing Enforcement Laws*, THE LEADERSHIP CONFERENCE, <http://www.civilrights.org/fairhousing/laws/state-laws.html> (last visited Mar. 3, 2015).

109. See 114 CONG. REC. S2530-32 (daily ed. Feb. 7, 1968) (statement of Sen. Tydings) (summarizing fair housing legislation in 23 states).

110. See *id.*

111. Ware, *supra* note 9, at 79. This study does not take up an examination regarding how much the Act was relied upon as compared to individual state provisions and whether the litigation that did result was more common in states that lacked state fair housing statutes.

for plaintiff-tenants.¹¹² Despite some level of success in the courts, housing discrimination continued to be widespread¹¹³ over the next twenty years, prompting legislators to add force to the “toothless tiger”¹¹⁴ and eventually leading them to enact the 1988 Amendments.

In the interim, however, Congress enacted additional fair housing measures in the spirit of the original Act. For example, the Housing and Community Development Act of 1974¹¹⁵ prohibited discrimination on the basis of race, color, national origin, sex, or religion in programs and activities receiving financial assistance from HUD’s Community Development and Block Grant (“CDBG”) Program.¹¹⁶

The 1974 Act is of particular importance here because it also had the effect of removing the antidiscrimination clause enacted in the Housing Act of 1949¹¹⁷ that prohibited discrimination by local housing agencies with respect to source-of-income. This provision had previously protected low-income benefits recipients in their access to public housing.¹¹⁸ In the midst of the restructuring and implementation of the CDBG Program, the 1949 language simply disappeared from the Code, without discussion, in what appears to be inadvertent error.

Throughout the early 1980s, legislators discussed and defeated several drafts of amendments to the Fair Housing Act, most of which were rejected as a result of controversy surrounding enhanced enforcement mechanisms. Finally, the amendments passed in 1988 improved enforcement and provided protection against discrimination to two new classes: the handicapped and families with children.¹¹⁹

112. *Id.*

113. Schill, *supra* note 108, at 145.

114. 134 CONG. REC. S10455 (1988) (statement of Sen. Kennedy).

115. Pub. L. No. 93-383, 88 Stat. 633 (1974) (codified as amended in scattered sections of 12 U.S.C., 20 U.S.C., and 42 U.S.C.).

116. Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (1974) (codified as amended in scattered sections of 12 U.S.C., 20 U.S.C., and 42 U.S.C.).

117. Pub. L. No. 81-171, 63 Stat. 413 (1949) (codified as amended in scattered sections of 42 U.S.C.).

118. *See* Housing Act of 1949, Pub. L. No. 81-171, 63 Stat. 413 (1949) (codified as amended in scattered sections of 42 U.S.C.).

119. Ware, *supra* note 9, at 84.

Although the inclusion of handicapped persons seemed desirable, it soon became clear that to some legislators, its level of desirability depended upon the definition of ‘handicapped.’ A compromise was eventually reached, which would allow ‘handicapped’ to be defined to include, for example, individuals infected with the HIV (or AIDS) virus, but not individuals whose current substance abuse/addiction posed a threat to others. Similarly, the inclusion of families with children disturbed a few legislators who anticipated a dilution of effective enforcement of fair housing claims due to the sizable increase in the number of claims this group would likely generate.

Future acts and executive orders would build on this framework, such as President Bill Clinton's Executive Order 12892 which amended President Kennedy's mandate by extending the protected classes to those defined by "race, color, religion (creed), sex, disability, familial status or national origin."¹²⁰ None of these acts or orders made mention of discrimination on the basis of an individual's source of income.

C. FIGHTING PRIVATE DISCRIMINATION ON THE BASIS OF SECTION 8 ASSISTANCE

1. *Legislation*

In the lead-up to the Fair Housing Amendments Act of 1988,¹²¹ the House and Senate considered several drafts of various types of housing legislation. Among these was a 1985 draft considered by the House of Representatives that included a prohibition on discrimination on the basis of holding a Section 8 voucher.¹²² The final Consolidated Omnibus Budget Reconciliation Act¹²³ as passed by the Congress later that session did not contain the suggested language. By 1987, however, the proponents of the antidiscrimination provision prevailed.¹²⁴ The House passed the bill to the Senate and eventually, after meeting success in both houses, the legislation was given to a Conference Committee for final revisions. In its Report on the bill, the Committee noted:

The House amendment contained a provision that was not contained in the Senate bill to prohibit private owners who have entered into a Section 8 contract for housing assistance payments for tenants in their multifamily housing projects, from refusing to lease available dwelling units at the fair market rent (FMR) to a holder of a Section 8 certificate or voucher. The conference report contains the House provision¹²⁵

The House version that prevailed was codified at 42 U.S.C. § 1437f(t). Though the Committee did not characterize the provision as an an-

120. Exec. Order No. 12,892, 59 Fed. Reg. 2939 (Jan. 17, 1994) (quotation marks omitted).

121. Pub. L. No. 100-430, 102 Stat. 1619 (1988) (codified as amended in scattered sections of 28 U.S.C. and 42 U.S.C.).

122. See Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82 (1985) (the language was nearly identical to the language that was finally passed in 1988).

123. Pub. L. No. 99-272, 100 Stat. 82 (1985).

124. See Housing and Community Development Act of 1987, Pub. L. No. 100-242, 105 Stat. 1815 (1988) (codified as amended in scattered sections of 12 U.S.C. and 42 U.S.C.).

125. H.R. REP. NO. 100-426, at 178-79 (1987) (Conf. Rep.), reprinted in 1987 U.S.C.C.A.N. 3458, 3475-76 (1987).

tidiscrimination measure, in effect (and in its final title), the section served that purpose. The record tracing the history of the provision and the justification for its implementation is sparse. No reference was made in the Congressional Record to state or local antidiscrimination laws already in place, as there had been with the Fair Housing Act¹²⁶ twenty years earlier. As shown below, only a small handful of states and municipalities had passed antidiscrimination provisions for low-income tenants.¹²⁷ The federal legislature enacted this protection despite the absence of a social movement underway at the state or local level.

In supporting this addition to the bill, Congress made clear not only its intent to serve tenants and provide them with “greater access to decent and affordable housing” but also that the provision grant tenants and their advocates “a cause of action to enforce the statute in federal court.”¹²⁸ The extensive historical record further clarified Congress’s objective with respect to tenants’ rights vis-à-vis private landlords:

Because owners often unreasonably refuse to rent units to applicants who hold these portable subsidies, this bill contains several provisions to changes [sic] the practices of owners involved in other federal housing programs. Section 147 of the bill creates *an enforceable right for applicants* that would prohibit owners that receive Section 8 subsidies for any other units in the project from refusing to rent a unit to a certificate or voucher holder . . . because the applicant has a Section 8 certificate or voucher housing subsidy.¹²⁹

The language of the relevant section of the bill cannot mistake this intent. Titled “Nondiscrimination against certificate holders and voucher holders,” the bill prohibits any owner who receives housing assistance payments through a public housing authority from refusing to enter into a housing assistance payments contract with a Section 8 voucher where “a proximate cause of [the refusal] is the status of such prospective tenant as a holder of such voucher.”¹³⁰ This was a great

126. Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended in 42 U.S.C. §§ 3601-3619 (1988)).

127. See *infra* Parts VI & VII.

128. H.R. REP. NO. 100-122(I), at 53 (1987), *reprinted in* 1987 U.S.C.C.A.N. 3317, 3369 (1987).

129. H.R. REP. NO. 100-122(I), at 32 (emphasis added). In spite of this added language, some courts have refused to recognize such a right. See *infra* Subsection IV.C.2.

130. 42 U.S.C. § 1437f(t)(1)(B) (1994) (repealed 1998). Section A covered all other certificate programs in the same manner, prohibiting any property owner from not leasing any available dwelling to a Section 8 voucher holder, “a proximate cause of which is the status of such prospective tenant as holder of such a certificate.” 42 U.S.C. § 1437f(t)(1)(A) (1994) (repealed 1998).

victory for Section 8 recipients, affording them significant protection and a means by which to take action against delinquent landlords.

It would not last long. By 1994, there was already significant pressure to remove what came to be known as the "take one, take all" clause from the wording of the statute. Before considering how and why the once highly regarded protection deteriorated, I examine whether it was relied upon to combat discrimination in the Section 8 program and if so, how.¹³¹

2. *Litigation*

The first action raised under 42 U.S.C. § 1437f(t) came two-and-a-half years after Congress added it to the Low-Income Housing Program guidelines. In 1990, Judge Mary Johnson Lowe of the United States District Court for the Southern District of New York found that a landlord who had previously entered into contracts for housing assistance payments on behalf of some of its Section 8 tenants could not refuse to rent an apartment to a Section 8 voucher holder applicant "as a result of that applicant's status as a Section 8 voucher holder."¹³² Such a refusal constituted a "clear[] violat[ion under] the anti-discrimination provision."¹³³ This decision signaled a positive start for the courts' interpretation and application of the law, though it was short-lived.

Fewer than half a dozen claims were litigated in the federal courts during the ten years the federal government maintained this protection for voucher holders.¹³⁴ Plaintiff-tenants were successful in litigating against their landlords in two of these: *Glover v. Crestwood Lake*,¹³⁵ quoted above, in the United States District Court for the Southern District of New York, and *Knapp v. Smijanec*,¹³⁶ discussed below. In another Southern District of New York case, *Riddick v. Summit House*,¹³⁷ the district judge did not reach the plaintiff's

131. Due to limitations on research materials, I focus on litigation in state and federal courts for this analysis, though there is also evidence of litigation in local commissions on this matter (often appealed to the state court system) and other efforts outside the judiciary, such as publicity campaigns to promote awareness and enforcement by nongovernmental agencies.

132. *Glover v. Crestwood Lake Section 1 Holding Corps.*, 746 F. Supp. 301, 309 (S.D.N.Y. 1990).

133. *Glover*, 746 F. Supp. at 309.

134. It is difficult to surmise or speculate as to whether the law was effective in deterring discrimination among landlords outside of the reported litigation; no data is available with respect to numbers of tenants who gained access who would not otherwise have had housing as a result of the law.

135. 746 F. Supp. 301 (S.D.N.Y. 1990).

136. 847 F. Supp. 1428, 1437 (W.D. Wis. 1994), *aff'd sub nom.* *Knapp v. Eagle Prop. Mgmt. Corp.*, 54 F.3d 1272 (7th Cir. 1995).

137. 835 F. Supp. 137 (S.D.N.Y. 1993).

§ 1437f(t) claim, but rather directed the parties to seek resolution on other grounds.¹³⁸ In the first of the two losing cases, *Peyton v. Reynolds Associates*,¹³⁹ the United States Court of Appeals for the Fourth Circuit ruled that the plaintiff-tenants had failed to establish causation—namely, that their status as voucher holders was the cause of the landlord’s refusal to enter into leases.¹⁴⁰ The panel distinguished the plaintiffs’ situation from that in *Glover* on the basis of the Reynolds Associates’ denial that the plaintiffs’ voucher status had any role in its decision to not rent to them, whereas in *Glover*, the landlord-corporation conceded that the voucher holders’ status was the cause of its denying them tenancy.¹⁴¹

The most thorough depiction of the protection intended by the federal law, yet rejected by the courts, comes from neither of the two affirmative decisions, but instead from an ardent dissent by Judge Guido Calabresi of the United States Court of Appeals for the Second Circuit in a case where, as in the other cases cited above, the prospective tenants brought a claim against the landlords under § 1437f(t) alleging discrimination on the basis of their status as voucher holders. In his dissent in *Salute v. Stratford Greens Garden Apartments*,¹⁴² Judge Calabresi described the majority’s position (ruling in favor of the landlord defendants) as a “judicially created exception that, [the court] concedes, departs from the statute’s plain meaning and that . . . finds no support in the [law’s] legislative history.”¹⁴³ He noted that the majority “admit[ted] that the clear purpose of § 1437f(t) . . . was to prevent landlords” from discriminating against Section 8 applicants, and further criticized the holding:

In fact, the actual language of the House Report is considerably stronger and states that Congress enacted this provision ‘to create[] an enforceable right for applicants that would prohibit owners that receive Section 8 subsidies for *any other units* in the project from refusing to rent a unit to a certificate . . . holder . . . because the applicant has a Section 8 certificate. . . .’ . . . It is therefore difficult to see how the legislative history supports the district court’s conclusion—embraced by the majority—that ‘[t]he case before [it] d[id] not implicate th[e] concern [of the House Report].’¹⁴⁴

138. *Riddick v. Summit House, Inc.*, 835 F. Supp. 137, 144 (S.D.N.Y. 1993). The judge found the dispute to be between the public housing authority and the landlord, not the prospective tenant.

139. 955 F.2d 247 (4th Cir. 1992).

140. *Peyton v. Reynolds Assocs.*, 955 F.2d 247, 252 (4th Cir. 1992).

141. *Peyton*, 955 F.2d at 253-54.

142. 136 F.3d 293 (2d Cir. 1998).

143. *Salute v. Stratford Greens Garden Apartments (Salute III)*, 136 F.3d 293, 303 (2d Cir. 1998) (Calabresi, J., dissenting).

144. *Salute III*, 136 F.3d at 305 n.8 (internal citations omitted).

The district court decision that Judge Calabresi cites¹⁴⁵ was a critical turning point in the § 1437f(t) litigation and provides insight into the groundwork for what would eventually signal the provision's demise. In his first decision, rendered in May 1995, District Judge John Gleeson granted the plaintiff-tenants' motion for preliminary injunctive relief and ordered the property owners to rent an apartment to the prospective tenants.¹⁴⁶ Nine months later, however, he reversed his original holding and found in favor of the property-owning corporation.¹⁴⁷

Judge Gleeson's second decision, later affirmed by the Second Circuit, in which he overturned his own earlier holding that the defendant landlord had violated the antidiscrimination provision was premised on several factors. First, Judge Gleeson found that a "straightforward application"¹⁴⁸ of the law "would produce an odd and unfortunate result"¹⁴⁹—unfortunate enough to grant him license to go outside the four corners of the statute in forming his decision. Recognizing that "once a landlord chooses to participate by accepting a Section 8 tenant, it cannot turn away subsequent Section 8 certificate holders based on their status as Section 8 participants," the judge nevertheless found "force" in the property owner's argument that a decision in favor of the tenants would amount to a "forced marriage with the government."¹⁵⁰ Second, Judge Gleeson relied heavily on the "numerous legislative efforts" underway in Congress at the time to repeal § 1437f(t) (referred to as the "take one, take all" provision).¹⁵¹ The principal justifications for the repeal were to "minimize the burdens of Section 8 participation" and thereby make the program "more attractive to landlords."¹⁵²

145. *Salute II*, 918 F. Supp. 660, 664-65 (E.D.N.Y. 1996).

146. *Salute v. Stratford Greens (Salute I)*, 888 F. Supp. 17, 21 (E.D.N.Y. 1995).

147. *Salute II*, 918 F. Supp. at 668. This decision was affirmed by the Second Circuit in *Salute III*, 136 F.3d at 302.

148. *Salute II*, 918 F. Supp. at 663.

149. *Id.* at 664.

150. *Id.* at 663, 665.

151. Judge Gleeson acknowledged these developments in detail:

Several bills in the current Congress seek to repeal the "take one, take all" provision. H.R. 2099, which was introduced on July 21, 1995, was passed by both the House and the Senate, but was never signed into law. H.R. 2406 was introduced in the House on September 27, 1995 and reported in the House on February 1, 1996, but has not been voted on.

Id. at 665 n.3. Another version introduced in the House, H.R. 3019, was introduced less than three weeks before *Salute II* came down; it passed in the House in just two days and was received in the Senate ten days before Judge Gleeson's decision. H.R. Res. 3019, 104th Cong. (1996) (enacted). S. 1594 was introduced in the Senate on March 6, 1996 as well, but remained inactive at the time of the *Salute II* decision. S. 1594, 104th Cong. (1996).

152. *Salute II*, 918 F. Supp. at 665.

V. LOST IN TRANSITION: THE DISAPPEARANCE OF FEDERAL PROTECTION

Roughly one year before Judge Gleeson's second decision in *Salute v. Stratford Greens*,¹⁵³ in January 1995, ten years after the introduction of the protective measure, the House Appropriations Committee entertained testimony from John Weicher of the Hudson Institute regarding the difficulties 42 U.S.C. § 1437f(t) posed on landlords and the perverse incentives it created.¹⁵⁴ Later that spring, a second set of hearings led to the suggestion to remove the antidiscrimination provision altogether. The suggestion came not from industry, but from government—Henry Cisneros, then President Clinton's Secretary of Housing and Urban Development.¹⁵⁵ At the time, it was the proposal of the Clinton Administration to remove the antidiscrimination provision on the grounds that the provision disincentivized landlords from participating in the Section 8 program.¹⁵⁶ The Administration contended, and Congress agreed, that bringing more landlords into the program was a priority, though there was no analysis presented to Congress that demonstrated how bringing more participants in (while allowing those new and old landlords to discriminate) would lead to an effective realization of the program's goals.¹⁵⁷ Policymakers focused on encouraging greater landlord participation rather than on other barriers facing current recipients working within the landlord system. The removal was formally advanced for the first time in a bill slated to become the Public Housing Reform and Empowerment Act of 1995,¹⁵⁸

153. 918 F. Supp. 660 (E.D.N.Y. 1996).

154. *Reinvention of HUD and Redirection of Hous. Policy: Before the Subcomm. on Hous. Opportunity and Cmty. Development and the Subcomm. on HUD Oversight and Structure of the S. Comm. on Banking, Hous., and Urban Affairs*, 104th Cong. 31-48 (1995) (statement of John Weicher, Senior Fellow, Hudson Institute).

155. H.R. 2406, *The United States Housing Act of 1995: Hearing Before the Subcomm. on Hous. and Cmty. Opportunity of the Comm. on Banking and Fin. Servs.*, 104th Cong. 43-48 (1995) (statement of Hon. Henry Cisneros, Secretary of HUD), <https://archive.org/stream/hrunitedstatesh00oppogoog#page/n46/mode/2up/search/Cisneros> [hereinafter *Hearing on H.R. 2406*].

156. *Hearing on H.R. 2406*, *supra* note 155, at 43-47.

157. *Id.* at 47-48. The Obama Administration has taken a different, more cooperative approach. In 2010, HUD Secretary Shaun Donovan announced that applicants seeking HUD grants must "comply with state and local laws that protect individuals from being denied housing based on their lawful source of income." Press Release, HUD Secretary Shaun Donovan, HUD tells grant applicants: don't discriminate based on legal 'sources of income' or risk funding (June 11, 2010), http://portal.hud.gov/hudportal/HUD?src=/press/press_releases_media_advisories/2010/HUDNo.10-121; see also U.S. Dept't of Hous. & Urban Dev., FR-5415-N-01, Notice of Funding Availability (NOFA), Policy Requirements and General Section to HUD's FY2010, NOFAs for Discretionary Programs (2010), available at <http://www.hud.gov/offices/adm/grants/nofa10/gensec.pdf>.

158. S. Res. 1260, 104th Cong. (1995) (enacted). Its companion bill, H.R. 2406, was introduced on Sept. 27, 1995 and sponsored by Representative Rick Lazio (R-NY). Al-

introduced by Senator Connie Mack (R-FL) and co-sponsored by Senators Bond (R-MO), D'Amato (R-NY) and Domenici (R-NM).

Though it was ultimately unsuccessful in that session, the removal provision gained great support from owner interest groups, including the National Association of Housing and Redevelopment Officials ("NAHRO")¹⁵⁹ and other private groups, such as the Schiff Group (a consulting group on federal housing programs).¹⁶⁰ Supportive testimony was also offered to the Senate Subcommittee on Housing Opportunity and Community Development by the director of the federal Government Accountability Office's Housing and Community Development Division, Jim Wells, who stated on the record that the antidiscrimination provision "made some property owners reluctant to participate."¹⁶¹ None of these witnesses referred to the section by its "antidiscrimination" title, but rather each referred to it as the "take one, take all" requirement or rule. None made use of the fair housing language. They advocated its removal through wide-reaching comments addressing ways to increase flexibility and choice for tenants determining where they want to live (related to the substitution of portable, tenant-based rent subsidies for subsidies tied to a single property) and they attributed tenants' difficulty in securing housing to the "reluctance" of property owners to participate and hence to the "take one, take all" rule.

While civil rights were no longer in the same spotlight by the 1990s, welfare-related services were. Still, the hearings held by the House Committee on Banking and Financial Services included only representatives of the Department of Housing and Urban Development ("HUD") and property owners. No tenants' organizations were

though both bills passed—the vote in the Senate was unanimous—they were unable to reconcile the two versions before the end of the legislative session. *See supra* note 151.

159. NAHRO's "main interest is urban renewal and public housing, and its main thrust is to push for more and more of each NAHRO has been somewhat suspicious of innovations which threaten to work outside the traditional framework of local public housing agencies." (NAHRO is a "member advocacy organization" for "employees of local public housing agencies and renewal agencies"). HAROLD WOLMAN, *POLITICS OF FEDERAL HOUSING* 60 (1971).

160. Both NAHRO and the Schiff Group in their 1995 statements testified that removal of the provision would make it more attractive to landlords to participate in the Section 8 program. *Hearing Before the Subcomm. on Hous. and Cmty. Opportunity of the Comm. on Banking and Fin. Servs.*, 104th Cong. 74-88 (statement of Roberty Armstrong on behalf of NAHRO), available at <https://archive.org/stream/hr2406unitedstat00unit#page/n1/mode/2up>; *Public Housing Reform and Empowerment Act of 1995: Hearing on S. 1260 Before the Comm. on Banking, Housing, and Urban Affairs*, 104th Cong. 32-33 (1995) (statement of Joseph G. Schiff).

161. *Restructuring HUD's Assisted / Insured Multifamily Housing Portfolio: Hearing Before the Subcomm. on Hous. Opportunity and Cmty. Dev. of the Comm. on Banking, Hous., and Urban Affairs*, 104th Cong. 67 (1995) (statement of Jim Wells, Assoc. Dir., Hous. and Cmty. Dev. Issues, Res., Cmty. and Econ. Dev. Div., U.S. Gen. Accounting Office).

included. The Senate Committee on Banking, Housing and Urban Affairs heard testimony from seven tenants' organizations,¹⁶² but none of them noted the perils of losing the antidiscrimination provision.¹⁶³ As a result, the perspective presented to members of Congress was limited to just one side. The rhetoric and framing of those opposed to the law focused only on justifications for low landlord turnout and omitted any reference to discriminatory impediments facing tenants.¹⁶⁴

After many defeated attempts, the repeal finally passed both houses in October 1998,¹⁶⁵ more than two years after Judge Gleeson's predictions of its coming in *Salute*.¹⁶⁶ The 1998 bill was primarily concerned with administrative reform, consolidating the Section 8 voucher and certificate programs into a single voucher program to "reduce administrative burdens and increase the acceptability of vouchers in the private housing market."¹⁶⁷ Section 554 of the repealing Act deleted subsection (t), the antidiscrimination provision, entirely. The Congressional Report on the repeal cited only reports submitted in the preparation of the 1995 version of the bill and hearings before the Senate Banking Committee.¹⁶⁸ Little to no opposition was presented in the 105th Congress as members welcomed the reform, citing the way in which the new law "increas[es] resident choice by improving the ability of tenant-based assistance programs to meet the demand for affordable housing."¹⁶⁹ The last time that provision was mentioned was in the Senate Committee's Report to the full Senate on December 20, 1995. In addition, it was believed the new legislation would "protect the poorest of the poor" by requiring public housing authorities to continue to make available significant numbers of units for all low-income levels, but to reserve a substantial amount for those in the lowest tier of income-earners.¹⁷⁰ What was not seen by congressional leadership at the time was that, although more housing

162. The following organizations offered testimony: The National Housing Law Project; the American Association of Retired Persons; the Center for Community Change; the National Low-Income Housing Coalition; the Massachusetts Union of Public Housing Tenants; the Empowerment Network Foundation; and the Consortium for Citizens with Disabilities. See *Public Housing Reform and Empowerment Act of 1995—S. 1260: Hearing Before the Comm. on Banking, Hous., and Urban Affairs*, 104th Cong. 48-74, 111-83 (1995).

163. See *id.*

164. See *id.*

165. See Pub. L. No. 105-276, 112 Stat. 2461 (1998) (codified at 42 U.S.C. § 1437f note (1998)).

166. *Salute II*, 918 F. Supp. at 665.

167. 141 CONG. REC. S13858 (1995).

168. *Id.* (referring to hearings from Oct. 26, 1995).

169. 141 CONG. REC. S13844 (statement by Sen. Connie Mack).

170. *Id.*

could be offered to these lowest earners as a result of the new legislation, there would no longer be any protection in place to guarantee them access to those units.

From this limited record, it would appear that the loss of the antidiscrimination provision became collateral damage in the process of a more extensive goal to increase the number of landlords participating nationwide. Neither at the time of the testimony presented in 1995 nor in 1998 was there any discussion about the congressional intent behind the enactment of § 1437f(t). Rather than accommodate both goals—protection against antidiscrimination and expansion of participants—property owner interest groups along with HUD successfully convinced members of Congress that the poorly drafted language of the antidiscrimination provision rendered it harmful to the greater goals of the national housing plan. In so doing, Congress passed control of the antidiscrimination policies to the subfederal levels.

In fact, an important emphasis on devolution can also be seen in the 1998 law more generally. The 1998 law intended to give the local public housing authorities increased independence over the management of their public assistance programs, particularly the Section 8 program. As Senator Mack put it, “[m]icromanagement by both Congress and the Department of Housing and Urban Development [HUD] ha[ve] saddled housing authorities . . . mak[ing] it impossible for even the best of them to run their developments effectively and efficiently.”¹⁷¹ By contrast, it was hoped that the bill would “address[] the crisis in public housing” by “returning greater responsibility over the operation and management of public housing to [local] housing authorities.”¹⁷² Today, local housing agencies are required to comply with all federal civil rights and fair housing laws, and to further fair housing in carrying out the agency plan, which covers public housing and the tenant-based voucher program without measures to protect from discrimination the groups that program is intended to serve. In this respect, the repeal also had the effect of devolving or decentralizing the prohibition on discrimination.

Across the country, prohibitions of this type have been taken up by the states and their political subdivisions.¹⁷³ In the next Part, I survey those default state and local laws and analyze their development.

171. *Id.*

172. *Id.*

173. There was no attempt to introduce antidiscrimination language in the Section 8 Voucher Reform Act of 2007, H.R. 1851, 110th Cong. (2007), as discussed in Part III. See *supra* notes 34-86.

VI. STATES AND LOCALITIES TAKE ACTION

Several states and cities had enacted antidiscrimination provisions protecting low-income residents well before the federal legislation was enacted in 1987. Many more enacted replica legislation in the aftermath of the federal statute's passage; and still more have enacted protective measures since the federal repeal. Although one might be able to draw patterns, and therefore conclusions, from these trends, not only is there little indication of a causative trend but there is little evidence to suggest that there has been any communication or cross-referencing vertically or horizontally among those with the provision and those considering enactment. This Section explores the state and local initiatives and their lack of reference to the federal law.

The story of state initiatives to combat sources of income discrimination dates back to before the introduction of the federal law, to 1971, with Massachusetts.¹⁷⁴ In broad strokes, the implementation of state statutes protecting fair housing for the poor roughly corresponds with the enactment of the major federal housing initiatives that they mirror. They have advanced in two major waves: three states¹⁷⁵ in the early 1970s following the passage of Congress's Fair Housing Act¹⁷⁶ in 1968, and nine¹⁷⁷ in the aftermath of the Fair Housing Amendments Act of 1988.¹⁷⁸ Despite their coincidental enactment, each state law grew out of unique efforts developed by proponents within each individual state and not through concerted action at the national or even regional level. The map that results illustrates the diverse geography and political makeup of the states where such legislation has become law.

Massachusetts was the first state to implement protection against source-of-income discrimination. On August 31, 1971, the Massachusetts General Court (the state's legislature) passed into law what would become section 4(10) of Chapter 151B of the Massachusetts

174. MASS. GEN. LAWS ch. 151B, § 1 (2010).

175. See ME. REV. STAT. tit. 5, § 4581-A (2011); MINN. STAT. § 363A.01 (2011); WIS. STAT. § 106.50 (2011).

176. Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended in 42 U.S.C. §§ 3601-3619 (1988)).

177. See CAL. GOV'T CODE § 12955 (Deering 2012); CONN. GEN. STAT. § 46a-63(3) (2011); D.C. CODE § 2-1402.21 (2011); N.J. STAT. ANN. § 10:5-4 (West 2012); N.D. CENT. CODE § 14-02.5-02 (2011); OKLA. STAT. tit. 25, § 1452 (2011); OR. REV. STAT. § 659A.421 (2009); UTAH CODE ANN. § 57-21-2(21) (LexisNexis 2011); VT. STAT. ANN. tit. 9, § 4503 (2011).

178. Pub. L. No. 100-430, 102 Stat. 1619 (1988) (codified at 42 U.S.C. §§ 3601-3619 (1988)).

General Laws.¹⁷⁹ That law created a prohibition on discrimination against tenants who receive public housing subsidies “solely because the individual is such a recipient” or “because of any requirement of [the] . . . subsidy program.”¹⁸⁰

The law was challenged in 1987 by a landlord who claimed, under a field preemption rationale, that the state law’s antidiscrimination measure was precluded by the federal Section 8 program as a whole.¹⁸¹ The landlord further claimed that provisions in the federal law governing Section 8 housing indicated that the program was simply voluntary, whereas, the landlord maintained, the Housing Court’s ruling against him would make the program mandatory.¹⁸² The Supreme Judicial Court of Massachusetts reversed summary judgment against the landlord on the basis of the misapplication by the Housing Court of the appropriate substantive standards for finding a violation of chapter 151B, section 4(10).¹⁸³ The Supreme Judicial Court focused its analysis on the relevance of the word “solely” and concluded that the Attorney General had not met his burden of showing that the property owner was motivated “solely” by these discriminatory bases.¹⁸⁴ Stating that “[t]he Federal statute merely creates the scheme and sets out the guidelines for the funding and implementation of the program by the United States Secretary of Housing and Urban Development (HUD) through local housing authorities,”¹⁸⁵ the court also determined that the Massachusetts law was not preempted by the specifications of the federal program: “It does not preclude State regulation.”¹⁸⁶

In response to the court’s decision, by 1990, the Massachusetts General Court amended the law to remove the word “solely” and added new language making it unlawful for a landlord to discriminate against a housing subsidy recipient *either* “because the individual is such a recipient, *or* because of any requirement of such public assistance, rental assistance, or housing subsidy program.”¹⁸⁷ Thus, when

179. See *Keeping the Promise: Preserving and Enhancing Housing Mobility in the Section 8 Housing Choice Voucher Program*, POVERTY & RACE RESEARCH ACTION COUNCIL, <http://www.prrac.org/pdf/AppendixB.pdf> (last visited Mar. 1, 2011). State legislature records are extremely limited prior to the 1990s and even today are not nearly as extensive in most states as compared to in the federal government. Unfortunately, there is no record in the Massachusetts State Archives regarding the reasoning behind or the sponsorship of this legislation.

180. MASS. GEN. LAWS ch. 151B, § 4(10) (2010) (emphasis added).

181. *Att’y Gen. v. Brown*, 511 N.E.2d 1103, 1105-06 (Mass. 1987).

182. *Brown*, 511 N.E.2d at 1105-06.

183. *Id.* at 1109-10.

184. *Id.* at 1109.

185. *Id.* at 1106.

186. *Id.*

187. MASS. GEN. LAWS ch. 151B, § 4(10) (2010). See also 1989 Mass. Acts 1822.

the next challenge came to the law in 2007, the Supreme Judicial Court took notice of the revised language and decided in favor of the tenant.¹⁸⁸

Minnesota followed on the heels of Massachusetts, enacting into law on May 24, 1973 the Minnesota Human Rights Act¹⁸⁹ that made unlawful discrimination on the basis of an individual's "status with regard to public assistance."¹⁹⁰ Disputes arising under the law would not, however, be litigated in the Minnesota Court of Appeals until 2003. In an unpublished opinion, the Minnesota Court of Appeals affirmed a ruling for summary judgment in favor of the property owner on the basis of "undisputed facts [that] do not establish a violation of the Minnesota Human Rights Act."¹⁹¹ More recently, the state courts dealt a blow to the law, finding an exception where a landlord made out a legitimate business basis for excluding the voucher holder.¹⁹²

In 1975, the Maine state legislature passed into law the Maine Human Rights Act,¹⁹³ which made unlawful any discrimination against an individual on the basis of that "individual's status as [a] recipient" of federal aid.¹⁹⁴ A case brought under this law came before the Supreme Judicial Court of Maine four years later.¹⁹⁵ There, the court reversed the superior court's judgment for the tenants, concluding that the words "solely because," like in the Massachusetts law, precluded relief unless the individual's welfare status was the only determining factor.¹⁹⁶

The District of Columbia enacted its Human Rights Act of 1977.¹⁹⁷ The Act includes a prohibition on source-of-income discrimination.¹⁹⁸ Litigation regarding this language has come before the D.C. Court of Appeals twice and before the federal court of appeals,

188. DiLiddo v. Oxford St. Realty, 876 N.E.2d 421, 428-30 (Mass. 2007). Another violation of the state provision was found in *Whitford v. Ford*, 13 Mass. Discr. L. Rep. 1001 (Jan. 3, 1991), a Massachusetts Commission Against Discrimination ("MCAD") case. In *Whitford*, the Commissioner found that the landlord had discriminated on the basis of the prospective tenant's Section 8 status and that the landlord's proffered reasoning (a general aversion to government involvement in his rental property affairs) could "not constitute a legitimate non-discriminatory reason for refusing to rent to a Section 8 tenant." *Whitford*, 13 Mass. Disc. L. Rep. at 1026.

189. 1973 Minn. Laws 2159 (codified at MINN. STAT. § 363A.03(47) (2002)).

190. MINN. STAT. § 363A.03(47) (2002).

191. Babcock v. BBY Chestnut Ltd. P'ship, No. CX-03-90, 2003 Minn. App. LEXIS 899, at *1 (Minn. Ct. App. July 29, 2003).

192. Edwards v. Hopkins Plaza Ltd. P'ship, 783 N.W.2d 171, 181 (Minn. App. 2010).

193. ME. REV. STAT. tit. 5 § 4582 (2011).

194. *Id.* § 4581-A.

195. Vance v. Speakman, 409 A.2d 1307, 1308 (Me. 1979).

196. *Vance*, 409 A.2d at 1310.

197. D.C. CODE §§ 2-1401.01 to 2-1411.06 (LexisNexis 2008).

198. D.C. CODE § 2-1401.02 (LexisNexis 2008). This language was enacted before 1986 (which is as far back as electronic records go), and the original act was passed in 1977.

the United States Court of Appeals for the District of Columbia Circuit, once.¹⁹⁹ The more interesting D.C. case is the case of *Bridget Feemster v. BSA Ltd.*²⁰⁰ in the D.C. Circuit.²⁰¹ This was not the first case in federal court evaluating this provision of a state law, but unlike the Wisconsin case described below, the D.C. Circuit ruled in favor of the plaintiff on the Human Rights Act claim, finding that:

Just as it would constitute a facial violation of Title VII to discriminate in leasing on the basis of a renter's race — regardless of whether the landlord professed a 'benign' motive for so doing — it is a facial violation of the Human Rights Act to discriminate on the basis of the renter's source of income.²⁰²

Feemster is the only federal case where a subfederal source-of-income antidiscrimination provision has been upheld. Other than this case, the federal courts have only served to limit mechanisms for Section 8 voucher holders to seek relief against discrimination.

The response to source-of-income discrimination becomes even more localized when one examines the lengthening list of cities and counties that have created protections against this mistreatment.²⁰³ Urbana, Illinois was the first city to enact such a law in 1975.²⁰⁴ Madison, Wisconsin also enacted a protective law shortly thereafter in 1977,²⁰⁵ followed by Ann Arbor, Michigan in 1978.²⁰⁶ The Ann Arbor law, supported by local legal services organizations working in the area of housing, passed through the City Council with little fanfare and no opposition;²⁰⁷ it is not clear from Council records precisely why the organizations brought the matter to the Council at that time or

199. In *Borger Management Inc. v. Sindram*, 886 A.2d 52, 64-65 (D.C. 2005), the D.C. Court of Appeals remanded the case for additional consideration on the source-of-income matter after the trial court had ruled against the tenant on that claim. Another case, *Blodgett v. University Club*, 930 A.2d 210, 215 (D.C. 2007), also raised the source-of-income claim but not in a housing context. In that case, an individual was refused membership to a private club on an alleged discriminatory premise.

200. 548 F.3d 1063 (D.C. Cir. 2008).

201. *Feemster v. BSA Ltd. P'ship*, 548 F.3d 1063 (D.C. Cir. 2008).

202. *Feemster*, 548 F.3d at 1070.

203. Though some cities lack detailed records describing the impetus to their action, others maintain lengthy transcripts and additional information that helps to explain where their project came from. The result is a spotty collection of dates and narratives, through which a few notable stories stand out.

204. URBANA, ILL. ORD. NO. 7576-43, §§ 1-28 (enacted 1975).

205. MADISON, WIS. CODE OF ORD. § 39.03 (2014).

206. ANN ARBOR, MICH., CODE §§ 9:150-52 (2009). It is impossible to conduct a comprehensive search of all municipalities and their legislative activity; my research in several databases of local media and city council ordinances shows Ann Arbor as the first city to implement this type of provision.

207. Report on the Public Hearing regarding the Human Rights Ordinance, Jan. 23, 1978, as provided by the Ann Arbor City Clerk's Office (on file with author).

where the idea came from.²⁰⁸ Shortly thereafter, Wisconsin, perhaps inspired by Madison's example, enacted its antidiscrimination provision in 1979.

Wisconsin's story unites the federal statutory history with one state's efforts to put protections in place for low-income renters. In 1979, the Wisconsin legislature passed into law an act that prohibited discrimination on the basis of "lawful source of income."²⁰⁹ The term was left undefined in the statute itself, but a definition could be found in the state's Administrative Code.²¹⁰ The original statute also included the following statement of intent:

It is the intent of this section to render unlawful discrimination in housing. It is the declared policy of this state that all persons shall have an equal opportunity for housing regardless of sex, race, color, handicap, religion, national origin, sex or marital status of the person maintaining a household, lawful source of income, age or ancestry and *it is the duty of the local units of government to assist in the orderly prevention or removal of all discrimination in housing through the powers granted under s. 66.433 . . .* This section shall be deemed an exercise of the police powers of the state for the protection of the welfare, health, peace, dignity and human rights of the people of this state.²¹¹

During the first few years the law was in place, very little litigation of significance resulted. By 1994, however, a case was brought to the United States District Court for the Western District of Wisconsin, bringing suit against a landlord for discrimination in violation of not just the Wisconsin state law but also the federal law, 42 U.S.C. § 1437f(t).²¹² The federal district court held that the landlord violated the federal law, but not the state provision.²¹³ Both positions were upheld on appeal to the United States Court of Appeals for the Seventh Circuit, making this case the only one in which a federal appellate court found for the plaintiff on the § 1437f claim.²¹⁴ The court's divergent decision was premised on its bewildering finding that the Section 8 voucher did not "clearly equate to the other forms of aid

208. *Id.*

209. 1979 Wis. Legis. Serv. 931-33 (West); 1979 WIS. SENATE BILL 244, ch. 188.

210. "[I]nclud[ing], but [] not limited to, lawful compensation or lawful remuneration in exchange for goods or services provided; profit from financial investments; any negotiable draft, coupon or voucher representing monetary value such as food stamps; social security; public assistance; unemployment compensation" benefits. WIS. ADMIN. CODE DWD § 220.02(8) (2009).

211. 1979 Wis. Legis. Serv. 931-33 (West); 1979 WIS. SENATE BILL 244, ch. 188 (emphasis added). Note the emphasis on municipalities to effectuate the state plan.

212. *See Knapp v. Eagle Prop. Mgmt.*, 54 F.3d 1272, 1276 (7th Cir. 1995).

213. *Knapp*, 54 F.3d at 1282-83.

214. *See id.*

specified in the statute.”²¹⁵ It did not find Section 8 vouchers to qualify as public assistance vouchers but instead analogized them to food stamps. It reasoned that “[u]nlike food stamps, however, [S]ection 8 vouchers do not have a monetary value independent of the voucher holder and the apartment sought.”²¹⁶ Moreover, the court noted that the form of payment—from the local housing authority to the housing owner “pursuant to a contract between those parties, rather than to the voucher holder [directly]”—made it fall outside the scope of the act.²¹⁷ While the court found that Section 8 vouchers “could *arguably* be included within the Wisconsin Act,” it would decline to ascribe that intent to the state legislature.²¹⁸ Neither the circuit court nor the district court certified the question to the Wisconsin Supreme Court, but instead each pronounced on the meaning of the state law. It is difficult to understand such a holding in light of the statement of intent by the Wisconsin legislature expressing its conviction to end “*all* discrimination in housing.”²¹⁹ The Seventh Circuit thus staked out the federal law as the exclusive protective force for the participants in the federal program.

Rounding out the polities enacting legislation in the first wave were West Seneca, New York in 1979²²⁰ and Philadelphia, Pennsylvania in 1980.²²¹ For five years, there would be silence around the country in both local communities and states until the introduction of what would become the federal Fair Housing Amendments Act of 1988. Shortly thereafter, a new wave of state and local laws came into effect, beginning with Oklahoma in 1985;²²² Hamburg, New York²²³ and Wauwatosa, Wisconsin in 1986;²²⁴ Vermont²²⁵ and Ripon, Wisconsin²²⁶ in 1988; Utah²²⁷ and Connecticut in 1989;²²⁸ Bellevue,

215. *Id.* at 1282.

216. *Id.*

217. *Id.*

218. *Id.* (emphasis added). The court gave three potential problems with a contrary interpretation that it was trying to avoid: first, it believed that such a holding would make a voluntary federal program mandatory; second, it found that “the state could read income to include these vouchers, but could accept nonparticipation in the program as a legitimate reason for the owner’s action, thereby relieving him of liability in the same way that legitimate nondiscriminatory reasons dissolve a *prima facie* case under Title VII”; and third, it found that limited application of the provision would contradict the purpose of the program. *Id.* at 1282-83.

219. WIS. STAT. § 106.50(1) (2009) (emphasis added).

220. WEST SENECA, N.Y. CODE § 71-3 (2014).

221. PHILA., PA. CODE ch. 9-1100 (2014).

222. OKLA. STAT. tit. 25, § 1452 (2014).

223. HAMBURG, N.Y., ORDINANCES § 109-3 (2010).

224. WAUWATOSA, WIS. MUN. CODE § 15.22 (2014).

225. VT. STAT. ANN. tit. 9, §§ 4501(6), 4503 (2011).

226. RIPON, WIS. MUN. CODE § 12.48 (2014).

227. UTAH CODE ANN. § 57-21-2(21) (WEST 2011).

228. CONN. GEN. STAT. §§ 46a-64b (2011).

Washington in 1990;²²⁹ as well as Portland, Oregon;²³⁰ Montgomery County, Maryland;²³¹ and the state of New Jersey in 1991.²³²

Throughout the 1990s, many more cities and counties and three more states came on board, beginning with Howard County, Maryland;²³³ Dane County, Wisconsin;²³⁴ Cambridge, Massachusetts;²³⁵ Quincy, Massachusetts;²³⁶ and King County, Washington²³⁷ in 1992; followed by: North Dakota²³⁸ and State College, Pennsylvania 1993;²³⁹ Iowa City, Iowa;²⁴⁰ Champaign, Illinois;²⁴¹ Revere, Massachusetts;²⁴² and San Francisco, California 1994;²⁴³ Wheeling, Illinois;²⁴⁴ and Oregon²⁴⁵ 1995; Chicago, Illinois;²⁴⁶ and Benton County, Oregon 1998;²⁴⁷ and California²⁴⁸ and Seattle, Washington²⁴⁹ 1999. Note how there is no apparent correlation with the timing of the removal of the federal provision.²⁵⁰ Like the federal story, these achievements have not been easy-coming in all cases. The Connecticut statute²⁵¹ has been challenged twice before the Connecticut Supreme Court, but upheld on both occasions.²⁵² A new bill was

229. BELLEVUE, WASH. CITY CODE § 9.20.045 (2014).

230. PORTLAND, OR., MUN. CODE § 23.01.060 (2011).

231. MONTGOMERY CNTY., MD. CODE § 27.12 (2011).

232. N.J. STAT. ANN. §§ 10:5-4, 10:5-12 (West 2011).

233. HOWARD CNTY., MD. CODE § 12.207 (2014).

234. DANE CNTY., WIS. CODE § 31-02 (2014).

235. CAMBRIDGE, MASS. MUN. CODE § 14.04.040.

236. QUINCY, MASS. MUN. CODE § 2.150.010.

237. KING CNTY., WASH. ORDINANCES ch. 12, art. 20 (2010).

238. N.D. CENT. CODE § 14-02.5-02 (2009).

239. STATE COLLEGE, PA., ORDINANCES ch. 5, part E, § 501-10 (2010).

240. IOWA CITY, IOWA CODE §§ 2-5-1, 2-1-1 (2014).

241. CHAMPAIGN CODE, ILL. § 17-21(c) (2011).

242. REVERE, MASS. MUN. CODE § 9.28.080.

243. S.F., CAL., POLICE CODE § 3304 (2014).

244. WHEELING, ILL. HUMAN RIGHTS ORDINANCES Ch. 6.14 (1995).

245. OR. REV. STAT. § 659A.421 (2009).

246. CHI., ILL. CODE §§ 5-8-030, 2-150-020(m) (2010).

247. Benton Co., Or., Ordinance 98-0139 (Aug. 14, 1998).

248. CALIF. GOV'T CODE § 12955 (2009). Notably, however, the California case law suggests that its prohibition does not cover Section 8 voucher holders. See *SABI v. Sterling*, 183 Cal. App. 4th 916 (2010).

249. SEATTLE, WASH. CODE § 14.08.040 (2014); Seattle, Wash. Ordinance 119628 (Aug. 31, 1999).

250. The Wheeling Ordinance references the concerns about the federal statute, however, and interaction with the structural federal statute: "Notwithstanding anything to the contrary contained in this title, nothing contained in this chapter shall require any person who does not participate in the federal Section 8 Housing Assistance Program (42 U.S.C. 1437f) to accept any subsidy, . . ." WHEELING, ILL. HUMAN RIGHTS ORD. Ch. 6.14.

251. The statute, added in 1989, was an amendment to the state's human rights statute. See CONN. GEN. STAT. §§ 46a-64c (2008).

252. See *Comm'n on Human Rights and Opportunities v. Sullivan Assocs. (Sullivan I)*, 739 A.2d 238, 242 (Conn. 1999); *Comm'n on Human Rights and Opportunities v. Sullivan Assocs. (Sullivan II)*, 939 A.2d 541, 548 (Conn. 2008).

introduced in the Connecticut House in 2000 to reverse the outcome of the court cases and repeal the legislation, but was rejected in committee.²⁵³ The New Jersey statute has come under fire from property owners who have said that to conform to the statute, which carries a fine of up to \$10,000, “impose[s] an ‘onerous burden’ on [property owners] and open[s] the litigation floodgates” on the basis of baseless claims.²⁵⁴

Since 2000, still more have enacted similar legislation, including: Naperville, Illinois,²⁵⁵ Nassau County, New York,²⁵⁶ and both Corte Madera and East Palo Alto, California (2000);²⁵⁷ Multnomah County, Oregon (2001);²⁵⁸ Memphis, Tennessee and Wilmington, Delaware (2002);²⁵⁹ Woodland, California (2004);²⁶⁰ Frederick County, Maryland (2005);²⁶¹ Grand Rapids, Michigan (2005);²⁶² St. Louis, Missouri (2006);²⁶³ Buffalo, New York (2006);²⁶⁴ Sun Prairie, Wisconsin (2007);²⁶⁵ Harwood Heights, Illinois (2009);²⁶⁶ Miami – Dade County, Florida (2009);²⁶⁷ Redmond, Washington (2012);²⁶⁸ Westchester, New York (2013);²⁶⁹ and Austin, Texas (2014).²⁷⁰ More may be on the way: the states of Hawaii, New York, and Maryland, and the commonwealth of Virginia introduced legislation prohibiting source of income discrimination in recent years but these have not yet been enacted. None of the legislative background materials (where available) makes reference to the loss of federal protection. Because counties, where they exist, are largely rural or green suburban jurisdictions where

253. H.B. 5835, 2000 Leg., Feb. Session (Conn. 2000).

254. See Manny Fernandez, *Bias Is Seen As Landlords Bar Vouchers*, N.Y. TIMES, Oct. 30, 2007, at Metro A1.

255. NAPERVILLE, ILL., MUN. CODE tit. 10, ch. 5 (2010).

256. NASSAU CNTY. ADMIN. CODE § 21-9.7 (2014).

257. CORTE MADERA, CAL., MUN. CODE §§ 5.30.020-5.30.040 (2014); EAST PALO ALTO, CAL., MUN. CODE § 14.16 (2009).

258. MULTNOMAH CNTY. OR. CODE § 15.342 (2014).

259. MEMPHIS, TENN., MUN. CODE § 10-36-5 (2014); WILMINGTON, DEL., MUN. CODE ch. 35, art. III, §§ 35-78 (2014).

260. WOODLAND, CAL., MUN. CODE § 6A-4-60 (2014).

261. FREDERICK CO., MD., MUN. CODE § 2-2-68 (2011).

262. GRAND RAPIDS, MICH., MUN. CODE § 9.362 (2014).

263. ST. LOUIS, MO., CITY REV. CODE ch. 3.44 (2014).

264. BUFFALO, N.Y., CODE OF ORDINANCES § 154-12 (2014).

265. SUN PRAIRIE, WIS., CODE OF ORDINANCES § 9.20.010 (2014).

266. HARWOOD HEIGHTS, ILL., CODE OF ORDINANCES tit. 19 (2009).

267. MIAMI-DADE CNTY., FLA., CODE OF ORDINANCES § 11A-11(12) (2009).

268. REDMOND, WASH., MUN. CODE Ch. 6.38.010, 6.38.020 (2014).

269. LAWS OF WESTCHESTER CNTY., N.Y., No. 6057-2013, Ch. 700, art. II § 700.19-35 (2014).

270. Austin, Tex. Res. No. 20140417-048 (December 15, 2014). Implementation of the amendment to the ordinance was stayed, however, by a federal district court upon a petition for a preliminary injunction by the Austin Apartment Association, an organization of landlords. See *Source of Income*, AUSTIN APARTMENT ASSOCIATION HOME, <http://www.austinaptassoc.com/source-of-income.html>.

Section 8 housing vouchers are not applicable, as expected, there are fewer of them enacting these provisions, and the ones that do enact such provisions, do so at the lead of the major cities they encompass.

Even after all these local communities—large and small—have taken action, there remain many more with large populations dependent on vouchers that lack the protection they need for those facing loss of housing as a direct consequence of blatant discriminatory practice. A study conducted by the nonprofit Fair Housing Justice Center found hundreds of instances of discrimination by landlords and brokers who overtly stated in their advertisements on craigslist.com, the popular online advertising site, that Section 8 voucher holders need not pursue their listing.²⁷¹ My own informal study found the same: In cities across the nation—both those with protective laws in place and those without—landlords are writing into their ads that they do not accept Section 8 housing. However, for those that are part of the program, these advertisements constitute facial violations of antidiscrimination laws where those laws exist.

VII. A SCATTERED MAP

A. PATTERNS

At first glance, these data suggest there is no discernible pattern to the proliferation of antidiscrimination measures designed to protect the poor, other than perhaps a tenuous parallel with the enactment of federal fair housing legislation. Each of these states and local communities is politically, geographically, and demographically diverse. Compare North Dakota and California: North Dakota has approximately only 6,000 voucher holders and one of the shortest waiting periods of any state for receiving a voucher; California, on the other hand, is home to over 260,000 voucher holders who endure a waiting period of more than two years.²⁷²

The local story is even more disparate. Municipalities from rural college towns to suburban counties to major metropolises have undertaken to protect their low-income populations. The proliferation of local-level protective measures began in the second half of the 1970s in the college towns of Urbana, Illinois; Madison, Wisconsin; and Ann Arbor, Michigan. Take Ann Arbor with a population of 113,934 that is 73% white, where the home ownership rate is approximately 46%, and

271. Fred Freiberg & Diane L. Houk, *No License to Discriminate*, FAIR HOUSING JUSTICE CENTER 6-8 (2008), http://www.fairhousingjustice.org/wp-content/uploads/2012/11/License_to_Discriminate_finalDRAFT.pdf.

272. SECTION 8 VOUCHER HOLDERS BY STATE, HUD DATABASE, available at <http://www.hud.gov>.

20.2% lives below the poverty line.²⁷³ Contrast the profile of Ann Arbor with an even smaller town that enacted the same law the following year: West Seneca, New York, whose population is roughly 45,000.²⁷⁴ West Seneca is 97.2% white and 6.3% of the town's population lives below the poverty line; the home ownership rate is approximately 79%.²⁷⁵ The next city to follow suit is nearly four hundred miles to the south of West Seneca: Philadelphia, Pennsylvania. The population of Philadelphia is roughly 1.5 million; 41% white; 26.5% below the poverty line; with a homeownership rate of approximately 55%.²⁷⁶

A similar range is found in the county data. Montgomery County, the first county to adopt the antidiscrimination measure based on the available data, is Maryland's most affluent county and its most populous.²⁷⁷ Only about 6,000 residents rely on a Section 8 voucher or certificate (as of 2010 Department of Housing and Urban Development ("HUD") data).²⁷⁸ By contrast, Cook County, Illinois, which adopted a similar measure²⁷⁹ two years later, is home to over 63,000 Section 8 residents.²⁸⁰ Yet, demography need not be determinative for a state, city, or county to respond where there is evidence of a problem. The enactment of source-of-income discrimination protection could be, and likely is, the result of the confluence of many factors.

Take the story of Champaign, Illinois, for example—a story of horizontal federalism, a label used by commentators to characterize peer exchanges mediated between and among cities or between and

273. STATE AND COUNTY QUICKFACTS: ANN ARBOR, MICH., U.S. CENSUS BUREAU (2010), available at <http://quickfacts.census.gov/qfd/states/26/2603000.html>. Homeownership rate is a five-year estimate computed by dividing the number of owner-occupied housing units by the number of occupied housing units or households.

274. STATE AND COUNTY QUICKFACTS: WEST SENECA CDP, N.Y., U.S. CENSUS BUREAU (2010), available at <http://quickfacts.census.gov/qfd/states/36/3680907.html>.

275. *Id.*

276. STATE AND COUNTY QUICKFACTS: PHILA., PA., U.S. CENSUS BUREAU (2010), available at <http://quickfacts.census.gov/qfd/states/42/4260000.html>.

277. ABOUT MONTGOMERY COUNTY, MONTGOMERY CNTY. MD., <http://www.montgomerycountymd.gov/resident/about.html>.

278. A Picture of Subsidized Households: Montgomery County, Maryland, DEP'T OF HOUS. AND URBAN DEV., (2000), http://www.huduser.org/portal/picture2000/form_1s.odb?year=2000 (select "Census Tract (based on Census 2000 designations)"; select "MD Maryland"; click "next screen"; select "MD Montgomery Census Tract 7001.01 24031700101 - Montgomery County No census tract 24031999999"; click "Section 8 Certificates and Vouchers"; click "next screen"; select "ALL"; click "next screen"; select "View data on screen in an HTML table").

279. Cook Cnty., Ill., Human Rights Ordinance 93-0-13 (Mar. 16, 1993) (codified at COOK CNTY., ILL. MUN. CODE, Ch. 42, art. II § 42-38 (2013)).

280. A PICTURE OF SUBSIDIZED HOUSEHOLDS, DEP'T OF HOUS. AND URBAN DEV., http://www.huduser.org/portal/picture2000/form_1s.odb?year=2000 (select "Metropolitan Statistical Areas (MSAs)"; select "1600 Chicago IL PMSA"; click "next screen"; click "Section 8 Certificates and Vouchers"; click "next screen"; select "ALL"; click "next screen"; select "View data on screen in an HTML table").

among states,²⁸¹ at work. The history of Champaign's confrontation with this issue reflects translocal peer pressure for progressive change. A city Human Rights Ordinance prohibited discrimination on the basis of source-of-income since 1994 but had not defined "source-of-income" anywhere in the city code.²⁸² In 2001, the city's Human Relations Commission ruled that the source-of-income provision did not cover Section 8 vouchers;²⁸³ however, in 2006, it revisited the issue after learning of a 2004 case that addressed the same issue in Chicago,²⁸⁴ in which the Chicago Commission interpreted the wording as including Section 8 voucher holders.²⁸⁵ In light of the Chicago decision, the Champaign Commission reversed its prior determination and held that source of income *did* include Section 8 vouchers.²⁸⁶ The Commission then voted to recommend to the City Council that the City's Human Rights Ordinance be amended to specifically include Section 8 in the source-of-income definition.²⁸⁷

The outcome could have been different if the Champaign lawmakers had looked instead to the legislation in force in Cook County, Illinois. Cook County contains 128 municipalities in its region, but its seat is in the City of Chicago.²⁸⁸ Its population of approximately 5.3 million people makes it the second most populous county in the United States.²⁸⁹ Cook County has its own ordinance addressing source-of-income discrimination.²⁹⁰ County government in Illinois has principal responsibility for the protection of persons and property, but voucher holders living just outside the city limits of Chicago lack the protection their neighbors have only a few blocks away. Chicago passed its discrimination prohibition in 1988.²⁹¹ It includes a prohibition on source-of-income discrimination.²⁹² The County's antidis-

281. See, e.g., Resnik, Civin, & Frueh, *supra* note 26.

282. See Mike Monson, *Revision Would Affect City's Landlords*, NEWS-GAZETTE, Nov. 18, 2005; CHAMPAIGN, ILL., MUN. CODE ch. 17, art. V, § 17-73(5) (1994).

283. Monson, *supra* note 282.

284. Mark Abner, *Champaign Landlords Now Permitted to Discriminate Against Section 8 Voucher Holders*, THE PUBLIC (Nov. 2007), available at <http://publici.ucimc.org/?p=1188>.

285. *Godinez v. Sullivan-Lackey*, 815 N.E.2d 822, 827 (Ill. App. Ct. 2004).

286. Abner, *supra* note 284.

287. Mike Monson, *Section 8 Definitions Rejected by Champaign Council*, NEWS-GAZETTE, Mar. 1, 2006.

288. ABOUT COOK COUNTY, <http://www.cookcountyil.gov/about-cook-county/> (last visited Mar. 11, 2015).

289. *Id.*

290. Cook Cnty., Ill., Human Rights Ordinance 93-0-13 (Mar. 16, 1993) (codified at COOK CNTY., ILL. MUN. CODE, Ch. 42, art. II § 42-38).

291. CHI., ILL., MUN. CODE § 5-8-030 (1988).

292. *Id.*

crimination legislation, by contrast, dates back to March 16, 1993.²⁹³ It has never been amended to include a prohibition on source-of-income discrimination. The puzzling disparity between these two constituencies, perhaps the result of heavy lobbying from local real estate professionals advocacy organizations, has led to inconsistencies in protection for residents living within half a mile from each other which translate into homelessness for some but not others.

Like Champaign, other cities have looked to their sister cities across the state, but some have not settled for the minimum protection found there. When the city of St. Louis signed a contract with the federal government as part of HUD's Fair Housing Assistance Program in 2006, it looked to Kansas City as a model for change in this direction.²⁹⁴ Local media hailed St. Louis city officials for taking the steps necessary to protect local residents, including their adoption of an antidiscrimination provision, though the passage of the same prohibition on discrimination with respect to particular (non-income-related) classes was a condition of receiving federal aid.²⁹⁵ Nevertheless, while Kansas City and the federal requirements stopped short of protection for low-income residents, St. Louis went a step further without explanation. It enacted a law that made it unlawful "[f]or any person to discriminate against any other person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of . . . legal source of income[.]"²⁹⁶ Thus, the Illinois and Missouri towns exhibit horizontal federalism.

When the Portland, Oregon City Council considered an antidiscrimination bill, it followed suit, but it looked upward to the state to inquire whether the state code provided this protection²⁹⁷—an example of vertical federalism. Finding it did not, the Council held a hearing about the proposed bill, and proponents and opposing parties came out in equal, sizeable numbers.²⁹⁸ The ordinance passed and the Council issued its findings related to the bill.²⁹⁹ For one, the City took notice of other cities around the United States that had some measure

293. Cook Cnty., Ill., Human Rights Ordinance 93-0-13 (Mar. 16, 1993) (codified at COOK CNTY., ILL. MUN. CODE, Ch. 42, art. II § 42-38).

294. FAIR HOUSING NEWS, U.S. DEP'T OF HOUS. AND URBAN DEV. (2006), available at http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_14773.pdf.

295. Norm Parish, *City May Help with Housing Complaints*, ST. LOUIS POST-DISPATCH, Apr. 28, 2006, at Metro C5.

296. St. Louis, Mo., Ordinance 67119 (Apr. 28, 2006) (codified at ST. LOUIS, MO., CITY REV. CODE ch. 3.44.080 (2014)).

297. Portland, Or., Ordinance 164,709, draft amendments (Sept. 19, 1991) (on file with author).

298. See CITY OF PORTLAND, OR., OFFICE OF THE CITY ATTORNEY, RECS. OF SEPT. 26, 1991, Ordinance No. 164709.

299. See *id.*

in their codes prohibiting discrimination in housing. It also found it important that "Oregon law [did] not clearly prohibit discrimination on the basis of . . . source of income at [that] time."³⁰⁰ In the absence of state action,³⁰¹ the City sought to create a measure that would protect its residents from the discrimination found in the Portland area.³⁰²

All three brief case studies in Illinois, Missouri, and Oregon display communication across governments—horizontally in Illinois and Missouri where the cities saw themselves as competing with their sister cities to be at the forefront of social policy, or vertically in Oregon where the city saw an opportunity for it to act as a model for the state. In the latter case, the state legislature followed the Portland City Council's lead within four years, although no records are available to confirm that the city's action played a role in the later state action.

Despite these highlights where communication among governments led to policymaking in this area, they are only highlights, and have not spawned greater dialogue. As noted above, many metropolitan areas have not taken up these initiatives.³⁰³ With low visibility and marketability, the propagation has moved slowly. The only cases of explicit horizontal communication across borders identified were those mentioned above—between cities within a single state. Only recently did the nation's largest city, and the home of the most federal voucher holders in the country,³⁰⁴ New York City, confront this problem head-on. As a result of "gentrification spreading into low-income areas" of the city, "many landlords in struggling neighborhoods" were under pressure to turn away voucher holders in favor of high-paying clientele.³⁰⁵ The City Council took up a proposal for adding protection against discrimination on the basis of source of income in 2007.³⁰⁶ Landlord groups opposed the bill, arguing that the proposed law "would turn a voluntary program riddled with bureaucratic problems

300. Portland, Or., Ordinance 164,709, draft amendments, para. 3 (Sept. 19, 1991) (on file with author).

301. Oregon enacted a state law in 1995, just after Portland. See OR. REV. STAT. § 659A.421 (1995).

302. Portland, Or., Ordinance 164,709, draft amendments, para. 4 (Sept. 19, 1991) (on file with author).

303. It is not possible to determine whether and where measures were considered but ultimately not implemented. My research through a national database of local news attempted to capture these stories where reported, but rejected measures may not make the news in most places, particularly smaller communities.

304. 270,000 residents use vouchers in New York City. Fernandez, *supra* note 254, at A1.

305. *Id.*

306. *Id.*

into a mandatory one.”³⁰⁷ Tenants complained that more than thirty landlords had turned down their applications and nonprofit advocacy organizations drew attention to the way in which Section 8 discrimination was masking racial and gender discrimination, as well.³⁰⁸ The bill passed, but was vetoed by Mayor Michael Bloomberg who criticized it “for prohibiting private owners from making sound business decisions about their property[.]”³⁰⁹ In a rare display of its authority, the Council promoted the law, overriding the mayor’s veto.³¹⁰ It went into force on March 26, 2008.³¹¹ In the first six months that the law was in effect, the city’s Commission on Human Rights “investigated or received 77 complaints of source of income discrimination.”³¹² But the litigation under this provision is not limited to the Commission’s work. The Legal Aid Society in New York City has sued more than ninety landlords in related claims.³¹³ Meanwhile, attorneys representing landlords across the city offered, in their defense, that “people in the industry simply don’t know that this sort of practice is illegal.”³¹⁴ They claim innocence on the premise that, “[a]t least for the last decade[,] it’s been entirely lawful to refuse to rent to tenants with vouchers.”³¹⁵

These snapshots into state and local experiences reveal a scattered map with many unique policies taken up as advocates across the nation independently seek protection for tenants in their home communities, rather than a national movement driven by centrally coordinated or concerted action. Regardless of the small size of the trend, the implications are striking for understanding how policymakers adapt to federalism’s opportunities and approach this area of shared power. Federalism allows seeds to be planted in various localities, but also limits and detracts from the achievement of a universal vision of social rights.

307. *Id.*

308. *Id.* (quoting Bertha Lewis, Executive Director of New York ACORN, a community organizing group: “We think that this is really . . . a way for landlords to do race and gender discrimination under a nice-sounding name”).

309. Manny Fernandez, *Despite New Law, Subsidized Tenants Find Doors Closed*, N.Y. TIMES, Sept. 20, 2008, at B1.

310. *Id.*

311. *Id.* A follow-up article by the *New York Times* revealed its scant application and the lack of awareness by landlords about the law. See Manny Fernandez, *Judge Upholds City Ban on Section 8 Rent Bias*, N.Y. TIMES, Feb. 19, 2009, at A24. Despite its being put into place, discrimination cases proliferate and many remain without access to decent, affordable housing. *Id.*

312. *Despite New Law, Subsidized Tenants Find Doors Closed*, *supra* note 309.

313. *Id.*

314. *Id.*

315. *Id.*

B. GUIDANCE FROM THE COURTS

Though this Article is focused on legislative activity, the impact of the courts should not be underestimated. As noted above, taken together, the federal courts did not look favorably at the federal law and may have even contributed to its repeal. Only one circuit court and one district court found for the tenants in cases where a claim of discrimination was brought pursuant to 42 U.S.C. § 1437f.³¹⁶ By contrast, state courts have read the “general welfare” purpose into their laws where the federal courts were unwilling to do so.³¹⁷ But even those are few and far between.³¹⁸ State and local Rights’ Commission decisions are more difficult to track down, though most of their rules provide an appeal process whereby aggrieved parties may enter the state court system in the second round with the Commission as co-appellee.

Some courts, both state and federal, have found that discrimination on the basis of an individual’s source of income has served as a pretext for discrimination on the part of a landlord who refused to rent to an individual under one of the prohibited classes—most commonly, on the basis of race.³¹⁹ Those decisions are consistent in outcome and purpose. However, in isolation, “low-income housing status” does not trigger the same degree of protection and thus provides little hope that the judiciary can resolve the irregularities in the trend. Rick Schragger notes that the question of growing significance is whether courts will find that more centralized legislation overrides progressive local legislation in any respect. Even setting aside any question about the distribution of authority (courts have not, generally, had trouble addressing the preemption issue—and have found none), courts have not read into the statutes a right to be free from discrimination in acquiring housing.³²⁰ In the context of social rights-related issues,

316. See *Glover v. Crestwood Lake Section 1 Holding Corps.*, 746 F. Supp. 301, 310 (S.D.N.Y. 1990); *Knapp v. Eagle Prop. Mgmt. Corp.*, 54 F.3d 1272, 1275 (7th Cir. 1995).

317. Former Massachusetts Chief Justice Margaret Marshall put it this way: “The [state legislature] was aware that [the law] imposed financial burdens on landlords, and it made various policy judgments striking the balance between those burdens and the public interest in making housing accessible and affordable for disabled persons [W]e may not strike a different balance.” *DiLiddo v. Oxford St. Realty*, 876 N.E.2d 421, 429-30 (Mass. 2007).

318. Only three state courts have found for plaintiff-tenants: New Jersey, Massachusetts, and Connecticut.

319. See, e.g., *Bronson v. Crestwood Lake Section 1 Holding Corp.*, No. 89 Civ. 5386, 1990 U.S. Dist. LEXIS 2648, *1-2 (S.D.N.Y. Mar. 9, 1990); *M.T. v. Kentwood Constr. Co.*, 651 A.2d 101, 102 (N.J. 1994); *Franklin Tower One, LLC v. New Mexico*, 725 A.2d 1104, 1109-11 (N.J. 1999).

320. *The Progressive City*, *supra* note 46, at 73. The question turns first on the determination as to whether an individual is entitled to, or has a right to, a Section 8 voucher and, second, whether a recipient of a voucher has a right to *use* it where occupancies are available. With the establishment of a right to a housing voucher, one could

however, courts may not necessarily be asked to deduce a hierarchical scheme of authority. These cases generally do not pose questions about supremacy in which courts would need to negotiate the power distribution.

Within this system of joint sovereignty shared by all levels of government, no level ever staked out or claimed a right to serve as the exclusive policymaker, facilitating a haphazard set of policies that ricocheted across the governmental levels. In the few instances where more than one level might have been implicated, courts have come out differently without a coherent guiding principle to sort out each level's role. As a result, the contours of the social need have been individually identified and supported by the work of the local, state, and federal governments, each leveraging its comparative advantage.

This checkerboard of legislative and judicial activity demonstrates the lack of a common commitment to a single approach from the menu of options. Rather, it has resulted in the default option, notwithstanding occasional communication with courts intervening as arbitrators of low-impact cases largely limited to their facts.

VIII. REALIZING A RESPONSIBILITY TO PROTECT

Although I have referred to how the enactment of antidiscrimination protections would lead to a "comprehensive" housing strategy, no empirical studies have been conducted to confirm whether antidiscrimination provisions would lead to an overall increase in the housing available for voucher holders. The Clinton Administration prioritized greater landlord participation by eliminating elements of the program to which landlords responded negatively. The level of discrimination against Section 8 voucher holders may have been and continues to be quite low such that one would find little to no difference in overall tenant placement as a result of maintaining or implementing an antidiscrimination measure. Without further and extensive empirical research, it is impossible to know for sure. It may be true, as the Clinton Administration argued, that the overall num-

infer a right to apply that voucher, and therein provide safeguards to barriers that prevent individuals from doing so. For the proposition that, under certain circumstances, tenants have a right to use their vouchers as payment for rent and that a landlord must accept them, see, *Feemster v. BSA Ltd. P'ship*, 548 F.3d 1063, 1069 (D.C. Cir. 2008) ("[T]he tenants' right . . . to pay their rent with [] vouchers, is secure unless and until their tenancies are validly terminated under [state or local] law.") (emphasis added). This backdoor option is one way federal courts could institute protections against source of income discrimination, akin to the creative doctrinal tools they have used in other areas of the law. See generally William E. Forbath, *Not So Simple Justice: Frank Michelman on Social Rights, 1969-Present*, 39 *TULSA L. REV.* 597 (2004); see also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 70-133 (1973) (Marshall, J., dissenting).

ber of tenants able to find housing would increase if more landlords participate and the discrimination protection is left out.³²¹

The critical policy question that remains unanswered concerns what to do in light of the widespread bankruptcy of protection for Section 8 voucher recipients seeking housing in locales where state or municipal antidiscrimination policies are lacking. Broadly speaking, is the movement at the local level an example of progressive federalism at work whereby a national norm will build through the communication and experimentation among the states and their subdivisions, or is it a default position in the absence of federal direction? Which level, if any, ought to take the lead on antidiscrimination housing policies, or are we satisfied with the status quo default approach?

This Part looks backward at the civil rights movement, where federal lawmaking occurred after states and local communities had experimented and their numbers had grown. It also takes up the theories and politics of federalism as examples of strategies for approaching antidiscrimination as an area of overlapping sovereignty.

A. HOW TO MAKE A SOCIAL MOVEMENT

Across the years, the civil rights movement's translation from advocacy into law has, like the source-of-income antidiscrimination issue, ricocheted between and among the many levels of government.³²² Many believed that the federal authorities would rely on the well-established state and local enforcement agencies in place of taking action of their own.³²³ Thus, the federal government was moved to action, passing the Civil Rights Act of 1964³²⁴ to combat the failure of some cities and states to take action against discrimination. The dearth of state and local legislation became a national problem that had to be ameliorated out of necessity to reel in conservative states to the newly minted national norm.³²⁵ The federal intervention was not the first move, nor the second-best choice, but rather the last resort

321. *The United States Housing Act of 1995: Hearing Before the Subcomm. on Hous. and Cmty. Opportunity of the Comm. on Banking and Fin. Servs.*, 104th Cong. 43-48 (1995) (statement of Hon. Henry Cisneros, Secretary of HUD), available at <https://archive.org/stream/hrunitedstatesh00oppogoog#page/n46/mode/2up/search/Cisneros> [hereinafter *Hearing on H.R. 2406*].

322. See Joseph P. Witherspoon, *Civil Rights Policy in the Federal System: Proposals for a Better Use of Administrative Process*, 74 *YALE L.J.* 1171, 1172 n.6 (1965).

323. Scarcely a few years before, the larger concern would have involved conflicting legislation rather than concurrent. Throughout the nineteenth century and into the early twentieth century, many cities had housing ordinances designed to segregate the races rather than to end segregation. See Laurence D. Pearl & Benjamin B. Terner, *Survey: Fair Housing Laws—Design for Equal Opportunity*, 16 *STAN. L. REV.* 849, 852 (1964); see also *Buchanan v. Warley*, 245 U.S. 60, 80-81 (1917).

324. Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified at 42 U.S.C. § 2000d (1964)).

325. See Witherspoon, *supra* note 322, at 1171.

option. This approach falls within Madison and De Tocqueville's vision of localized democratic governance, and it traces to the progressive cities' and states' movement of today. Its underlying premise reflects a theory of comparative advantage: because local governments are better situated and better equipped to enforce civil rights protections, they should take on this role.³²⁶

This policy structure places pressure on the states to be the primary actors in protecting social and civil rights. In fact, before 1945, civil rights legislation (where it existed at all) *was* a state and local power, though it was limited to provide protection to minority customers in businesses (and with very narrow enforcement capacity).³²⁷ Then, in 1941, President Roosevelt created the Fair Employment Practice Commission that would investigate discriminatory employment practices.³²⁸ Picking up on the federal government's lead, many state commissions suddenly appeared on the map to replicate and reinforce the Federal Commission's authority. The success of these state, and in some cases local, commissions encouraged lawmakers to broaden the scope of the commissions³²⁹ to other areas such as education and housing.³³⁰

The inclusion of private housing in the areas of the commissions' jurisdiction did not enter the legislative scene until 1959.³³¹ That year, four states implemented general antidiscrimination provisions for residents seeking housing in the private market: Colorado, Connecticut, Massachusetts, and Oregon.³³² The stepwise extension of state-generated protections continued in this way, though it was slow-moving, and not accepted without a struggle.³³³ Between 1959 and 1965, the constitutionality of seven state fair housing codes was challenged.³³⁴ Throughout these years, the ricocheting effect—slightly indeterminate and haphazard, but communicative in nature and highly publicized—had the consequence of positively establishing protections against discrimination in the housing market at multiple levels of government.³³⁵

326. *Id.* at 1173.

327. *Id.* at 1178.

328. *Id.*

329. These state commissions varied significantly in their choice of definitions and jurisdictional scope. *See id.* at 1180-81.

330. *Id.* at 1179-80. Their failure to address all areas of discrimination limited their ability to precipitate a change of significance in constitutional culture. *See id.*

331. Pearl & Terner, *supra* note 323, at 850.

332. *Id.* at 850 n.9.

333. *Id.* at 851.

334. *Id.*

335. *See id.* at 850-51.

By the time of the 1964 civil rights legislation, Congress was able to draw upon this multiplicity of activity. The Civil Rights Act made use of all facets and features of the federal system. It introduced new considerations for states lacking the most comprehensive protective measures; took away jurisdiction for states with lesser protections in some cases; allowed states to be more stringent where they wanted to implement additional protections; enhanced and encouraged communication between the federal courts and state agencies in adjudicative proceedings; relied on commissions to mobilize minorities in their area, developing their civic engagement; and employed the local commissions to facilitate alternative dispute mechanisms where appropriate.³³⁶

Concerns about preemption, taken up again in the early 1990s, loomed large in the early years of government activity in civil rights, both with respect to the states' codes pre-empting any and all local ordinances and, when the federal government stepped in, with respect to its occupying the field.³³⁷ A federal court in California found that a California state statute preempted municipal civil rights codes, but in Pennsylvania, the opposite conclusion was reached on the basis of the text of the state law.³³⁸ This controversy was avoided in the 1964 Civil Rights Act through the addition of an explicit statement permitting state and local laws to extend protections further, should they so choose. Overall, it is important to note how civil rights issues have never been categorically assigned to one level or another.

These historical narratives about the dynamism of federalism and the exercise of all its attributes in the context of antidiscrimination continue today with respect to housing assistance. Yet, again, the story of source-of-income discrimination can be distinguished from prior rights initiatives: unlike prior movements, the earliest authority in this instance originated with the federal government (in 1949), not with the states or local communities. Prior to the more substantial enactment in 1985 of the prohibition on discrimination by private landlords, only a small group of states had equivalent protection.³³⁹

Notably, by contrast, the civil rights and fair housing movements were just that—movements. They began as state and local initiatives that grew into federal initiatives largely because certain parts of the

336. See Witherspoon, *supra* note 322, at 1171.

337. See Pearl & Turner, *supra* note 323, at 884.

338. For example, California's Rumford Fair Housing Act, 1963 Cal. Stat. 1853, forbade local fair housing laws. Pearl & Turner, *supra* note 323, at 852-53.

339. See *supra* notes 174-222 and accompanying text.

nation were not meeting what grew to be a national norm. Both exhibited elements of the dual cooperative and dialogic approach—vertically and horizontally—whereby federal legislators drew on state and local efforts to justify their advocacy in Congress.

Why did housing discrimination against low-income residents follow a different path? Why did it not percolate upwards through an instrumental use of the federal system? One reason may be the strength of the landlord lobby at the national level. Though states and localities are often able to overcome landlord lobbies where they may advocate against discriminatory protections, their strength in Congress at the time of the repeal of the federal statute was overwhelming. Further, their voices were amplified by the executive branch under another rationale for repeal: growth of the housing program. In essence, the federal and state levels were simply identifying different problems from their respective vantage points. The federal housing authority endeavored to engage more landlords in the program, while the state endeavored to get more tenants in the housing units that were available. These need not be exclusionary goals though so far we have yet to see their cooperation on this point.

A second reason may be the lack of a strong constituency or social movement either at the grassroots level or among transnational organizations of government actors (TOGAs, in the words of Judith Resnik, Joseph Frueh, and Joshua Civin³⁴⁰)—transborder collaborations among mayors or state and city legislators. Elected officials may be reluctant or unable to support such a move in light of their need for reelection as single actors—elections in which real estate owners may play a large role, thus paralyzing action on the part of the executive or the legislature.

Regardless of these distinctions, it is in any case difficult to justify an argument for the distribution of authority to one of the levels on the basis of history in this case when civil rights issues themselves ricocheted back and forth across several levels.³⁴¹ Still, the movement may stand for a larger principle according to which social and civil rights are recognized as unique sets of policies for which “default” is an unacceptable second-best. The civil rights movement demonstrates the need for at least some sort of uniform federal threshold—a minimum set of rights to serve as a floor upon which states and localities may build additional protections in a way that would bridge the ideological posturing underlying discussions of federalism.

340. See Resnik, Civin & Frueh, *supra* note 26, at 709.

341. James Blumstein notes how “the federalism deal . . . empowers local communities, but it also constrains local power regarding civil rights by the superior authority of the federal government.” Blumstein, *supra* note 24, at 1272.

B. POLITICS OR PRINCIPLES

Larry Kramer makes reference to the way in which scholarly and judicial discussion about federalism is like the proverbial “blind m[a]n trying to describe an elephant.”³⁴² The academic literature is replete with accounts of the functions of federalism and how the Constitution or the Founding Fathers envisioned its operation.³⁴³ Scholars draw our attention to federalism’s promotion of choice, competition, participation, experimentation, and the diffusion of power.³⁴⁴ The judiciary highlights them as readily as the academic community.³⁴⁵ These federalism values are not intended to be ideologically centered, though they are often cast in that light. Heather Gerken comments on how “federal-state interactions take place in areas where states and the federal government possess concurrent jurisdiction, with states often administering federal programs.”³⁴⁶ More often than not, policymakers from each level of government collaborate within the system rather than as independent actors outside of it.³⁴⁷ And both scholars and politicians can acknowledge the descriptive point Gerken makes that many aspects of American life are governed by programs requiring concerted action.

Still, the political undertones of discussion about distribution of authority are salient in the discourse of everyday policymaking and all the more so when it comes to unclaimed issue areas of overlapping sovereignty. The menu discussed above is intended to be apolitical, though its employment and ultimate outcome are politically laden. Some scholars outrightly reject the availability of a diverse set of approaches on the premise that what is not enumerated is not up for

342. Larry D. Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1485 (1994).

343. In this respect, many make note that when the Founders drafted the Constitution, an “entrenched localism” was the “preeminent factor” in American life. R. Kent Newmyer, *John Marshall, Political Parties, and the Origins of Modern Federalism*, in FEDERALISM: STUDIES IN HISTORY, LAW, AND POLICY: PAPERS FROM THE SECOND BERKELEY SEMINAR ON FEDERALISM 17, 17 (Harry N. Scheiber & Theodore Correl eds., 1988).

344. See Richard Briffault, “What about the ‘Ism?’” *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1312 (1994) (collecting cites); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2213-14 (1998); Akhil Reed Amar, *Five Views of Federalism: “Converse-1983” in Context*, 47 VAND. L. REV. 1229, 1230-43 (1994); Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 TEX. L. REV. 1, 53-63 (2004); Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1493-511 (1987); see generally Hills, *supra* note 15.

345. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

346. Gerken, *supra* note 23, at 12-13.

347. Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 354 (1985) (“States may have rights, powers, and immunities within the federal compact, but they cannot be conceived as staying outside of it.”).

negotiation but rather is necessarily decentralized. Kramer, for one, insists that the goal of federalism is to “preserve the regulatory authority of state and local institutions to legislate policy choices.”³⁴⁸

The oft-cited “states as laboratories” metaphor is often meant to imply the possibility or the intention on the part of its proponents that experimental policies taken up by states would then lay the groundwork for the growth of a national norm.³⁴⁹ The states act as testing grounds for the potential national policy. Likewise, the same has been said of cities as laboratories for state policy in recent scholarship.³⁵⁰ This instrumentalist conception of federalism traditionally associated with progressive politics sees states and localities as stepping stones to the centralization of a national solution, in contrast with the traditional federalist or conservative conception in which the state policies are ends in themselves and diversity among them is valued.

The variable history of source-of-income antidiscrimination measures provides insight for understanding the limits and assumptions of previous models of federalism, and the approaches I have outlined, as well. I use the terms “default localism” and “progressive federalism” to capture the approach that has been applied in the source-of-income antidiscrimination phenomenon. Both are intended to depict the same phenomenon, but the framing is reflective of both politics and policy-making.

First, “progressive federalism” could imply that the state and local levels are ideal for certain policies as they provide more opportunities to enhance democratic decision-making, civic participation, and are more responsive to the needs of the community, among other reasons.³⁵¹ The progressive federalist takes the position that, where the

348. Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 222 (2000); but see *Two Cheers for Process Federalism*, *supra* note 24, at 1358 n.42, 1385 (arguing that the inability of the state to “control the local telephone market, provide tort remedies for injured citizens, and prevent oil spills in crucial waterways” are “from the standpoint of state regulatory authority . . . losses border[ing] on the disastrous”) (emphasis added). Much of Young’s work is intended to show that the Court’s jurisprudence—its emphasis on “hard” protections of state power rather than “soft” ones, its rulings on sovereignty that only ensure that the federal government leaves the states alone—does not promote what Young thinks to be the core value of federalism: ensuring that states “have meaningful things to do.” *The Rehnquist Court’s Two Federalisms*, *supra* note 344, at 52.

349. See, e.g., Edward A. Purcell, Jr., *Evolving Understandings of American Federalism: Some Shifting Parameters*, 50 N.Y.L. SCH. L. REV. 635, 669-71 (2006).

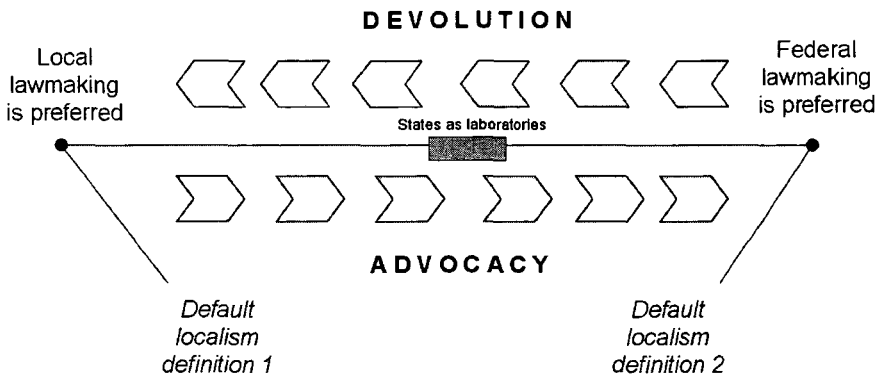
350. See, e.g., Shanna Singh, Note, *Brandeis’s Happy Incident Revisited: U.S. Cities as the New Laboratories of International Law*, 37 GEO. WASH. INT’L L. REV. 537, 545, 548-49 (2005).

351. See *The Progressive City*, *supra* note 46, 45-46.

origin of authority is otherwise uncertain, the best allocation of power for making the determination whether to protect voucher holders grants the subfederal governments the decision-making authority.

“Default localism,” on the other hand, denotes that in this policy area, the federal government has failed to act, and local or state action serves as the “default” or “back-up” option. The legislation in contention should be federal, but it has been lost or would be blocked if attempted. Here, the impetus of state and local action is traced to a perception that the federal government has neglected important policy areas.

There are meaningful consequences to the approach taken, depending on the politics and characteristics of the issue. The interaction among these definitions and models is captured in this diagram:



The diagram shows where the reference to “default localism” assigns an ideal starting position for a policy, with the understanding that through the processes of advocacy or devolution some responsibilities are able to be shared across multiple levels of governance in an approximation to real policymaking. In between, I have labeled the zone as “states as laboratories” to indicate where development and testing might take place and also where, as in this situation, indeterminacy perpetuates a “non-directional” or static middle ground. Regardless of the starting point, norm diffusion is likely to occur, but the agenda-setting position is critical for directing the tenor of the policy.

Robert Schapiro promotes progressive federalism among state and local communities, though he offers that not all laws are created equal for this purpose.³⁵² As discussed below, antidiscrimination measures are distinct from regulatory issues like health care, pollu-

352. See generally Schapiro, *supra* note 27.

tion, and pro-worker policies cited by scholars like David Barron.³⁵³ Rather, “[i]mplementation of human rights should not depend on the discretion of [the] individual states The realization of human rights should not depend on accidents of geography.”³⁵⁴ While it is not surprising that landlord lobbies have significant clout at the national level, does that relegate all tenant advocacy efforts to the local level, by default? Aggregate translocalism is never entirely comprehensive in application—some locales are left out. Progressive federalists respond that the democratic features of localism allow for more ownership over outcomes.

Are these positions, which map easily onto the menu presented at the outset of the Article, so ideologically entrenched that anything short of a national norm is likened to ideological “settling” for progressives? Or can the default localism that has resulted be conceptualized, and therefore accepted, as progressively federalist?

Local government activity in low-income housing discrimination emerged in the 1970s, though similar antidiscrimination provisions in other areas are well-known.³⁵⁵ While these initiatives in particular have emerged from progressive social movements, not all local government activism has been politically progressive.³⁵⁶ For example, many local actions—both city and county—and some state action concerning immigration are aimed at enhancing laws against unauthorized immigrants, and similar examples can be found in the areas of land-use regulations and firearm promotions as well.³⁵⁷

Others before me have noted how these municipal policy developments and their interplay in both courts and legislative dialogue draw into question the relationship between progressivism and decentralization. Schragger identifies two complications—one historical and one ideological. First, “in the twentieth century, the rhetoric of local and state autonomy has primarily been used by conservatives to at-

353. See *infra* note 362 and accompanying text.

354. Robert A. Schapiro, *Not Old or Borrowed: The Truly New Blue Federalism*, 3 HARV. L. & POL'Y REV. 33, 52 (2009).

355. See Witherspoon, *supra* note 322, at 1178; Risa Goluboff, *Civil Rights History Before, and Beyond, Brown*, in WHY THE LOCAL MATTERS: FEDERALISM, LOCALISM, AND PUBLIC INTEREST ADVOCACY, PAPERS FROM THE ELEVENTH ANNUAL LIMAN PUBLIC INTEREST PROGRAM COLLOQUIUM 11 (Kathleen Claussen, et al. eds., 2009), available at http://www.law.yale.edu/documents/pdf/liman_whyTheLocalMatters.pdf.

356. See Goluboff, *supra* note 355, at 13-19 (discussing Jim Crow laws).

357. See Richard Briffault, *Local Leadership and National Issues*, in WHY THE LOCAL MATTERS: FEDERALISM, LOCALISM, AND PUBLIC INTEREST ADVOCACY, PAPERS FROM THE ELEVENTH ANNUAL LIMAN PUBLIC INTEREST PROGRAM COLLOQUIUM 67 (Kathleen Claussen, et al. eds., 2009), available at http://www.law.yale.edu/documents/pdf/liman_whyTheLocalMatters.pdf.

tack progressive legislation at the national level.”³⁵⁸ Second, as asserted above, progressives often view local policymaking as a second-best solution to large-scale problems. The common view is that “federal legislation is necessary to prevent sub-national governments from racing to the bottom in social and economic policy, or that, even absent a race to the bottom, local regulation is an imperfect or partial approach to large-scale problems that can only be handled at a national or global scale.”³⁵⁹

Schapiro, Barron, and others labeled the recent evolution of state and local progressive lawmaking in many policy areas as “blue state federalism.”³⁶⁰ They describe how states and cities are “becoming actively engaged” in areas where they share overlapping authority with the federal government such as education, immigration, and health care.³⁶¹ According to Schapiro and Barron, states are “prodding the federal government into action,” demonstrating the potential of federalism to advance significant progressive goals.³⁶² Likewise, Schragger notes how the urban-based reforms of the Progressive Era serve as a useful model for today’s political left.³⁶³ They remind us that “the rhetoric of decentralization” is not—and should not be—the sole province of states’ rights activists and conservatives.³⁶⁴

C. SELECTING FROM THE MENU

If one then separates one’s thinking from the politically imbued discourse in this area, this project asks: what should determine how (or which approach from the menu should apply) to distribute power in areas of overlapping sovereignty generally, if it is possible to develop generic criteria? For discrimination in particular, one should consider whether social and civil rights constitute a special case due to the higher stakes they pose.

Richard Briffault makes note of the contexts in which local innovation may be most salient, and acknowledges that local experimentation may also demonstrate that local solutions are best:

The case for local autonomy is strongest when the upper levels of government are inactive, whether because the issue

358. See *The Progressive City*, *supra* note 46, at 39-40; see also Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 *YALE L.J.* 2542 (2006).

359. *The Progressive City*, *supra* note 46, at 40.

360. For a discussion, see, contributions to 3 *HARV. L. & POL’Y REV.* (2009).

361. See e.g., *Not Old or Borrowed: The Truly New Blue Federalism*, *supra* note 354, at 51.

362. *Id.*; see generally David J. Barron, *Foreword: Blue State Federalism at the Crossroads*, 3 *HARV. L. & POL’Y REV.* 1 (2009).

363. See *The Progressive City*, *supra* note 46, at 43.

364. See *id.* at 42.

in question is particularly pressing in some localities but not especially salient elsewhere; because the upper levels of government are hobbled by political conflicts over the issue; or because of uncertainty over just how to address the issue and over whether a uniform state or national treatment is appropriate or required Different actions by different localities can enable policy analysts to assess the costs and benefits of different approaches and judge which would work better for the state or the nation, or whether varying treatments would be better still.³⁶⁵

As discussed above, antidiscrimination laws have found two homes—the first, prohibiting discrimination by public authorities, was situated in the organic housing program law itself. The discussion in Part II articulated how national housing policy has never been strictly national and has gradually devolved since its highly national creation at the time of the New Deal. The strategy of the national housing policy has been to vest in 3,900 independent, localized public housing agencies “the maximum amount of responsibility and flexibility in program administration.”³⁶⁶ This creates a relationship of reliance and, by necessity, cooperation in which obtaining continued funding for local programming is dependent upon responsible administration of the program, which, in turn, requires some reasonable level of flexibility in local administration. Still, in cooperative fashion, the housing system employs all facets of the country’s federalist structure by creating an elaborate tri-level administrative scheme. Since its inception, the national housing policy has affirmed its commitment “[t]o provide financial assistance to the States and political subdivisions thereof” in meeting their own housing needs.³⁶⁷ This language leaves ambiguous the top-down or bottom-up determination of public housing policy. As a result, many reforms to housing legislation over

365. See Briffault, *supra* note 357, at 79. Briffault goes on to argue as follows:

There is increasing evidence that large-scale social and economic problems can be addressed at the local and state levels, that races to the bottom are not a necessary corollary to federalism, and that national regulation might be more likely to favor large-scale corporate interests than the kinds of constituencies progressives often care about No doubt there are races to the bottom in some areas; but there are also races to the top. Nor should decentralized law-making be considered a second-best solution to national problems. The localness of regulatory initiatives is their greatest strength [W]e are now quite (healthfully) skeptical that any of those problems are susceptible to a single national solution.

Id. at 42-43. These are not just twenty-first-century accounts. See also Felix Frankfurter, *THE PUBLIC AND ITS GOVERNMENT* 49-50 (1930) (“[O]ur federalism calls for the free play of local diversity in dealing with local problems.”); Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 *COLUM. L. REV.* 489, 493 (1954).

366. 42 U.S.C. § 1437(a)(1)(C) (2006).

367. United States Housing Act of 1937, Pub. L. No. 75-412, 50 Stat. 888 pmb1. (1937) (codified and omitted at 42 U.S.C. § 1401 (1974)).

the years have struggled with achieving an appropriate balance in the distribution of power between federal and local authorities, particularly where federal activity has significant local repercussions.³⁶⁸ Where possible, however, the federal policy commitment has set a tone or expectation for collaboration and communication.

The approach adopted for addressing overlapping sovereignty in antidiscrimination is particularly complicated because it has been problematized through a partly unconscious decentralization—a mistake in the course of reform that no one, not even housing advocates, noticed. On the one hand, devolution of housing antidiscrimination policy leads to the operation of a federal program that lacks operational assurance for those it is purportedly intended to benefit that they will in fact be able to benefit from the program; from another perspective, however, one might view the de facto decentralization as both appropriate and useful since discriminatory behavior is highly localized. Its experience teaches us subsidiary lessons regarding ways in which to leverage the comparative advantages of each level of the

368. For example, when HUD instituted its Moving to Opportunity program in the early 1990s, in which selected cities would receive grants to combine tenant-based rental assistance with housing counseling to help very low-income families move from poverty-stricken urban areas to low-poverty neighborhoods, backlash from local homeowners in Maryland was felt in downtown Washington, D.C. According to one congressional aide: “The truth is local pols up for re-election successfully politicized MTO.” Laurie Abraham, *Foes Kill Housing Plan Funds*, CHI. TRIB. (Dec. 15, 1994), http://articles.chicagotribune.com/1994-12-15/news/9412150065_1_mto-mikulski-gautreaux. This advocacy led to an effort to strip \$171 million from the program. *Id.*

In recent years, Congress has continued to press for increased devolution and deregulation in its rhetoric, while its administrative processes have required federal-local government interaction, suggesting that Congress intends to maintain tight control over the policy as a whole. Nevertheless, there is a fundamental difference between the structural housing policy which operates through regulatory pronouncements and block grants and discrimination. These two are not the same and should not be conflated. In other words, just because the devolution-oriented tri-level structure works for the programmatic side of housing does not mean it should be adopted for discrimination provisions or that housing discrimination measures should be integrated in the organic program statute, as has been done by some states.

To be sure, federal statutes on Section 8 programming generally leave selection of tenants to the discretion of the property owner. Section 1437f(d)(1)(A) provides that contracts for assistance payments between a public housing agency and a rental property owner must allow that the “selection of tenants . . . be the function of the owner” with the exception of a few programs under which the “agency may establish local preferences.” It also includes an exception that does not allow property owners to deny admission to “victim[s] of domestic violence, dating violence or stalking” on the basis of the individual’s victimization if the applicant otherwise qualifies. *Id.* But nowhere does it require landlords to take Section 8 voucher holders as tenants. This point is reemphasized in the subsection on vouchers, under the heading “Selection of tenants”: “Each housing assistance payment contract entered into by the public housing agency and the owner of a dwelling unit[] shall provide that the screening and selection of families for those units shall be the function of the owner.” 42 U.S.C. § 1437f(o)(6)(B). Thus, the housing program provides little assistance for responding to the normative inquiry on power distribution for antidiscrimination measures.

federalist system and about where the political capital for particular groups lies.

Where does this leave policymakers seeking comprehensive effect? With respect to antidiscrimination policies, a more communicative approach could facilitate a middle ground that would maximize the utility of the federalist structure³⁶⁹ and cross the ideological divide. The haphazardness of the default approach makes it less attractive, particularly as applied to social and civil rights—whether conservative or progressive. In the housing discrimination context, the absence of federal protection cannot be resolved without a means through which to create that dialogue. Kathleen and Ned Sebelius suggest the creation of a commission to advance this type of communication.³⁷⁰ Such a commission may become unwieldy, but it would at the very least realize an otherwise abstract vision for enhanced cooperative federalism.³⁷¹ For an overlap issue like antidiscrimination to move toward the communication approach requires a mechanism for dialogue, political will, and some trigger to discourse, which need not reach the level of social movement, but which should prompt lawmakers to communicate—if not act. Then, through a more communicative, transfederal approach, a national threshold could be set in collaboration with the states and localities that have experience in this area. States and localities could then expand the protections from that federal floor as they wished.

IX. CONCLUSION

As both a governance relationship and a principle of constitutional law in the United States, concepts of federalism dominate our understanding of power. While the latter creates some policy areas of exclusivity, the former enables areas of coincidence and potential collaboration. The initial policymaking forum generates considerable leverage for itself in the norm's proliferation. But are we maximizing these potentialities?

The states that had antidiscrimination language in place by 1985, when the federal prohibition was enacted, were few and far between. Per the way Judge Calabresi tells the tale, it was a Congress-initiated movement, on the heels of cries for more protection after the original

369. Cf. Schapiro, *supra* note 27, at 283 (detailing Schapiro's vision of federalism "achiev[ing] its goals" through interaction among the state and national levels).

370. See Kathleen Sebelius & Ned Sebelius, *Bearing the Burden of the Beltway: Practical Realities of State Government and Federal-State Relations in the Twenty-First Century*, 3 HARV. L. & POL'Y REV. 9, 31 (2009).

371. There is notably some debate as to whether cooperative federalism is a good idea. See, e.g., Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L.J. 557, 559 (2000).

fair housing law came into effect in 1968.³⁷² By the time the law was suggested in 1985, only a handful of cities across the country, and only four states—Massachusetts, Minnesota, Wisconsin, and Maine—had the law on the books.³⁷³ However, soon after the federal law went into effect, it was already under challenge. Within the first five years, a half dozen federal courts found it impossible to satisfy the conditions set forth in the law—rendering it meaningless and prompting congressional action to repeal the law. In spite of these developments, some judges saw a different purpose in 42 U.S.C. § 1437f(t) and tried to imbue their holdings with that spirit; but it would come too late.³⁷⁴ Judge Calabresi's impassioned dissent in 1998 illustrates this attempt to bring back meaning to the law.³⁷⁵ At that time, however, the law had already been amended. Meanwhile, states and localities pressed forward, acting singly—sometimes by looking to a sister city, but generally at the urging of local advocates, with limited means for engaging in transfederal dialogue.

Although the new federalism scholarship celebrates the increasingly frequent coincidental or even centripetal action³⁷⁶ by states, localities, and the federal government to address pressing policy matters with an impact at all three levels and beyond, the low-income housing discrimination experience does not fall neatly into any of the models. In the absence of communication or assignment, antidiscrimination provisions remain localized by default. At this time of uncertainty about where the law will take us, we watch with anticipation to learn whether the default localism that has emerged will establish a movement to further a shared national goal of providing housing for those in need.

372. See *supra* notes 143-44 and accompanying text.

373. See *supra* notes 174-96 and accompanying text.

374. See *supra* note 143 and accompanying text.

375. See *supra* note 143 and accompanying text.

376. Gerken, *supra* note 23, at 74.

