

Improving the Housing Choice Voucher Program through Source of Income Discrimination Laws

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The Housing Choice Voucher (“HCV”) program is a government program that subsidizes the rent of low-income individuals or families, allowing them to afford housing in the private market. Families pay 30 percent of their income towards rent, and the voucher covers the remainder. Congress created the program with the goal of enabling low-income families to live in high-opportunity neighborhoods, thereby improving family outcomes and eliminating the concentrations of poverty often seen with other low-income housing programs. This goal has failed, however, largely due to landlord discrimination against voucher holders. Many families are unable to find housing that will accept their voucher. For families that do find housing, they are unable to access the low-poverty neighborhoods the HCV program promised. For families of color, discrimination has an especially significant effect. To improve the success of the HCV program, this Note argues that policymakers must limit the ability of landlords to refuse to accept HCVs and that the most effective method for doing so is through Source of Income (“SOI”) discrimination laws that prohibit discrimination against voucher holders.

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INTRODUCTION

The United States has an affordable housing crisis.¹ Around the country, low-income families struggle to find housing, as cities face a shortage of affordable places to live.² Millions of low-income Americans pay 70 percent or more of their income towards housing.³ In California, where the housing crisis is especially severe, at least 30 percent of families in every part of the state cannot afford local rents; in some places up to 60 percent are unable to afford rent.⁴ As a result, rates of homelessness, displacement, and adverse health effects are increasing.⁵

One way for low-income families to afford rent is a voucher through the HCV Program. HCVs subsidize the rent of private units so that qualifying families only pay 30 percent of their income for rent.⁶ Congress created the HCV program, originally called “Section 8,” in 1974 with the goal of helping low-income families obtain affordable housing in low-poverty communities.⁷

1. Tanza Loudenback, *America’s Future Depends on the Death of the Single-Family Home*, BUS. INSIDER (Dec. 4, 2017), <https://www.businessinsider.com/us-housing-crisis-homeownership-single-family-home-2017-12> [<https://perma.cc/4SK5-2ZSN>].

2. Conor Dougherty, *The Great American Single-Family Home Problem*, N.Y. TIMES (Dec. 1, 2017), <https://nyti.ms/2kfuPV1> [<https://perma.cc/7G97-3N9K>].

3. Glenn Thrush, *As Affordable Housing Crisis Grows, HUD Sits on the Sidelines*, N.Y. TIMES (July 27, 2018), <https://nyti.ms/2K3DFN3> [<https://perma.cc/M4AF-N58M>].

4. Michael Hiltzik, *California’s Housing Crisis Reaches from the Homeless to the Middle Class — But It’s Still Almost Impossible to Fix*, L.A. TIMES (Mar. 29, 2018), <http://www.latimes.com/business/hiltzik/la-fi-hiltzik-housing-crisis-20180330-story.html> [<https://perma.cc/5B5J-8ELS>].

5. Dougherty, *supra* note 2.

6. *Id.*

7. See Alex Schwartz, *Public Housing and Vouchers*, in OXFORD HANDBOOK OF U.S. SOCIAL POLICY, *supra* note 7, at 423–24.

The program is largely failing to meet these goals, however. Instead, the government implements the HCV program in a manner that further deepens racial and economic segregation.⁸ Long waitlists due to a shortage of available vouchers and program eligibility criteria make obtaining a voucher extremely difficult.⁹ For those who receive a voucher, many are unable to find a unit that will accept it, and thus the voucher goes unused.¹⁰ And for those who do find landlords willing to accept their voucher, the units are not in the “good” neighborhoods that Congress envisioned the program would provide access to.¹¹ Although researchers disagree on how to measure neighborhood quality, studies generally find that HCV holders are unable to obtain housing in low-poverty, high-opportunity neighborhoods with low levels of segregation.¹²

The search for housing with a voucher is especially difficult for families of color, who make up the majority of voucher recipients, as landlord discrimination on the basis of a voucher is often pretext for racial discrimination.¹³ As a result, families of color are even less likely than White families to find housing in high-opportunity areas.¹⁴

One significant cause for the failures of the HCV program is landlord refusal to rent to families with vouchers.¹⁵ This discrimination against voucher holders is termed Source of Income (“SOI”) discrimination.¹⁶ Because landlord participation in the HCV program is voluntary and tenant selection decisions are

8. RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 190 (2017).

9. See J. Rosie Tighe et al., *Source of Income Discrimination and Fair Housing Policy*, 32 J. PLAN. LITERATURE 3, 4 (2017).

10. See Barbara Sard, Ctr. on Budget & Policy Priorities, *Understanding Housing Voucher Utilization and Success Rates Presentation* 5 (Dec. 11, 2015), <http://nhlp.org/files/01%20Voucher%20Utilization%20Presentation.pdf> [https://perma.cc/UZ6W-2NR9].

11. See Alex Schwartz et al., *Vouchers and Neighborhood Distress: The Unrealized Potential for Families with Housing Choice Vouchers to Reside in Neighborhoods with Low Levels of Distress*, 18 CITYSCAPE: J. POL’Y DEV. & RES. 207, 215–16 (2016) [hereinafter Schwartz et al. 2016].

12. See Kirk McClure & Bonnie Johnson, *Housing Programs Fail to Deliver on Neighborhood Quality, Reexamined*, 25 HOUSING POL’Y DEBATE 463, 470–71 (2015). One definition that studies have used for “good” neighborhood is one that offers the opportunity to racially and ethnically integrate, measured through the percentage of the neighborhood’s residents that are a minority. An alternative definition used by researchers is that a good neighborhood has low levels and concentrations of poverty. Other measures include unemployment rates, assisted housing, and the number of high school dropouts. To reach their conclusion that voucher holders fail to obtain housing in good neighborhoods, McClure and Johnson reviewed research evaluating quality on these different measures, finding that Section 8 programs were not successfully placing families in good neighborhoods regardless of the measure used. See *id.*

13. See generally Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 UCLA L. REV. 1540, 1569 (2012).

14. See Tighe et al., *supra* note 9, at 4.

15. See Sard, *supra* note 10, at 5.

16. See 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, 776 (2010). SOI discrimination also encompasses discrimination on the basis of other sources of income, such as social security or disability benefits.

left to landlords,¹⁷ landlords are free to engage in SOI discrimination. This means that the availability, quality, and location of low-income housing depends on private landlords, and that landlords have the ability to couch racial discrimination behind a cover of HCV refusal. Therefore, vouchers are an imperfect housing solution. Accordingly, HCVs have not created access to high-opportunity neighborhoods for low-income families, especially families of color.¹⁸

More than forty years later, and despite these flaws, housing advocates still champion the potential for vouchers to provide families with better neighborhood choices.¹⁹ They argue that if properly implemented, vouchers are good policy.²⁰ Legislation that prohibits landlords from discriminating against tenants using HCVs is one solution that can significantly improve the program. This Note argues that such laws, referred to as SOI discrimination laws, have the potential to improve the HCV program by allowing it to better provide low-income families with affordable housing in high-opportunity neighborhoods.

First, this Note describes the history of subsidized housing programs in the United States, and the subsequent decision to create the HCV program. Second, this Note evaluates the success of the HCV program, arguing that it has failed to reach its goals of improving access to low-poverty neighborhoods because of discrimination against HCVs. It further argues that such failure is evidence of efforts to weaken the social safety net. Finally, this Note describes SOI discrimination laws and presents the debate around them, arguing that they are an effective solution to discrimination against voucher holders. Through such laws, policymakers can ensure that low-income families, especially those of color, have access to the benefits associated with high-opportunity neighborhoods, fulfilling the goals of the HCV program.

I. BACKGROUND

Public housing, a supply-side approach, and HCVs, a market-side approach, are two key forms of subsidized federal housing programs in the United States.²¹ Public housing is the oldest housing program in the nation; construction began with New Deal legislation in 1937 and continued to increase through the 1980s.²² Public housing provides partially or fully subsidized units for low-income individuals, with federal assistance attached to the specific

17. “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) (2012).

18. *Id.*

19. See Schwartz 2014, *supra* note 7, at 428.

20. *Id.*

21. See *id.* at 413.

22. *Id.* at 414.

unit.²³ Before the creation of the HCV program in 1974, public housing was the largest federal housing assistance program.²⁴ But the HCV program has now exceeded public housing in size and is the nation's largest low-income housing program.²⁵ This section explores the background of federal housing programs, looking at the development of public housing and the creation of the HCV program.

A. Initial Government Housing Interventions

The federal government's first intervention in the housing market was during World War I. To meet the housing needs of workers in war industry jobs, Congress passed three laws funding the construction of units.²⁶ In total, the government completed fifty-five projects, capable of accommodating 95,000 people.²⁷ Congress sold the units after the war ended, but the program established a precedent of federal involvement in housing.²⁸

The collapse of the economy during the Great Depression brought about more significant federal involvement in housing, with efforts led by Presidents Herbert Hoover and Franklin D. Roosevelt.²⁹ The Emergency Relief and Reconstruction Act of 1932 provided limited-dividend corporations with loans to construct low-income housing.³⁰ However, there was minimal private sector interest in such loans. Thus, in 1934, the program changed into one where the federal government acquired slums, cleared them, and built housing under the Public Works Administration (PWA).³¹ These projects helped pave the way for permanent public housing programs.³² Through the PWA program, the federal government created fifty-eight low-income developments around the country—about twenty-five thousand units of housing.³³ The program effectively ended in 1935 with *United States v. Certain Lands*, when the Sixth Circuit held that the federal government could not use eminent domain powers for slum clearance.³⁴

23. *Id.*

24. *Id.*

25. *Id.*

26. *Public Housing in War on Poverty*, CQ RESEARCHER (July 22, 1964), <http://library.cqpress.com/cqresearcher/cqresrre1964072200> [https://perma.cc/2AA9-8XSZ].

27. Christian Topalov, *Scientific Urban Planning and the Ordering of Daily Life: The First "War Housing" Experiment in the United States, 1917–1919*, 17 J. URB. HIST. 14, 15, 20–22 (1990). There were a variety of unit types constructed: single-family units and dormitories, hotels, and boarding houses for single people. *Id.* The type of dwelling depended on the type of worker intended to live there; skilled workers lived in modern housing communities, while nonskilled workers and government workers lived in dormitories. *Id.*

28. EDWARD G. GOETZ, *NEW DEAL RUINS: RACE, ECONOMIC JUSTICE, AND PUBLIC HOUSING POLICY* 26 (2013).

29. *See Public Housing in War on Poverty*, *supra* note 26.

30. *Id.*

31. *See* GOETZ, *supra* note 28, at 26.

32. *See id.*

33. *Id.*

34. *Id.* at 27.

B. United States Housing Act

Instead of appealing the *Certain Lands* decision, the Roosevelt administration encouraged state governments to construct public housing.³⁵ But housing advocates maintained that federal intervention was necessary, and they pushed for Congress to act.³⁶ In 1937 Congress passed the United States Housing Act (“Housing Act”), which created a public housing program that would operate through state and local governments.³⁷ The Housing Act authorized local governments to establish Public Housing Authorities (PHAs) to build and manage public housing.³⁸ PHAs are local entities and have the right to exercise eminent domain to acquire property for public housing, unlike the federal government under the *Certain Lands* decision.³⁹ The Housing Act also created the United States Housing Authority to provide financial assistance to PHAs.⁴⁰ The Housing Act is now principally codified at 42 U.S.C. §§ 1437 et seq.

From the beginning, public housing was controversial and legislative attempts to enact programs in 1935 and 1936 failed.⁴¹ However, by 1937 the Housing Act passed with overwhelming majorities in both chambers of Congress.⁴² Advocates in Congress gained votes by presenting the program as one of job creation and slum clearance, not just housing creation.⁴³ They touted public housing as a solution to slums, as “modern housing in place of dilapidated slum dwellings.”⁴⁴ Senator Robert E. Wagner, the legislative sponsor of the 1937 Act, claimed that public housing would be the “next step in the country’s economic recovery.”⁴⁵ Although President Roosevelt had opposed the 1935 and 1936 bills, he supported the 1937 bill, seeing the potential for economic growth through construction jobs.⁴⁶

Political compromises were necessary to pass the legislation, which ultimately weakened the program.⁴⁷ The private real estate lobby alleged that

35. *Id.*

36. *Id.*

37. *Id.*

38. Schwartz 2014, *supra* note 7, at 416.

39. *Id.*

40. *Public Housing in War on Poverty*, *supra* note 26. The Housing Act authorized two types of financial assistance to PHAs: loans and an annual funding subsidy. *Id.* In 1942 the United States Housing Authority was renamed the Federal Public Housing Authority. *Id.*

41. GOETZ, *supra* note 28, at 27.

42. *Public Housing in War on Poverty*, *supra* note 26.

43. GOETZ, *supra* note 28, at 27.

44. *Id.* at 26.

45. *Id.* at 27.

46. *Id.* President Roosevelt was initially uninterested in passing housing legislation. *Id.* Additionally, both the Interior Department, which had housed the PWA housing program, and the Commerce Department opposed the 1935 and 1936 bills. *Id.* However, Roosevelt’s New Deal Program was largely built on the idea that public works would generate jobs, leading to his support in 1937. *Id.*

47. Schwartz 2014, *supra* note 7, at 415.

public housing was “socialistic and wasteful.”⁴⁸ In addition, there was concern that public housing would harm the private market.⁴⁹ Further, White neighborhoods strongly opposed the development of public housing in their communities.⁵⁰

To appease these concerns, Congress included an “equivalent elimination” mandate in the legislation that required one unit of substandard housing to be destroyed for every public housing unit built.⁵¹ The mandate ensured that most public housing would be built in previous slum areas, limiting development to inner-city areas and leading to concentrations of extreme poverty and racial segregation.⁵² In addition, the mandate helped ensure that public housing would not compete with the private market, by largely constraining it to impoverished areas where the private market “would not function.”⁵³ Congress also agreed to place limits on the incomes of tenants; by only serving families with incomes below the level necessary to secure housing in the private market, public housing would not compete with private housing.⁵⁴ Finally, the Housing Act limited the independence of PHAs by requiring them to enter into an agreement with local governments before building or operating any housing.⁵⁵ Thus, localities that did not want to create public housing, such as affluent suburbs, did not have to, guaranteeing that public housing would be concentrated in large cities and working-class suburbs.⁵⁶

C. *Introduction to the HCV Program*

By the 1970s, most people associated public housing with racial segregation, extreme poverty, high crime rates, and dilapidated buildings.⁵⁷ While there were many factors that created these issues, they are largely attributable to the concentrations of poverty and racial segregation created by the Housing Act.⁵⁸ Rather than address the weaknesses of public housing, however, Congress instead established the Section 8 Existing Housing Certificate Program

48. See Michael H. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 CORNELL L. REV. 877, 896 (1989).

49. GOETZ, *supra* note 28, at 28. According to Senator Wagner, “the most important consideration is, that public housing projects should not be brought into competition with private industry . . . To reach those who are really entitled to public assistance, and to get into the field where private enterprise cannot operate, is the objective of this bill.” *Id.*

50. Schwartz 2014, *supra* note 7, at 416.

51. GOETZ, *supra* note 28, at 28.

52. Schwartz 2014, *supra* note 7, at 416.

53. GOETZ, *supra* note 28, at 28.

54. Schwartz 2014, *supra* note 7, at 415.

55. GOETZ, *supra* note 28, at 28.

56. Schwartz 2014, *supra* note 7, at 416.

57. *Id.* at 415. Schwartz argues that these issues are mostly seen at public housing programs in large cities; while developments in suburbs, rural America, and small cities were, and remain, less troubled. *Id.*

58. *Id.*

(hereinafter “Section 8”) in 1974.⁵⁹ Advocates claimed the program would integrate low-income families into low-poverty neighborhoods.⁶⁰ In 1988, Congress renamed the program the “Housing Choice Voucher Program,” but it is still commonly referred to as Section 8.⁶¹

The main provisions governing the program are codified at 42 U.S.C. § 1437f(o). The Department of Housing and Urban Development (HUD) manages the HCV program, while PHAs administer vouchers locally.⁶² Federal law requires that at least 75 percent of families with HCVs be at or below 30 percent of the area’s median income.⁶³ Low-income families that receive HCVs can use the voucher to pay for the housing of their choice in the private market.⁶⁴ Families pay up to 30 percent of their income in rent, and the voucher pays the remainder directly to the landlord, up to a limit based on the local area’s fair market rent value.⁶⁵ If the rent is more than the voucher limit, families can also pay the additional amount as long as rent is not more than 40 percent of the family’s income.⁶⁶ The unit must also pass regular physical quality inspections.⁶⁷ Federal law however does not mandate that landlords participate in the HCV program.⁶⁸ For landlords that do participate, the program leaves tenant selection decisions to their discretion.⁶⁹

The goal of the HCV program is to help low-income families find “decent” places to live in “economically mixed” communities.⁷⁰ Research shows that the HCV program has largely failed to meet this goal.⁷¹ However, research also finds that vouchers do have the potential to better facilitate family access to high-

59. See 42 U.S.C. § 1437f, at *References in Text* (2012); Schwartz 2014, *supra* note 7, at 415.

60. See McClure & Johnson, *supra* note 12, at 467.

61. See Schwartz 2014, *supra* note 7, at 423. Congress also changed some programmatic details in 1998. *Id.*

62. Ocen, *supra* note 13, at 1569–70.

63. Kirk McClure et al., *Housing Choice Voucher Location Patterns a Decade Later*, 25 HOUSING POL’Y DEBATE 215, 215 (2015).

64. THE LAWYERS’ COMM. FOR BETTER HOUS., LOCKED OUT: BARRIERS TO CHOICE FOR HOUSING VOUCHER HOLDERS 2 (2002) [hereinafter LOCKED OUT], <http://lcbh.org/sites/default/files/resources/2002-lcbh-housing-voucher-barriers-report.pdf> [https://perma.cc/K8UC-TS8G].

65. See Ocen, *supra* note 13, at 1570.

66. Schwartz 2014, *supra* note 7, at 424.

67. McClure et. al, *supra* note 63, at 215.

68. Although federal law does not expressly state that the HCV program is voluntary, courts have largely concluded that it is. See 42 U.S.C. § 1437f(o) (2012); *Inclusive Cmty. Project, Inc. v. Abbott (Inclusive Cmty. II)*, No. 3:17-CV-0440-D, 2018 WL 2415034, at *1 (N.D. Tex. May 29, 2018) (“federal law does not mandate that landlords participate in the Voucher program”); *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 296 (2d Cir. 1998) (“Participation by landlords is voluntary; they lawfully may refuse to accept applications from Section 8 beneficiaries.”).

69. 42 U.S.C. § 1437f(o)(6)(B) (“[T]he screening and selection of families for those units shall be the function of the owner.”).

70. 42 U.S.C. § 1437f(a).

71. See Schwartz 2014, *supra* note 7, at 425.

quality neighborhoods as compared to subsidized units in public housing.⁷² This Note will now turn to the argument in favor of vouchers, as well as other arguments in support of a market-side approach to housing subsidies.

D. Why Privatize Subsidized Housing?

The decision to turn to a private solution for low-income housing in 1974 echoed an overall trend at the time of public welfare programs transitioning to market-based approaches.⁷³ Following the expansion of the public welfare state during the New Deal era in the 1920s and 1930s, the private market quickly channeled the creation of these new social rights away from the public system to the private market.⁷⁴ One area where this is seen clearly is in health care. Within a few decades, American businesses transferred the provision of health care away from the universal or community-based options considered during the New Deal to an entrenchment of health insurance within the workplace.⁷⁵ The HCV program followed a similar pattern, with a transition away from publicly owned accommodations to the private market.⁷⁶

The HCV program was politically controversial. Liberals generally advocated for supply-side approaches like public housing while proponents of a market-side approach tended to be conservatives.⁷⁷ They argued that vouchers would (1) better allow access to high-opportunity, economically integrated communities, (2) increase family outcomes, and (3) be more efficient and cost-effective.⁷⁸ Today, the debate between private and supply-side subsidies is far less divisive, with liberals appreciating both approaches, and conservatives mostly opposing all forms of low-income housing subsidies.⁷⁹

First, advocates of vouchers argued that privatization would more successfully eliminate concentrations of poverty than supply-side approaches. By having the freedom to seek housing anywhere in the PHA's jurisdiction, proponents claimed that the HCV program could more effectively open the door for families to integrate in less segregated, high-opportunity neighborhoods.⁸⁰ These were the same neighborhoods that largely excluded public housing.⁸¹ In contrast, opponents argued that vouchers could actually harm low-income families by having an inflationary effect on local markets, causing rents to

72. See Kirk McClure, *Deconcentrating Poverty with Housing Programs*, 74 J. AM. PLAN. ASS'N 90, 91 (2008).

73. See LOCKED OUT, *supra* note 64, at 2.

74. See Jennifer Klein, *The Business of Health Security: Employee Health Benefits, Commercial Insurers, and the Reconstruction of Welfare Capitalism, 1945–1960*, 58 INT'L LAB. & WORKING-CLASS HIST. 293, 294 (2000).

75. *Id.* at 293–94.

76. See Tighe et al., *supra* note 9, at 3.

77. See Schwartz 2014, *supra* note 7, at 424.

78. *Id.*

79. *Id.*

80. See Tighe et al., *supra* note 9, at 3.

81. See *id.*

increase.⁸² In addition, opponents were skeptical that the HCV program would actually improve access to low-poverty neighborhoods.⁸³

Next, proponents of HCVs claimed that increasing low-income families' access to high-opportunity neighborhoods would also improve their life outcomes.⁸⁴ Research shows that neighborhoods with high rates of poverty and unemployment, and low rates of adults with higher education, affect the educational attainment, employment, and criminal involvement of residents.⁸⁵ By allowing families to move to neighborhoods where they could get higher paying jobs and attend schools with more resources, supporters envisioned vouchers as a way to improve outcomes.⁸⁶ Opponents argued that vouchers would not necessarily improve residential choice, as the HCV program predicated its goals on the uncertain assumption that the private market would provide an adequate number of units in high-opportunity neighborhoods, and that families would choose to use their voucher in such neighborhoods.⁸⁷ Instead, voucher opponents pushed for improvements to public housing that would include developing in low-poverty neighborhoods.⁸⁸

Another rationale in favor of vouchers was that they would be more efficient than public housing programs.⁸⁹ Efficiency is often a key justification for the privatization of social service programs, as some argue that the private market uses resources more efficiently than the government.⁹⁰ To explain efficiency, theorists offer multiple explanations. Some contend that the motivation to maximize profit leads to efficiency in the private market, while others claim that a focus on political victory in the government minimizes efficiency.⁹¹ However, opponents of HCVs criticized the efficiency rationale, emphasizing that the government also has an interest in efficient operation, regardless of (and often benefitting) political goals.⁹² Opponents argued that a desire to shrink the welfare system motivated the push for privatization, not efficiency, and cautioned against such change.⁹³

82. See Schwartz 2014, *supra* note 7, at 424.

83. See *id.*

84. See Margery Austin Turner, *Moving Out of Poverty: Expanding Mobility and Choice Through Tenant-Based Housing Assistance*, 9 HOUSING POL'Y DEBATE 373, 375 (1998).

85. See *id.*

86. See Ocen, *supra* note 13, at 1570.

87. See McClure & Johnson, *supra* note 12, at 467.

88. See Schwartz 2014, *supra* note 7, at 424.

89. Schwartz et al. 2016, *supra* note 11, at 208.

90. Schill, *supra* note 48, at 882.

91. *Id.*

92. *Id.*

93. *Id.* at 887.

II.

THE HOUSING CHOICE VOUCHER PROGRAM

This Section will evaluate why the HCV program has failed to achieve its goals. Although proponents of HCVs claimed that depending on the private market by using vouchers would create access for low-income families in high-opportunity areas, the program has failed to do so. I argue that this is because of landlord discrimination. Such discrimination is the direct consequence of the HCV program's dependence on the private market, as the availability, quality, and location of low-income housing in the United States is dependent on the choices of private landlords.⁹⁴

A. *Failures of the Housing Choice Voucher Program*

Supporters of vouchers championed them for their portability and claimed that they would allow low-income families access to good neighborhoods.⁹⁵ However, this potential has not been fully realized, especially for families of color.⁹⁶ While the HCV program is now the largest subsidized housing program in the United States, with about 2.2 million families in the program, it has been largely unable to meet its stated goals.⁹⁷ Some studies have found that vouchers are less expensive than public housing.⁹⁸ Nonetheless, the program's goal of integration in high-opportunity neighborhoods to eliminate concentrations of poverty and improve family outcomes has generally failed.

First, a substantial portion of voucher recipients are unable to find any units to use their voucher.⁹⁹ The last HUD study, in 2001, found that only an average of 69 percent of voucher recipients in large metropolitan areas were successfully able to lease a unit with their voucher.¹⁰⁰ More recent figures from local housing authorities suggest even lower success rates. For example, in 2017, the Dallas Housing Authority estimated that only 40 percent of people with vouchers in that

94. After the creation of Section 8 in 1974, public housing production continued to increase through the 1980s. *See* Schwartz 2014, *supra* note 7, at 423. In addition, the supply of public housing has shrunk since the 1990s, due to demolition or redevelopment of the projects. *Id.* Vouchers are now the largest rental subsidy program for low-income families in the US. *Id.*

95. Schwartz et al. 2016, *supra* note 11, at 208.

96. *Id.*

97. *See* McClure et al., *supra* note 63, at 215.

98. *See* Schill, *supra* note 48, at 900. For example, in 1988, the Congressional Budget Office estimated that housing an elderly individual in public housing for twenty years costs the government 30 percent more than if it had provided the individual with a voucher. *Id.*

99. *See generally* Sard, *supra* note 10, at 3, 5 (explaining that success rates are on average 69 percent, but in some markets were as low as 37 percent).

100. U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF POLICY DEV. & RESEARCH, 1 STUDY ON SECTION 8 VOUCHER SUCCESS RATES: QUANTITATIVE STUDY OF SUCCESS RATES IN METROPOLITAN AREAS ii (2001) [hereinafter VOUCHER SUCCESS RATES], <https://www.huduser.gov/publications/pdf/sec8success.pdf> [https://perma.cc/DQL4-3EGS].

market can use them,¹⁰¹ while Dallas' estimated success rate in 2001 was 66 percent.¹⁰²

Even for voucher recipients able to find a qualifying unit, the HCV program has also largely failed to achieve its goal of providing access to high-opportunity neighborhoods.¹⁰³ In comparison to public housing residents, HCV recipients are less likely to live in the neighborhoods with the highest rates of poverty.¹⁰⁴ However, voucher families are underrepresented in low-poverty neighborhoods with excellent schools and other services envisioned by the HCV program, and overrepresented in high poverty, low-opportunity areas.¹⁰⁵ Instead, many housing voucher recipients end up remaining in the low-income neighborhoods they previously lived in.¹⁰⁶ Even when researchers control for the availability of affordable housing in high-opportunity neighborhoods, studies show that voucher holders are excluded disproportionately in these areas.¹⁰⁷ Thus, although HCVs have done a better job than public housing in keeping families out of the neighborhoods with the highest levels of poverty, they largely have been unable to grant them access to the neighborhoods that program advocates claimed would be available.¹⁰⁸

Success rates are especially low for families of color, as Black and Hispanic recipients trying to find units confront even greater challenges.¹⁰⁹ Discrimination against families of color is especially prevalent in middle-class communities, which are often largely White.¹¹⁰ Families of color using a voucher predominantly live in areas that are more than 50 percent Black or Hispanic, neighborhoods that overwhelmingly have the highest levels of poverty.¹¹¹ In contrast, White families with vouchers are much more represented in predominantly White, high-opportunity neighborhoods.¹¹² Therefore, in comparison to White families, families of color are especially underrepresented in low-poverty areas.¹¹³ For example, 12 percent of Black families with vouchers live in the census tracts with the highest poverty rates, where more than 40

101. Laura Sullivan & Meg Anderson, *Section 8 Vouchers Help the Poor — But Only If Housing Is Available*, N.P.R. (May 10, 2017), <https://www.npr.org/2017/05/10/527660512/section-8-vouchers-help-the-poor-but-only-if-housing-is-available> [<https://perma.cc/X4KY-NH7D>].

102. VOUCHER SUCCESS RATES, *supra* note 100, at C-4.

103. *See* Tighe et al., *supra* note 9, at 3.

104. *See* Schwartz 2014, *supra* note 7, at 425; *see also* McClure & Johnson, *supra* note 12, at 471 (arguing that Section 8 performs better than public housing).

105. *See* Schwartz et al. 2016, *supra* note 11, at 214.

106. *See* Ocen, *supra* note 13, at 1571.

107. *See* Schwartz et al. 2016, *supra* note 11, at 214.

108. *See generally id.* at 214–15 (explaining that voucher recipients generally use their voucher in the neighborhoods with the highest level of distress).

109. *See* Tighe et al., *supra* note 9, at 4.

110. Paula Beck, *Fighting Section 8 Discrimination: The Fair Housing Act's New Frontier*, 31 HARV. C.R.-C.L. L. REV. 155, 159 (1996).

111. Schwartz et al. 2016, *supra* note 11, at 215.

112. *Id.*

113. Tighe et al., *supra* note 9, at 4.

percent of the population falls below the poverty line; only 4 percent of White families with vouchers live in these areas.¹¹⁴ In comparison, 16 percent of Black families live in tracts with a poverty rate of less than 10 percent, while 28 percent of White families do.¹¹⁵ As Richard Rothstein, a historian and academic focusing on the history of housing segregation in the United States, argues, implementation of HCV program only further deepens racial segregation.¹¹⁶

B. Understanding the Failures of the HCV Program

Under federal law that governs the HCV program, landlords can refuse to rent to tenants who are using HCVs.¹¹⁷ This type of SOI discrimination—discrimination against a potential tenant on the basis of their source of income—factors into why the HCV program fails to provide access to good neighborhoods and why families that qualify for vouchers are unable to find units.¹¹⁸ The program’s success relies on an assumption that private landlords in low-poverty neighborhoods will be willing to accept vouchers. But landlords often refuse, despite the guarantee of rent from the voucher. Tenants are then left with few housing options for which to use their vouchers, usually in the same neighborhoods that HVCs were meant to provide a way out of.¹¹⁹ For example, a 2012 study in Austin, Texas found that only 6 percent of the units surveyed were open to HCVs.¹²⁰ Most of the units available were in areas of high poverty and crime that lacked high-performing schools and sustainable employment opportunities.¹²¹

One possible explanation for why the HCV program has been unsuccessful at moving families to high-opportunity neighborhoods is that recipients choose to use their vouchers in neighborhoods that are familiar to them.¹²² Less than 1 percent of affordable units in predominantly Black or Hispanic neighborhoods are located in low-poverty areas.¹²³ Therefore, voucher holders who prefer to live in a predominantly minority community are most likely to live in high-poverty

114. Nat’l Low Income Hous. Coal., *Who Lives in Federally Assisted Housing?*, 2 HOUS. SPOTLIGHT 14 (2012), <http://nlihc.org/sites/default/files/HousingSpotlight2-2.pdf> [https://perma.cc/E29D-WRCU].

115. *Id.*

116. ROTHSTEIN, *supra* note 8, at 190.

117. See Tighe et al., *supra* note 9, at 6; 42 U.S.C. § 1437f(d)(1)(A) (2012) (“[T]he selection of tenants shall be the function of the owner.”).

118. See Sard, *supra* note 10, at 5.

119. See Beck, *supra* note 110, at 159.

120. AUSTIN TENANTS’ COUNCIL, VOUCHER HOLDERS NEED NOT APPLY: AN AUDIT REPORT ON THE REFUSAL OF HOUSING CHOICE VOUCHERS BY LANDLORDS IN THE AUSTIN MSA 4, 9 (2012), <http://www.austintexas.gov/edims/document.cfm?id=211114> [https://perma.cc/2KX6-9RNS].

121. *Id.* at 4.

122. See Tighe et al., *supra* note 9, at 3.

123. Schwartz et al. 2016, *supra* note 11, at 216–17.

neighborhoods. Research shows, however, that most voucher holders would like to move to economically mixed communities but are unable to find housing.¹²⁴

Finally, some opponents of SOI discrimination laws argue that market factors, such as low rental vacancy rates or a lack of affordable housing in low-poverty neighborhoods, are what limit the availability of units for voucher recipients.¹²⁵ But, research shows that families are in fact underrepresented relative to the availability of affordable housing in low-poverty neighborhoods.¹²⁶ This is especially true for Black and Hispanic voucher holders.¹²⁷ In fact, increasing the availability of housing that costs less than the voucher amount in low-poverty neighborhoods had no significant effect on the ability of minority voucher holders to rent there.¹²⁸ Thus, experts in housing and urban policy argue that increasing the availability of affordable housing in low-poverty neighborhoods will minimally affect improving residential choices for families of color.¹²⁹

Therefore, although market factors and individual choice may contribute to the HCV program's inability to provide access to low-poverty neighborhoods, SOI discrimination is a more significant factor. For families of color, SOI discrimination has an especially significant effect.

C. *Understanding the HCV Program as Retrenchment of the Safety Net*

Retrenchment is an often hidden attempt to weaken welfare policies by cutting funding or restructuring programs.¹³⁰ In 1996, Paul Pierson, a political scientist, argued that despite an image of the US welfare state as under attack, economic, political, and social pressures had not weakened welfare programs.¹³¹ Pierson's analysis was an influential assessment that led to the conventional view among scholars that welfare policies were more secure than they might appear to be.¹³² But political scientist Jacob Hacker challenged Pierson's conclusion, arguing that political actors opposed to the social safety net were using hidden

124. Tighe et al., *supra* note 9, at 3. Studies show that where tenants ultimately end up living is in conflict with their stated preferences. *Id.* Further, research finds that where voucher holders end up renting is a response to discrimination by landlords, not personal neighborhood preference. *Id.*

125. See Schwartz et al. 2016, *supra* note 11, at 223.

126. *Id.* Schwartz's research found that the availability of housing in low-poverty neighborhoods that is within an HCV's amount had no significant effect on the percentage of voucher holders who attain housing in such neighborhoods. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. See Jacob S. Hacker, *Privatizing Risk Without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States*, 98 AM. POL. SCI. REV. 243, 244 (2004).

131. Paul Pierson, *The New Politics of the Welfare State*, 48 WORLD POL. 143, 173 (1996).

132. Hacker, *supra* note 130, at 244.

means to attack welfare policy.¹³³ These sorts of attacks weaken the social safety net, so that welfare programs offer incomplete protection.¹³⁴

Such efforts to undermine housing assistance are evident in the HCV program. By allowing landlords to discriminate against voucher holders, the program fails to provide quality housing for low-income families, especially those of color. This can be understood as a purposeful strategy by actors opposed to safety net policies to weaken the provision of housing services.

One specific strategy of weakening the safety net is conversion, which Hacker defines as the internal altering of a program's purpose and goals.¹³⁵ Programs that rely on public-private partnerships are especially susceptible to conversion, as private actors have a high level of discretion in how they implement programs, and changes in their goals can significantly affect the efficacy of programs.¹³⁶ For example, tax break policies for employers who offer pension and health benefits to employees are a public-private healthcare partnership.¹³⁷ The program gives employers wide discretion in who they offer benefits to, and whether they offer benefits at all.¹³⁸ With that discretion, employers can pursue their own goals—including offering widespread, quality coverage or minimal healthcare or no coverage at all.¹³⁹ These choices individually alter the tax break program through conversion of its policies.¹⁴⁰

Similarly, the HCV program, as a private market solution, gives landlords discretion to decide if they want to participate and who they want to accept vouchers from.¹⁴¹ Landlords, like employers deciding about health benefits, are therefore able to influence the purposes of the program based on their individual goals. These goals often reflect opposition to the program and are motivated by animus towards low-income families, as seen by landlord defenses of SOI discrimination.¹⁴² This Note discusses landlord arguments in depth below. Generally, though, landlords claim that they do not accept vouchers because HCV recipients are disruptive tenants who bring crime, drugs, and disorder.¹⁴³ As a result, landlords often engage in SOI discrimination, which ultimately limits the efficacy of the HCV program.¹⁴⁴

133. *Id.*

134. *See id.*

135. *Id.* at 246.

136. *See id.* at 243, 247.

137. *See id.* at 247.

138. *Id.*

139. *Id.*

140. *Id.*

141. *See* 42 U.S.C. § 1437f(o) (2012); 42 U.S.C. § 1437f(o)(6)(B).

142. *See generally* Ocen, *supra* note 13, at 1544 (explaining that landlords often blame HCV families for “increased crime, violence, and blight,” and describe voucher recipients as “criminal, lazy, and scary”). *Id.*

143. *See* Part III.C.

144. *See* Tighe et al., *supra* note 9, at 6.

Michael Schill, an expert on housing policy, argues that regardless of ulterior motives, welfare advocates should not reject the efficiency goals of privatization.¹⁴⁵ Schill urges advocates to establish welfare policies within the private market for housing, which he argues is the most efficient framework for delivery.¹⁴⁶ However, the failures of HCVs show that motivations within a welfare program matter. By allowing the influence of landlords who engage in SOI discrimination, the HCV program has not been able to meet the housing needs of voucher recipients, weakening the program and the overall safety net. Accordingly, policymakers should consider measures to limit the influence of landlords on the HCV program. SOI laws, which minimize landlord discretion, are an important step towards limiting conversion of the program.

III.

EFFICACY OF SOURCE OF INCOME DISCRIMINATION LAWS

Advocates champion the potential of HCVs to provide low-income families with access to better neighborhoods, via existing housing in the private market.¹⁴⁷ However, the program has largely failed to realize this potential.¹⁴⁸ Because the program relies on landlords to meet these goals, SOI discrimination by landlords prevents many voucher holders from finding units. Although reliance on landlords is an inevitable consequence of turning to private market solutions, implementing SOI discrimination laws minimizes the impacts of discrimination and can help realize the potential of the HCV program.

This Part will first discuss litigation strategies to combat the effects of SOI discrimination, although the courts are ultimately an ineffective solution to this problem. Next, this Part will explain the function of SOI discrimination laws and analyze their successes. Finally, this Part will address arguments by landlords, policymakers, and economists against SOI discrimination laws, explaining that such claims are largely motivated by animus towards the poor, especially those who are considered undeserving of support.

A. *Litigation Strategies*

The impact of voucher discrimination on low-income families has led tenants' rights advocates to consider several litigation strategies. One approach is to challenge SOI discrimination against prospective renters under the federal Fair Housing Act (FHA) through disparate impact claims.¹⁴⁹

145. Schill, *supra* note 48, at 887.

146. *Id.* at 888.

147. See Schwartz 2014, *supra* note 7, at 428.

148. See Part II.

149. See Tighe et al., *supra* note 9, at 6, 8.

Disparate impact claims challenge practices that have a “disproportionately adverse effect on minorities” without a legitimate rationale.¹⁵⁰ The FHA prohibits discrimination in the housing market on the basis of protected classes such as race, national origin, and sex, but not source of income.¹⁵¹ However, because voucher holders are disproportionately families of color, advocates argue that discrimination against HCV recipients disparately impacts a protected class.¹⁵² In addition, as the Court explained in *Inclusive Communities I*, disparate impact cases can also help uncover discriminatory intent.¹⁵³ Coupled with evidence that voucher success rates are especially low for minorities,¹⁵⁴ disparate impact liability can expose “disguised animus” and help advocates argue that alleged landlord refusals on the basis of a voucher are actually pretext for racial discrimination.¹⁵⁵ In 2015, the Supreme Court affirmed that disparate impact claims are cognizable under the FHA.¹⁵⁶ However, these claims have been met with mixed results in lower courts.¹⁵⁷

Disparate impact claims are brought under a traditional burden-shifting analysis. The plaintiff must first show that a no-voucher policy has an adverse impact on a protected class; then, the burden shifts to the defendant to show that there is a valid need for the policy.¹⁵⁸ If the defendant successfully demonstrates a need, the plaintiff must then show that the reason given is either a pretext for discrimination or achievable through an alternative practice.¹⁵⁹ In litigating disparate impact claims, plaintiffs struggle with issues of proof.¹⁶⁰ As the Court emphasized in *Inclusive Communities I*, claims of statistical disparity are insufficient—the plaintiff must also demonstrate a causal connection between the defendant’s specific policy and the disparity.¹⁶¹

Lower courts however have been unwilling to accept a causal connection between no-voucher policies and disparities for families of color. Thus, courts have yet to impose liability on landlords. First, the Sixth Circuit does not allow causes of action against landlords who never participated in the program.¹⁶² However, the court held that plaintiffs may bring disparate impact challenges against landlords who withdraw from the HCV program after initially

150. Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project (*Inclusive Cmty. I*), 135 S.Ct. 2507, 2513 (2015).

151. 42 U.S.C. § 3604(a) (2012) (“[I]t shall be unlawful to refuse to . . . rent . . . a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”).

152. See, e.g., Tighe et al., *supra* note 9, at 6.

153. *Inclusive Cmty. I*, 135 S. Ct. at 2522.

154. See Tighe et al., *supra* note 9, at 4.

155. See *Inclusive Cmty. I*, 135 S.Ct. at 2522.

156. *Id.* at 2518.

157. See Tighe et al., *supra* note 9, at 6.

158. See Daniel, *supra* note 16, at 782.

159. *Id.*

160. See Tighe et al., *supra* note 9, at 6.

161. *Id.*

162. Graoch Assocs. # 33 v. Louisville/Jefferson Cty. Metro Human Relations Comm’n, 508 F.3d 366, 377 (6th Cir. 2007).

participating.¹⁶³ Next, the Second Circuit does not allow disparate impact claims for HCV discrimination due to the voluntary nature of the program.¹⁶⁴ Finally, the Seventh Circuit categorically exempted landlords from liability for voucher discrimination.¹⁶⁵ The court held that because the HCV program is voluntary, non-participation is a “legitimate reason for [a landlord’s] refusal to accept” vouchers and therefore owners are not liable for racial discrimination.¹⁶⁶ Some analysts argue that the Seventh Circuit’s holding was incorrect, as it relies on the voluntary nature of the HCV program as evidence that landlord refusals have a legitimate reason; however, disparate impact claims do not depend on a finding of discriminatory intent.¹⁶⁷ Nonetheless, the decision remains good law.¹⁶⁸ Therefore, litigation is unlikely to prevent SOI discrimination against families with vouchers.

B. Success with Discrimination Laws

A better approach for improving the success of the HCV program is through SOI discrimination laws.¹⁶⁹ These laws prohibit landlords from not renting to a tenant who uses a voucher, by making source of income a protected class alongside other common categories like race and sex.¹⁷⁰ Under these laws, aggrieved tenants and advocates can access the local government’s enforcement mechanisms—both civil and administrative actions—for housing discrimination.¹⁷¹ Remedies vary across localities, but can include punitive and compensatory damages.¹⁷² As of June 19, 2018, eleven states, Washington D.C., and dozens of local governments have SOI discrimination laws that protect

163. *Id.*

164. *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 302 (2d Cir. 1998); Daniel, *supra* note 16, at 788.

165. *Knapp v. Eagle Prop. Mgmt. Corp.*, 54 F.3d 1272, 1280 (7th Cir. 1995).

166. *Id.* at 1280. *See also* Daniel, *supra* note 16, at 788–89.

167. *See id.*

168. Under *Inclusive Communities I*, it is unclear whether the Seventh Circuit decision will remain good law. The Supreme Court affirmed that disparate impact claims are cognizable under the FHA and do not have an intent component. *See Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project (Inclusive Cmty. I)*, 135 S.Ct. 2507, 2513 (2015).

169. Some localities have SOI discrimination laws that prevent landlords from discriminating against particular kinds of income, but not against Section 8 or HCV recipients. California is one such state. *See* CAL. GOV’T CODE § 12955(p)(1) (2012); *Sabi v. Sterling*, 183 Cal. App. 4th 916 (2010). In using the term “SOI discrimination” this Note means refers to laws that *do* include vouchers.

170. *See Tighe et al.*, *supra* note 9, at 7.

171. *See id.*

172. *See* POVERTY & RACE RESEARCH ACTION COUNCIL, EXPANDING CHOICE: PRACTICAL STRATEGIES FOR BUILDING A SUCCESSFUL HOUSING MOBILITY PROGRAM (2017), <http://www.prrac.org/pdf/AppendixB.pdf> [<https://perma.cc/H5TF-T66H>] (listing in full the SOI discrimination laws).

tenants from HCV discrimination.¹⁷³ In total, about one-third of families with vouchers live in a jurisdiction protected by SOI discrimination laws.¹⁷⁴

Such ordinances are more likely to increase low-income families' access to high-opportunity neighborhoods than the litigation strategies mentioned above.¹⁷⁵ Studies show that these laws can significantly improve outcomes by deterring landlords from biased practices, reducing the prevalence of discrimination.¹⁷⁶

First, studies suggest that SOI discrimination laws increase the likelihood of HCV recipients finding a place to live.¹⁷⁷ One study, in a report for HUD, found that voucher success rates (successfully using the voucher within the PHA's time frame) are 12 percent higher in jurisdictions with SOI discrimination laws as compared to jurisdictions without such ordinances.¹⁷⁸ Another study confirmed these results, finding that SOI discrimination laws increase success rates by 5 to 12 percent.¹⁷⁹ In a jurisdiction with 10,000 vouchers, this means that between 500 and 1,200 additional units could successfully be leased.¹⁸⁰ These impacts are especially significant for large PHAs such as the Dallas Housing Authority.¹⁸¹

Second, SOI discrimination laws may improve the likelihood of low-income families moving to better neighborhoods.¹⁸² A 2014 study found that voucher holders in places with SOI discrimination laws were more likely to move to neighborhoods with lower rates of poverty and racial segregation, in comparison to recipients in areas without such laws.¹⁸³ A 2018 study examining Washington, D.C. and Newark, two areas with SOI discrimination laws, found that rates of voucher denials in low-poverty neighborhoods were similar to the

173. *See id.*

174. *See* ALISON BELL, ET AL., CTR. ON BUDGET & POLICY PRIORITIES, PROHIBITING DISCRIMINATION AGAINST RENTERS USING HOUSING VOUCHERS IMPROVES RESULTS (2018), <https://www.cbpp.org/research/housing/prohibiting-discrimination-against-renters-using-housing-vouchers-improves-results> [<https://perma.cc/A4A6-H9YL>].

175. *See* Tighe et al., *supra* note 9, at 8.

176. *See id.* at 8–9.

177. BELL ET AL., *supra* note 174; Tighe et al., *supra* note 9, at 8–9. Tighe and Bell et al. both explain that more research is needed to confirm the findings that SOI discrimination laws are effective mechanisms at combatting discrimination. BELL ET AL., *supra* note 174; Tighe et al., *supra* note 9, at 8–9. This may include research on how SOI discrimination affects the housing search process for voucher holders, studies that disentangle the effects of SOI discrimination versus racial discrimination, and distinguishing SOI laws from the effects of other protections. BELL ET AL., *supra* note 174; Tighe et al., *supra* note 9, at 8–9.

178. Tighe et al., *supra* note 9, at 8–9.

179. Lance Freeman, *The Impact of Source of Income Laws on Voucher Utilization*, 22 HOUSING POL'Y DEBATE 297, 311 (2012).

180. *Id.*

181. *See* DALLAS HOUS. AUTH., SECTION 8 DEMOGRAPHIC REPORT FOR ALL PROGRAMS (2016), <http://www.dhadal.com/PDF/S8/S8D201612.pdf> [<https://perma.cc/TG4U-FCF9>].

182. *See* Tighe et al., *supra* note 9, at 8.

183. *Id.*

overall rates for all neighborhoods.¹⁸⁴ In contrast, sites without discrimination laws had much higher denial rates in wealthier neighborhoods.¹⁸⁵ These findings suggest that SOI discrimination laws can significantly improve families' access to low-poverty areas.

Finally, SOI discrimination laws help jurisdictions combat racial housing discrimination. HCVs rely on a landlord's willingness to accept vouchers, which operates in the context of historical racial segregation.¹⁸⁶ Thus, families of color disproportionately suffer the effects of SOI discrimination.¹⁸⁷ First, SOI laws can minimize the disparate impact that landlord resistance to HCVs has on families of color, who make up a large percentage of the program.¹⁸⁸ By prohibiting voucher-based rejections, SOI laws will benefit voucher holders of color. This impact is especially beneficial given the lack of success in challenging the disparate impacts of voucher refusals through litigation.¹⁸⁹ Further, SOI laws prevent landlords from concealing racial animus—hiding behind a refusal to rent to someone because they are subsidized. SOI discrimination is often motivated by discriminatory intent.¹⁹⁰ Those opposed to HCV tenants frame their opposition in facially-neutral but race-laden language: they blame HCV families for “increased crime, violence, and blight” and describe voucher recipients as “criminal, lazy, and scary.”¹⁹¹ Indeed, allowing landlords to claim they are not discriminating on the basis of race but instead on voucher status “makes a mockery of the Fair Housing Act” and its protection against racial discrimination.¹⁹²

One limitation of SOI discrimination laws, however, is continued discrimination despite prohibiting bias against income sources.¹⁹³ While SOI laws were successful in Washington, D.C. and Newark, the 2018 HUD study also showed that landlords in Philadelphia largely ignored the city's SOI laws.¹⁹⁴ Instead, they widely denied vouchers, especially in low-poverty areas, at rates comparable to jurisdictions without SOI laws.¹⁹⁵ Similarly, a 2002 study found that although Chicago has had a SOI discrimination law since 1999, voucher holders still face SOI discrimination from landlords.¹⁹⁶ Thus, it is necessary to

184. See BELL ET AL., *supra* note 174.

185. See *id.*

186. See Ocen, *supra* note 13, at 1571; see also BELL ET AL., *supra* note 174 (explaining that racism and discrimination have played a significant role in creating racially segregated neighborhoods).

187. See Part II.A for the disproportionate effect on families of color.

188. See DALLAS HOUS. AUTH., *supra* note 181. For example, 86 percent of voucher participants in Dallas are Black. *Id.*

189. See Part III.A.

190. See Beck, *supra* note 110, at 155; Ocen, *supra* note 13, at 1544.

191. Ocen, *supra* note 13, at 1544 (internal quotation marks omitted).

192. See ROTHSTEIN, *supra* note 8, at 208–09.

193. See LOCKED OUT, *supra* note 64, at 4, 11.

194. See BELL ET AL., *supra* note 174.

195. See *id.*

196. See LOCKED OUT, *supra* note 64, at 11.

increase awareness of such laws among voucher holders and landlords, and to adequately enforce these measures in order to fully realize the benefit of SOI discrimination laws.¹⁹⁷

C. Arguments Against Discrimination Laws

Despite the harmful effects of SOI discrimination and the success of anti-discrimination laws, many landlords and politicians maintain that SOI discrimination is justified. Such claims can be understood as an attempt to undermine the HCV program's ability to achieve its goals. This Section will first examine arguments in opposition to SOI laws, arguing that the critiques lack merit. Next, this Section will argue that opposition is instead a reflection of animus towards the poor, especially those who are considered not as deserving of help.

1. Housing Cost Increases and Burdensome Requirements

One argument made against SOI laws is that they will increase housing prices.¹⁹⁸ Economists claim that by limiting the ability of landlords to provide housing to the tenants they prefer, owners will overprice housing.¹⁹⁹ Indeed, some research shows that regulating the housing market can increase housing prices and rents.²⁰⁰ However, those studies examined the effect of zoning ordinances; researchers have not proven an effect from SOI laws.²⁰¹ Further, there is evidence that subsidized housing, such as HCVs, largely has a positive effect on neighborhood property values.²⁰²

Next, opponents raise concerns that the HCV program's requirements are burdensome. The Texas Legislature provides one example. In 2014, Austin, TX, passed a SOI discrimination ordinance.²⁰³ Austin landlords sued the City of Austin, claiming that the ordinance infringed on their private property rights, but the district court upheld the law.²⁰⁴ Shortly thereafter, Texas passed Senate Bill 267, which effectively outlawed Austin's ordinance.²⁰⁵ SB 267 prohibits laws that prevent a landlord from refusing to rent to someone because their source of income includes federal housing assistance, such as the HCV program.²⁰⁶ The statute, however, does not affect ordinances that prohibit discrimination against

197. See BELL ET AL., *supra* note 174.

198. See Tighe et al., *supra* note 9, at 8.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 10.

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

204. *Id.*

205. *Bill Analysis: Author's/Sponsor's Statement of Intent*, SRC-CFJ S.B. 267 84(R) (Feb. 3, 2015), <https://capitol.texas.gov/tlodocs/84R/analysis/pdf/SB00267I.pdf#navpanes=0> [<https://perma.cc/2Q6C-SKC4>].

206. TEX. LOCAL GOV'T CODE § 250.007 (2017).

a military veteran because of the veteran's source of income to pay rent.²⁰⁷ SB 267 went into effect in September 2015.²⁰⁸

According to Texas Senator Charles Perry, the author of SB 267, the law's purpose is to protect owners from forced compliance with the program.²⁰⁹ Senator Perry's Statement of Intent acknowledges that HCVs are important, and many landlords who are used to the "intricacies" of the program are able to administer it successfully.²¹⁰ However, he claims that SB 267 is necessary to protect an owner's "right to choose" whether to rent to someone with a voucher.²¹¹ Many landlords express the same concern, claiming that they refuse to accept vouchers because they do not want to comply with regulations like mandatory housing quality standards ("HQS").²¹² HQS, however, require only basic health and safety measures, to ensure that housing is "decent, safe and sanitary."²¹³ Requirements include functioning smoke detectors, proper bathroom facilities, and working heaters.²¹⁴

Landlords also worry that they will lose money because of administrative delays by local housing authorities, such as delayed rental agreements and rent payments.²¹⁵ However, research suggests that landlords may actually benefit from renting to voucher holders.²¹⁶ In practice, they can charge more than they could otherwise get from private renters, due to HUD calculations of rent limits.²¹⁷

Another argument opponents of SOI discrimination laws raise is concern that renting to voucher recipients will lead to problematic tenant behavior. Landlords argue that voucher recipients are disruptive tenants who do not pay their rent.²¹⁸ They suggest that poor families "overcrowd apartments, damage

207. *Id.*

208. *Id.* On February 16, 2017, the Inclusive Communities Project, a Dallas housing non-profit, filed a lawsuit against Texas in the Northern District of Texas claiming that SB 267 violates the 14th Amendment and the Fair Housing Act because it perpetuates racial housing discrimination and segregation and makes it more difficult for Black voucher families to access housing in areas with low poverty and high opportunity. *See* Inclusive Cmty. Project, Inc. v. Abbott (*Inclusive Cmty. II*), No. 3:17-CV-0440-D, 2018 WL 2415034, at *1 (N.D. Tex. May 29, 2018). On May 29, 2018, the court granted the plaintiff's motions to dismiss on the grounds that defendants lacked standing. *Id.*

209. *Author's/Sponsor's Statement of Intent*, *supra* note 205.

210. *Id.*

211. *Id.*

212. *See* Beck, *supra* note 110, at 159.

213. U.S. DEP'T OF HOUS. & URBAN DEV., HOUSING QUALITY STANDARDS (HQS) – FREQUENTLY ASKED QUESTIONS, https://www.hud.gov/sites/documents/DOC_9143.PDF [<https://perma.cc/25NZ-CZE9>].

214. Housing Quality Standards (HQS), 24 C.F.R. § 982.401 (2015).

215. *See* Rebecca Tracy Rotem, Note, *Using Disparate Impact Analysis in Fair Housing Act Claims: Landlord Withdrawal from the Section 8 Voucher Program*, 78 FORDHAM L. REV. 1971, 1983 (2009).

216. *See* Tighe et al., *supra* note 9, at 8.

217. *See id.*

218. *See* Rotem, *supra* note 215, at 1983.

property, and make too much noise.”²¹⁹ Further, landlords claim that HCV discrimination is justified because tenants with vouchers bring the “problems of poverty with them.”²²⁰ For example, a 2006 report by the City of Antioch, California, alleged that the behavior of HCV tenants is disruptive, and that “they bring crime, drugs and disorder to the neighborhood.”²²¹ These views are largely based on stereotypes and notions as to who low-income individuals are.

2. *Animus Towards Undeserving Poor*

Such objections to SOI laws illustrate animus towards poor families and a desire to weaken the safety net for those seen as underserving of government support. Michael Katz, a historian and social theorist, argues that no society can meet all of its people’s needs, such as those of housing, but must draw the line between “those who merit help and those who do not.”²²² Those who meaningfully contribute to society are seen as meriting help.²²³ In contrast, individuals deemed to be dependent on the safety net because of their own choices or behavior are considered undeserving of support.²²⁴

Poor, unmarried Black mothers are often seen as undeserving, with poverty viewed as the result of their “sexual licentiousness.”²²⁵ They have been cast as “lazy welfare mothers” who “breed children at the expense of taxpayers.”²²⁶ And, negative stories about poverty often highlight the faces of Black women.²²⁷ This negative portrayal of Black mothers is exemplified in the Aid to Families with Dependent Children (ADC) program.²²⁸ Created in 1935, the ADC provided federal support for female-headed families with young children.²²⁹ When Congress first created the program, White widows comprised the majority of families and the aid was generally uncontroversial.²³⁰ However, as the ADC served fewer White women over time and instead began to primarily help unmarried women of color, controversy around the program increased.²³¹ In response, Congress restricted ADC eligibility and left its administration to the states.²³² In 1996, Congress ended the ADC entirely, replacing it with the stricter

219. Beck, *supra* note 110, at 159.

220. Rotem, *supra* note 215, at 1982.

221. Ocen, *supra* note 13, at 1573.

222. MICHAEL B. KATZ, *THE PRICE OF CITIZENSHIP* 341 (2008).

223. *Id.*

224. *Id.*

225. *Id.* at 342.

226. Ocen, *supra* note 13, at 1558.

227. *Id.*

228. See Andrew Morris, *The Great Depression and World War II*, in *OXFORD HANDBOOK OF U.S. SOCIAL POLICY*, *supra* note 7, at 68.

229. *Id.*

230. *Id.*

231. *Id.* at 70.

232. *Id.*

Temporary Assistance for Needy Families (TANF) program.²³³ TANF includes additional limitations such as requiring a single mother to initiate child support proceedings against her child's father.²³⁴

Here too, SB 267 can be understood as an effort to minimize federal aid for unmarried Black mothers. Because voucher recipients are disproportionately families headed by Black women, the view that they are undeserving is another explanation for the prevalence of SOI discrimination. In the HCV program, 75 percent of voucher recipients are female-headed families, and 45 percent of voucher recipients are Black families.²³⁵ In contrast, 35 percent of families are White and 16 percent are Hispanic.²³⁶ The overrepresentation of Black families is especially apparent when considering that White families make up 56 percent of all renters in the United States, while Black families compose just 18 percent.²³⁷

The classification between deserving and undeserving poor also explains SB 267's exception for laws that prohibit discrimination because of a veteran's "lawful source of income to pay rent."²³⁸ Since members of the military provide national security services, they are often seen as deserving of government aid.²³⁹ Active-duty members receive substantial social entitlements, such as housing, health care, and family allowances.²⁴⁰ Indeed, some of the earliest social provisions in the United States were pensions for veterans by early colonial governments.²⁴¹ The GI Bill of Rights, aimed at reintegrating World War II veterans, was the "most wide-ranging set of social benefits ever offered by the federal government."²⁴² Thus, the veterans exception in SB 267 exemplifies how opposition to SOI discrimination laws reflects biases against those who are seen as the undeserving poor.

Although opponents of SOI laws argue that participation in the HCV program will harm landlords and force them to rent to problematic tenants, these claims lack merit. Instead, opposition reflects animus towards low-income communities, particularly Black mothers. Allowing such claims to influence policymakers and the administration of the HCV program ultimately weakens the program and the social safety net. Advocates should remain alert to such

233. Anne Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview*, 8 MICH. J. GENDER & L. 121, 123 (2002).

234. *Id.*

235. Nat'l Low Income Hous. Coal., *supra* note 114, at 2–3.

236. *Id.* at 3.

237. *Id.*

238. TEX. LOCAL GOV'T CODE § 250.007(b) (2017).

239. See Brian Gifford, *The Camouflaged Safety Net: The U.S. Armed Forces as Welfare State Institution*, 13 SOC. POL.: INT'L STUD. GENDER, ST. & SOC'Y 372, 386 (2006).

240. *Id.* at 382–83.

241. See Laura S. Jensen, *Social Provision Before the Twentieth Century*, in OXFORD HANDBOOK OF U.S. SOCIAL POLICY, *supra* note 7, at 24.

242. IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 113 (2005).

attacks in order to ensure that retrenchment does not destroy the value of these programs for low-income families.

CONCLUSION

As a private market solution that relies on the willingness of landlord participation, the HCV program is vulnerable to discrimination that reduces its efficacy. This is especially the case for families of color considered undeserving of government support. SOI discrimination laws can help eliminate this problem by limiting discriminatory landlord discretion. For more than fifty years, the HCV program has failed to meet its goal of providing access to high-opportunity neighborhoods for low-income families. SOI laws have the potential to help the program achieve its goal.

