

COMMODYING PUBLIC HOUSING: NEW YORK CITY'S USE OF THE RENTAL ASSISTANCE DEMONSTRATION (RAD) PROGRAM AS NEOLIBERAL POLITICAL PROJECT, LEGAL RATIONALITY AND NORMATIVE THEORY

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ABSTRACT

As public housing across the U.S. has seen diminished investment, increased repair needs, and management dysfunction, public housing authorities have turned to programs such as the federal Rental Assistance Demonstration (RAD) program to provide critically necessary repairs and in search of future stability. Billed as a cost-neutral private-public partnership by its proponents, RAD and similar programs convert public housing to project-based Section 8, turning over management responsibilities and a property interest to private actors. This Article seeks to uncover the full costs of these programs using three currents of understanding neoliberalism: (1) neoliberalism as a class-based political project seeking to re-establish and expand capital accumulation; (2) neoliberalism as a rationality that infects all aspects of society, including the law; and (3) neoliberalism as a normative theory on the nature of freedom and democracy. Using these lenses, this Article contends that (1) RAD and a similar program, the Blueprint for Change, are forms of neoliberal privatization that ultimately serve to prioritize profits for the economic elite at the expense of tenants; (2) such prioritization is the necessary result of neoliberal logics that have overtaken all areas of life, including the juridical; and (3) these logics lead to the treatment of

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individuals as only economic actors, undermine wellbeing, and circumvent solidarity.

Specifically, this Article argues that RAD prioritizes profit over tenants because it is designed to facilitate capital accumulation for the economic elite by financializing a public good; using the apparatus of the government to facilitate privatization and uphold the interests of private capital; and redistributing wealth from the poorest (public housing tenants) to the wealthiest (real estate developers/landlords). To carry this out, this Article turns to the Law and Political Economy framework to show how RAD requires the judicial system to adopt neoliberal rationality by prioritizing efficiency for wealth accumulation over tenant power and neutrality over equality. RAD also needs the juridical to give preference for anti-politics over democracy through its interpretation of the RAD statute and contractual transactional documents, as well as by giving deference to administrative agencies' judgments and decision-making. The legal system's adoption of this neoliberal rationality in evaluating public housing privatization schemes fundamentally undoes the boundary between public housing as a political space for contestation over shared goals and values and as an economic space to advance the goals of capitalism. This shift has resulted in the diminishment of public housing tenants' political power and a remaking of democratic practices at public housing complexes, with vast implications for how the most marginalized American voices are heard or silenced. Building on my experiences representing tenants undergoing RAD conversions during my Skadden Fellowship, this Article also takes stock of the myriad effects of privatization of public housing on tenants themselves and on local (and arguably national) democracy, and suggests a path forward for both fixing the distressed state of public housing and re-imagining public housing as an engine of democracy.

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INTRODUCTION

America is undoubtedly in the throes of an affordable housing crisis—namely a shortage of affordable homes for middle-class and low-income households.¹ As with every crisis, the most marginalized people are those most devastated by its effects.² As the crisis continues, the idea that the profit motive and affordable housing cannot co-exist is gaining steam, with many jurisdictions adopting or considering laws and policies that would dramatically curtail the profit motive in housing.³ But as tenants, activists, and advocates fight for policy measures such as good cause eviction or rent control, the closest thing the U.S. has to de-commodified housing—public housing—is undergoing a radical transformation in the form of privatization.⁴ Since public housing is often the only bastion of affordable housing for low-income tenants with strict tenant protections, the privatization of this critical public infrastructure and resource could exacerbate an already-dire homelessness crisis in America.⁵

One of the main programs allowing for the privatization of public housing is the federal Rental Assistance Demonstration (RAD) program. RAD facilitates the conversion of public housing to project-based Section 8, a type of subsidized housing in which the government pays a portion of a tenant's rent to a private landlord who owns and operates low-income housing.⁶ In so doing, RAD turns

1. ANDREW AURAND, DAN EMMANUEL, EMMA FOLEY, MATT CLARKE, IKRA RAFI, & DIANE YENTEL, NAT'L LOW INCOME HOUS. COAL., *THE GAP: A SHORTAGE OF AFFORDABLE HOMES* (2023), https://nlihc.org/sites/default/files/gap/Gap-Report_2023.pdf.

2. Thomas H. Byrne, Benjamin F. Henwood, & Anthony W. Orlando, *A Rising Tide Drowns Unstable Boats: How Inequality Creates Homelessness*, 693 ANNALS AM. ACAD. POL. & SOC. SCI. 28 (2021); Teresa Wiltz, *'A Pileup of Inequities': Why People of Color Are Hit Hardest by Homelessness*, STATELINE (Mar. 29, 2019), <https://stateline.org/2019/03/29/a-pileup-of-inequities-why-people-of-color-are-hit-hardest-by-homelessness/> [<https://perma.cc/9V5M-X6MD>]; Heidi Schultheis, *Lack of Housing and Mental Health Disabilities Exacerbate One Another*, CTR. FOR AM. PROGRESS (Nov. 20, 2018), <https://www.americanprogress.org/article/lack-housing-mental-health-disabilities-exacerbate-one-another/> [<https://perma.cc/UN2N-Z9ZA>].

3. Paige Curtis, *Return of Rent Control? How Some US Cities Are Trying to Keep Roofs over People's Heads*, THE GUARDIAN (June 9, 2023), <https://www.theguardian.com/us-news/2023/jun/09/rent-control-comeback-america-massachusetts> [<https://perma.cc/VDF5-2FJ7>].

4. See *"The Tenant Never Wins": Private Takeover of Public Housing Puts Rights at Risk in New York City*, HUM. RTS. WATCH (Jan. 27, 2022), <https://www.hrw.org/report/2022/01/27/tenant-never-wins/private-takeover-public-housing-puts-rights-risk-new-york-city> [<https://perma.cc/ZS92-C3NL>].

5. See David R. Jones, *City's Homeless Crisis Will Become Catastrophic If We Don't Save Public Housing*, CMTY. SERV. SOC'Y (Mar. 9, 2017), <https://www.cssny.org/news/entry/citys-homeless-crisis-will-become-catastrophic-if-we-dont-save-public-housi> [<https://perma.cc/BG98-89KY>].

6. See 42 U.S.C. § 1437f note ("Rental Assistance Demonstration"); see *Project-Based Vouchers*, NAT'L HOUS. L. PROJECT, <https://www.nhlp.org/resource-center/project-based-vouchers/> [<https://perma.cc/XAB9-4BTJ>] (last visited Mar. 9, 2024); *Project-Based Rental Assistance*, NAT'L HOUS. L. PROJECT, <https://www.nhlp.org/resource-center/project-based-rental-assistance/> [<https://perma.cc/XAB9-4BTJ>] (last visited Feb. 28, 2024).

over property interests and day-to-day operations to private entities.⁷ RAD is one of several privatization schemes to which public housing authorities (PHAs) have turned recently.⁸ The turn towards RAD is a result of the dramatic disinvestment in public housing since the 1970s and is related to Congress's preference for Section 8 programs, which rely on the private market.⁹ As the federal government has disinvested in public housing, public housing tenants have experienced substandard living conditions as their buildings have deteriorated and there has been insufficient public funding for repairs or capital improvements.¹⁰ Similarly, as PHAs have received reduced funding, their performance has plummeted, leading to widespread mismanagement.¹¹ RAD and similar programs were conceived to fill this funding gap and raise money for desperately-needed repairs.¹² And its main selling point in a political climate that is hostile to the welfare state is that RAD does not require overt increased public funding of public housing.¹³

Nothing in life, however, is free under capitalism. RAD depends on private entities to raise capital to fund repairs and rehabilitation of public housing, often through mortgages, loans or bonds that leverage public housing (i.e., the property interest, rental payments, federal subsidies) in exchange for an infusion of

7. “*The Tenant Never Wins*”: *Private Takeover of Public Housing Puts Rights at Risk in New York City*, *supra* note 4, at 33–34.

8. *See, e.g., Demolition and Disposition Applications (Section 18)*, U.S. DEP’T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/public_indian_housing/centers/sac/demo_dispo [<https://perma.cc/Q42J-DRTC>] (last visited Feb. 29, 2024); N.Y.C. HOUS. AUTH., *A BLUEPRINT FOR CHANGE* (2020), https://www1.nyc.gov/assets/nycha/downloads/pdf/NYCHA-Blueprint-for-Change_NYHC_Final.pdf [<https://perma.cc/HJ2G-GCUG>] [hereinafter *NYCHA Blueprint*]. While this Article focuses on RAD and a similar program being implemented by the New York City Housing Authority (NYCHA), the Blueprint, many of the arguments in this Article can be applicable to most privatization schemes concerning public housing because the details of difference do not fundamentally alter the analysis. For convenience, when I reference “RAD” in this Article, I generally mean both RAD and the Blueprint, unless otherwise delineated.

9. Jackson Gandour, “*We Deserve to Have a Place to Live*”: *How US Underfunding Public Housing Harms Rights in New York, New Mexico, and Beyond*, HUM. RTS. WATCH 25–28 (Sept. 27, 2022), <https://www.hrw.org/report/2022/09/27/we-deserve-have-place-live/how-us-underfunding-public-housing-harms-rights-new> [<https://perma.cc/U4K7-M7KP>]; *see also* Andre Shashaty, *U.S. Cuts Back and Shifts Course on Housing Aid*, N.Y. TIMES, Oct. 18, 1981 (§8), at 1, <https://www.nytimes.com/1981/10/18/realestate/us-cuts-back-and-shifts-course-on-housing-aid.html> [<https://perma.cc/WJ8Z-JYEY>].

10. *See* Gandour, *supra* note 9, at 29–42.

11. *See id.*

12. *See Rental Assistance Demonstration (RAD)*, NAT’L HOUS. L. PROJECT (Sept. 7, 2017), <https://www.nhlp.org/resources/rental-assistance-demonstration-rad/> [<https://perma.cc/GU2S-E8LL>].

13. *See* Jake Bittle, *Public Housing Is Going Private, and It’s Congress’s Fault*, AM. PROSPECT (Nov. 1, 2019), <https://prospect.org/infrastructure/housing/public-housing-is-going-private-and-its-congress-fault-HUD/> [<https://perma.cc/GU2S-E8LL>]; U.S. DEP’T OF HOUS. & URBAN DEV., *FINAL REPORT: EVALUATION OF HUD’S RENTAL ASSISTANCE DEMONSTRATION (RAD)* 29 (2019), <https://www.huduser.gov/portal/sites/default/files/pdf/RAD-Evaluation-Final-Report.pdf> [<https://perma.cc/CVR3-LRPD>].

capital.¹⁴ All this comes at a cost—a cost that is greater than the interest payments that will inevitably be owed to the financiers who lend the money to pay for repairs. This Article argues that the turn towards the privatization of public housing exacts tremendous costs on public housing tenants, social cohesion, and American democracy without equal, if any, benefits in return. To uncover these costs, this article will examine the New York City Housing Authority’s (“NYCHA”) implementation of RAD and a similar program, the Blueprint for Change (“Blueprint”), as neoliberal projects. It argues that they are shaped by the economic ideology of neoliberalism and serve as vehicles for further dissemination of neoliberalism’s principles, logics, and values.

The term and concept of “neoliberalism”—often vaguely used to define the dominant political, economic, and policy theories and approaches that rose to prominence in the 1970s and spread across the world by the 1980s—has been analyzed and dissected from a multitude of perspectives.¹⁵ Scholars have generally categorized the political analysis of neoliberalism into three currents as they have explored its contours and pragmatic deployment in spaces as diverse as economic decision-making, the welfare state, international relations, the judiciary, and the personal sphere.¹⁶ The first, based on neoliberalism’s outgrowth from and reimagining of classical economic liberalism, also known as *laissez-faire*, views neoliberalism as a class-based political project to change conditions to allow for further accumulation of capital, often by dispossession.¹⁷ The second current contends that neoliberalism is a totalizing rationality—a normative order of reason—that has seeped from the economic sphere into every area of society.¹⁸ And the third current looks to certain values and ideals stemming from the underpinnings of neoliberal theory, as developed in the 1930s by theorists such as the Ordoliberals and Chicago School economists, to argue that neoliberalism prescribes a particular normative view about the nature of freedom and democracy, such as the ideal relationship between a “democratic” government and its citizens.¹⁹ Neoliberal claims and arguments, whether explicitly named as such or not, are deployed in various contexts to promote capitalist imperatives, often at the expense of democratic values and institutions.²⁰ It is also true that

14. See 42 U.S.C. § 1437f note; *Rental Assistance Demonstration (RAD)*, U.S. DEP’T OF HOUS. & URBAN DEV., <https://www.hud.gov/RAD> [<https://perma.cc/T4T5-8T28>] (last visited Mar. 1, 2024).

15. Honor Brabazon, *Introduction: Understanding Neoliberal Legality*, in *NEOLIBERAL LEGALITY: UNDERSTANDING THE ROLE OF LAW IN THE NEOLIBERAL PROJECT* 1, 3 (Honor Brabazon ed., 2017).

16. See *id.* at 3–4; see also David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L. & CONTEMP. PROBS. 1, 1–4 (2014).

17. Brabazon, *supra* note 15, at 3–4.

18. *Id.* at 4; see generally WENDY BROWN, *UNDOING THE DEMOS: NEOLIBERALISM’S STEALTH REVOLUTION* (2015).

19. See generally WENDY BROWN, *IN THE RUINS OF NEOLIBERALISM: THE RISE OF ANTIDEMOCRATIC POLITICS IN THE WEST* (2019).

20. Grewal & Purdy, *supra* note 16, at 6.

neoliberalism as a cohesive theory contains various contradictions and blurry contours that are constantly evolving along with capitalism. But using these three theories of neoliberalism—all of which describe various facets of a single system and ideology—illuminates RAD’s underpinnings and real-world effects on tenants, movement-building, and democracy.

My turn to political theory here mirrors my search for answers to questions that RAD tenants and organizers often asked of me when I was a Skadden Fellow at a large legal services organization; I carried out a fellowship project focused on the privatization of public housing in New York City from 2020 to 2022. After my fellowship concluded, the political theory lens gave me insight into the ultimate question that tenants and organizers were fundamentally asking me: how can public housing tenants use this moment—a push for privatization amid deep distress at NYCHA’s developments—to imagine and build towards public housing that ensures that tenants may thrive?

In order to envision something better, it is imperative to understand the root causes of the distress. Thus, this Article will use the three currents of understanding neoliberalism to contend that (1) RAD is a form of neoliberal privatization that ultimately serves to prioritize profits for the economic elite at the expense of tenants; (2) such prioritization is the necessary result of neoliberal logics that have overtaken all areas of life, including the juridical;²¹ and (3) these logics lead to the treatment of individuals as only economic actors, undermine wellbeing, and circumvent solidarity. Specifically, this Article will argue that RAD prioritizes profit over tenants because it is designed to facilitate capital accumulation for the economic elite by financializing a public good; using the apparatus of the government to facilitate privatization and uphold the interests of private capital; and redistributing wealth from the poorest (public housing tenants) to the wealthiest (real estate developers and landlords). To carry this out, this Article will turn to the Law and Political Economy framework to show how RAD requires the judicial system to adopt neoliberal rationality by prioritizing efficiency for wealth accumulation over tenant power, and neutrality over equality. RAD also needs the juridical to give preference for anti-politics over democracy through its interpretation of the RAD statute and contractual transactional documents and its deference to administrative agencies’ judgments and decision-making. The legal system’s adoption of this neoliberal rationality in evaluating public housing privatization schemes fundamentally undoes the boundary between public housing as a political space for contestation over shared goals and values, and as an economic space to advance the goals of capitalism. This shift has resulted in the diminishment of public housing tenants’ political power and a remaking of democratic practices at public housing complexes with

21. I use the term “juridical” to capture law and legal reasoning generally as well as the power and power relations that emanate from the law. See Victor Tadros, *Between Governance and Discipline: The Law and Michel Foucault*, 18 OXFORD J. OF LEGAL STUD. 75 (1998).

vast implications for how the most marginalized American voices are heard and/or silenced.

Part I of this Article will begin by situating the rise of RAD in 2012 and the Blueprint in 2020 within the history of public housing in the U.S. Then, it will focus on New York City to describe how RAD and the Blueprint function in practice, and how they have been received by NYCHA residents. Next, Section II will discuss how RAD and the Blueprint have affected NYC public housing tenants. Section III will discuss how political theories of neoliberalism can both explain tenant experiences and illuminate possibilities for change that tenants so keenly desire. With this focus, Section III will examine how RAD, as a form of neoliberal privatization, prioritizes profit over tenants due to neoliberal logics and in turn harms tenants' well-being and solidarity as tenants are treated solely as economic actors. Section III will do so by using the aforementioned three intersecting analyses of neoliberalism and examining how RAD and the Blueprint exemplify, embody, disavow, or contradict such theories. Finally, Section IV will discuss paths forward to resist the immense costs of privatization.

It should be noted that I deliberately use the term “privatization” in this article to encompass programs that other scholars might argue are “private-public partnerships” and categorically distinct from “privatization.”²² One of the key arguments in this article—made with the illuminating help of political theory as a guiding framework—is that the importation of market logics and control into public infrastructure and services through a public-private partnership is indeed privatization, which imposes particular costs, burdens, and accountability issues on the public and democracy as a whole. This Article thus implicitly revisits, and pushes back against, scholarship that suggests the public/private divide is fluid or porous and that private entities with a profit motive can play a beneficial role in the public realm.²³

Throughout this Article, I will incorporate and turn repeatedly to my direct experiences as a Skadden Fellow at a large legal services organization, where I carried out a project focused on the privatization of public housing in New York City from 2020 to 2022. I will draw on what I witnessed representing and working with public housing tenants, as well as my experiences with organizers, advocates, NYCHA, and the U.S. Department of Housing and Urban Development (HUD) to illuminate the situation on the ground. These experiences with tenants, organizers and institutional actors serve as the basis of my methodology for gathering and building the facts in this article. Most of the tenant stories and opinions highlighted are those of my former clients or tenants whom I met while working with organizers or coalitions.

22. See Chasity H. O'Steen & John R. Jenkins, *We Built It, and They Came! Now What? Public-Private Partnerships in the Replacement Era*, 41 STETSON L. REV. 249 (2012).

23. See, e.g., Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1347 (2003); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 591 (2000).

I. THE DECLINE OF PUBLIC HOUSING AND THE RISE OF THE RENTAL ASSISTANCE DEMONSTRATION (RAD) AND SIMILAR PROGRAMS

Beginning in the 1930s, the federal government has used public money to build, own, and maintain public housing.²⁴ The Housing Act of 1937 authorized the federal government to provide federal funding to local public housing authorities (PHAs), state-chartered institutions tasked with constructing, owning, and managing housing.²⁵ Public housing was originally segregated and often only open to middle-class white families, entrenching systemic discrimination and inequities at its inception.²⁶ Despite its racist and classist underpinnings, low-income people of color eventually moved into public housing as desegregation efforts took hold across the country.²⁷ Today, public housing, which generally allows residents to pay 30% of their income as their rent and provides tenants stringent statutory protections from eviction,²⁸ ensures that low-income tenants can remain in affordable and stable housing, even if the surrounding neighborhood gentrifies.²⁹

A. Defunding and divesting from public housing from the 1970s onwards

Beginning in the 1970s, immediately after the passage of the Fair Housing Act of 1968, the federal government began to decrease its fiscal support for public housing.³⁰ Coinciding with the rise of neoliberal economic policies in the west

24. Gandour, *supra* note 9, at 12.

25. *Id.*

26. *Id.* at 12–13. This article does not explore the creation and development of public housing through a racial capitalism or critical race theory lens, even though both are certainly applicable to public housing. To explore these lenses and their application to the development of U.S. public housing, see Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013); Etienne C. Toussaint, *Of American Fragility: Public Rituals, Human Rights, and the End of Invisible Man*, 52 COLUM. HUM. RTS. L. REV. 826, 892 (2021); Amna A. Akbar, *Toward A Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 447–59 (2018); Martha R. Mahoney, *Whiteness and Remedy: Under-Ruling Civil Rights in Walker v. City of Mesquite*, 85 CORNELL L. REV. 1309 (2000); Elizabeth M. Iglesias, *Global Markets, Racial Spaces and the Role of Critical Race Theory in the Struggle for Community Control of Investments: An Institutional Class Analysis*, 45 VILL. L. REV. 1037 (2000).

27. Gandour, *supra* note 9, at 13; Richard Rothstein, *Public Housing: Government-Sponsored Segregation*, AM. PROSPECT (Oct. 11, 2012), <https://prospect.org/article/public-housing-government-sponsored-segregation/> [<https://perma.cc/QC9W-W39C>].

28. See 42 U.S.C. §§ 1437a(1)(A), (2)(B)(ii); 24 C.F.R. §§ 964, 966 (2023).

29. See *id.*; see also Kyle Giller, *The Fight for NYCHA: RAD and the Erosion of Public Housing in New York*, 23 CUNY L. REV. 283, 284 (2020).

30. *Public Housing History*, NAT'L LOW INCOME HOUS. COAL. (Oct. 17, 2019), <https://nlhlc.org/resource/public-housing-history> [<https://perma.cc/4D7J-6QBN>]; Giller, *supra* note 29, at 284–85.

and the era of forced structural adjustment internationally,³¹ public housing was targeted in the U.S. as a part of the defunding of the welfare state.³² As Congress has divested from public housing (otherwise known as “Section 9 housing,” named for the section of the Housing Act that created public housing), Congress has increased its funding of Section 8 programs, which provide subsidies to private landlords for housing low-income tenants, whether in individual apartments or buildings overall.³³

In 1973, President Richard Nixon began this trend by placing a moratorium on all public housing spending.³⁴ In 1974, he created the Section 8 voucher program, which has steadily received increased funding from the federal government while funding for public housing has declined.³⁵ The apex of defunding public housing in favor of private market solutions occurred in 1998, when Congress passed, and President Bill Clinton signed, the Faircloth Amendment to the Housing Act of 1937, effectively banning all future construction of new public housing.³⁶ The Faircloth Amendment remains law today, hampering construction of new public housing, even though there is a national housing shortage of affordable housing, especially for low-income households.³⁷

As funding for public housing declined, repair needs dramatically increased. By the 1980s, most of the public housing stock across the country had deteriorated

31. As used here, “structural adjustment” refers to “a set of lending practices whereby governments would receive loans if they agreed to implement specific economic reforms.” Sarah Babb, *The Social Consequences of Structural Adjustment: Recent Evidence and Current Debates*, 31 ANN. REV. OF SOC. 199, 200 (2005). Such conditions were forced onto the Global South during the 1980’s debt crisis when developing countries saw their debt balloon as interest rates rose at the end of the 1970s, and they could not repay the substantially higher debts. *Id.* at 200–01. Lending institutions, such as the International Monetary Fund and the World Bank, offered to bail out these countries in the Global South on the condition that they implement certain neoliberal economic reforms, such as privatization of public assets, trade liberalization, competitive exchange rates, increased foreign direct investment, deregulation, and reduction in welfare spending. *See id.*; *see also* Brian F. Crisp & Michael J. Kelly, *The Socioeconomic Impacts of Structural Adjustment*, 43 INT. STUD. Q. 533, 534 (199).

32. Giller, *supra* note 29, at 284–85; *Gandour, supra* note 9, at 25–26.

33. *See* G. Thomas Kingsley, *Trends in Housing Problems and Federal Housing Assistance*, URB. INST. (Oct. 2017), <https://www.urban.org/sites/default/files/publication/94146/trends-in-housing-problems-and-federal-housing-assistance.pdf> [<https://perma.cc/49A2-7H7P>].

34. Giller, *supra* note 29, at 298.

35. *See id.*; Will Fischer, Sonya Acosta, & Anna Bailey, *An Agenda for the Future of Public Housing*, CENTER ON BUDGET & POLICY PRIORITIES 7–8 (March 11, 2021), <https://www.cbpp.org/sites/default/files/3-11-21/hous.pdf> [<https://perma.cc/5PT6-SGQF>].

36. Housing Act of 1937 § 9(g), 42 U.S.C. 1437(g); *see also* *Gandour, supra* note 9, at 27–28.

37. *Gandour, supra* note 9, at 27–29, 14–16; *see also* *Guidance on Complying With the Maximum Number of Units Eligible for Operating Subsidy Pursuant to Section 9(g)(3)(A) of the Housing Act of 1937 (aka the Faircloth Limit)*, U.S. DEP’T OF HOUS. & URBAN DEV., <https://www.hud.gov/sites/documents/FRCLTH-LMT.PDF> [<https://perma.cc/S57F-WZMD>]. Low-income households can be separated into “low-income,” “very low-income,” or “extremely low-income” households, which generally refer to households with no more than 80%, 50% or 30% of the median area incomes. *See* 42 U.S.C. §§ 1437a(b)(2)(A), 1437a(b)(2)(B), 1437a(b)(2)(C). For convenience, I will use “low-income” to encompass all three categories of households.

markedly and many developments were in desperate need of repairs and renovations.³⁸ Tenants were (and continue to be) forced to live with broken elevators, leaks, mold, faulty sewage pipes, and pests as their buildings aged and required large-scale renovations and stabilization.³⁹

Although the federal government attempted to revitalize and repair some of the distressed public housing in the 1990s, mostly through the HOPE VI Program, those efforts failed.⁴⁰ They were not substantial or sustained enough to counter all the mounting repair needs, which continue to today.⁴¹ Notably, in the last two decades, Congress has continually failed to fund public housing adequately. Funding for repairs and rehabilitation “declined by over 50% between 2000 and 2013 and was 35% below 2000 levels in 2021.”⁴² During this same period, funding for daily operations was well below the actual operating costs for PHAs, according to HUD’s own metrics, with the sole exception of 2020, which saw an injection of funding through the Coronavirus Aid, Relief, and Economic Security (CARES) Act.⁴³

Continually starved of funding, mismanagement of public housing developments by PHAs came hand-in-hand with the physical deterioration of the complexes.⁴⁴ PHAs have since deliberately left units empty,⁴⁵ failed to perform

38. Kingsley, *supra* note 33, at 10; Gandour, *supra* note 9, at 25–26.

39. Kingsley, *supra* note 33, at 10; Gandour, *supra* note 9, at 25–26; *see also* Daniel Denvir, *The History of American Public Housing Shows It Didn’t Have to Decline: An Interview with Edward Goetz*, JACOBIN (Jan. 6, 2023), <https://jacobin.com/2023/01/public-housing-us-history-destruction-neoliberalism-hope-iv> [<https://perma.cc/9YGY-X4PM>].

40. For more on how HOPE VI—the US’s first foray into leveraging private capital to “fix” distressed public housing—did not include tenants’ voices, led to tenant displacement, and resulted disproportionately in demolition without one-to-one unit replacement, *see When Hope Falls Short: Hope VI, Accountability, and the Privatization of Public Housing*, 116 HARV. L. REV. 1477 (2003); Susan J. Popkin, *Proposed cuts to public housing threaten repeat of the 1980s’ housing crisis*, URB. INST. (June 1, 2017), <https://www.urban.org/urban-wire/proposed-cuts-public-housing-threaten-repeat-1980s-housing-crisis> [<https://perma.cc/5HJ6-PWYN>]; Denvir, *supra* note 39.

41. Gandour, *supra* note 9, at 25–27.

42. *Id.*, at 28.

43. *Id.*

44. *Id.*; *see also* Luis Ferré-Sadurní, *The Rise and Fall of New York Public Housing: An Oral History*, N.Y. TIMES (July 9, 2018), <https://www.nytimes.com/interactive/2018/06/25/nyregion/new-york-city-public-housing-history.html> [<https://perma.cc/4WQW-AEXF>].

45. *See* Denvir, *supra* note 39; *see, e.g.*, Ari Ephraim Feldman, *NYCHA has 6,000 vacant units as it struggles to quickly make repairs*, NY1 (Jan. 31, 2023), <https://ny1.com/all-boroughs/politics/2023/01/31/nycha-has-6-000-vacant-units-as-it-struggles-to-quickly-make-repairs> [<https://perma.cc/KUZ4-QB7C>].

timely repairs,⁴⁶ misdirected money,⁴⁷ failed to enforce statutorily mandated tenants' rights,⁴⁸ discriminated against tenants,⁴⁹ and falsified critical documents such as lead inspections.⁵⁰

B. Creation of the RAD program

Recognizing that the country's public housing continued to deteriorate and that there was no political will to allocate public funds sufficient to stabilize and rehabilitate it, Congress created the Rental Assistance Demonstration (RAD) program in 2012 to fund public housing repairs and rehabilitation.⁵¹ The RAD statute authorized the conversion of public housing developments to project-based Section 8, a program that allows private landlords and management companies to receive federal subsidies in return for operating buildings or units serving low-income tenants.⁵² Unlike the tenant-based Section 8 voucher program, which allows tenants to rent individual units anywhere on the private rental market, the project-based Section 8 program funds the units or buildings themselves and requires that the landlord maintain certain waitlist and screening requirements.⁵³ Both Section 8 programs have tenant protections beyond what is typically

46. See, e.g., Joni Hess, *Feds take over Slidell Housing Authority, citing mismanagement*, NOLA.COM (Jan. 12, 2023), https://www.nola.com/news/northshore/federal-officials-take-control-of-slidell-housing-agency/article_08cc5314-91ed-11ed-8fb3-9b8c12fd4c2a.html [https://perma.cc/ZHB7-QVYJ]; Ferré-Sadurní, *The Rise and Fall of New York Public Housing*, *supra* note 44; D. Bradford Hunt, *What Went Wrong with Public Housing in Chicago?*, 94 J. ILL. STATE HIST. SOC'Y 96, 111–16 (2001).

47. See, e.g., Hess, *supra* note 46; Jon Brooks, *Audit of S.F. Housing Authority Finds Financial, Program Mismanagement*, S.F. PUB. PRESS (June 5, 2013), <https://www.sfpublicpress.org/audit-of-s-f-housing-authority-finds-financial-program-mismanagement/> [https://perma.cc/ARD2-J58R]; Ferré-Sadurní, *The Rise and Fall of New York Public Housing*, *supra* note 44.

48. See, e.g., *NYCHA to Reform Rent Adjustment System, Pay \$190,000 in Settlement Impacting Hundreds of Thousands of Tenants*, LEGAL SERVICES N.Y.C. (Aug. 2, 2021), <https://www.legalservicesnyc.org/news-and-events/press-room/1695-nycha-to-reform-rent-adjustment-system-and-pay-190000-as-part-of-settlement-that-will-help-hundreds-of-thousands-of-tenants-across-the-city> [https://perma.cc/XY9D-8SMB].

49. See Cara Hendrickson, *Racial Desegregation and Income Deconcentration in Public Housing*, 9 GEO. J. POVERTY L. & POL'Y 35, 48–52 (2002).

50. Ferré-Sadurní, *The Rise and Fall of New York Public Housing*, *supra* note 44.

51. 42 U.S.C. § 1437f note; Rachel M. Cohen, *Goodbye Public Housing?*, AM. PROSPECT (Nov. 12, 2015), <https://prospect.org/economy/goodbye-public-housing/> [https://perma.cc/WT6K-XNU8].

52. 42 U.S.C. § 1437f note. The statute authorized two components: Component 1 and Component 2. *Id.* Component 1 authorizes the conversion of public housing buildings, which will be discussed at length in this article while Component 2 allows for owners of buildings in three HUD “legacy” programs—Section 8 Moderate Rehabilitation, Rent Supplement, and Rental Assistance Payment (RAP)—to convert their buildings to project-based Section 8 and access long-term repairs financing. See U.S. DEP'T OF HOUS. & URBAN DEV., NOTICE H-2019-09 PIH-2019-23 (HA): RENTAL ASSISTANCE DEMONSTRATION – FINAL IMPLEMENTATION, REVISION 4 AS AMENDED BY RAD SUPPLEMENTAL NOTICE 4B 1-2 (July 31, 2023).

53. Compare 24 C.F.R. part 983 (2023), with 24 C.F.R. part 982 (2023).

provided under state law.⁵⁴ The conversion of public housing to project-based Section 8 therefore turns over the management and operations of public housing to private landlords and management companies.⁵⁵

While PHAs can (and in the instance of NYCHA, do) remain the deed owners of the buildings or retain some property interest in the properties, a new private landlord also gains a property interest, often through a ground lease.⁵⁶ These ground leases—a long-term lease agreement that allows the owner of a building to lease a development to another entity to operate according to the terms of the agreement—are for 99-year terms, which will outlive the vast majority of current tenants.⁵⁷ Private landlords enjoy access to private capital, such as mortgages, and tax credits, such as the Low Income Housing Tax Credits (LIHTC), unavailable to PHAs as public entities; these sources of capital are used or leveraged to rehabilitate the former public housing buildings.⁵⁸ As part of the conversion process, the PHA hires private developers and contractors to rehabilitate and repair the deteriorating buildings post-conversion.⁵⁹

The RAD program was authorized by Congress on a “demonstration” basis, meaning as a way to test and measure the effectiveness of such conversions for accomplishing its goals.⁶⁰ While the RAD statute first authorized the conversion of only 60,000 units nationally, that statutory cap has since been raised three times to 455,000 units nationally.⁶¹ The program is operated and overseen by HUD, the

54. See 24 C.F.R. part 983 (2023); 24 C.F.R. part 982 (2023). Many tenant protections are built into every aspect of the housing regulations, which dictate, *inter alia*, housing standards, when and how a landlord may begin eviction proceedings, and accessibility for people with disabilities. See, e.g., 24 C.F.R. §§ 983.257, 983.101, 983.102 (2023); 24 C.F.R. §§ 982.53, 982.310, 982.401 (2023).

55. See 42 U.S.C. § 1437f note; Cohen, *supra* note 51.

56. See 42 U.S.C. § 1437f note; U.S. DEP’T OF HOUS. & URBAN DEV., RAD GUIDANCE FOR PHA OWNERSHIP / CONTROL REQUIREMENTS – RAD I / PHA CONVERSION TRANSACTIONS (2017), https://www.radresource.net/doc_out.cfm?id=ogcownership [<https://perma.cc/PZV8-PXU4>]; U.S. DEP’T OF HOUS. & URBAN DEV., THE RENTAL ASSISTANCE DEMONSTRATION (RAD): AN OVERVIEW (2021), https://www.hud.gov/sites/dfiles/Housing/documents/RAD_Overview_06072021.pdf [<https://perma.cc/GSC3-ES9S>]; U.S. DEP’T OF HOUS. & URBAN DEV., RENTAL ASSISTANCE DEMONSTRATION (RAD): REFERENCE GUIDE FOR PUBLIC HOUSING PROJECTS CONVERTING TO PROJECT-BASED VOUCHER (PBV) ASSISTANCE 14–15 (2022) <https://www.radresource.net/sources/public/RAD%20PBV%20QUICK%20REFERENCE%20GUIDE%20Feb%202022.pdf> [<https://perma.cc/7UQG-RASV>].

57. See, e.g., Lease Agreement Among NYCHA, Brooklyn Pact II Housing Development Fund Corporation and Brooklyn Housing Preservation L.P. 20 (Feb. 5, 2020) (on file with author).

58. See U.S. DEP’T OF HOUS. & URBAN DEV., RAD GUIDANCE FOR PHA OWNERSHIP / CONTROL REQUIREMENTS, *supra* note 56; U.S. DEP’T OF HOUS. & URBAN DEV., THE RENTAL ASSISTANCE DEMONSTRATION (RAD): AN OVERVIEW, *supra* note 56.

59. U.S. DEP’T OF HOUS. & URBAN DEV., NOTICE H-2019-09 PIH-2019-23 (HA), RENTAL ASSISTANCE DEMONSTRATION – FINAL IMPLEMENTATION, *supra* note 52, at 24–25.

60. 42 U.S.C. § 1437f note (Rental Assistance Demonstration).

61. See U.S. DEP’T OF HOUS. & URBAN DEV., RAMSEYER FOR THE “RENTAL ASSISTANCE DEMONSTRATION” AS SET FORTH IN THE CONSOLIDATED AND FURTHER CONTINUING APPROPRIATIONS ACT, 2012, at 2 (2022), https://www.hud.gov/sites/dfiles/Housing/documents/RAD_112-55_Comprehensive_Ramseyer_3-15-22.pdf [<https://perma.cc/HCB6-XNVH>] (containing RAD statutory language with annotations); 42 U.S.C. § 1437f note (Rental Assistance Demonstration).

federal agency tasked with generally overseeing and administering federally-funded public housing nationally.⁶² Although HUD has not promulgated any federal regulations governing the RAD program, the RAD Statute requires tenant input in the conversion process, that tenants retain all the same rights that they had prior to conversion, and that no tenant will be re-screened for eligibility or evicted as a result of the conversion process.⁶³ HUD has implemented these statutory and other requirements through two HUD Notices that govern the conversion process and tenants' fair housing, civil rights, and relocation rights; tenants are also protected under civil rights and antidiscrimination laws.⁶⁴ Once a building is converted, it is also governed by the relevant regulations for the specific project-based Section 8 program under which the building is funded, whether that is the Project Based Voucher (PBV) program or the Project Based Rental Assistance (PBRA) program.⁶⁵

Taken as a whole, RAD is a roundabout way to raise money for desperately needed repairs of public housing. Despite requiring many more administrative resources than simply funding public housing adequately, as will be discussed *infra*, RAD has been wholeheartedly embraced by Congress, HUD, PHAs, developers, private landlords, and many affordable housing advocates as the solution for the chronic underfunding of public housing. It is no surprise that market actors love RAD since profit opportunities for private interests infest every aspect of the process. In exchange for maintaining and revitalizing public housing that has been dramatically defunded and mismanaged, private landlords, management companies, and developers can collect a variety of fees and payments: rent paid by tenants, management fees, developer fees, and federal subsidies meant to match market-rate rents, which can become even more

62. See 42 U.S.C. § 1437f note (Rental Assistance Demonstration).

63. 42 U.S.C. § 1437f note (Rental Assistance Demonstration).

64. See U.S. DEP'T OF HOUS. & URBAN DEV., NOTICE H-2019-09 PIH-2019-23 (HA), RENTAL ASSISTANCE DEMONSTRATION – FINAL IMPLEMENTATION, *supra* note 52, at 1, 3; U.S. DEP'T OF HOUS. & URBAN DEV., NOTICE H 2016-17 PIH 2016-17 (HA), RENTAL ASSISTANCE DEMONSTRATION (RAD) NOTICE REGARDING FAIR HOUSING AND CIVIL RIGHTS REQUIREMENTS AND RELOCATION REQUIREMENTS APPLICABLE TO RAD FIRST COMPONENT – PUBLIC HOUSING CONVERSIONS (2016), https://www.hud.gov/sites/documents/16-17HSGN_16-17PIHN.PDF [https://perma.cc/YB32-EZ93].

65. However, HUD may modify or waive statutory or regulatory requirements of the PBV and PBRA programs as necessary to ensure that conversions are effective. See 42 U.S.C. § 1437f note (Rental Assistance Demonstration); U.S. DEP'T OF HOUS. & URBAN DEV., NOTICE H-2019-09 PIH-2019-23 (HA), RENTAL ASSISTANCE DEMONSTRATION – FINAL IMPLEMENTATION, *supra* note 52, at 1–2, 45–98; 24 C.F.R. pt. 983 (2023) (PBV Program); 24 C.F.R. pts. 880, 881, 883, 884, 886 (2023) (PBRA Program); 24 C.F.R. pt. 247 (2023) (PBRA Program). The major difference between the PBV and PBRA programs is that the PBV program is administered by local PHAs while HUD directly manages the PBRA program. *Policy Basics: Project-Based Vouchers*, CTR. ON BUDGET & POL'Y PRIORITIES (July 11, 2023), <https://www.cbpp.org/research/housing/project-based-vouchers> [https://perma.cc/44Z5-NWW5].

profitable if building operations minimize costs.⁶⁶ All these payments, except for rent paid by tenants, are paid by the government in exchange for private entities to provide oftentimes poor services and work, as will be discussed *infra*. In essence, the RAD program panders to the interests of capital by creating an entire governmental program designed for private entities to reap profits at the expense of tenants, the public purse and increased government resources.

RAD also helps the PHAs by diluting and offloading many of their responsibilities to private entities. Before conversion, PHAs themselves must act as landlords by managing day-to-day operations, including making repairs, performing re-certifications, initiating evictions, and administering the tenant association programs. RAD enables PHAs to rely on the new private landlords and management companies to perform all these tasks post-conversion.⁶⁷ Depending on the project-based Section 8 program to which a development converts, PHAs either retain some management and oversight role post-conversion or they can offload the property entirely from their portfolio of responsibilities.⁶⁸ Under the PBV program, the PHA becomes the administrator of the Section 8 vouchers attached to each unit and oversees the new private landlord, management company, and developer through a Housing Assistance Payments (HAP) contract as well as through the transactional documents of the conversion.⁶⁹ Under the PBRA program, HUD assumes oversight responsibilities of the new private entities, though a PHA may have some responsibilities related to construction and rehabilitation immediately post-conversion.⁷⁰

Since RAD was created in 2012, PHAs have converted over 200,000 housing units under RAD.⁷¹ HUD publicly touts that the physical conditions in these units will be improved and that their capital needs will be met for the next 20 years

66. See Gandour, *supra* note 9, at 3, 44, 46–55; U.S. DEP’T OF HOUS. & URBAN DEV., NOTICE H-2019-09 PIH-2019-23 (HA), RENTAL ASSISTANCE DEMONSTRATION – FINAL IMPLEMENTATION, *supra* note 52, at 116–18; see, e.g., Melody Simmons, *Housing Employees Say They’ve Been Left Out of the Loop on Privatization Plan*, BALT. BREW (Apr. 1, 2014), <https://www.baltimorebrew.com/2014/04/01/housing-employees-say-theyve-been-left-out-of-the-loop-on-privatization-plan/> [<https://perma.cc/5ZHQ-V6KQ>].

67. See 24 C.F.R. § 983.209 (2023); 24 C.F.R. § 982.452 (2023); 24 C.F.R. § 880.601 (2023).

68. See CTR. ON BUDGET & POL’Y PRIORITIES, *supra* note 65 (discussing difference between the PBV and PBRA programs and how the PBRA program does not have a role for PHAs because it is HUD that directly contracts with private landlords and management companies).

69. See generally U.S. DEP’T OF HOUS. & URBAN DEV., RENTAL ASSISTANCE DEMONSTRATION (RAD): REFERENCE GUIDE FOR PUBLIC HOUSING PROJECTS CONVERTING TO PROJECT-BASED VOUCHER (PBV) ASSISTANCE (2022), <https://www.radresource.net/sources/public/RAD%20PBV%20QUICK%20REFERENCE%20GUIDE%20Feb%202022.pdf> [<https://perma.cc/TXW5-L3K6>].

70. See generally U.S. DEP’T OF HOUS. & URBAN DEV., RENTAL ASSISTANCE DEMONSTRATION (RAD): POLICY QUICK REFERENCE GUIDE TO MULTIFAMILY HOUSING (PBRA) REQUIREMENTS (2020), https://www.hud.gov/sites/dfiles/Housing/documents/RAD_PBRA_Quick_Ref_Guide_09-2020.pdf [<https://perma.cc/BXL9-TGHD>].

71. *RAD Fact Sheet*, RAD RESOURCE DESK, https://www.radresource.net/pha_data2020.cfm [<https://perma.cc/7LAU-NZST>] (last visited Apr. 1, 2024).

under RAD.⁷² These purported benefits accrue, RAD’s proponents say, without having to provide a cent more in public financing. This key point—rehabilitation of deteriorated public housing units without any more visible public financing—has been politically attractive. Congress has been stuck in a stalemate over funding the country’s social safety net after the poor and marginalized have been maligned as “welfare queens” in racially-charged targeting of the “undeserving poor.”⁷³ But such a simplified narrative is inaccurate. RAD is subsidized by a wide array of governmental funding, such as continued federal financing for Section 8 programs; federal aid, such as FEMA aid; governmental tax breaks, such as LIHTC; and government housing incentive programs, such as energy efficiency and solar grants.⁷⁴ Allowing RAD to eat up these sources of funding takes away critical resources for building and maintaining more affordable housing, which is so desperately needed.⁷⁵ But since Section 8 enjoys more Congressional and political support, advocates for RAD argue it allows for PHAs to switch public housing to a more politically stable funding source.⁷⁶

72. *Id.*

73. See Bittle, *supra* note 13; Sarah Kleiner, *The U.S. Ignored Public Housing. This is What Happened.*, CTR. FOR PUB. INTEGRITY (Jan. 7, 2022), <https://publicintegrity.org/inside-publici/newsletters/watchdog-newsletter/us-ignored-public-housing/> [<https://perma.cc/MN28-NPX7>]; Ann Cammett, *Welfare Queens Redux: Criminalizing Black Mothers In The Age Of Neoliberalism*, 25 S. CAL. INTERDISC. L.J. 363 (2016).

74. See, e.g., Amir Khafagy, *NYCHA’s Embrace of RAD Program Brings a Mix of Praise and Worry*, SHELTERFORCE (Oct. 9, 2018), <https://shelterforce.org/2018/10/09/nychas-embrace-of-rad-program-brings-a-mix-of-praise-and-worry/> [<https://perma.cc/9NJE-Y9NG>] (discussing how the RAD conversion of Ocean Bay Houses in NYC used FEMA aid). See also U.S. DEP’T OF HOUS. & URBAN DEV., FACT SHEET #13: RAD AND LOW-INCOME TAX CREDITS (2023), https://www.hud.gov/sites/dfiles/Housing/documents/RADResidentFactSheet_13_RADandLowIncomeTaxCredits.pdf [<https://perma.cc/3E5D-4CEC>]; see also Marc O’Meara, *Soft Funds and Equity Continue to be Crucial for Funding RAD Transactions*, NOVOGRADAC (Mar. 4, 2021), <https://www.novoco.com/periodicals/articles/soft-funds-and-equity-continue-be-crucial-funding-rad-transactions> [<https://perma.cc/KQ6W-UQHT>] (“Novak said that some of the funds available to RAD conversions include HUD HOME funds, Community Development Block Grants, the Federal Home Loan Bank Affordable Housing Program, National Housing Trust Fund financing, state housing trust fund financing, energy efficiency and solar grants, state preservation grants and more.”).

75. See, e.g., Alex Schwartz and Kirk McClure, *The Rental Assistance Demonstration Program and Its Current and Projected Consumption of Low- Income Housing Tax Credits*, 23 CITYSCAPE J. POL’Y DEV. & RSCH. 9 (2021).

76. See Bittle, *supra* note 13; see, e.g., *Permanent Affordability Commitment Together (PACT)*, N.Y.C. HOUS. AUTH., <https://www.nyc.gov/site/nycha/about/pact.page> [<https://perma.cc/6NKM-VFXS>] (last visited Apr. 1, 2024) (“Through PACT, developments will be included in the federal [RAD] program and convert to a more stable, federally-funded program called Project-Based Section 8.”); *Testimony on the Impact of NYCHA’s RAD/PACT Program*, CITIZENS BUDGET COMM’N (May 3, 2022), <https://cbcnyc.org/advocacy/testimony-impact-nychas-radpact-program> [<https://perma.cc/95PP-92W9>] (“The many advantages of converting from Section 9 public housing funding to voucher financing under RAD include . . . [p]roviding a more stable funding stream than Section 9, and one that enjoys bipartisan support.”).

C. RAD conversion process

In addition to depending on a variety of government funds (though not directly earmarked for public housing), RAD also relies on a legally and administratively complicated conversion process that requires immense resources from HUD and PHAs. First, once a PHA has decided to pursue RAD, the PHA must give notice to tenants about its intent to convert their buildings, hold meetings about the process and tenants' rights, and allow tenants to submit comments about the conversion plans.⁷⁷ Second, the PHA applies to HUD to participate in RAD, and HUD will make a determination in a competitive process (due to the statutory cap on conversions) of whether the PHA's application should be conditionally approved or denied, taking into special consideration if the PHA's conversion plans require relocation for rehabilitation.⁷⁸ Further, at this stage, the PHA must prepare a Significant Amendment to PHA Plan for the RAD conversion and follow usual procedures for a Plan amendment, including engaging with the Resident Advisory Board, residents, and the public.⁷⁹

Third, if a PHA's application is preliminarily approved, HUD will issue the PHA a Commitment to Enter into a Housing Assistance Payments Contract (CHAP), a conditional agreement allowing for the PHA to begin the RAD conversion so long as the PHA complies with continuing notice requirements, plans for tenant relocation as necessary, and submits required plans and paperwork.⁸⁰ Fourth, after reviewing and approving the PHA's plans, HUD will issue a RAD Conversion Commitment (RCC), which generally means that HUD has approved the PHA's RAD conversion plans and the property is likely to convert in 45-60 days.⁸¹ At this stage, the PHA must finalize its conversion documents and submit them to HUD for approval while continuing to meet with and give notice to tenants about the conversion plans, their rights, and relocation, if applicable.⁸² Finally, when a building closes, all the relevant transactional documents are executed and the affected buildings are officially removed from the

77. See U.S. DEP'T OF HOUS. & URBAN DEV., NOTICE H-2019-09 PIH-2019-23 (HA), RENTAL ASSISTANCE DEMONSTRATION – FINAL IMPLEMENTATION, *supra* note 52, at 23–104.

78. U.S. DEP'T OF HOUS. & URBAN DEV., NOTICE H 2016-17 PIH 2016-17(HA), RAD NOTICE REGARDING FAIR HOUSING AND CIVIL RIGHTS REQUIREMENTS AND RELOCATION REQUIREMENTS, *supra* note 64.

79. *Id.* at 40.

80. See U.S. DEP'T OF HOUS. & URBAN DEV., NOTICE H-2019-09 PIH-2019-23 (HA), RENTAL ASSISTANCE DEMONSTRATION – FINAL IMPLEMENTATION, *supra* note 52, at 20.

81. *Id.* at 17; see also U.S. DEP'T OF HOUS. & URBAN DEV., RENTAL ASSISTANCE DEMONSTRATION WELCOME GUIDE FOR NEW AWARDEES: RAD 1ST COMPONENT 7–8 (2015), https://www.hud.gov/sites/documents/RAD_WELCOMEGUI_1STCOMP.PDF [<https://perma.cc/4R58-BENN>] [hereinafter HUD Welcome Guide].

82. U.S. DEP'T OF HOUS. & URBAN DEV., NOTICE H 2016-17 PIH 2016-17(HA), RAD NOTICE REGARDING FAIR HOUSING AND CIVIL RIGHTS REQUIREMENTS AND RELOCATION REQUIREMENTS, *supra* note 64, at 41, 49–50.

public housing program and transferred to the Section 8 program.⁸³ After closing, rehabilitation begins and the relocation plan, if applicable, is implemented.⁸⁴

Throughout this complicated and paperwork-heavy process, the PHA must liaise, negotiate, and work with a multitude of actors, often including HUD, prospective developers, private landlords, management companies, banks, development corporations, attorneys, elected officials, and tenants. While the conversion process requires many different types of tenant notice and opportunities for input, tenants have no ultimate veto or binding authority over a PHA's decision to convert their development under RAD.⁸⁵ Further, during this resource-intensive process, money and labor to run the buildings and provide services to tenants is re-routed to operationalize the conversion, leading tenants to see even fewer repairs and services in the lead up to, and during, a RAD conversion, to be discussed *infra*.

D. The New York City Housing Authority's Blueprint for Change

Despite how complicated a RAD conversion is for a PHA, there is a strong and increasing appetite for RAD among PHAs. Since RAD is statutorily capped at 455,000 units nationwide,⁸⁶ meaning that PHAs compete with one another for their RAD applications to be approved by HUD, PHAs have turned to similar RAD-like programs to rehabilitate their ailing public housing developments.⁸⁷ The most novel and ambitious of these plans is the New York City Housing Authority's (NYCHA) Blueprint, which aims to convert two-thirds of NYCHA's public housing stock (approximately 110,000 units) to the PBV program.⁸⁸

The basic goal of the Blueprint is to access and leverage Tenant Protection Vouchers (TPVs),⁸⁹ a type of Section 8 subsidy, to raise private capital for repairs.

83. HUD WELCOME GUIDE, *supra* note 81, at 8–9.

84. U.S. DEP'T OF HOUS. & URBAN DEV., NOTICE H 2016-17 PIH 2016-17(HA), RAD NOTICE REGARDING FAIR HOUSING AND CIVIL RIGHTS REQUIREMENTS AND RELOCATION REQUIREMENTS, *supra* note 64, at 41.

85. See U.S. DEP'T OF HOUS. & URBAN DEV., NOTICE H-2019-09 PIH-2019-23 (HA), RENTAL ASSISTANCE DEMONSTRATION – FINAL IMPLEMENTATION, *supra* note 52, at 92–113 (discussing resident notification and consultation requirements but not requiring tenant approval for HUD approval and conversion).

86. 42 U.S.C. § 1437f note(4).

87. See Ed Gramlich, NAT'L LOW INCOME HOUS. COAL., REPOSITIONING OF PUB. HOUS. 1 (2021), https://nlihc.org/sites/default/files/AG-2021/04-10_Repositioning-Public-Housing.pdf [<https://perma.cc/7T7Q-LENW>] (describing how public housing can raise money for repairs through mechanisms available under Section 18 and Section 22 of the U.S. Housing Act); see, e.g., RENO HOUS. AUTH., SITE REDEVELOPMENT & PRES., <https://www.renoha.org/redevelopment-and-preservation/> [<https://perma.cc/5Y CZ-9MWH>] (last visited Mar. 2, 2024) (describing how the Reno Housing Authority is redeveloping its Hawk View property pursuant to Section 18).

88. See *NYCHA Blueprint*, *supra* note 8.

89. Meir Rinde, *Who Gets Tenant Protection Vouchers?*, SHELTERFORCE (Apr. 20, 2023), <https://shelterforce.org/2023/04/20/who-gets-tenant-protection-vouchers/> [<https://perma.cc/ZK7B-2DMS>]; *NYCHA Blueprint*, *supra* note 8 (detailing how NYCHA would operationalize TPVs to raise private capital).

Specifically, the Blueprint seeks to use Section 18 of the U.S. Housing Act, which governs “disposition”—meaning a change in ownership—and “demolition” of public housing, to dispose of approximately 110,000 units.⁹⁰ The “disposing” of NYCHA units would occur by ground-leasing them to a different entity. When a disposition occurs under Section 18, HUD may issue TPVs.⁹¹ The Blueprint seeks to apply for, and hopefully receive, TPVs for each disposed unit that NYCHA can attach to each unit, like a project-based voucher.⁹² Ultimately, NYCHA hopes to leverage the TPVs for private financing, including mortgages and bonds, for rehabilitation and repairs.⁹³

The Blueprint seeks to avoid criticism of using private landlords and management companies in converted buildings. This criticism has often been made by tenants, advocates, and labor unions about RAD because private entities provide poor quality services, undercut unionized wages, and have not been held accountable by NYCHA.⁹⁴ The Blueprint seeks to dispose the units to a public benefit corporation created under New York State law called the Public Housing Preservation Trust (the “Preservation Trust” or the “Public Trust”).⁹⁵ The Blueprint envisions that the Preservation Trust will contract back management responsibilities to NYCHA, meaning, in theory, that the same public employees will continue to perform the day-to-day operations at converted Blueprint buildings.⁹⁶ The benefit of the Blueprint, according to NYCHA, is that a public entity remains accountable to tenants while private capital can fund the repairs that Congress refuses to fund.

In summer 2022, NYCHA accomplished the first step of its Blueprint by coaxing the New York State legislature to pass legislation creating the Preservation Trust, over much tenant and advocate disapproval and calls for a delay.⁹⁷ To push the bill through, NYCHA compromised by, *inter alia*, capping the number of initial units that may be converted to 25,000, allowing for the

90. See *NYCHA Blueprint*, *supra* note 8, at 6.

91. See Rinde, *supra* note 89.

92. See *id.* at 7–8.

93. See *generally id.*; *id.* at 8.

94. See Tatyana Turner, *NYCHA’s RAD/PACT and Preservation Trust Plans, Explained*, THE CITY (Aug. 15, 2023), <https://citylimits.org/2023/08/15/nychas-rad-pact-and-preservation-trust-plans-explained/> [<https://perma.cc/KQ3D-RGNQ>]; *The Need for Contracting Accountability and Transparency at NYCHA*, TEAMSTERS LOCAL 237, <https://www.local237.org/about-237/presidents-biography/from-the-president/1283-accountability-and-transparency-at-nycha> [<https://perma.cc/672Z-FSC5>] (last visited Mar. 2, 2024).

95. See *NYCHA Blueprint*, *supra* note 8, at 9.

96. See *id.*

97. See B. A7805D, 2021–22 Assemb., Leg. Sess. (N.Y. 2022); B. S9409A, 2021–22 S., Leg. Sess. (N.Y. 2022); *Governor Hochul Signs Legislation Creating New York City Public Housing Preservation Trust*, N.Y. STATE (June 16, 2022), <https://www.governor.ny.gov/news/governor-hochul-signs-legislation-creating-new-york-city-public-housing-preservation-trust> [<https://perma.cc/VL5R-9NEE>].

legislature to raise the cap in consultation with NYCHA.⁹⁸ The next steps for the Blueprint are most likely: (1) tenant voting on the funding scheme for their development; (2) application by NYCHA to HUD seeking to dispose of public housing buildings to the Preservation Trust; (3) HUD’s approval of the applications; (4) the ultimate transfer of the buildings to the Preservation Trust, likely via a ground lease, similar to NYCHA’s RAD conversions; and (5) the initial “pooling” of TPVs to raise money for capital repairs.⁹⁹

E. NYCHA’s Full Embrace of Privatization

In addition to NYCHA’s plans to convert two-thirds of its public housing stock to project-based Section 8 under the Blueprint, NYCHA has been aggressively pursuing RAD conversions under a related plan to convert one-third of its public housing units, rebranded as Permanent Affordability Commitment Together (PACT) by NYCHA.¹⁰⁰ On a national scale, NYCHA has completed the highest number of RAD conversions, closing over 20,000 units thus far.¹⁰¹ Taken together, NYCHA intends to privatize its entire public housing stock—the largest in the country¹⁰²—by converting all its units to the PBV program. If NYCHA is successful, NYC, long defined by large-scale public housing developments, will no longer have *any* public housing within its five boroughs, with a multitude of impacts on tenants that will be discussed *infra*.

NYCHA’s embrace of privatization of its entire public housing stock comes after decades of disinvestment on the federal, state, and local levels and accompanying mismanagement.¹⁰³ Although NYCHA was able to successfully steward its public housing stock through the turbulent years of the 1980s and 1990s, the dramatic cuts to NYCHA’s budgets in the late 1990s and early 2000s

98. See N.Y. Pub. Hous. Law § 630(1) (McKinney 2022); Samar Khurshid, *Preservation Trust and Beyond: Report Assesses NYCHA’s Progress and Challenges in Executing ‘Blueprint for Change’*, GOTHAM GAZETTE (Feb. 25, 2023), <https://www.gothamgazette.com/city/11850-nycha-progress-blueprint-change-preservation-trust> [<https://perma.cc/2JJX-KC5D>].

99. See LEGAL SERVICES NYC, WHAT DOES NYCHA’S BLUEPRINT FOR CHANGE MEAN FOR PUBLIC HOUSING IN NYC? (2021).

100. See *Permanent Affordability Commitment Together (PACT)*, *supra* note 76. This article will use “RAD” and “PACT” interchangeably.

101. *RAD Fact Sheet*, *supra* note 71.

102. Gandour, *supra* note 9, at 19; N.Y.C. HOUS. AUTH., NYCHA 2023 FACT SHEET 2 (2023), <https://www.nyc.gov/assets/nycha/downloads/pdf/NYCHA-Fact-Sheet-2023.pdf> [<https://perma.cc/3326-5KNU>].

103. See Luis Ferré-Sadurní, ‘Lighting Money on Fire’ as Mold and Rats Persist in New York Public Housing, N.Y. TIMES (July 26, 2019), <https://www.nytimes.com/2019/07/26/nyregion/nycha-rats-roof-repairs.html> [perma.cc/X56J-7Q8T]; Frank G. Runyeon, *Inspectors Reported Contamination in Water Tanks. NYCHA Had It Erased.*, CITY & STATE N.Y. (Aug. 2, 2018), <https://www.cityandstateny.com/articles/politics/new-york-city/nycha-contamination-water-tanks> [<https://perma.cc/D4V8-HVT4>]; Benjamin Weiser, Luis Ferré-Sadurní, Glenn Thrush and J. David Goodman, *De Blasio Cedes Further Control of NYCHA but Avoids Federal Takeover*, N.Y. TIMES (Jan. 31, 2019), <https://www.nytimes.com/2019/01/31/nyregion/hud-nycha-deal.html> [perma.cc/CN2L-WMYQ].

proved to be too much for NYCHA to maintain its level of services and repairs.¹⁰⁴ Not only did NYCHA see a \$1.4 billion federal operating shortfall between 2000 and 2018, but New York State and New York City also terminated state and city appropriations for state- and city-financed public housing, respectively.¹⁰⁵ This contributed to additional operating shortfalls of \$90 million annually until 2010 when these 21 developments were federalized.¹⁰⁶ Despite the federalization, these developments still had to share in an inadequate federal budget after 2010.¹⁰⁷ Similarly, NYCHA's repair budget is in arrears and its five-year capital repair needs grew from \$6.9 billion in 2006 to \$31.8 billion in 2017; federal funding for capital repairs never reached \$5 billion during this period.¹⁰⁸ Today, NYCHA estimates that it needs \$78 billion for capital repairs and modernization of its buildings.¹⁰⁹

As federal, state, and local funding for NYCHA fell precipitously, repair needs and mismanagement grew exponentially. Between 2002 and 2014, the conditions in NYCHA apartments dramatically worsened when compared to private housing.¹¹⁰ In 2014, NYCHA settled a class action lawsuit accusing the agency of failing to properly remediate excess moisture and mold by agreeing to proper and timely repairs.¹¹¹ The agency could never fulfill its legal promises, and tenants were forced to return to court to improve and enforce the settlement agreement in 2018.¹¹² Despite new safeguards in the settlement agreement, during my time representing NYCHA tenants in repairs cases, mold and excess moisture issues were almost always a problem. NYCHA almost never timely addressed them according to the terms of the settlement.¹¹³

Also in 2018, the federal government sued NYCHA, alleging that NYCHA had deliberately failed to provide decent and sanitary housing and to comply with

104. Giller, *supra* note 29, at 300; VICTOR BACH, PUBLIC HOUSING: NEW YORK'S THIRD CITY, CMTY. SERV. SOC'Y 3–4 (2017); Emily Peiffer, *New York City's Fall from Public Housing Success Represents a Broader Crisis*, URB. INST. (June 13, 2018), <https://www.urban.org/urban-wire/new-york-citys-fall-public-housing-success-represents-broader-crisis> [perma.cc/EPW9-L9JP]; Ferré-Sadurní, *The Rise and Fall of New York Public Housing: An Oral History*, *supra* note 44.

105. BACH, *supra* note 104, at 3.

106. *Id.*; see also *NYCHA 2.0: Progress at Risk*, CITIZENS BUDGET COMM'N (Sept. 17, 2019), <https://cbcny.org/research/nycha-20-progress-risk> [perma.cc/Q9XM-MXNB].

107. See N.Y.C. HOUS. AUTH., PACT-UNFUNDED UNITS (2023), <https://www.nyc.gov/assets/nycha/downloads/pdf/PACT-Unfunded-Units-Fact-Sheet.pdf> [https://perma.cc/W7Y3-9K4A].

108. Giller, *supra* note 29, at 301–02.

109. *Modernizing NYCHA Properties*, N.Y.C. HOUS. AUTH., <https://www.nyc.gov/site/nycha/about/modernizing-properties.page> [https://perma.cc/V2D5-FWF5] (last visited Mar. 8, 2023); see also *NYCHA Blueprint*, *supra* note 8, at 3.

110. BACH, *supra* note 104, at 6.

111. *Baez v. New York City Housing Authority*, NAT'L RES. DEF. COUNCIL (Feb. 7, 2023), <https://www.nrdc.org/court-battles/baez-v-new-york-city-housing-authority> [https://perma.cc/84MG-8VKZ].

112. *Id.*

113. See Greg B. Smith, *NYCHA's Decade of Court-Monitored Mold Cleanup Starts to Show Results*, CITY (June 29, 2023), <https://www.thecity.nyc/2023/6/29/23777515/nycha-mold-cleanup-progress-baez-monitor> [https://perma.cc/RA88-453U].

lead-paint regulations, leading children to suffer from lead poisoning.¹¹⁴ The suit further alleged that NYCHA had systematically covered up their failures and intentionally deceived inspectors of their faulty and illegal work.¹¹⁵ To avoid a federal receivership, NYCHA and NYC agreed to settle the case with internal reforms and serious repairs, under the oversight of a federal monitor.¹¹⁶ Despite this, many tenants have not seen any real improvement in their living conditions, which continue to be extremely dire.¹¹⁷

In addition to the serious repairs issues facing tenants, NYCHA's mismanagement has also imperiled critical tenants' rights guaranteed under the law. Faced with a slew of federal lawsuits, NYCHA has been forced to enter into remedial agreements regarding its failure to: comply with the Americans with

114. Benjamin Weiser & J. David Goodman, *New York City Housing Authority, Accused of Endangering Residents, Agrees to Oversight*, N.Y. TIMES (June 11, 2018), <https://www.nytimes.com/2018/06/11/nyregion/new-york-city-housing-authority-lead-paint.html> [<https://perma.cc/H5B4-M2RT>]; Press Release, U.S. Dep't of Just., Manhattan U.S. Attorney Announces Settlement With NYCHA and NYC To Fundamentally Reform NYCHA Through the Appointment Of a Federal Monitor and the Payment By NYC Of \$1.2 Billion Of Additional Capital Money Over the Next Five Years (June 11, 2018), <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-settlement-nycha-and-nyc-fundamentally-reform-nycha> [<https://perma.cc/YQ6V-8PSW>].

115. Weiser & Goodman, *supra* note 114.

116. *Id.*

117. Greg B. Smith, *Five Years Later, Still 'A Long Way to Go' on NYCHA Agreement With Feds*, CITY (Feb. 2, 2024), <https://www.thecity.nyc/2024/02/02/five-years-nycha-agreement-feds/> [<https://perma.cc/YCY7-DK3R>]; David Lazar, *NYCHA Federal Monitor: Problems Persist Despite Progress*, NY1 (Dec. 5, 2022), <https://www.ny1.com/nyc/all-boroughs/inside-city-hall/2022/12/06/nycha-federal-monitor-problems-persist-despite-progress> [<https://perma.cc/LX5S-EMTT>]; Molly Crane-Newman, *Queensbridge Houses Residents Fed up over Mold, Lead, Flooding, Cockroaches and Other Vermin Sue NYCHA over Years of Neglect*, N.Y. DAILY NEWS (Aug. 17, 2021), <https://www.nydailynews.com/new-york/queens/ny-queensbridge-houses-nycha-lawsuit-neglect-asbestos-lead-20210817-5dx4xpvdvdydfbnbu3egaxpe-story.html> [<https://perma.cc/5SXG-8FNP>]; *Crown Heights NYCHA residents without heat ahead of arctic blast*, ABC 7 (Feb. 3, 2023), <https://abc7ny.com/heat-arctic-blast-severe-weather-nycha/12767388/> [<https://perma.cc/2DK4-PDW9>]; Noah Goldberg, *Judge calls lack of hot water in Queens NYCHA building since November 'a crime'*, N.Y. DAILY NEWS (Feb. 5 2022), <https://www.nydailynews.com/new-york/ny-queens-nycha-tenants-no-hot-water-judge-jail-20220206-6k72w3tb6negfikhfl66avlqi-story.html> [<https://perma.cc/X67Y-VPLK>]. My experiences representing public housing tenants in repairs cases and working with organizers in public housing conformed with news reporting on the persistently dire conditions in NYCHA developments. I regularly represented tenants with incredibly hazardous conditions in their apartments and buildings, including mold, leaks, pest infestations, water damage (i.e. collapsed ceilings), uneven or broken floors, broken appliances, lack of heat, lack of adequate water service, sewage backups, feces and urine in building common areas and broken intercoms, doors and locks. Despite repeated maintenance requests and lawsuits in housing court, NYCHA rarely repaired these conditions in a timely fashion.

Disabilities Act (ADA);¹¹⁸ adhere to federal law requiring tenants to be charged no more than 30% of their income;¹¹⁹ honor tenants' due process and reasonable accommodation rights in its right-sizing procedures, which govern how households experiencing a change in composition must sometimes move to smaller or larger units;¹²⁰ and properly grant domestic violence priorities to applicants.¹²¹ Beyond these issues, tenants face incompetence, notable absence, and outright hostility from NYCHA staff on a daily basis based on my experience directly representing them.

Taken together, NYCHA is a chronically underfunded agency driven to dysfunction and mismanagement by such inadequate funding. It is tasked with carrying out a mission—providing safe and affordable housing for the poorest and most marginalized New Yorkers—that it simply cannot do in its current condition. Its woes stemmed fundamentally from the government's disinvestment from public housing and has arguably spread throughout all its operations, from its internal processes to culture of work to approach to repairs. It is, as Kyle Giller argues, an agency that has been subjected to intentional disinvestment so that it is ripe for the application of “shock doctrine,” a term and concept coined by Naomi Klein to describe the raiding of public assets through privatization in the wake of a disaster.¹²² NYCHA's turn towards privatization through RAD and the Blueprint is the final step in the agency's “shock treatment.”¹²³ Indeed, NYCHA itself views RAD and the Blueprint as critical to fulfilling its legal obligations to reform internally and to complete critical capital repairs under the federal

118. Press Release, Legal Services N.Y.C., NYCHA Will Reform Reasonable Accommodation System in Settlement, Agrees to Improve Systemic Delays (July 16, 2020), <https://www.legalservicesnyc.org/news-and-events/press-room/1618-nycha-will-reform-reasonable-accommodation-system-in-settlement-agrees-to-improve-systemic-delays-and-dead-end-waitlists-plaguing-accommodations-and-transfer-processes-for-mobility-impaired-residents-> [<https://perma.cc/8AFF-RXER>].

119. See *NYCHA to Reform Rent Adjustment System*, *supra* note 48.

120. *NYCHA Right-sizing Settlement*, VOLUNTEERS OF LEGAL SERV. (Sept. 2, 2014), <https://volsprobono.org/lawsuit-settlement-creates-new-nycha-procedures/> [<https://perma.cc/VF4K-TBCG>].

121. Daniel Beekman, *To Settle Lawsuit, the Housing Authority Will Change How It Handles Apartment Applications from Domestic Violence Victims*, N.Y. DAILY NEWS (Jan. 6, 2014), <https://www.nydailynews.com/new-york/nycha-seals-deal-abuse-article-1.1568107?barcxprox=true> [<https://perma.cc/F332-EBLU>].

122. Giller, *supra* note 29, at 298–99.

123. *Id.* at 299–300. While the “shock” here is not a quick-paced disaster like Hurricane Katrina or a coup, the dire conditions at public housing developments rises to the level of a disaster and is apt for “shock treatment.”

settlement agreement.¹²⁴ In short, to NYCHA, privatization is the solution for its woes.

Given its precarious position and shock treatment, NYCHA's operations and failures are shaped and constrained by neoliberalism's hollowing out of the state in favor of the market as well as the application of neoliberal rationality. Conversely, despite its shock treatment, NYCHA also makes affirmative choices that buy into neoliberal logics and normative theories beyond what is arguably necessary for neoliberal goals to be met. This tension in NYCHA's relationship to neoliberalism will be illustrated *infra*.

F. Critiques of NYCHA's full-scale privatization

NYCHA's decision to privatize all its public housing stock has led to a variety of reactions. How a group or individual views RAD and the Blueprint often depends on their positionality and what they stand to gain or lose from the transaction.

Many, but not all, public housing tenants are extremely skeptical of RAD and the Blueprint, viewing such programs as the first step towards commodifying NYCHA's housing stock so that real estate companies and investors can eventually evict all low-income tenants, hike up the rents and move in market-rate

124. See, e.g., *City Capital Action Plan*, NYCHA 4 n.5, 6 (May 7, 2021) (discussing how required lead abatement in certain developments such as Williamsburg Houses and Harlem Rivers Houses will be addressed by a RAD/PACT conversion); *Heating Action Plan*, NYCHA 33 (last visited Mar. 8, 2023) (discussing how 93 of NYCHA's developments will "receive temperature sensors as part of the RAD/PACT construction scope of work" in order to meet heating needs); *Elevator Response Action Plan*, NYCHA 6 (Jan. 31, 2020) (discussing how "NYCHA will transfer 150 additional elevators to third-party management through the [RAD/]PACT program by December 31, 2024" and "[t]he developer selected through [RAD/]PACT will replace elevators as needed in buildings under its purview"). Prior to RAD and the Blueprint, NYCHA also sought to implement a variety of privatization plans focused mostly on leasing land and air rights for private development and conversion of some properties to mixed-income housing. See BACH, *supra* note 104, at 18–20.

tenants.¹²⁵ At the very least, tenants opposed to privatization fear increased evictions, higher rents, worse or equally bad service, loss of rights, and continuing repair issues.¹²⁶ While privatization programs have promised continuing affordability and federal protections similar to what public housing tenants now have, tenants do not trust NYCHA or HUD to protect their interests and uphold their rights given the years of disinvestment, neglect, and, sometimes, outright deceit that they have faced.¹²⁷ Other public housing tenants, desperate for repairs and trapped in their hazardous apartments due to lack of affordability on the rental market, are more open to RAD and the Blueprint.¹²⁸ They hope that embracing privatization means that they will finally be able to live with dignity in their own homes.¹²⁹

Further, as between RAD and the Blueprint, public housing tenants tend to more favorably view the Blueprint because it does not involve bringing in a private landlord or management company, suggesting that this plan might be a safer bet

125. Rachel M. Cohen, *Can Private Capital Save Public Housing? (Tenants Have Their Doubts)*, AM. PROSPECT (Aug. 28, 2014), <https://prospect.org/culture/can-private-capital-save-public-housing-tenants-doubts/> [<https://perma.cc/YW7Q-9VTF>]; Melanie Aucello, *Saving NYCHA: Conned in Kips Bay: Public housing plan full of lies*, N.Y. DAILY NEWS (Mar. 31, 2021), <https://www.nydailynews.com/opinion/ny-oped-saving-nycha-20210331-155oahhyhbdenljmukuljqz4hy-story.html> [<https://perma.cc/LG3W-9ZZC>]; Amir Khafagy, *Public Housing Is Going Private—and Residents Are Fighting Back*, AM. PROSPECT (June 21, 2021), <https://prospect.org/infrastructure/housing/public-housing-going-private-residents-fighting-back/> [<https://perma.cc/2Y6H-3559>]; Isabel Song Beer, *‘Fight On Our Behalf’: NYCHA Residents Demand Help from Elected Officials*, AMNY (May 23, 2022), <https://www.amny.com/politics/fight-on-our-behalf-nycha-residents-demand-help-from-elected-officials/> [<https://perma.cc/4XTP-NV26>]; Rebecca Greenberg, *NYCHA Tenants Protest Demolition of Public Housing Complexes in Manhattan*, NY1 (June 27, 2023), <https://www.ny1.com/nyc/all-boroughs/housing/2023/06/28/nycha-tenants-protest-demolition-of-public-housing-complexes-in-manhattan> [<https://perma.cc/96N7-HTAJ>]. See also *Testimony of Daniel Barber, Reginald H. Bowman, Jacqueline Lara, Ramona Ferreyra, Carmen Perez Abreu, Jia Xin Zhang, and Cesar Yoc – Virtual Public Hearing on NYCHA’s “Blueprint for Change” Proposal to Help Streamline Operations and Address Its Capital Needs, Part 1*, N.Y. STATE ASSEMBLY (Dec. 8, 2020), https://nystateassembly.granicus.com/player/clip/5694?view_id=8&redirect=true&h=2ce3005fa3db0b03b3dfd800c0bc7e30 [<https://perma.cc/6Y5T-YAF4>]; *Testimony of Princella Jamerson, Dana Elden, Jasmine Sanchez, Brenda Temple, and Aixa Torres – Virtual Public Hearing on NYCHA’s “Blueprint for Change” Proposal to Help Streamline Operations and Address Its Capital Needs, Part 2*, N.Y. STATE ASSEMBLY (Dec. 8, 2020), https://nystateassembly.granicus.com/player/clip/5695?view_id=8&redirect=true&h=bc07194a60b57f220184254153728650 [<https://perma.cc/26UT-JYXE>].

126. See *supra* note 125; see also Amine Bit and Aissatou Diallo, *Facing NYCHA’s Turn to Privatization, Manhattanville Residents Fear How Developers with Fiscal Motives Will Affect Their Housing*, COLUMBIA SPECTATOR (Nov. 5, 2021), <https://www.columbiaspectator.com/news/2021/11/05/facing-nychas-turn-to-privatization-manhattanville-residents-fear-how-developers-with-fiscal-motives-will-affect-their-housing/> [<https://perma.cc/N7XD-3EGX>].

127. See *supra* note 126; see also *supra* note 125.

128. See Rachel Holliday Smith, *After Demolition Scare, Chelsea NYCHA Tenants Forge New Path With Private Management*, CITY (April 11, 2021), <https://www.thecity.nyc/2021/4/11/22378290/chelsea-nycha-tenants-forge-path-with-rad-private-management> [<https://perma.cc/FBN2-6VKC>].

129. See *id.*

in terms of long-term affordability than RAD.¹³⁰ However, some tenants are skeptical that the Blueprint can lead to quality management and repair services since the plan involves NYCHA—now known for being incompetent in handling tenants repair, recertification, and other needs—continuing to manage day-to-day operations.¹³¹ While these tenants may not necessarily favor a private landlord and management company, they expressed to me that they could not see NYCHA improving.

Advocates and activists tend to be split in their views of RAD and the Blueprint. Many organizers and advocates embrace the view—typically of their constituencies—that privatization is risky and might lead to displacement, worse or equally bad service, poor quality repairs, loss of rights or permanent loss of affordable housing.¹³² They also often argue that adequately funding public housing via public funds is a better solution to privatization schemes, such as RAD and the Blueprint.¹³³ Other advocates and organizers see RAD and the Blueprint as the only way to preserve NYCHA’s housing stock because increased public funding is politically infeasible.¹³⁴ These advocates fear a receivership that could take over NYCHA and potentially lead to wholesale demolition of the last bastion of truly affordable housing in NYC.¹³⁵

130. These were views commonly expressed to me by tenants when I was a Skadden Fellow. *See also* Colin Kinniburgh, *NYCHA’s Latest Rescue Plan Needs State Approval But That Won’t Be Coming Anytime Soon*, *GOTHAM GAZETTE* (June 4, 2021), <https://www.gothamgazette.com/state/10539-nycha-blueprint-rescue-plan-needs-state-approval> [<https://perma.cc/G5B5-QSJW>].

131. These were views commonly expressed to me by tenants when I was a Skadden Fellow. *See also id.*; Dean Moses, *Back to the drawing board: NYCHA tenants rally against ‘A Blueprint for Change’*, *AMNY* (Mar. 23, 2021), <https://www.amny.com/news/getting-to-the-yoke-of-the-issue-nycha-tenants-rally-against-a-blueprint-for-change/> [<https://perma.cc/AYS5-KFFF>]; Rachel Vick, *Advocates denounce NYCHA hearing on public housing reform*, *QUEENS EAGLE* (July 26, 2021), <https://queenseagle.com/all/its-disrespectful-advocates-denounce-nycha-hearing-on-housing-reform> [<https://perma.cc/72QB-8SZM>].

132. Giller, *supra* note 29, at 311; Kristen Hackett, *Opinion: City’s Finance-Driven Approach to Managing NYCHA is Wrong for Tenants*, *CITY LIMITS* (Aug. 18, 2020), <https://citylimits.org/2020/08/18/opinion-citys-finance-driven-approach-to-managing-nycha-is-wrong-for-tenants/> [<https://perma.cc/6ALZ-MB8Z>].

133. *See Letter to US Senate Banking Committee and US House Financial Services Committee*, *HUM. RTS. WATCH* (Aug. 31, 2023), <https://www.hrw.org/news/2021/08/31/letter-us-senate-banking-committee-and-us-house-financial-services-committee> [<https://perma.cc/DAY9-VG38>]; *Where’s the Money?: “There’s No Money.”*, *JUST. FOR ALL COAL.* (Jan. 23, 2020), <http://nycharising.info/education/wheres-the-money-theres-no-money/> [<https://perma.cc/HJ7L-84ET>].

134. *See Testimony of Sunia Zatterman, Georgi Banna, Victor Bach and Lucy Newman – Virtual Public Hearing Part 1*, *supra* note 125; *Testimony of Rachel Fee – Virtual Public Hearing Part 2*, *supra* note 125; N.Y.C. COUNCIL COMM. ON PUB. HOUS. IN RELATION TO THE RENTAL ASSISTANCE DEMONSTRATION PROGRAM/PERMANENT AFFORDABILITY COMMITMENT TOGETHER PROGRAMS, *TESTIMONY OF LORRAINE Y. COLLINS AND DANNY CABRERA 5* (2021), <https://legistar.council.nyc.gov/View.ashx?M=F&ID=9075643&GUID=516CD1BD-5302-40E2-BE97-155C2E311433> [<https://perma.cc/MS5Z-X84C>].

135. *See supra* note 134.

Organized labor tends to oppose RAD because that results in a union labor force being replaced by non-union labor.¹³⁶ However, labor has typically embraced or been open to the Blueprint on the condition that union labor will continue to be required for work at public housing developments, and they do not stand to lose any protections or benefits.¹³⁷

Finally, real estate developers, private landlords, private management companies and their allied interests fully support RAD and the Blueprint, seeing these privatization schemes as opportunities for low-risk profits and market expansion.¹³⁸ These entities are so supportive that they are pushing for the privatization of all public housing across the country.¹³⁹

II. THE EFFECTS OF PRIVATIZATION ON PUBLIC HOUSING TENANTS AND COMMUNITIES, AND THEIR EFFORTS TO FIGHT BACK

The material effect of privatization on public housing tenants and communities has been large and widespread. Tenants living through RAD conversions often experience deteriorating conditions in their building prior to conversion, such as mold, leaks, pest infestations, broken flooring, defective plaster and paint, clogged sinks or tubs and broken cabinets and appliances.¹⁴⁰ While this is not uncommon in NYCHA complexes, what is new is that NYCHA has often refused to make *any* repairs, even going so far as to argue in court they cannot guarantee that any repairs will be made because the building will convert under RAD at a future uncertain date, in violation of local law.¹⁴¹ NYCHA seems

136. See N.Y.C. COUNCIL COMM. ON HOUS. HEARING ON NYCHA DEV.: NYCHA 2.0 AND PACT/RAD, TESTIMONY OF JOSHUA BARNETT 47–50 (2021), <https://legistar.council.nyc.gov/View.ashx?M=F&ID=9075643&GUID=516CD1BD-5302-40E2-BE97-155C2E311433> [<https://perma.cc/MS5Z-X84C>]. But see *Testimony of Gregory Floyd – Virtual Public Hearing Part 1*, *supra* note 125 (expressing approval of RAD in a hearing on the Blueprint).

137. See *Testimony of Gregory Floyd, Luis J. Coletti, and Jon Forster – Virtual Public Hearing Part 1*, *supra* note 125.

138. Giller, *supra* note 29, at 306.

139. See RAD COLLABORATIVE, THE COLLABORATIVE Q&A—ACCELERATING PUBLIC HOUSING CONVERSIONS TO THE SECTION 8 PLATFORM, <https://static1.squarespace.com/static/5693b0579caddb61a0a1cda98/t/5fbc342b258e6b08de36ab4b/1606169643921/RC-Q%26A+Accelerating+the+Job+Final+11-01-20.pdf> [<https://perma.cc/D5YK-D6HG>]; *Next Steps for HUD and Congress*, RAD COLLABORATIVE (Aug. 19, 2020), <https://www.robly.com/archive?id=e282ac3147cb1b3a6734f7993abd670d&v=true> [<https://perma.cc/2R3U-9QSN>].

140. See N.Y.C. COUNCIL COMM. ON PUB. HOUS. IN RELATION TO THE RENTAL ASSISTANCE DEMONSTRATION PROGRAM/PERMANENT AFFORDABILITY COMMITMENT TOGETHER PROGRAMS, TESTIMONY OF ELIZABETH GYORI, *supra* note 134, at 5. For a thorough report documenting many of the issues discussed in my testimony and in this section, see generally “*The Tenant Never Wins*”: *Private Takeover of Public Housing Puts Rights at Risk in New York City*, *supra* note 4.

141. See N.Y.C. COUNCIL COMM. ON PUB. HOUS. IN RELATION TO THE RENTAL ASSISTANCE DEMONSTRATION PROGRAM/PERMANENT AFFORDABILITY COMMITMENT TOGETHER PROGRAMS, TESTIMONY OF ELIZABETH GYORI, *supra* note 134, at 4; NYC Admin. Code §§ 27-2004(a)(45), 27-2005(a), (b); Multiple Dwelling Law §§ 4(44), 78(1) (N.Y.). In my experience, the willingness of a court to accept this excuse depends on the court’s familiarity with RAD and the tenant’s ability to push back on the assertions made by NYCHA, which can be extremely limited if the tenant is not represented by an attorney.

to want to offload all repairs costs to the new private landlord at the expense of tenants' health and safety.¹⁴² These repair issues continue once the building has officially transferred hands because the new private landlord wants to make all the repairs at once during the developments' rehabilitation, which usually begins approximately one year after conversion.¹⁴³ Tenants are thus left to languish in unsafe and unhealthy conditions for two or more years, all so that NYCHA and the new private landlord can cut costs.¹⁴⁴

This often coincides with a steady decrease in service provision by the development's management office, which is operated by NYCHA employees until closing.¹⁴⁵ Tenants have reported that NYCHA employees refuse to log repair requests, effectuate interim recertifications, add family members, or file transfer requests in the lead up to a conversion, despite their legal obligation to do so.¹⁴⁶ Sometimes, these employees simply lose applications or requests.¹⁴⁷ This decrease in service can materially impact a tenant's rights because loss of applications to add family members, pets, or appliances pre-conversion can lead to eviction cases or succession issues (a family member's right to take over the apartment later on) post-conversion.¹⁴⁸

Once construction begins at converted RAD buildings, tenants who are not relocated experience a "rehabilitation in place," meaning they live through months of construction as their apartments are completely renovated and many of the buildings' main systems, such as the boiler or waste systems, are replaced.¹⁴⁹ My clients often complained about noise, dust, lead exposure, lack of social distancing among construction workers during the height of the COVID-19 pandemic, and difficulty accessing their units due to elevator outages or use for constructions.¹⁵⁰ Further, tenants are often kept in the dark about the pace of construction.¹⁵¹ Some of my clients reported walls being left open for weeks while awaiting installation

142. See N.Y.C. COUNCIL COMM. ON PUB. HOUS. IN RELATION TO THE RENTAL ASSISTANCE DEMONSTRATION PROGRAM/PERMANENT AFFORDABILITY COMMITMENT TOGETHER PROGRAMS, TESTIMONY OF ELIZABETH GYORI, *supra* note 134, at 5.

143. *Id.* at 4.

144. See *id.* During my fellowship, I saw that the conversion process can take approximately one year and then rehabilitation work would begin within one year of conversion.

145. See *id.* at 5–6.

146. See *id.*

147. See *id.*

148. See *id.*

149. NYCHA primarily performs rehabilitation in place. See *Permanent Affordability Commitment Together (PACT): Resources for Residents*, N.Y.C. HOUS. AUTH., <https://www.nyc.gov/site/nycha/about/pact/resident-resources.page> [https://perma.cc/FY6Y-LXUM] (last visited Mar. 11, 2023).

150. See N.Y.C. COUNCIL COMM. ON PUB. HOUS. HEARING ON OVERSIGHT: THE IMPACT OF PACT/RAD, TESTIMONY OF ELIZABETH GYORI 7–10 (2022), <https://legistar.council.nyc.gov/View.ashx?M=F&ID=10894753&GUID=D80C9F74-49E1-4B91-8F21-EC1F72F2B14A> [https://perma.cc/C3UN-5LZ8].

151. *Id.* at 7–8.

of new systems.¹⁵² Other tenants, who had arranged with their property managers for the entire apartment renovation to be completed during several weeks while they stayed with family or friends to minimize exposure to construction, returned only to find that the construction was not finished.¹⁵³

Once the construction is completed, tenants complain about shoddy work or use of cheap materials that quickly break.¹⁵⁴ One of my clients reported to me that her new floors and door handles broke within weeks of installation. Others have documented pieces of façade falling off newly renovated buildings or reported incorrectly installed windows flying into the apartment and breaking apart after a storm.

Tenants are also often left in the dark about the conversion process and their rights during and after it. Despite the statutory requirement that tenants receive notice about a PHA's intent to convert their building under RAD and the PHA host at least two meetings with tenants about their rights,¹⁵⁵ most of my clients and tenants with whom I met did not know much, if anything, about the RAD conversion process.¹⁵⁶ Tenants similarly rarely knew about or understood the Blueprint.¹⁵⁷ Tenants often reported not receiving notices or only receiving them in English when they primarily spoke another language.¹⁵⁸ When NYCHA only conducted virtual meetings with tenants during the COVID-19 pandemic, tenants, especially those who were elderly and disabled, reported difficulty accessing the virtual meetings to me.¹⁵⁹ Consequently, many tenants I spoke with did not know that their building had converted under RAD; some even sued NYCHA *pro se* in repairs cases post-conversion, failing to name the new private landlord and management company. Other tenants only found out that their building was converting when they were asked to sign the new RAD lease.

When tenants do attend outreach meetings with NYCHA, they report that NYCHA has not calmed their fears, anxieties or mistrust of NYCHA, with some tenants telling me that they felt insulted by the tone and tenor of the meetings.¹⁶⁰ Despite being required by law to gather tenant input prior to a conversion,¹⁶¹

152. *See id.*

153. *Id.*

154. *Id.* at 10.

155. 42 U.S.C. § 1437f note; U.S. DEP'T OF HOUS. & URBAN DEV., NOTICE H-2019-09 PIH-2019-23 (HA), RENTAL ASSISTANCE DEMONSTRATION – FINAL IMPLEMENTATION, *supra* note 52, at 92.

156. *See* N.Y.C. COUNCIL COMM. ON PUB. HOUS. IN RELATION TO THE RENTAL ASSISTANCE DEMONSTRATION PROGRAM/PERMANENT AFFORDABILITY COMMITMENT TOGETHER PROGRAMS, TESTIMONY OF ELIZABETH GYORI, *supra* note 134, at 6.

157. *See id.* at 13.

158. *See id.*

159. *See id.* at 6.

160. *See id.*

161. 42 U.S.C. § 1437f note; U.S. DEP'T OF HOUS. & URBAN DEV., NOTICE H-2019-09 PIH-2019-23 (HA), RENTAL ASSISTANCE DEMONSTRATION – FINAL IMPLEMENTATION, *supra* note 52, at 92–95.

NYCHA often does not provide space for tenants to critique the decision to privatize their building under RAD and can hide or shy away from discussing possible downsides of conversion, such as the loss of citywide transfer rights, discussed *infra*.¹⁶² Many tenants feel that NYCHA has failed to address their mismanagement of their buildings and neglect of tenants' needs for decades, which has engendered widespread mistrust of NYCHA among tenants.¹⁶³ Without first addressing this mistrust, tenants find it difficult to believe what NYCHA says about privatization.¹⁶⁴ This high level of mistrust can cause disruptions to the conversion and construction process overall, as tenants have sometimes refused to allow access to construction workers for fear that they will perform the construction improperly.¹⁶⁵

Post-conversion, tenants reported confusion about new procedures and processes, such as paying rent, reporting repairs, and addressing housing-related issues.¹⁶⁶ The privatization process is especially jarring for tenants because they can no longer rely on their property management office as a one-stop resource. Tenants must keep in mind and liaise with three separate entities: (1) NYCHA's Section 8 Department for issues pertaining to their project-based voucher, such as recertifications and adding household members; (2) the new private management company for repairs and daily operation of the buildings; and (3) the new private landlord, who must be sued in any legal action. Tenants often have difficulty identifying the right entity to approach with their concerns, and the new private management companies often do not help direct tenants, as I frequently heard. Similarly, while tenants retain their grievance rights post-conversion, they must file a grievance with NYCHA if the issue pertains to their project-based voucher and with the new landlord/management company if the issue pertains to their tenancy.¹⁶⁷ Such a distinction is difficult for advocates to discern, let alone tenants.

In terms of evictions, tenants in RAD buildings seem to experience an uptick in eviction filings and completed evictions, especially right after a conversion is completed, though this information is not disclosed by NYCHA in a comprehensive way.¹⁶⁸ The number of evictions at privatized buildings appeared

162. *See id.*

163. *See id.*

164. N.Y.C. COUNCIL COMM. ON PUB. HOUS. HEARING ON OVERSIGHT: THE IMPACT OF PACT/RAD, TESTIMONY OF ELIZABETH GYORI, *supra* note 150, at 11–12.

165. *Id.* at 10.

166. “*The Tenant Never Wins*”, *supra* note 4, at 9, 61.

167. *See* U.S. DEP'T OF HOUS. & URBAN DEV., NOTICE H-2019-09 PIH-2019-23 (HA), RENTAL ASSISTANCE DEMONSTRATION – FINAL IMPLEMENTATION, *supra* note 52, at 69–70, 90–91; N.Y.C. HOUS. AUTH., SAMPLE PACT RESIDENT LEASE – REVISED JANUARY 2023, <https://www.nyc.gov/assets/nycha/downloads/pdf/pactlease-english.pdf> [<https://perma.cc/YKU3-EJ6G>].

168. “*The Tenant Never Wins*”, *supra* note 4, at 56–68; N.Y.C. COUNCIL COMM. ON PUB. HOUS. HEARING ON OVERSIGHT: THE IMPACT OF PACT/RAD, TESTIMONY OF RAFAEL MOURE-PUNNETT, *supra* note 150, at 1–2.

to be higher than those at public housing developments during my fellowship.¹⁶⁹ But moving forward, it is almost certain that there will be more evictions (at least filed) at privatized buildings because NYCHA has since adopted a new policy of refraining from evicting tenants who are behind on rent unless they owe more than two years in arrears.¹⁷⁰ At privatized buildings, this policy decision is left up to the new private landlords and management companies, who have no incentive to miss out on valuable tenant rent payments and are likely to be quicker to evict. Such is another example of how shifting affordable housing to the private sector ultimately hurts tenants because of the private landlords' profit motive.

More broadly, tenants facing these issues may experience compounding harms and exacerbation of other inequities. Among these are increased mental and physical health issues, disruption of education or employment, and lack of economic mobility. Tenants recounted to me increased anxiety and stress due to housing uncertainty; coughing and other physical ailments due to construction dust; loss of income while staying home to give access to construction workers; and an inability to succeed to the apartment in which they had been living for years because a NYCHA official in the management office failed to process a request to add them as a family member, imperiling the generational asset of an affordable apartment.

The privatization of public housing also leads to various normative changes, meaning changes to how certain actions, outcomes, and institutions are valued as good or bad. First, the normative value of public housing, the only de-commodified form of housing in the U.S., is diminished in favor of market logics and influence. This change suggests that housing should not be a positive human right, but rather a privilege afforded to those with an affluent market position. Second, when a development converts, tenants cease to be a part of a broad group linked together by their common landlord, the PHA. When “NYCHA tenants” become “Wavecrest tenants” and “PACT Renaissance Collaborative tenants,” former public housing tenants experience a diminishment in solidarity and power. Even though RAD allows resident associations to continue to receive funding to represent tenants, tenants now no longer have a common target—NYCHA—with common policies and positions. Instead, tenants must organize around the varying policies and procedures of their new landlords and management companies. Finally, privatization enforces the idea that the most practical solution to house the poor and marginalized is the private market. Advocates, even in progressive movements, now often call for Section 8 vouchers for all tenants, rather than more

169. N.Y.C. COUNCIL COMM. ON PUB. HOUS. HEARING ON OVERSIGHT: THE IMPACT OF PACT/RAD, TESTIMONY OF RAFAEL MOURE-PUNNETT, *supra* note 150, at 1–2.

170. Rachel Vick, *NYCHA Dismisses over 30,000 Eviction Cases*, QUEENS DAILY EAGLE (Feb. 3, 2022), <https://queenseagle.com/all/nycha-dismisses-over-30000-eviction-cases> [<https://perma.cc/6DYE-UTSA>].

public or social housing.¹⁷¹ But others, including many tenants and advocates I met, believed that if safe and affordable housing is indeed a fundamental right for all, it must be normatively valued as such and not left to the whims of the market, which currently favors building more luxury apartments and catering to the wealthy at the expense of poor tenants and consumers.¹⁷²

III. RAD AND ITS PROGENY AS A NEOLIBERAL PROJECT

As I worked with tenants and organizers on this array of issues arising from the privatization of public housing in NYC, I often found myself faced with the same questions. Why couldn't tenants legally compel Congress to fund public housing to adequate levels so that repairs could be made and mismanagement could be fixed without privatization? Why did NYCHA, HUD, and certain politicians and advocates say that RAD and the Blueprint were not "privatization"? Could tenants and organizers trust NYCHA's claims that RAD and the Blueprint were going to preserve and improve public housing rather than destroy it? And why did other tenants not care as much about privatization as they did? Working at a Legal Services Corporation ("LSC") funded nonprofit, I was barred from advocating for or against any legislation or policy.¹⁷³ Thus, I could not do more in my capacity as their attorney than provide them with information about how RAD and the Blueprint operated, what the likely legal repercussions would be of their implementation, and how a suit against Congress is likely to be dismissed for a variety of doctrinal reasons. But their questions stayed with me. I personally knew that tenants and organizers were pointing out key inconsistencies, fault-lines, and problems that privatization was creating and that I was seeing daily in my work—problems that NYCHA, HUD, and even some advocates were keen to overlook.

Indeed, some advocates refused to criticize the Blueprint for relying on bond financing, instead arguing that such a financing model is respectable because all public works projects rely on bond financing. Their uncritical acceptance of bond financing overlooks how crumbling public infrastructure across the U.S. has

171. Suzannah Cavanaugh, *Tenant Activists Fight Each Other over Vouchers*, REAL DEAL (Sept. 10, 2021), <https://therealdeal.com/new-york/2021/09/10/tenant-activists-fight-each-other-over-vouchers/> [<https://perma.cc/S8H7-8JLC>].

172. See Emma Ockerman, *Tons of New Apartments Are Being Built That Almost No One Can Afford*, VICE NEWS (Jan. 15, 2020), <https://www.vice.com/en/article/z3bnme/tons-of-new-apartments-are-being-built-that-almost-no-one-can-afford> [<https://perma.cc/F9ED-8JEP>]; Jason Karain & Jeanna Smialek, *Is the Entire Economy Gentrifying?*, N.Y. TIMES (March 4, 2023), <https://www.nytimes.com/2023/03/04/business/economy/premium-prices-inflation.html> [<https://perma.cc/S3AL-4BE3>].

173. CHRISTOPHER BUERGER, NAT'L LEGAL AID AND DEF. ASSOC., WHAT CAN AND CANNOT BE DONE: REPRESENTATION OF CLIENTS BY LSC-FUNDED PROGRAMS 7 (2018), <https://www.nlada.org/sites/default/files/What%20Can%20and%20Cannot%20Be%20Done%20Updated%20July%202018.pdf> [<https://perma.cc/EL8D-PK9T>].

accompanied this dominant financing model.¹⁷⁴ Some advocates joined with NYCHA and HUD in generally refusing to call RAD or the Blueprint “privatization” because NYCHA remained the deed owner of the developments and only low-income tenants could move into RAD buildings, despite the introduction of market forces into both programs.¹⁷⁵ And in meetings and calls, I witnessed some advocates argue that tenant pushback against RAD and the Blueprint should be ignored because RAD and the Blueprint were, in their mind, the best solutions for dire conditions in public housing, even though tenants would ultimately bear the consequences of privatization.

Not only did the tenants and organizers’ questions stay with me, but I was also alarmed by the narratives that NYCHA, HUD, and certain advocates pushed in response to these questions. Tenants and organizers felt gaslit, and so did I. Moreover, I deeply felt the inequity of power between tenants and the powerful institutional actors involved in public housing’s privatization. While NYCHA, HUD, and certain advocates could freely push for privatization, advocates like myself were gagged by the state through the LSC restrictions from exploring alternative solutions (i.e. legislation) for public housing with tenants themselves. After I completed my fellowship and left my LSC-funded organization, I turned to political theories of neoliberalism to grapple with the questions that tenants and organizers asked of me. In so doing, political theory helps to illuminate the contours, effects, and reach of RAD and the Blueprint, especially beyond the superficial narratives touted by NYCHA, HUD, and certain advocates. Political theory not only aids in tracing the flow of money and power that privatization allows and unleashes, but also its effects on holistic tenant welfare, organizing for tenant power, and democratic consciousness at public housing developments. In other words, political theory allows for the examination of the ways neoliberalism

174. David Schaper, *Potholes, Grid Failures, Aging Tunnels And Bridges: Infrastructure Gets A C-Minus*, NAT’L PUB. RADIO (Mar. 3, 2021), <https://www.npr.org/2021/03/03/973054080/potholes-grid-failures-aging-tunnels-and-bridges-nations-infrastructure-gets-a-c> [<https://perma.cc/QF97-6QLG>]; see generally Ellen Dannin, *Crumbling Infrastructure, Crumbling Democracy: Infrastructure Privatization Contracts and Their Effects on State and Local Governance*, 6 NW. J. L. & SOC. POL’Y 47 (2011); Destin Jenkins, *THE BONDS OF INEQUALITY: DEBT AND THE MAKING OF THE AMERICAN CITY* (2021); Astra Taylor, *Wall Street Doesn’t Have to Rule Our Cities: An Interview with Destin Jenkins*, JACOBIN (July 28, 2022), <https://jacobin.com/2022/07/municipal-debt-bondholders-race-san-francisco> [<https://perma.cc/Y6HA-FFMG>].

175. See, e.g., Victor Bach and Lucy Newman, *Testimony: Support for the NYC Public Housing Preservation Trust*, CMTY. SERV. SOC’Y (Dec. 8, 2020), <https://www.cssny.org/news/entry/testimony-support-for-the-nyc-public-housing-preservation-trust> [<https://perma.cc/W5G9-RKAU>]; N.Y. HOUS. CONF., TESTIMONY OF RACHEL FEE (2020), <https://thenyh.org/wp-content/uploads/2020/12/NYHC-Blueprint-Testimony-State-Legislature-12.8.2020.pdf> [<https://perma.cc/UVZ3-9LJ8>]; COUNCIL OF LARGE PUB. HOUS. AUTHORITIES, TESTIMONY OF SUNIA ZATERMAN IN SUPPORT OF NEW YORK STATE ASSEMBLY BILL 11149 (2020), <https://clpha.org/sites/default/files/documents/Sunia%20Zaterman%20NY%20Assembly%20Testimony%2012.7.0.pdf> [<https://perma.cc/3ZS2-TWV2>]; N.Y.C. COUNCIL COMM. ON PUB. HOUS. HEARING ON OVERSIGHT: THE IMPACT OF PACT/RAD, TESTIMONY OF BRENDAN CHENEY, *supra* note 150, at 1–2. N.Y.C. COUNCIL COMM. ON PUB. HOUS. HEARING ON OVERSIGHT: THE IMPACT OF PACT/RAD, TESTIMONY OF ERIN BURNS-MAINE, *supra* note 150, at 1–2.

structurally and systematically forecloses certain possible trajectories for public housing.

As briefly outlined above, scholars have generally developed the three intersecting analyses of neoliberalism: (1) neoliberalism as a class-based political project seeking to re-establish and expand capital accumulation after a lull under Keynesianism;¹⁷⁶ (2) neoliberalism as a rationality that infects all aspects of society, including the law; and (3) neoliberalism as a normative theory on the nature of freedom and democracy.¹⁷⁷ Taken together, these currents describe different facets of neoliberalism as a whole. By using these theories to aid in understanding the costs of the privatization of public housing, this Section will push back against narratives favored by pro-RAD actors and provide counter-narratives grounded in real-world consequences and tenant experiences. Specifically, this Section will argue that RAD and the Blueprint are classically neoliberal privatization schemes that are designed to prioritize profits for the economic elite (specifically, private landlords, developers, and management companies) at the expense of public housing tenants. Further, such prioritization of profit over tenants is the necessary result of neoliberal rationality, which has systematically infected almost all aspects of society, including the law, since neoliberalism's ascendance from the 1970s onward. Neoliberal logics lead not only to the treatment of individuals, including tenants, as solely economic actors, but also undermines holistic tenant well-being and the building of political solidarity among tenants necessary to form a powerful movement challenging privatization.

A. RAD is a class-based political project that re-establishes capital accumulation for the economic elite via privatization

The conversion of public housing to project-based Section 8 through RAD and the Blueprint is not only a quintessential example of privatization—as much as NYCHA, HUD and certain advocates deny that fact—but it is also a prime example of accumulation by dispossession. Specifically, these programs privatize and financialize a public asset after manufacturing a crisis: the deterioration and mismanagement of public housing. Disinvestment in the welfare state caused the crisis.¹⁷⁸ The economic elite then manipulated the emergency to ensure a redistribution of capital from the poorest (public housing tenants) and the public purse to the wealthiest (real estate developers, landlords, management companies, and private investors).¹⁷⁹ This process requires, and is dependent on, use of the

176. Keynesianism is an economic theory that became dominant from 1946 to 1976 and posits that government intervention is necessary to stabilize the economy by stimulating demand. See Jim Probasco, *Keynesian Economics: A Depression-Era Idea That's Seen a Resurgence in the 21st Century*, BUS. INSIDER (July 13, 2022), <https://www.businessinsider.com/personal-finance/keynesian-economics> [<https://perma.cc/LX8K-DFZZ>].

177. See *supra* Introduction.

178. See Gandour, *supra* note 9, at 25–42.

179. See DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 160–65 (2005).

apparatus of the state, namely HUD, PHAs, and the judiciary, to facilitate privatization and uphold the interests of private capital.¹⁸⁰

In many ways, RAD and its progeny closely align with David Harvey's understanding of neoliberalism, which is, first and foremost, a theory of economic and political practices that seek to maximize individual entrepreneurial freedom because such is best for human well-being.¹⁸¹ This vision views the role of the state as building and preserving institutional frameworks that best advance necessary individual freedoms, such as strong private property rights and the ability to buy, sell, and invest through free markets and free trade.¹⁸² While the neoliberal state must guarantee certain institutions, such as “the quality and integrity of money,” as well as the “military, defen[s]e, police, and legal structures and functions required to secure private property rights and to guarantee, by force if necessary, the proper functioning of markets,” this understanding of neoliberalism contends that the role of the state ends there.¹⁸³ The state has no role in markets, which are to be left to develop on their own through market signals and rational economic actors.¹⁸⁴

Harvey and others view this theory as a class-based political project because it arose in response to both the hegemony of Keynesianism in the post-World War II era and the stagflation crisis in the 1970s and 1980s.¹⁸⁵ Neoliberalism sought to advance the interests of economic elites—private property owners, businesses, corporations, and finance capital—by promoting the opening up of new markets for capital accumulation, after those interests had taken a backseat under Keynesianism.¹⁸⁶ What was required to transform Keynesian societies such as the U.S. into neoliberal ones was a vast array of economic and political policy choices promoted as advancing the values (though distorted) of freedom and social justice.¹⁸⁷ Chief among these was the creation of a favorable climate for business interests, including deregulation; privatization; the prioritization, and essential guarantee, of financial interests over all others; austerity measures to reduce public spending on the welfare state; the shifting of political decision-making from

180. *See id.* at 2, 76–77.

181. *Id.* at 2.

182. *Id.*

183. *Id.* at 2, 7.

184. *Id.* at 2.

185. The rise of neoliberalism in the 1970s and 1980s occurred when the world was seeing a crisis of capital accumulation, namely when inflation and unemployment were high, tax revenues decreased, and social expenditures rose dramatically. *See id.* at 12–15. Under Keynesianism, the dominant economic policy since the end of World War II, economic elites had seen their ability to hoard wealth restrained dramatically, but this was less concerning given high growth rates and returns. *Id.* at 15. However, in the era of stagflation, they grew increasingly concerned about their economic status as real interest rates became negative and investment dividends were low. *Id.* Neoliberalism provided economic elites the tools to transform all areas of society to benefit their increased capital accumulation. *See id.* at 19–31.

186. *Id.* at 3, 7.

187. *See id.* at 22–42.

democratic means to non-democratic ones; and the destruction of all social solidarities.¹⁸⁸

Working together, these choices have allowed for the crowning achievement of neoliberalism, which is, according to Harvey, accumulation by dispossession.¹⁸⁹ That is, the “continuation and proliferation of accumulation practices which Marx had treated of as ‘primitive’ or ‘original’ during the rise of capitalism” and is characterized primarily by “redistribut[ion], rather than [generation, of] wealth and income.”¹⁹⁰ Accumulation by dispossession thus favors the privatization and commodification of public assets, which allow for new areas of accumulation in fields that had previously been off limits for profit generation.¹⁹¹ Financialization is also a key feature, as it allows for redistribution through “speculation, predation, fraud, [] thievery” and the skimming off of value through fees.¹⁹² Further, the management and manipulation of crises is a large part of accumulation by dispossession because it allows for the elite to create debt crises that can be manipulated to ensure wealth transfers from the poorest to the richest.¹⁹³ Finally, the fourth feature of accumulation by dispossession is the state’s direct engagement in redistribution of wealth from the lower to the upper classes through government policies.¹⁹⁴ The material result of the rise and success of neoliberalism is the widening of economic inequality, an increase in economic precarity among the lower classes, and a destruction of social solidarities necessary for democracy.¹⁹⁵

1. Turning over control and ownership of public infrastructure to private entities

RAD and the Blueprint are privatization schemes because they allow private entities to take ownership and control over public infrastructure in order to make a profit. RAD is a “private-public partnership” that converts public housing developments that are owned and operated by government entities with public funding to infrastructure that is partly, if not fully, owned by private entities.¹⁹⁶ In NYC, NYCHA remains the deed owner of the buildings while the new landlord ground leases the developments from NYCHA on a 99-year lease; the new private entity thus gains an essential property interest in public housing developments for much longer than NYCHA has been in existence, reaps profit from the Section 8

188. *See id.* at 3, 23, 29, 45–48, 64–66, 75.

189. *Id.* at 159.

190. *Id.*

191. *Id.* at 160–61.

192. *Id.* at 161–62.

193. *See id.* at 162–63.

194. *See id.* at 164–65.

195. *See id.*

196. *See id.* at 76–77.

subsidy and tenant rent payments, and gains control over critical infrastructure.¹⁹⁷ Further, RAD allows for private management companies to manage the day-to-day operations of project-based Section 8 buildings and private developers to undertake the rehabilitation of former public housing developments.¹⁹⁸ In NYC, some of the management companies that have taken over RAD buildings have been dubbed “slumlords” for their horrendous treatment of tenants, irresponsible management of buildings and high eviction rates.¹⁹⁹ Yet these bad private actors continue to win bids to manage RAD buildings in NYC.²⁰⁰

The Blueprint seeks to escape the label of “privatization” by creating the Preservation Trust, a state law entity that will ground lease public housing buildings and contract back management responsibilities to NYCHA.²⁰¹ However, simply avoiding allowing private companies to gain the title of “landlord” or “management company” is not enough to save the Blueprint from being a privatization scheme. The Preservation Trust is a public benefit corporation authorized by Article X, Section 5 of the New York State Constitution.²⁰² These corporations serve two generally recognized purposes: (1) to ensure that the government is *not* liable for debts incurred by the public benefit corporation when carrying out public works projects and (2) to carry out such projects with freedom and flexibility that the government is usually not permitted.²⁰³ The New York Court of Appeals has itself recognized that public benefit corporations “enjoy[] an existence separate and apart from the State, even though they exercise a governmental function.”²⁰⁴ Therefore, the Blueprint’s use of a public benefit corporation is a form of privatization by giving away control

197. See Lease Agreement among New York City Housing Authority and PACT II Housing Development Fund Corp (on file with author).

198. N.Y.C. HOUS. AUTH., PLANNING FOR PACT, https://www.nyc.gov/assets/nycha/downloads/pdf/PFP%20Info%20Sheet_English.pdf [<https://perma.cc/FT7G-FJZ7>].

199. See, e.g., Anjali Kamat, *NYCHA Hires Private ‘Slumlord’ to Run Public Housing*, WNYC (Feb. 6, 2019), <https://www.wnyc.org/story/nycha-hires-private-slumlord-public-housing/> [<https://perma.cc/DY7U-CUK4>].

200. See N.Y.C. HOUS. AUTH., NYCHA PACT PROJECTS (Jan. 2024), https://www.nyc.gov/assets/nycha/downloads/pdf/PACT_Dataset.pdf [<https://perma.cc/2YX8-CDLV>]; see also, e.g., Press Release, N.Y.C. Hous. Auth., NYCHA and Resident Leaders Select Beacon Communities, MBD Community Housing Corporation, and Karel Holdings to Deliver \$128.5 Million in Comprehensive Upgrades at Boston Secor, Boston Road Plaza, and Middletown Plaza (Feb. 24, 2023) <https://www.nyc.gov/site/nycha/about/press/pr-2023/pr-20230224.page> [<https://perma.cc/JW64-RC8N>] (Wavecrest selected as management agent); Press Release, N.Y.C. Hous. Auth., NYCHA and Resident Leaders Select National and Local Non-Profit PACT Partners The Community Builders and Ascendant Neighborhood Development to Address \$85 Million in Repair Needs at Metro North Plaza and Gaylord White Houses (Feb. 13, 2023), <https://www.nyc.gov/site/nycha/about/press/pr-2023/pr-20230213.page> [<https://perma.cc/4AYU-9GPY>].

201. *NYCHA Blueprint*, *supra* note 8, at 6.

202. See N.Y. PUB. HOUS. LAW § 628(1); N.Y. CONST. art. X, § 5.

203. N.Y. CONST. art. X, § 5; *In re World Trade Ctr. Lower Manhattan Disaster Site Litig.*, 89 N.E.3d 1227, 1234–35 (N.Y. 2017).

204. *Plumbing, Heating, Piping & Air Conditioning Contractors Ass’n v N.Y. State Thruway Auth.*, 158 N.E.2d 238, 239–40 (N.Y. 1959).

and ownership of public infrastructure to an entity that is designed to function independently and autonomously from the state.²⁰⁵ Further, the Blueprint's reliance on financialization, discussed *infra*, is another form of privatization.

Moreover, as discussed *supra*, the main impetus and justification for the privatization of public housing is the consistent shortfall in public funds to operate and repair public housing from the 1970s onwards. In this way, the deterioration and mismanagement of public housing is a crisis created by the state and now being managed and manipulated by the economic elite to peddle privatization as a solution, a key element of accumulation by dispossession. This "solution" conveniently allows private actors to turn a profit for themselves through extracting rents, government subsidies, fees, and interest rates (including via bond financing) in exchange for poor services or simply lending capital.²⁰⁶

2. Financialization of public infrastructure

RAD and the Blueprint turn to private capital to finance repairs of public housing, which gives private entities control over once-public infrastructure. Under both programs in NYC, the property interest—the leasehold interest—along with government-backed Section 8 subsidies and tenant rental payments are mortgaged and leveraged for loans to fund repairs and rehabilitation work; these loans must be paid back with interest, lining the pockets of financiers.²⁰⁷ Further, under the Blueprint, the Preservation Trust is authorized to issue bonds, notes, or other obligations to raise private money for repairs, using the leasehold interest, government subsidies, and tenant payments as collateral.²⁰⁸ Such a debt funding model allows financial interests, including investment returns, to drive housing policy. This may have the effect of increasing evictions, as has already been seen in RAD, and enforcement of draconian rules designed to surveil and punish the poor.²⁰⁹ In the event of a default, the bondholders would have the right to collect on their collateral, which includes the leasehold interest. That means the control and operations of developments privatized and financialized under the Blueprint

205. See HARVEY, *supra* note 179, at 65, 76–79.

206. *Id.* at 162–64.

207. See LEGAL SERVICES NYC, *supra* note 99, at 14–15; N.Y.C. HOUS. DEV CORP., NYCHDC TERM SHEET: PACT PRESERVATION PROGRAM (2021), https://www.nychdc.com/sites/default/files/202107/HDC%20NYCHA%20Preservation%20Term%20Sheet.FINAL_.pdf [<https://perma.cc/ZZK2-MR8A>].

208. See N.Y. Pub. Hous. Law §§ 628, 637, 639; See NYCHA *Blueprint*, *supra* note 8, at 6.

209. See “*The Tenant Never Wins*”, *supra* note 4, at 50–68; N.Y.C. COUNCIL COMM. ON PUB. HOUS. HEARING ON OVERSIGHT: THE IMPACT OF PACT/RAD, TESTIMONY OF RAFAEL MOURE-PUNNETT, *supra* note 150.

could ultimately be operated by bondholders.²¹⁰ The same arguably goes for RAD buildings that have mortgaged their leasehold interest for repairs.

The potential for profit from RAD and the Blueprint includes the payment of fees from public money to private entities for their time, expertise, and services. This includes developer fees, social service fees, construction fees, and management fees.²¹¹ These types of fees are an example of one of the “[i]nnumerable ways” private entities can “skim off values from within the financial system,” even if such entities add no value to the PHA or tenants.²¹² Indeed, as was discussed *supra* Part II, RAD tenants often complain that the quality of the rehabilitation work is poor; the new private managers at best ignore their needs and at worst make mistakes that jeopardize tenants’ housing; and many tenants have seen a diminishment in their rights post-conversion.

3. *Use of the legal system to facilitate and uphold privatization*

RAD and the Blueprint are only possible through Congressional authorization and the use of state entities and the legal system.²¹³ It is PHAs that make, and HUD that receives and approves of, RAD and Section 18 disposition applications.²¹⁴ More than simply participating in and facilitating an application process, PHAs and HUD work closely with private industry to share knowledge and expertise, ensuring that the process is favorable to industry interests.²¹⁵ For example, the Council of Large Public Housing Authorities founded the RAD Collaborative, an organization working to “build a community of practice around [RAD]” through “peer sharing and exchanges” such as “communications, best practices, lessons, advancements and productive working relationships among”

210. *See* Bondholders—In general, 7 Fletcher Cyc. Corp. § 3152; Right of bondholders to bring foreclosure in general, 7 Fletcher Cyc. Corp. § 3153. The statutory scheme does not permit the Preservation Trust to change “the affordable character” of the buildings. N.Y. Pub. Hous. Law § 631(1)(a). NYCHA believes that the bondholders are most interested in the TPV subsidy payments from the government and would not be interested in operating or running a subsidized housing building.

211. *See, e.g.*, PACT Renaissance Collaborative LLC Amended and Restated Operating Agreement Between PRC Managing Member LLC and NYCHA PACT Member LLC 20 (Nov. 30, 2020) (describing a property management fee of \$97/unit for the PACT Manhattan Bundle) (on file with author); “Development Budget,” PACT Manhattan Bundle: PACT Renaissance Collaborative 2 (listing a developer’s fee as 10% of costs) (on file with author); Approved Renovation Budget for PACT Manhattan Bundle (describing the construction costs, including \$17,350,639 for “overhead and profits”) (on file with author); Approved Budget for PACT Manhattan Bundle (describing “Resident/Social Service Expense” as \$343,600) (on file with author).

212. HARVEY, *supra* note 179, at 161.

213. *See* 42 U.S.C. § 1437f note (RAD statute); 42 U.S.C. §§ 1437f, 1437f(o), 13661-13664 (project-based Section 8); 42 U.S.C. § 1437p (disposition and demolition).

214. *See supra* note 213.

215. *See Building with RAD*, RAD COLLABORATIVE, <http://www.radcollaborative.org/> [<https://perma.cc/5P2D-R7D8>] (last visited Mar. 3, 2024). For more on how private-public partnerships promoted housing discrimination across the U.S., *see* KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP (2019).

public and private entities with a stake in RAD conversions.²¹⁶ Notably, in its creation, the RAD Collaborative received support from the National Equity Fund, a nonprofit focused on development of affordable housing through LIHTC; the HAI Group, an insurance company; Reno & Cavanaugh, a real estate law firm; and CF Housing Group, a consulting firm where, *inter alia*, former HUD officials advise PHAs on their RAD conversions.²¹⁷ As such, RAD and the Blueprint depend heavily on the use of the state apparatus, working in lock-step with private actors, to facilitate the privatization of public assets and, thus, the movement of wealth upwards.

Beyond the use of state processes and collaboration between the private and public sectors, these schemes also use private law—that is, contract and property law—to restrict the use of the public housing developments post-conversion.²¹⁸ In NYC, a complex web of legal documents numbering in the tens of thousands of pages per conversion bundle (a group of developments that convert together and are leased to the same private landlord) govern the process. The general legal scheme is an automatically-renewing 99-year ground lease conveying a property interest from NYCHA to the new private landlord and an automatically-renewing Housing Assistance Payments (HAP) contract for a term of 20 years between the new landlord and NYCHA so that the new landlord can receive Section 8 subsidy payments. A host of additional documents restricts how the new private entities may use and operate the buildings and land.²¹⁹ These include protections for tenants' rights, as required under the RAD statute, some of which are also

216. *About the Collaborative*, RAD COLLABORATIVE, <http://www.radcollaborative.org/about-us> [<https://perma.cc/8GPQ-UBE6>] (last visited July 1, 2024).

217. *Id.*; see also Chase Cook, *Annapolis Housing Authority Begins RAD-Ical Change for Redevelopment*, CAPITAL GAZETTE (June 22, 2019), <https://www.capitalgazette.com/politics/ac-cn-haca-approves-rad-1011-story.html> [<https://perma.cc/P9RV-HMQW>]; *About NEF*, NAT'L EQUITY FUND, <https://www.nationalequityfund.org/who-we-are/about-nef/> [<https://perma.cc/9F3W-LBTE>] (last visited Mar. 3, 2024); *About Us*, HAI GRP., <https://www.housingcenter.com/about-us/> [<https://perma.cc/7EVY-M5ZS>] (last visited Mar. 3, 2024); *Our Team*, RENO & CAVANAUGH PLLC, <https://renocavanaugh.com/our-team> [<https://perma.cc/8BSB-MFB5>] (last visited Mar. 3, 2024); Donna Kimura, *Pop Quiz With Patrick Costigan*, AFFORDABLE HOUS. FIN. (Sep. 7, 2016), https://www.housingfinance.com/news/pop-quiz-with-patrick-costigan_o [<https://perma.cc/Z4AA-H8E3>].

218. As of the writing of this article, there have been no conversions under the Blueprint, meaning the legal scheme used for conversions discussed here is based on RAD transactional documents that the author has reviewed. NYCHA has suggested the Blueprint conversions will be modeled on RAD conversions.

219. See *Permanent Affordability Commitment Together: PACT Resources for Residents*, N.Y.C. HOUS. AUTH., <https://www.nyc.gov/site/nycha/about/pact/resident-resources.page> [<https://perma.cc/77J7-HJVL>] (last visited Mar. 4, 2024) (see “PACT Template Documents” at the bottom of the page). Among these are a RAD Use Agreement, an Operating Agreement, a Management Agreement, a Control Agreement, a Declaration of Restrictive Covenant and a Regulatory Agreement. *Id.*

enumerated in tenants' leases. The result is the use of the force and violence²²⁰ of the legal system to facilitate the privatization of public housing under the guise of promoting tenants' rights.²²¹

In defending privatization, HUD, PHAs, and proponents of RAD and the Blueprint often point to how the land and buildings are restricted to certain uses with these contracts, leases, covenants, and use agreements.²²² But it is not clear these contractual and property law protections are sufficient to protect tenants' rights, and the long-term affordability of these developments is unclear.²²³ For example, were the HAP contract to be terminated by the PHA or HUD for continued breach by the private landlord, it is unclear how the other transactional documents would operate to continue to keep the buildings permanently affordable and limited to currently eligible tenants.²²⁴

In addition to a turn towards private law, RAD and the Blueprint change which federal regulations apply to the buildings post-conversion. Public housing is governed by a slew of regulations that prescribe, *inter alia*, the role of the housing authority, tenants' rights and how admission and occupancy of public housing is to function.²²⁵ After conversion to the PBV program, those regulations no longer apply unless directly specified by the RAD statute, and the buildings are governed by the relevant project-based Section 8 regulations.²²⁶ As will be demonstrated *infra*, the switch from one set of regulations to another is not simply a necessity for funding that does not affect the material rights of tenants. Rather, the change from regulations governing the public provision of housing to

220. I use violence here to describe the imposition of RAD conversions on tenants who object to the privatization of their homes and attendant loss of rights but must ultimately comply with the program requirements in order to avoid eviction and homelessness. See generally Robert M. Cover, *Violence and the World*, 95 YALE L.J. 1605 (1985); Conor Friedersdorf, *Enforcing the Law Is Inherently Violent*, ATLANTIC (June 27, 2016), <https://www.theatlantic.com/politics/archive/2016/06/enforcing-the-law-is-inherently-violent/488828/> [<https://perma.cc/5DV3-VB4B>].

221. See HARVEY, *supra* note 179, at 7.

222. See Michael Kimmelman, *A Rebirth in the Bronx: Is This How to Save Public Housing?*, N.Y. TIMES (Aug. 19, 2021), <https://www.nytimes.com/2021/08/05/arts/design/bronx-public-housing.html> [<https://perma.cc/ZDT9-9SJ9>]; RAD COLLABORATIVE, BEING BETTER, MORE CLEAR & FAIR ABOUT IMPLEMENTATION (2019), <https://static1.squarespace.com/static/5693b0579cadb61a0a1cda98/t/5ce4372cf8a58d0001fff846/1558460205837/RC+View+4-15-19.pdf> [<https://perma.cc/6LRM-F3WJ>].

223. See Kimberly Burrowes & Janae Ladet, *A Program Is Only as Good as the People: Protecting Tenant Rights in RAD Implementation*, HOUS. MATTERS (Jan. 25, 2018), <https://housingmatters.urban.org/articles/program-only-good-people-protecting-tenant-rights-rad-implementation> [<https://perma.cc/X5VJ-LRSW>]; Memorandum from the NHLP to Affordable Housing and Tenant Advocates on Rental Assistance Demonstration – Long-Term Affordability Restrictions, NAT'L HOUS. L. PROJECT (July 21, 2015), [https://nhlp.org/files/NHLP-RAD_LTAffordability%20\(final\).pdf](https://nhlp.org/files/NHLP-RAD_LTAffordability%20(final).pdf) [<https://perma.cc/LJD2-SZBD>].

224. Memorandum from the NHLP to Affordable Housing and Tenant Advocates on Rental Assistance Demonstration, *supra* note 223.

225. See 24 C.F.R. pts. 902, 903, 905, 941, 943, 945, 960, 963, 964, 966, 970, 971, 972, 984, 990 (2023).

226. See 24 C.F.R. pt. 983 (PBV) (2023); 24 C.F.R. pts. 880, 881, 883, 884, 886 (PBRA) (2023).

regulations concerning private contractors provides cover and space for the legal system to impose neoliberal logics to tenants' claims for equivalent rights post-conversion. Such logics tend to favor diminishment of tenants' rights and power, as is the case with tenants' transfer rights.

4. The possible future of the privatization of public housing as a class-based political project

As Harvey notes, neoliberalism relies on the use of private-public partnerships to integrate business into governance so that the business of the state is essentially business.²²⁷ This is clear when examining the intricacies of, outcomes of, and support for RAD and the Blueprint. The privatization of public housing uses the state to invent a new market for the economic elite to redirect and redistribute wealth from the public (via payment of public funds for fees or subsidies) and from public housing tenants (via rent payments) to themselves.²²⁸

Many tenants fear that privatization will lead to the wholesale loss of extremely affordable public housing. Although that has yet to happen, these fears are not unfounded. Tenants, advocates, and policymakers do not and cannot know how the courts will enforce the myriad transactional documents undergirding RAD conversions in the event that there is a breach. Restrictions on the use of the land and buildings are tied to the interpretation of these contracts and property documents, which, as will be discussed *infra*, is not truly limited in any way under the law. And history shows that under neoliberalism, the state and legal system will privilege financiers' and bondholders' rights above all else, even if that means ordinary people will go without essential services.²²⁹

B. RAD prioritizes profit over tenants because it adopts and is based on a neoliberal rationality

The privatization of public housing is only made possible from the dissemination of neoliberal rationality—a normative set of ideas on how government and individuals should act—into all areas of life, including the legal system. From its inception to its implementation and reaction to tenant dissent, RAD and the Blueprint require various actors, including the courts, to make particular value judgments according to neoliberal logics.²³⁰ This includes prioritizing efficiency for wealth accumulation over power of tenants, neutrality over equality, anti-politics over democracy, and private law over public law.²³¹

227. HARVEY, *supra* note 179, at 76–77.

228. *See id.* at 65.

229. *See id.* at 45, 73–74.

230. *See generally*, BROWN, UNDOING THE DEMOS, *supra* note 18, at 62–72.

231. Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L. J. 1786, 1817–32 (2020); Brabazon, *supra* note 15, at 168–85.

Critical to delineating the key values, principles, and assumptions animating RAD is Wendy Brown's theory of neoliberalism as a rationality writ large. Drawing on Michel Foucault's analysis in his 1978-79 Collège de France lectures, Brown argues that neoliberalism is "an order of normative reason that, when it becomes ascendant, takes shape as a governing rationality extending a specific formulation of economic values, practices, and metrics to every dimension of human life."²³² Brown contends that this rationality extends neoliberal economic principles and logics into all non-economic areas of life and conceives of human beings, principally and foremost, as rational and individually-motivated market actors (*homo oeconomicus*) in all realms, even those unrelated to money or monetization.²³³ In so doing, neoliberal rationality re-shapes and re-forms the "knowledge, form, content, and conduct appropriate in" non-economic spheres of life.²³⁴

The key political rationality of neoliberalism is that,

"[T]he economy is at once model, object, and project. That is, economic principles become the model for state conduct, the economy becomes the primary object of state concern and policy, and the marketization of domains and conduct is what the state seeks to disseminate everywhere."²³⁵

Undoubtedly, the specific contours of neoliberal rationality derive, in part, from neoliberalism's general view of classical and neoclassical economic liberalism and the economic ideas and claims discussed *supra* in Part III(a).²³⁶

Further, Brown contends that neoliberal rationality is distinct in three ways, among the most significant for the purposes of this Article is that, "we are everywhere *homo oeconomicus* and only *homo oeconomicus*."²³⁷ As *homo oeconomicus* gains dominance in all spheres of life through dissemination of a neoliberal rationality, Brown argues that *homo oeconomicus* pushes out *homo politicus*, "the creature animated by and for the realization of popular sovereignty as well as its own individual sovereignty."²³⁸ In other words, under neoliberalism, *homo oeconomicus*'s domination vanquishes human beings' ability for deliberate self-rule and governance, which was critical to the development of democracy and shared belief in the ideals of "political equality and freedom, representation, popular sovereignty, and deliberation and judgment about the public good and the common."²³⁹

232. BROWN, UNDOING THE DEMOS, *supra* note 18, at 30.

233. *Id.* at 30–31.

234. *Id.* at 31.

235. *Id.* at 62.

236. *See id.*

237. *Id.* at 33–34.

238. *Id.* at 86–87.

239. *See id.* at 86–99.

The reach of neoliberal rationality to all areas of life includes the infection of the juridical because the juridical shapes and codifies the economic and is a “medium for disseminating neoliberal rationality beyond the economy, including to constitutive elements of democratic life.”²⁴⁰ The legal realm has always determined and elevated narratives about political rights, citizenship, and democracy.²⁴¹ Under neoliberalism, the role of the juridical has not changed, and in disseminating neoliberal logics, the juridical plays an active role in destroying the *demos*.²⁴²

Among the many ways that the law disseminates and models neoliberal rationality, legal scholars proposing a law and political economy framework, such as Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski and K. Sabeel Rahman, have characterized neoliberal legal rationality as the prioritization of efficiency for wealth accumulation over power, neutrality over equality, and anti-politics over democracy.²⁴³ Others such as Honor Brabazon have generally agreed, arguing that the key legal logics of neoliberalism include the shift from public to private law to match neoliberal preference for private markets and opposition to a common public interest.²⁴⁴ This involves de-politicizing the social interactions that the law mediates by advancing the idea that private law is neutral and free from distributional consequences.²⁴⁵

Neoliberal legal logics thus tend to create a preference for using the courts or administrative processes, with their faux air of neutrality and technical expertise, to resolve political debates.²⁴⁶ But as will be illustrated *infra*, this preference for seemingly “neutral” legal procedures simply provides cover for the substantive accumulation of wealth by dispossession and the marginalization of individuals’ rights. The use of the courts is to lend legitimacy and power to outcomes that overwhelmingly favor economic elites.²⁴⁷ When the substantive law may help the marginalized or dispossessed gain power and enforce their rights, neoliberal rationality dictate that the courts must foreclose a cognizable claim, instead channeling the *demos* into procedural engagement, such as voting or notice and comment, that can easily be rigged. In contrast, democratic contestations such as

240. *Id.* at 151.

241. *See, e.g.,* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

242. BROWN, UNDOING THE DEMOS, *supra* note 18, at 151–52.

243. *See* Britton-Purdy, Grewal, Kapczynski & Rahman, *supra* note 231, at 1818–32.

244. Brabazon, *supra* note 15, at 168–85.

245. *Id.* at 168–69 (arguing that the capitalist project purposely developed the law to “appear to be universal and fixed, independent of historical conjuncture and political will” when in reality the law was “no more neutral and less political than it had been in feudal times.”).

246. *Id.* (“Power and authority were seen less to be inflicted by one person on another and more as the mutual subordination of both parties to the independent reason of a neutral and rational authority: the law.”).

247. *See id.*

protest are disfavored.²⁴⁸ All of this is visible in RAD’s legal structure, creation, and practical effects on tenants, as will be explained in this Section.

1. The creation and implementation of RAD and the Blueprint for Change itself prioritizes efficiency for wealth accumulation by the economic elite over all else

To create RAD and the Blueprint, political actors including President Obama and the N.Y. legislature believed that creating an entirely new administrative and legal process was a better way to fund repairs for public housing developments than simply adequately funding public housing with public money (such as from taxation). Such a convoluted course can only seem efficient if efficiency is measured as efficiency for the accumulation of wealth.

For example, the Government Accountability Office (GAO) reviewed HUD’s calculation of RAD’s leverage ratio, meaning how much private investment is generated per dollar of public funding.²⁴⁹ HUD had estimated that the leverage ratio for RAD fluctuated between 19:1 and 9:1 from fiscal year 2014 to 2017.²⁵⁰ For fiscal year 2017, HUD announced that the leverage ratio was 19:1, meaning “that RAD generated \$4 billion in public-private investment, leveraging \$19 in private investment for every taxpayer dollar in public housing funds.”²⁵¹ When GAO reviewed these calculations, it determined that they were wildly incorrect because (1) HUD did not use data reflecting costs at completion of construction (instead relying on projected costs at time of closing); (2) did not properly segregate out public funding sources from private ones; and (3) did not report its leveraging by public or private sources.²⁵² Recalculating the ratios properly, GAO determined that the correct leveraging ratio for private-sector investment was 1.23:1, meaning only \$1.23 of private investment is generated per \$1 of public housing funds.²⁵³ Notably, HUD’s original calculations failed to distinguish between other public sector money, such as LIHTC, therefore inflating the RAD leverage ratio when the money “leveraged” was in fact mostly public money that could have been directed towards other affordable housing.²⁵⁴

Similarly, the basis of the Blueprint—the creation of the Preservation Trust under state law—has already been implemented for many other public services in

248. *See id.* at 174–77.

249. U.S. GOV’T ACCOUNTABILITY OFF., RENTAL ASSISTANCE DEMONSTRATION: HUD NEEDS TO TAKE ACTION TO IMPROVE METRICS AND ONGOING OVERSIGHT 10, 16 (2018), <https://www.gao.gov/assets/gao-18-123.pdf> [<https://perma.cc/RAQ3-S6CB>].

250. *Id.* at 10.

251. *Id.* at 11, 11 n.17.

252. *See id.* at 10–15.

253. *Id.* at 15–17.

254. *See id.* at 14–17, 48–54; *see also* Schwartz & McClure, *supra* note 75. The GAO report shows that \$6.05 billion of the total \$8.59 billion resources for RAD is public money of some sort, including PHA funding, LIHTC, other federal funds, and other state and county funds. *See* U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 249, at 53–54.

New York.²⁵⁵ Among those are the New York State Thruway Authority (NYSTA), which manages New York State's highways, and the Metropolitan Transit Authority (MTA), which runs NYC's subways and commuter rails.²⁵⁶ The NYSTA has bowed to pressure from private investors to raise tolls on drivers in order to maintain its bond ratings and lower borrowing costs, at the expense of drivers themselves.²⁵⁷ As toll prices have risen, the NYSTA has seen its debt levels, debt servicing, and reliance on debt financing rise dramatically.²⁵⁸ Similarly, the MTA has seen a steep rise in debt servicing costs while experiencing a decline in revenues and service quality, leading paradoxically to increased fares on riders, both before and after the pandemic.²⁵⁹ A comparative look at public benefit corporations with the power to engage in debt financing shows that such financing often leads to increased costs for the public while the quality of service stagnates or declines.²⁶⁰

255. The Preservation Trust was conceived based on New York's School Construction Authority, a public benefit corporation carrying out construction for public schools. See *NYCHA Blueprint*, *supra* note 8, at 6.

256. See N.Y. Pub. Auth. Law § 1201 (MTA); N.Y. Pub. Auth. Law § 352 (NYSTA).

257. See *Moody's Wants New York to Raise Tolls on Thruway*, NBC N.Y. (Nov. 2, 2019), <https://www.nbcnewyork.com/news/local/moodys-wants-new-york-to-raise-tolls-on-thruway/2081919/> [<https://perma.cc/4SVW-KWDP>]; Mark Wozniak, *Toll Hike Proposed by NYS Thruway Authority*, WBFO NAT'L PUB. RADIO (Dec. 19, 2019), <https://news.wbfo.org/post/toll-hike-proposed-nys-thruway-authority> [<https://perma.cc/23HE-A2RG>]; THOMAS P. DINAPOLI, OFF. OF THE N.Y. STATE COMPTROLLER, ASSESSMENT OF NEW YORK STATE THRUWAY AUTHORITY FINANCES AND PROPOSED TOLL INCREASE 17–19 (2023), <https://www.osc.state.ny.us/files/reports/pdf/assessment-thruway-authority-finances-toll-increase.pdf> [<https://perma.cc/V5F2-BX9E>].

258. *Id.* at 2; see also Keegan Trunick, *New York State Thruway toll hikes now in effect*, SPECTRUM NEWS (Jan. 1, 2024), <https://spectrumlocalnews.com/nys/central-ny/politics/2024/01/01/new-york-state-thruway-toll-hikes-now-in-effect> [<https://perma.cc/LNW5-WF33>].

259. See Clayton Guse, *One-fourth of MTA money to go towards debt in 2021: Comptroller*, N.Y. DAILY NEWS (Oct. 13, 2020), <https://www.nydailynews.com/new-york/ny-dinapoli-mta-report-finances-20201013-vivakib2mvg7amb6xd4zvph7q-story.html> [<https://perma.cc/K9LC-H9L3>]; Ana Ley, *How to Improve the M.T.A.? Experts Offer Five Ideas.*, N.Y. TIMES (Apr. 11, 2023), <https://www.nytimes.com/2023/04/11/nyregion/nyc-mta-transit-improvements.html> [<https://perma.cc/7K5M-5BN6>] (discussing the MTA's debt burden from bond financing); Ana Ley, *Price of N.Y.C. Subway Ride Will Go Up for the First Time in Years*, N.Y. TIMES (July 19, 2023), <https://www.nytimes.com/2023/07/19/nyregion/mta-subway-fare-hikes.html> [<https://perma.cc/VJB6-JNU8>]; David Meyer and Vincent Barone, *Subway Riders Might Pay for MTA's Debt with Fare Raises, Cut Service*, N.Y. POST (Mar. 11, 2020), <https://nypost.com/2020/03/11/subway-riders-might-pay-for-mtas-debt-with-fare-raises-cut-service/> [<https://perma.cc/W6XH-NTLG>]; Ameena Walker, *MTA Could Face \$42B in Outstanding Debt by 2022: Report*, N.Y. CURBED (Oct. 11, 2018), <https://ny.curbed.com/2018/10/11/17964786/mta-budget-deficit-debt-report-thomas-dinapoli> [<https://perma.cc/D6U6-GJ9G>]; Jim Dwyer, *Winners in M.T.A.'s Bond Sale: Underwriters and Politicians*, N.Y. TIMES (Dec. 7, 2004), <https://www.nytimes.com/2004/12/07/nyregion/winners-in-mtas-bond-sale-underwriters-and-politicians.html> [<https://perma.cc/S3P6-S58Z>].

260. Beyond this, debt financing tends to be based on, and lead to, inequality. For more on this topic, see generally DESTIN JENKINS, *THE BONDS OF INEQUALITY: DEBT AND THE MAKING OF THE AMERICAN CITY* (2021).

RAD and the Blueprint cannot logically be viewed as “efficient” ways of preserving or creating affordable housing for low-income tenants at a reasonable cost to the Congressional budget.²⁶¹ Rather, they can only be viewed as efficient for the continued accumulation of capital by dispossession.

2. Judicial interpretation of RAD transactional documents is often based on background assumptions that privilege wealth accumulation and market imperatives over the power and well-being of tenants

RAD and the Blueprint assume that the courts will “neutrally” interpret the transactional documents governing each conversion in a variety of potential legal cases, including in eviction or conditions cases, in cases challenging the scope or implementation of a conversion, or in cases on the financial obligations of all parties with a stake in the conversion. One “neutral” method of interpretation is viewing the documents in a purely cost-benefit analysis, namely that some “equivalent” protection of tenants’ rights through contract and property law is the same as the tenant protections under public housing law. But this type of analysis, which equates rights protected under public law with rights protected under private law, requires certain assumptions that heavily favor specific material outcomes. This includes assuming that public housing tenants have the same bargaining power as all others on the private market; the means to an end do not matter so long as the outcome sought by a tenant is conceivably possible; and the value of public goods are not fundamentally altered when substituted with the private market.

One of the best illustrations of the neoliberal juridical approach in cases concerning privatized public housing is the change in RAD tenants’ transfer rights.²⁶² NYCHA public housing tenants have the right to transfer to other public housing apartments (“site-based transfers”) across all five boroughs so long as the reason for the transfer fits within one of the approved reasons in NYCHA’s transfer policy.²⁶³ These approved reasons are far-ranging, including, for example, an uninhabitable apartment, need for a reasonable accommodation, living in an under-occupied or extremely overcrowded unit, being the victim of domestic violence or a traumatic incident, requiring medical care that is more than

261. See Brett Christophers, *Why Are We Allowing the Private Sector to Take Over Our Public Works?*, N.Y. TIMES (May 8, 2023), <https://www.nytimes.com/2023/05/08/opinion/inflation-reduction-act-global-asset-managers.html> [https://perma.cc/SV6S-DT6H].

262. Aside from transfer policies, these types of assumptions are also baked into various other changes in tenants’ rights after privatization. This includes changes in succession rights after conversion; to repair procedures and in repair oversight; to how and where recertifications are performed; and to tenants’ rights under various consent decrees and settlements that were binding on the PHA as a landlord, but no longer bind the new private entities post-conversion.

263. See “Chapter I: Occupancy,” *NYCHA Management Manual*, 33–34 (Nov. 28, 2017) (on file with author); “Appendix F: Transfer Priorities and Occupancy Standards for Families,” *id.* at 1–6; N.Y.C. HOUS. AUTH., TENANT SELECTION AND ASSIGNMENT PLAN (2023), <https://www.nyc.gov/assets/nycha/downloads/pdf/TSAPlan.pdf> [https://perma.cc/V48A-HAH7].

sixty minutes away, “[l]ong-term friction between neighbors,” or a work commute that is longer than ninety minutes.²⁶⁴

While carrying out my Skadden Fellowship project, my organization and I learned that after a building converts from public housing to RAD, NYCHA denies tenants the right to a site-based transfer unless a tenant is seeking to transfer within the same development or bundle of developments that converted together in one transaction (meaning the developments with the same new private landlord under one set of transactional documents).²⁶⁵ Since developments of one geographic area tend to convert as one bundle,²⁶⁶ this effectively means that tenants in RAD buildings can only transfer within one NYC neighborhood. NYCHA’s convoluted legal reasoning for denying tenants equivalent transfer rights in RAD buildings, as documented in a recent case litigating this transfer issue, is that (1) the federal regulations for the PBV program forbid PHAs from effectuating site-based transfers; and (2) giving tenants a tenant-based Section 8 voucher under the Housing Choice Voucher (HCV) program—a voucher that tenants can use to pay for an apartment they secure on the private rental market—is the functional equivalent of a site-based transfer.²⁶⁷

NYCHA’s first argument can easily be dispensed with as a matter of statutory interpretation and comparison with the practices and policies of other

264. “Appendix F: Transfer Priorities and Occupancy Standards for Families,” *supra* note 263, at 1–6.

265. See Respondent’s Brief at 19–32, *Doe v. New York City Hous. Auth.*, No. 22-cv-4460 (LJL), 2022 WL 2072570 (S.D.N.Y. June 9, 2022).

266. See N.Y.C. HOUS. AUTH., NYCHA PACT PROJECTS, *supra* note 200.

267. See Respondent’s Brief, *supra* note 265, at 16–32.

jurisdictions.²⁶⁸ NYCHA’s second argument, however, relies on neoliberal rationality. It equates a tenant-based voucher with a site-based transfer because they should theoretically be able to produce the same outcome: a tenant’s continued ability to live in a suitable unit. But in practice, this outcome is not guaranteed with a tenant-based voucher. In all other respects, a site-based transfer and tenant-based voucher are fundamentally different. With a site-based transfer, a tenant must generally only request the transfer and provide their geographic preferences. Then, the PHA identifies a suitable unit, the tenant approves it, and they move.²⁶⁹ With a tenant-based voucher, a tenant must take on the onus of searching for, applying for, and securing a suitable unit on the private rental market within a specific time period (120 days for NYCHA vouchers).²⁷⁰ A suitable unit must not only match a tenant’s particular needs (*e.g.* accessible unit

268. NYCHA contends that 24 C.F.R. § 983.261(b) mandates that they provide tenants seeking a transfer with a tenant-based voucher. *See* Respondent’s Brief, *supra* note 265, at 20–22. But that is not the plain text or meaning of the federal regulations, as 24 C.F.R. § 983.261(b) requires the PHA to “offer the family the opportunity for continued tenant-based rental assistance, in the form of either assistance under the voucher program or other comparable tenant-based rental assistance” when “the family has *elected* to terminate the [PBV] lease” as described in 24 C.F.R. § 983.261(a). 24 C.F.R. § 983.261(b) (emphasis added). Subsection (a) of that section provides that a “family may terminate the assisted [PBV] lease at any time after the first year of occupancy” as long as the family gives proper notice. *Id.* § 983.261(a). Reading the two provisions together, the obligation and requirement to provide a tenant-based voucher is only triggered when a family “has elected” to terminate the lease after one year of occupancy. *See id.*; *id.* § 983.261(b). A tenant seeking a transfer, especially due to a disability or for domestic violence, is not seeking to voluntarily terminate their lease, but rather to *maintain* their tenancy under their PBV lease in a unit that satisfies all their needs. This is further supported by the title of Section 983.261, which is “[f]amily right to move,” suggesting that this section is meant to protect the rights of tenants, including their right to choose where to live. Beyond this, at least two other jurisdictions—New Orleans and Baltimore—allow for site-based transfers in the RAD PBV program, with approval from HUD. *See* Supplemental Consent Decree, *Bailey, et. al. v. Hous. Auth. Of Balt. City, et. Al.*, No. 1:02-cv-00225-JFM, at 16 (D. Md., Oct. 26, 2015); HOUS. AUTH. OF NEW ORLEANS, HOUSING CHOICE VOUCHER PROGRAM ADMINISTRATIVE PLAN 22–25 (2019), https://www.hano.org/plans/HANOAdminPlan_May2019.pdf [<https://perma.cc/3E9D-HAA7>]. Even if the federal regulations are to be read as NYCHA has suggested, anti-discrimination laws, such as the ADA, arguably require that the regulation be disregarded so that a person with a disability has an equal opportunity to enjoy the same benefits of RAD PBV housing as a non-disabled tenant. While one court has accepted NYCHA’s reading of the regulations in one case in another suit challenging NYCHA’s RAD transfer policies, the court there failed to grapple with how two jurisdictions permit site-based transfers in their RAD PBV programs and how the regulations may be required to yield to properly uphold antidiscrimination laws. *See Liboy v. Russ*, No. 22 Civ. 10334 (VM), 2023 WL 6386889, at *13 n.8 (S.D.N.Y. Sept. 29, 2023). The court’s reasoning relied solely on how 24 C.F.R. § 983.261(c)(2) permits tenant-based voucher assistance for tenants who need to move due to domestic violence, dating violence, sexual assault or stalking. *See id.* Critically, the court failed to recognize that the language in 24 C.F.R. § 983.261(c)(2) is not mandatory, but permissive. *See id.* (“the PHA *may* offer . . .”) (emphasis added). This framing strongly suggests that a tenant-based voucher is meant to be one option among many, including lease bi-furcation or site-based transfers, that PHAs may offer to victims of domestic violence.

269. *See* “Chapter I: Occupancy,” *NYCHA Management Manual*, *supra* note 263, at 36–57.

270. *See* N.Y.C. HOUS. AUTH., HOUSING CHOICE VOUCHER PROGRAM ADMINISTRATIVE PLAN 26 (2023), <https://www.nyc.gov/assets/nycha/downloads/pdf/hcpvadministrative.pdf> [<https://perma.cc/U7ZS-TLLQ>].

for a person with mobility disabilities), but it must also meet the basic required configuration of bedrooms for the household size, have a rent price and utility payment structure that falls within the PHA's allowed Voucher and Utility Payment Standards (the maximum subsidy a PHA will pay on behalf of a household), and meet HUD's required Housing Quality Standards (habitability requirements enforced via an inspection).²⁷¹ If the tenant cannot find a suitable unit within the time allowed by the PHA, the voucher expires and the tenant must remain in their current home.²⁷² A tenant-based voucher therefore subjects tenants to the whims of the private rental market, where they face rampant source of income discrimination against tenants with vouchers.²⁷³ Rental prices have also seen dramatic inflation since the COVID-19 pandemic began to recede in the US.²⁷⁴ As a result, tenants with tenant-based vouchers often cannot find a suitable unit using their voucher because of discrimination, low availability, and higher

271. See, e.g., *id.* at 27–29; *Voucher Payment Standards and Utility Standards*, N.Y.C. HOUS. AUTH., <https://www.nyc.gov/site/nycha/section-8/voucher-payment-standards-vps-utility-allowance-schedule.page> [<https://perma.cc/S8DX-X5GR>] (last visited Aug. 22, 2024); 24 C.F.R. § 5.703 (2024); 24 C.F.R. § 982.402 (2023); 24 C.F.R. § 982.405 (2023); 24 C.F.R. § 982.503 (2023).

272. See N.Y.C. HOUS. AUTH., HOUSING CHOICE VOUCHER PROGRAM ADMINISTRATIVE PLAN, *supra* note 270, at 26.

273. See Gary Rhoades, *Freedom of Choice for Low-Income Renters Still Elusive as States and Cities Scramble to Confront Housing Voucher Discrimination*, 48 HUM. RIGHTS MAG. No. 2, 2023, at 16; Tim McNicholas, Dilcia Mercedes & Walter Smith Randolph, *CBS New York Investigates: Housing voucher discrimination in New York City*, CBS N.Y. (Dec. 19, 2023), <https://www.cbsnews.com/newyork/news/cbs-new-york-investigates-housing-voucher-discrimination-in-new-york-city/> [<https://perma.cc/9FFW-XP2H>]; Mihir Zaveri, *An Ex-D.J. Has a Housing Voucher. He Still Can't Find a Home.*, N.Y. TIMES (Mar. 6, 2023), <https://www.nytimes.com/2023/03/06/nyregion/homelessness-housing-voucher.html> [<https://perma.cc/Q9J3-E5N4>]; Mihir Zaveri, *Discrimination Weakens Tool for Reducing N.Y. Homelessness, Lawsuit Says*, N.Y. TIMES (May 25, 2022), <https://www.nytimes.com/2022/05/25/nyregion/ny-vouchers-homeless-discrimination.html> [<https://perma.cc/CPH7-KTHE>]; Stephanie Wykstra, *Vouchers Can Help the Poor Find Homes. But Landlords Often Won't Accept Them.*, VOX (Dec. 10, 2019), <https://www.vox.com/future-perfect/2019/12/10/21001692/housing-vouchers-discrimination-racism-landlords> [<https://perma.cc/APE8-SSN7>]; Matthew Haag, *'She Wants Well-Qualified People': 88 Landlords Accused of Housing Bias*, N.Y. TIMES (Mar. 15, 2021), <https://www.nytimes.com/2021/03/15/nyregion/real-estate-lawsuit-section-8-discrimination.html> [<https://perma.cc/C2WR-CE8H>].

274. Mihir Zaveri, *Rents Are Roaring Back in New York City*, N.Y. TIMES (Mar. 7, 2022), <https://www.nytimes.com/2022/03/07/nyregion/nyc-rent-surge.html> [<https://perma.cc/VTS9-NSZB>]; Myrian Garcia, *Inflation Sparks 30% Rent Spike for Two-Bedroom Apartments in New York City, Report Finds*, AMNY (Feb. 28, 2022), <https://www.amny.com/real-estate/rent-for-two-bedroom-apartments-in-new-york-city-spikes-by-30-report-finds/> [<https://perma.cc/XTV3-3C5L>]; Anjali Sundaram, *New York City Rents Jump 22.8% In November, as the Rental Market Bounces Back*, CNBC (Dec. 9, 2021), <https://www.cnbc.com/2021/12/09/new-york-city-rents-jump-22point8percent-in-november-as-rental-market-bounces-back.html> [<https://perma.cc/MX9P-P2RM>].

rents not covered by vouchers' payment standards.²⁷⁵ If RAD tenants do not succeed in finding a suitable new apartment, their only option is to remain in their current unit, even if it fails to meet their needs.

To equate a site-based transfer with a tenant-based voucher requires three underlying assumptions: (1) requiring tenants to search and secure their own transfer is more efficient than simply setting up a site-based transfer system; (2) a tenant has equal bargaining power on the private rental market relative to other renters as well as to landlords; and (3) the only significant value of public housing is the literal housing of poor tenants, rather than a place to cultivate community and democratic consciousness. The first assumption values efficiency for NYCHA, the new private landlord and the new private management company rather than for the tenant. Indeed, NYCHA argued in court that it would pose an undue administrative burden for NYCHA to effectuate a site-based transfer for a tenant with disabilities because “it would require NYCHA to overhaul the administration of the [RAD/]PACT waiting lists and design and implement a transfer process that does not currently exist.”²⁷⁶ In other words, NYCHA, which designed and implemented the RAD program across NYC made an ill-advised decision—whether intentionally cruel or lazily conceived—to not maintain a citywide waiting list system for transfers across all five boroughs for RAD tenants, as they do for public housing. Instead, they inexplicably chose to tie RAD waitlists to each conversion bundle.²⁷⁷ NYCHA now brazenly argues in court that it cannot correct its own mistake because doing so would require NYCHA, private landlords and private management companies to expend time, money and resources to implement a better policy that accommodates marginalized, poor and disabled tenants. NYCHA is, in effect, seeking to protect efficiency for wealth accumulation for its private partners at the expense of marginalized tenants. The cost of this “efficiency” is that marginalized tenants are forced to expend their own time, energy, and resources to find housing on their own, sometimes in violation of their rights under civil rights laws.

Relatedly, maximizing RAD's efficiency for wealth accumulation requires that PHAs, HUD, and the courts assume that tenants have equal bargaining power on the private rental market relative to landlords and other tenants searching for apartments. If this were the case, it would be easier for tenants to find affordable private housing. But this assumption does not match reality, as the private housing

275. See Jo Ciavaglia, *Bucks County is raising Section 8 housing payments. Will it bring in more landlords?*, BUCKS CTY. COURIER TIMES (Feb. 7, 2022), <https://www.phillyburbs.com/story/news/2022/02/08/bucks-affordable-housing-hud-rent-landlord-grondahl-tenant-section-8-homeless-eviction-montgomery/6648678001/> [<https://perma.cc/T6GA-F2GR>]; Jacqueline Rabe Thomas, *Why half of affordable housing vouchers in CT go unused: 'A slamming door in my face'*, CT INSIDER (Nov. 30, 2022), <https://www.ctinsider.com/news/article/Half-of-CT-affordable-housing-lottery-winners-17597460.php> [<https://perma.cc/23YS-3J74>].

276. Respondent's Brief, *supra* note 265, at 30.

277. See *id.*; “Section VI: Transfers: Public Housing Program,” *NYCHA Management Manual*, *supra* note 263, at 33–99.

market is rife with source of income and racial discrimination.²⁷⁸ In addition, tenants with vouchers are at a significant disadvantage because the tenant-based vouchers only pay for apartments at a fraction of actual private market rents.²⁷⁹ This makes it nearly impossible for tenants to find suitable apartments at the low rent their vouchers cover. The result is that tenants with tenant-based vouchers often cannot find affordable units on the private rental market, especially given high competition from tenants who can afford rents higher than those covered by PHA Voucher and Utility Payment Standards.²⁸⁰

For example, my client with disabilities, who brought suit against NYCHA on this transfer issue in *Doe v. NYCHA*, experienced brokers and landlords ignoring her requests to view or apply for apartments as soon as she said she had a tenant-based voucher.²⁸¹ She needed to stay in a certain geographic area to remain near her and her children's support network, but she was given a two-bedroom voucher for only \$2,217²⁸² (later raised to \$2,527 after NYCHA and HUD issued a higher payment standard in June 2022)²⁸³ for a three-person family. At the time, the average price for a two-bedroom apartment in Brooklyn, NY jumped from \$3,400 to \$4,421.²⁸⁴ The power imbalance between RAD tenants and market-rate tenants or landlords would not be a factor in a site-based transfer process in which a PHA would provide tenants transfer options in their desired geographic locations. Only by disregarding the relative lack of power of tenants

278. See Claire Corea, *Tenants' Right: The Law on Paper Versus the Law in Practice*, 47 RUTGERS L. REC. 226, 246–48 (2020); Rhoades, *supra* note 273; McNicholas, Mercedes & Randolph, *supra* note 273; see, e.g., Albert H. Fang, Andrew M. Guess & Macartan Humphreys, *Can the Government Deter Discrimination? Evidence from a Randomized Intervention in New York City*, 81 J. OF POL. 127 (2019).

279. Zaveri, *An Ex-D.J. Has a Housing Voucher. He Still Can't Find a Home.*, *supra* note 273; Zaveri, *Discrimination Weakens Tool for Reducing N.Y. Homelessness, Lawsuit Says*, *supra* note 274; Wykstra, *supra* note 274; N.Y.C. HOUS. AUTH., SECTION 8 PAYMENT STANDARD (2023) <https://www.nyc.gov/assets/nycha/downloads/pdf/payment-standards.pdf> [<https://perma.cc/HS6Q-9398>] (showing that the 2023 NYCHA Section 8 voucher payment standard was \$2,387 for a 1-bedroom apartment); *New York, NY Rent Prices*, ZUMPER: RENTAL MKT. TRENDS (Mar. 9, 2023), <https://www.zumper.com/rent-research/new-york-ny> [<https://perma.cc/NH7R-LLG7>] (showing that the March 2023 median rent for a 1-bedroom apartment in New York, NY was \$3,346).

280. See Zaveri, *An Ex-D.J. Has a Housing Voucher. He Still Can't Find a Home.*, *supra* note 273; Zaveri, *Discrimination Weakens Tool for Reducing N.Y. Homelessness, Lawsuit Says*, *supra* note 273; Wykstra, *supra* note 273; Haag, *supra* note 273.

281. See Affidavit of Jane Doe at 3–4, *Doe v. N.Y.C. Hous. Auth.*, No. 22-cv-4460 (LJL), 2022 WL 2072570 (S.D.N.Y. June 9, 2022).

282. N.Y.C. HOUS. AUTH., SECTION 8 PAYMENT STANDARD (Jan. 2022), <https://www.nyc.gov/assets/nycha/downloads/pdf/Section-8-HCV-VPS-NYC-Gov-Version-2021.pdf> [<https://perma.cc/KX5B-BABG>].

283. N.Y.C. HOUS. AUTH., SECTION 8 PAYMENT STANDARD (June 2022), <https://www.nyc.gov/assets/nycha/downloads/pdf/payment-standards.pdf> [<https://perma.cc/3W62-F26A>].

284. See Average Rent in Brooklyn, NY for 2 Bedroom Apartments Between March 19, 2022 and July 30, 2022, ZUMPER, <https://www.zumper.com/rent-research/brooklyn-ny> [<https://perma.cc/XNP6-PJTR>].

with vouchers can NYCHA and courts argue that a site-based transfer is the functional equivalent of providing a tenant-based voucher.

Thirdly, NYCHA's argument assumes that only the outcome—a tenant having the chance to move into another suitable unit—matters when it comes to comparing a site-based transfer and the issuance of a tenant-based voucher. This assumption is based on the idea that being given the opportunity to obtain an outcome through a tenant-based voucher is a neutral objective, meaning it does not favor the tenant or PHA in resolving the issue at hand. Once again, this disregards the power differentials between tenants with tenant-based vouchers and private market tenants and landlords. In enshrining a supposedly neutral goal and ignoring whether tenants are practically able to reach it, NYCHA's argument prioritizes equality of potential legal outcomes over equality in the process and actual outcomes. More fundamentally, NYCHA's disavowal of its responsibility to effectuate site-based transfers also assumes that the purpose of public housing is simply to provide a roof and four walls over the heads of marginalized tenants. However, NYCHA could just as easily assume that public housing, even that which has been privatized, should ensure that marginalized tenants not only have a place to sleep, but also a place to thrive and enjoy “the good life.” The latter can only occur if tenants do not have to worry and expend time, energy, and resources frantically scrambling to find an apartment on the private market.

Not only do NYCHA's RAD transfer policies rest upon these three assumptions, but they also penalize victims of domestic violence; directly violate the RAD Statute's mandate that RAD tenants retain the same rights that they had in public housing;²⁸⁵ and violate antidiscrimination laws prohibiting discrimination on the basis of a tenant's disability, such as the ADA, the Rehabilitation Act (RA), the Fair Housing Act, the New York State Human Rights Law, and the New York City Human Rights Law.²⁸⁶ These laws require that tenants with disabilities have an equal opportunity to access and enjoy the benefits

285. See 42 U.S.C. § 1437f note (9). The RAD statute requires that RAD tenants “shall, at a minimum, maintain the same rights under such conversion as those provided under sections 6 and 9 of [the U.S. Housing Act of 1937]” (hereinafter “Housing Act”). *Id.* Sections 6 and 9 of the Housing Act governs how PHAs must operate public housing. See 42 U.S.C. §§ 1437d, 1437g. A plain reading of the RAD statute thus mandates PHAs to ensure that tenants in RAD buildings retain the same rights they had as public housing tenants. Since NYCHA tenants have a right to site-based transfers that same right must be retained post-conversion. See “Chapter I: Occupancy,” *NYCHA Management Manual*, *supra* note 263, at 33–34.

286. See 42 U.S.C. § 12182(b)(1) (prohibiting, *inter alia*, “denial of the opportunity of” a person with a disability “to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity” on the basis of disability and affording persons with disabilities unequal opportunity to “participate in or benefit from a good, service, facility, privilege, advantage, or accommodation” on the basis of disability); 29 U.S.C. § 794(a) (prohibiting disability discrimination in federally-funded programs and activities); 42 U.S.C. § 3604(f)(2) (prohibiting disability discrimination in the sale or rental of housing in the U.S.); N.Y. Exec. Law §§ 296(2-a), 292 (21) (prohibiting, *inter alia*, disability discrimination in housing, including publicly-assisted housing, and refusals to provide reasonable accommodations in housing); N.Y.C. Admin. Code § 8-107(5)(1) (prohibiting, *inter alia*, disability discrimination in the rental of housing and in housing terms and conditions).

of federal programs and housing and requires the provision of reasonable accommodations to ensure such equal access.²⁸⁷ However, under NYCHA's policy, tenants with disabilities who need to move to a different neighborhood are effectively forced to choose between moving and staying in the PBV program; NYCHA refuses to provide a reasonable accommodation to ensure their continued equal access to the PBV program. This is because tenants with disabilities can only move to another neighborhood with federal assistance if they switch to the HCV Section 8 program. As such, tenants with disabilities requiring transfers are forced to give up a key benefit of the PBV and RAD programs—the provision of a suitable apartment. Instead, their switch into the HCV program puts the burden on tenants themselves to find a suitable, private market apartment. In effect, NYCHA forcibly removes tenants with disabilities requiring a site-based transfer from the PBV program and denies them the program's key benefit on the basis of their disability.

In cases litigating the transfer issue, courts have relied on neoliberal rationality in reading federal regulations and ruling on claims of discrimination on the basis of disability. For example, the court in *Doe* made it clear that whether a RAD tenant seeking to force NYCHA to effectuate a site-based transfer will prevail is dependent on whether the provision of a tenant-based voucher is equivalent to a site-based transfer.²⁸⁸ In this particular case, the plaintiff's claim was mooted while her motion for a preliminary injunction was pending because she found a suitable unit to which she could relocate.²⁸⁹ Despite this, the court suggested in its order denying the preliminary injunction that the provision of a tenant-based voucher might be a sufficient reasonable accommodation transfer for a tenant with disabilities so long as the tenant was ultimately provided with the

287. See *supra* note 286.

288. See Transcript of July 14, 2022 Hearing at 11–14, *Doe v. N.Y.C. Hous. Auth.*, No. 22-cv-4460 (LJL), 2022 WL 2072570 (S.D.N.Y. June 9, 2022).

289. See *id.* at 3–4.

basic necessities of life, such as shelter and heat.²⁹⁰ The court’s focus on the material outcome of providing basic life necessities thus ignores questions about the power of the tenant, the burdens of the transfer process and the social value of public housing as a space for tenants to thrive.

In *Liboy v. Russ*, the court dismissed a RAD tenant’s discrimination claims related to NYCHA’s refusal to provide a site-based transfer as a reasonable accommodation.²⁹¹ The court’s ruling was premised on a fundamental misunderstanding of the differences between the RAD PBV program and the HCV program. Confusingly, the court relied on a myriad of cases concerning the HCV program to support its holding that provision of a site-based transfer in the RAD PBV program would “substantively alter the benefits provided by the Section 8 Program.”²⁹² The court brushed off arguments about structural differences between the two programs and instead concluded that NYCHA’s role was to administer the subsidy payments in both programs and not to house tenants.²⁹³ The court’s ruling does not comport with many aspects of the RAD PBV program, the RAD statute and federal regulations. As described *supra*, NYCHA remains the deed owner of all RAD PBV buildings, meaning it is, at the end of the day, NYCHA providing housing to tenants, even if private entities have taken over day-to-day responsibilities through a ground lease. Further, the RAD statute acknowledges that the purpose of RAD—as publicly touted by HUD, NYCHA and politicians—is to “preserve and improve public housing” and requires that tenants “maintain the same rights” before and after conversion.²⁹⁴ Additionally, the federal regulations clearly delineate key differences between the HCV and

290. See *id.* at 11–13. The court’s interpretation of *GP-UHAB Hous. Dev. Fund Corp. v. Jackson*, No. CV-05-4830 (CPS), 2006 WL 297704 (E.D.N.Y. Feb. 7, 2006), also appeared flawed. See Transcript of July 14, 2022 Hearing, *supra* note 288, at 11–12. The court relied on *Jackson* to suggest that the provision of a tenant-based voucher was sufficient to meet NYCHA’s duties under the law. *Id.* But *Jackson* concerned a PBRA apartment building that went into foreclosure after defaulting on its HUD-backed mortgage, leading HUD to terminate the project-based contract and approve tenant-based vouchers under the statutory and regulatory scheme. *Jackson*, 2006 WL 297704, at *3–5. Due to a delay, tenants did not timely receive their tenant-based vouchers and were faced with the prospect of living in apartments without adequate heat because the PBRA building did not have sufficient funding. *Id.* at *12–13. On a motion for a preliminary injunction, the court ordered that HUD continue to pay the PBRA subsidy pending trial so that tenants could live in habitable conditions while they awaited the issuance of their individual vouchers. *Id.* at *1, *12–13. The facts and law in *Jackson* were entirely different from those in my reasonable accommodation transfer case, described *supra*; thus, its discussion of how a tenant-based voucher is a sufficient alternative to project-based assistance is inapposite, especially in the reasonable accommodation context. Rather, the key salient principle in *Jackson* is that “Section 8 funding is mandated precisely in order to guarantee livable housing to low income tenants” and tenants cannot be forced to live in uninhabitable apartments due to, *inter alia*, an agency’s “failure to comply with its legal obligations.” *Id.* at *13.

291. *Liboy v. Russ*, No. 22 Civ. 10334 (VM), 2023 WL 6386889, at *12–14 (S.D.N.Y. Sept. 29, 2023).

292. *Id.* at *12.

293. *Id.* at *13.

294. 42 U.S.C. § 1437f note; *id.* § 9.

PBV programs.²⁹⁵ Chief among them is that in the HCV program, “[t]he family may rent a unit anywhere in the United States in the jurisdiction of a [Public Housing Authority (“PHA”)] that runs a voucher program” while tenants must reside in specific developments to receive a PBV subsidy, meaning they have the guarantee of an apartment but not the flexibility to move anywhere in the PBV program.²⁹⁶

A generous reading of the court’s oversights in *Liboy* is that it was confused about all the various subsidized housing programs due to their sheer complexity. But the court’s normative speculation of how “project-based voucher programs afford participants less flexibility in securing alternative housing than beneficiaries of the tenant-based voucher programs” suggests that the court’s ruling was driven more by neoliberal rationality.²⁹⁷ Like in *Doe*, the court ignored the unequal power of tenants in the private market, the burdens of the current transfer process and the public housing’s public value for society. And the court was able to wield the RAD program’s transition to PBV regulations to doctrinally justify (albeit poorly) its rationality that more market choice is simply better for tenants and PHAs alike.²⁹⁸

*3. RAD and the Blueprint for Change embrace anti-democratic choices
through the use of procedural engagement and the administrative state*

RAD and the Blueprint also prioritize anti-politics over democracy, meaning, as Brabazon argues, they force political debates, issues, or dissent to be resolved by legal processes rather than through democratic contestation.²⁹⁹ In almost all respects, tenants’ ability to affect whether and how a RAD or Blueprint conversion occurs is relegated to procedural opportunities in an administrative process. Tenants may give input or raise issues with the PHA or HUD, but no safeguards exist to ensure that tenants have the ultimate say in what happens to their housing.

295. See 24 C.F.R. pt. 982 (2023) (entitled “Section 8 Tenant Based Assistance: Housing Choice Voucher Program”); *id.* pt. 983 (2023) (entitled “Project-Based Voucher (PBV) Program”); *id.* § 982.1(b)(1) (stating “[w]ith tenant-based assistance, the assisted unit is selected by the family” and “Section 8 assistance may be ‘tenant-based’ or ‘project-based.’”); *id.* § 982.2 (specifying that “[t]he tenant-based program is the HCV program.”). Compare, e.g., 24 C.F.R. § 982.353 (2023) (prescribing “[w]here family can lease a unit with tenant-based assistance” on the private rental market), with 24 C.F.R. § 983.253 (2023) (prescribing how an owner of PBV-assisted units may select and lease units to qualified tenants). Compare, e.g., 24 C.F.R. § 982.302 (2023) (prescribing the issuance and placement of a tenant-based voucher in the HCV program), with 24 C.F.R. § 983.251 (2023) (prescribing how tenants are selected for the PBV program) and 24 C.F.R. § 983.55 (2023) (prescribing how PHAs may select sites for PBV-assisted units open to PBV program participants).

296. 24 C.F.R. § 982.1(b) (2023); see 24 C.F.R. § 983.5 (2023).

297. *Liboy*, 2023 WL 6386889, at *13 n.9. The court’s comments are also incredibly patronizing towards tenants, substituting its own judgments of what is good for tenants while silencing the voices of tenants with disabilities who experience NYCHA’s actions as a lack of the choice they need.

298. See *id.* at *12–13.

299. See Brabazon, *supra* note 15, at 167, 168–85.

Tenants in public housing developments do not have a legally enforceable right to veto a PHA's decision to privatize a building under RAD, as discussed *supra*. The RAD statute expressly gives PHAs authority to apply for the RAD program and HUD authority to approve applications, without any mention that tenants must approve of such conversions.³⁰⁰ When faced with tenant protests against RAD conversions, NYCHA has generally moved forward with the conversion while making minimal efforts to engage in discussions with tenants about their concerns. NYCHA tends to focus these discussions on the lack of federal funding for repairs and how their rights will remain the same under RAD, failing to inform tenants about many of the substantive changes that tenants will see post-conversion, including, *inter alia*, a change in tenants' transfer rights.³⁰¹

The lack of a legal enforcement mechanism for tenants' wishes means that tenants seeking to block a conversion must try their hand at making procedural due process claims that are difficult to win. For example, in a lawsuit brought on behalf of tenants of Harlem River Houses, a NYCHA development privatized under RAD in 2021, the district court held that all the tenants' claims would be futile to pursue on a motion to amend the complaint, except for a single claim contending that the conversion required tenants to give up their property interest in Section 9 housing without due process.³⁰² As a result, the amended complaint did not include the breach of lease and arbitrary and capricious administrative action claims the tenants originally asserted.³⁰³ Such a procedural due process claim is difficult to prove without extensive organizing and documentation by tenants of the process's deficiencies, which is perhaps why the suit at Harlem River Houses was voluntarily dismissed by the tenants on June 30, 2022 after the defendants had moved to dismiss the case.³⁰⁴

As this illustrates, to challenge HUD's approval of a RAD application due to a PHA's failure to follow the requirements for a RAD conversion, tenants face an uphill battle. One of the only types of court challenges that they could bring is an arbitrary and capricious claim under the Administrative Procedure Act (APA), which requires a very high threshold showing that the actions of an agency had no

300. See 42 U.S.C. § 1437f note.

301. See N.Y.C. HOUS. AUTH., UNDERSTANDING YOUR RIGHTS, RESPONSIBILITIES, AND THE SECTION 8 PROGRAM: PACT CURRICULUM SESSION A (2021), <https://www.nyc.gov/assets/nycha/downloads/pdf/juneinfosessiona.pdf> [<https://perma.cc/DTU8-266Q>]; N.Y.C. HOUS. AUTH., PACT DESIGN AND CONSTRUCTION, PACT CURRICULUM SESSION B (2021), https://www.nyc.gov/assets/nycha/downloads/pdf/April_Info-Session-B_PPT_English.pdf [<https://perma.cc/F3PC-LVLJ>].

302. See Order on Motion to Amend, *Vanessa Walsh v. Gregory Russ*, No. 1:21-cv-04872-LAP (S.D.N.Y. Jan. 6, 2022); Second Amended Complaint, *Walsh*, 1:21-cv-04872-LAP, at 60 (S.D.N.Y. Mar. 8, 2022).

303. Compare First Amended Complaint, *Walsh*, at 49–50 (June 2, 2021), with Second Amended Complaint, *Walsh*, at 60 (Mar. 8, 2022).

304. See FRCP Rule 41 Dismissal Without Prejudice, *Walsh*, 1:21-cv-04872-LAP (June 30, 2022).

reasonable basis.³⁰⁵ Since HUD has been captured by industry interests and may be motivated to ensure the quick privatization of public housing, the APA does not deter agency misconduct or poor decision-making.³⁰⁶ In sum, when administrative processes serve capital accumulation by dispossession, neoliberal rationality prioritizes them over court enforcement of tenants' rights.

To try to give a façade of democratic legitimacy, NYCHA has turned to several procedural mechanisms to show tenant buy-in. One such mechanism that appeared to be implemented during the latter half of my fellowship was only moving forward with a RAD conversion if a development's tenant association president agreed to it. Asking tenant association presidents for their buy-in before commencing a RAD conversion does not adequately gauge the true desires and wishes of tenants because there is no check in place to ensure that a president's sign-off is based on their constituency's permission. While some presidents conscientiously educated themselves on privatization schemes and sought input from their constituencies, others proved to be power-hungry leaders who did not listen to tenant input. Further, NYCHA tenant associations can find it difficult to engage tenants in their discussions because of, as will be discussed *infra*, the many demands on tenants' time and energy, many of which result from simply living in poverty. Without any assurance of robust democratic engagement within tenant associations, seeking the sign-off of a tenant association president is simply a way for NYCHA to try to obtain some legitimacy for their RAD conversions while circumventing the will of the *demos*.

In the context of the Blueprint, the Preservation Trust statute requires that NYCHA hold a vote on whether tenants wish for their development to convert

305. *Natl. Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007) ("Review under the arbitrary and capricious standard is deferential; we will not vacate an agency's decision unless it . . . 'has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'") (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

306. See generally Sidney A. Shapiro, *The Complexity of Regulatory Capture: Diagnosis, Causality, and Remediation*, 17 *ROGER WILLIAMS U. L. REV.* 221 (2012) ("[P]rivatization can at best lead to agency capture and at worst be a directly corrupting influence on the public sector, as public actors are exposed to the temptations of private gain."); see also Nestor M. Davidson, *Relational Contracts in the Privatization of Social Welfare: The Case of Housing*, 24 *YALE L. & POL'Y REV.* 263, 271, 274, 311–12 (2006).

under the Blueprint.³⁰⁷ NYCHA interpreted this to mean that tenants must vote on whether they wish for their development to “join the Trust, join [RAD/]PACT, or reject both the Trust and [RAD/]PACT and remain in the Section 9 Program,” rather than asking if tenants simply wish to join the Blueprint or not.³⁰⁸ On its face, this might appear to try to foster democratic engagement. But when viewed in context, it becomes clear that this voting process is a procedural attempt to legitimize privatization schemes while circumventing democratic contestation, especially because NYCHA can run the votes multiple times.

One large flaw in this process is that the rules require that only 20% of Heads of Households at a particular development cast a vote in order for the vote to meet quorum.³⁰⁹ However, all adults with “permanent written permission from NYCHA to reside [in the apartment]” are eligible to vote.³¹⁰ Since Heads of Households are the main leaseholder(s) in a household, 20% of this subgroup of tenants is likely only a sliver of the eligible voters at a given development.³¹¹ For example, in an intergenerational family with five adults and two children, the grandmother may be the sole Head of Household and therefore the only vote that counts towards quorum, even though four other adults are eligible to vote. Only basing quorum on Head of Household votes fails to ensure that the vote represents all tenants’ views and instead privileges certain tenants over others. For instance, a vote in which 80% of the votes favor remaining in Section 9 and 60% of total eligible tenants turn out to vote can be declared illegitimate for failing to meet quorum because only 15% of Head of Households cast a ballot. On the flipside, a

307. See N.Y. Pub. Hous. Law § 630(2). As of the writing of this article, four NYCHA developments have completed voting under this statute, with three developments—Nostrand Houses, Bronx River Addition, and Unity Houses—voting in favor of conversion under the Blueprint. *Voting at Nostrand*, N.Y.C. HOUS. AUTH., <https://www.nyc.gov/site/nycha/residents/voting-nostrand.page> [<https://perma.cc/ST6U-EKJK>] (last visited Aug. 22, 2024); *Voting at Bronx River Addition*, N.Y.C. HOUS. AUTH., <https://www.nyc.gov/site/nycha/residents/voting-bronx-river-addition.page> [<https://perma.cc/8GPB-ZTLC>] (last visited Aug. 22, 2024). *Voting at Unity Towers*, N.Y.C. HOUS. AUTH., <https://www.nyc.gov/site/nycha/residents/voting-unity-towers.page> [<https://perma.cc/4SAB-W2U5>] (last visited Sept. 20, 2024). The fourth development, Coney Island Towers, voted to remain public housing under Section 9 of the U.S. Housing Act, leaving open questions on how urgently needed repairs will be financed there. *Voting at Coney Island Towers*, N.Y.C. HOUS. AUTH., <https://www.nyc.gov/site/nycha/residents/voting-coney-island-houses.page> [<https://perma.cc/PJ65-6F38>] (last visited Sept. 20, 2024). Hylan Houses is slated to vote between November 13, 2024 and December 12, 2024. See *Voting at Hylan Houses*, N.Y.C. HOUS. AUTH., <https://www.nyc.gov/site/nycha/residents/voting-hylan.page> [<https://perma.cc/4VGX-GGGB>] (last visited Sept. 20, 2024).

308. *Preservation Trust Final Voting Procedures*, N.Y.C. HOUS. AUTH., <https://www.nyc.gov/site/nycha/about/preservation-trust-final-voting-procedures.page> [<https://perma.cc/LR96-PENT>] (last visited Mar. 14, 2024). For more discussion of concerns about these voting options, see generally N.Y.C. HOUS. AUTH., WRITTEN COMMENTS SUBMITTED IN RESPONSE TO THE PUBLIC HOUSING PRESERVATION TRUST DRAFT VOTING PROCEDURES (2022), <https://www.nyc.gov/assets/nycha/downloads/pdf/written-public-comments-public-housing-preservation-trust-draft-voting-procedures.pdf> [<https://perma.cc/7ASC-TFJF>].

309. *Preservation Trust Final Voting Procedures*, *supra* note 308.

310. *Id.*

311. *Id.*

vote in which 80% of the votes favor joining the Trust and 40% of total eligible tenants turn out to vote can be declared legitimate because 21% of Head of Households voted. These policies stymie democratic engagement and create opportunities for gamesmanship in the voting process.³¹²

NYCHA, which is in charge of the process and conducting voter outreach, has significant sway over who will actually turn out to vote and how they will vote.³¹³ NYCHA can frame their outreach materials to favor RAD or the Blueprint; target outreach to tenants who are more likely to be in favor of privatization; and/or simply carry out poor voter outreach when they know tenants do not favor privatization so that quorum is not met.³¹⁴ A combination of these strategies is likely given NYCHA's record of conducting outreach about RAD and the Blueprint. While I was carrying out my fellowship, many tenants told me that they did not know that their building had converted under RAD, despite NYCHA's representations that they had done "robust" outreach to tenants.³¹⁵ Tenants had not heard about or attended any meetings with NYCHA and sometimes only found out about the conversion after they were asked to sign a new lease or faced an eviction suit for failing to sign a new lease.³¹⁶ Tenants also often did not understand or even know about the Blueprint, even though legislation

312. It is true that voting for elected officials in the U.S. can also be considered undemocratic by these same principles. But undemocratic voting in other, government-sanctioned elections should not provide cover for undemocratic voting processes at public housing developments. Further, in similar NYC affordable housing schemes, upwards of two-thirds of tenants must affirmatively agree to changes to the regulation of their housing in order for such to be legitimate and binding. See TakeRoot Justice, *Comment on Public Housing Preservation Trust Draft Voting Procedures* (Nov. 14, 2021), in N.Y.C. HOUS. AUTH., WRITTEN COMMENTS SUBMITTED IN RESPONSE TO THE PUBLIC HOUSING PRESERVATION TRUST DRAFT VOTING PROCEDURES, *supra* note 308, at 59–60.

313. See N.Y.C. HOUS. AUTH., PRESERVATION TRUST FINAL VOTING PROCEDURES, *supra* note 308.

314. See *id.*

315. N.Y.C. HOUS. AUTH., FINAL SIGNIFICANT AMENDMENT TO THE ANNUAL PHA PLAN FOR FISCAL YEAR 2023 2 (Sept. 12, 2023), https://www.nyc.gov/assets/nycha/downloads/pdf/Final_Amendment_FY_2023_Annual_Plan_09-12-23_ALL.pdf [<https://perma.cc/C6YA-K5F4>]; *NYCHA Selects Design-Build Teams for \$740M Comprehensive Modernization of Two Developments in Harlem and Staten Island*, NYCHA J. (Oct. 24, 2023), <https://nychajournal.nyc.gov/nycha-selects-design-build-teams-for-740m-comprehensive-modernization-of-two-developments-in-harlem-and-staten-island/> [<https://perma.cc/2BM4-X2TJ>]; Press Release, N.Y.C. Hous. Auth., NYCHA Engages With Fulton Houses Residents On NYCHA 2.0 Proposals (May 10, 2019), <https://www.nyc.gov/site/nycha/about/press/pr-2019/pr-20190510.page> [<https://perma.cc/RRS5-8F3E>].

316. See N.Y.C. COUNCIL COMM. ON PUB. HOUS. IN RELATION TO THE RENTAL ASSISTANCE DEMONSTRATION PROGRAM/PERMANENT AFFORDABILITY COMMITMENT TOGETHER PROGRAMS, TESTIMONY OF ELIZABETH GYORI, *supra* note 134, at 6.

in support of the plan was introduced three times during my fellowship.³¹⁷ While NYCHA said they conducted “outreach” about the Blueprint, I heard from organizers and tenants that tenants whose primary language was not English received materials about the plan in only English, despite NYCHA’s legal obligation to communicate with non-English speakers in a language that they can understand. Further, the materials that NYCHA disseminates almost always paint RAD and the Blueprint in a favorable light, sometimes by omitting key information.³¹⁸

If past is prologue, NYCHA’s voter outreach to tenants will be inadequate or biased.³¹⁹ NYCHA’s obligation under the Preservation Trust law to abide by tenants’ wishes on RAD and the Blueprint is effectively meaningless because the law allows NYCHA to conduct votes over and over again and to influence the vote outcomes.³²⁰ With enough attempts and influence, NYCHA will inevitably be able to secure the outcomes it wants. What is more, NYCHA has control over the material conditions at public housing developments across NYC; NYCHA therefore can choose to withhold or expend resources for critical repairs that affect tenants’ day-to-day lives to push for privatization through coercion.³²¹

Without a legally enforceable mechanism requiring PHAs to abide by their wishes, tenants have no recourse to challenge the power and violence of the state. This shows that neoliberal rationality’s preference for disputes to be resolved by the courts is contingent on the substance of the law that a court is tasked with

317. See Written Testimony of Elizabeth Gyori for the hearing on “[NYCHA’s] Blueprint for Change proposal to help streamline operations and address its capital needs,” N.Y. State Assembly Standing Comm. on Hous. 7–8 (Dec. 8, 2022) (on file with author); Greg B. Smith, *Tenants Warn They’re Expendable in NYCHA Restructuring Bill*, CITY (May 26, 2022), <https://www.thecity.nyc/2022/5/26/23143621/nycha-preservation-trust-tenants> [<https://perma.cc/4SLR-ANDG>]; Chau Lam, *Public housing financing revamp could be risky for NYCHA residents*, GOTHAMIST (May 25, 2022), <https://gothamist.com/news/mayor-adams-supports-revamp-of-public-housing-financing-some-residents-arent-so-sure> [<https://perma.cc/UPH6-83FK>].

318. See, e.g., N.Y.C. HOUS. AUTH., PLANNING FOR PACT: UNION AVENUE CONSOLIDATED (2020), <https://www.nyc.gov/assets/nycha/downloads/pdf/Union-Avenue-Consolidated-PPT-English.pdf>; N.Y.C. HOUS. AUTH., UNDERSTANDING YOUR RIGHTS, RESPONSIBILITIES, AND THE SECTION 8 PROGRAM: PACT CURRICULUM SESSION A, *supra* note 301; N.Y.C. HOUS. AUTH., PACT DESIGN AND CONSTRUCTION, PACT CURRICULUM SESSION B (2021), *supra* note 301. For example, these materials suggest that all tenants’ rights will remain the same and that NYCHA will be active in monitoring conditions post-conversion, omitting that tenants will no longer have the right to transfer units across NYC and that RAD tenants have often experienced NYCHA refusing to assist with conditions issues post-conversion, as discussed *supra*.

319. After my fellowship concluded, tenant advocates have reported some difficulty in performing outreach to the households for mandatory voting under the Preservation Trust statute. See Tatyana Turner, *NYCHA’s Second ‘Trust’ Vote Poses Unique Challenge: Scattered Tenants*, CITY LIMITS (Feb. 21, 2024), <https://citylimits.org/2024/02/21/nychas-second-trust-vote-poses-unique-challenge-scattered-tenants/> [<https://perma.cc/5AP2-6M4T>].

320. See N.Y. Pub. Hous. Law § 630(2).

321. See Bart M. Schwartz, Off. of the Fed. Monitor, *New York City Housing Authority – Public Housing Preservation Trust Voting Procedures – Response to Request for Comments*, in N.Y.C. HOUS. AUTH., WRITTEN COMMENTS SUBMITTED IN RESPONSE TO THE PUBLIC HOUSING PRESERVATION TRUST DRAFT VOTING PROCEDURES, *supra* note 308, at 58–59.

interpreting. RAD and the Blueprint illustrate how neoliberal rationality prefers court intervention only when the substantive law favors the accumulation of capital by dispossession. However, when a law might tip the balance of power towards the dispossessed—here, public housing tenants—neoliberal rationality seeks to close the courts off as an avenue for resolving disputes and defaults to legitimizing policy decisions through procedural processes such as voting.

C. RAD advances a normative theory about the nature of freedom and democracy that ultimately treats tenants as homo oeconomicus, undermines wellbeing and circumvents solidarity

RAD and the Blueprint's reliance on a neoliberal rationality, which prioritizes anti-politics over democracy, has material effects on tenant organizing, which impacts our democracy as a whole. First, public housing developments have transformed from a political space for democratic contestation to a space for problem-solving, management, and implementation of initiatives based on "consensus."³²² As such, the administrative state, with its preference for expertise, metrics and benchmarking, replaces public deliberations, debate and contestation about issues facing tenants.³²³ Second, neoliberalism's attack on society and the *demos* has led to a lack of organizing necessary for instigating political change on public housing policy.³²⁴ Third, as this occurs, the remaining efforts at organizing public housing have come to depend more and more on the court for the vindication of rights rather than political avenues for structural and widespread material change.³²⁵

These material trends at public housing developments facing privatization generally align with the rise of neoliberalism as the governing rationality and its implications for how citizens are governed writ large.³²⁶ Under neoliberal rationality, Brown documents, *inter alia*, the ascendance of the concept of "governance," an unsettled term that at least describes "a transformation from governing through hierarchically organized command and control . . . to governing that is networked, integrated, cooperative, partnered, disseminated, and

322. See BROWN, UNDOING THE DEMOS, *supra* note 18, at 127.

323. See *id.* at 135–50.

324. See BROWN, IN THE RUINS OF NEOLIBERALISM, *supra* note 19, at 26–29, 37, 50–53.

325. See Robert Knox, *Law, Neoliberalism and the Constitution Of Political Subjectivity: The Case of Organized Labour*, in NEOLIBERAL LEGALITY: UNDERSTANDING THE ROLE OF LAW IN THE NEOLIBERAL PROJECT, *supra* note 15, at 92, 92–93; See Brabazon, *supra* note 15, at 182–83.

326. Brown explores this by building on Foucault's theory that knowledge, truth and forms of reason are both subject to power relations and "generative of power itself," political rationality, such as neoliberal rationality, is the "conditions, legitimacy, and dissemination of a particular regime of power-knowledge that centers on the truths organizing it and the world it brings into being." BROWN, UNDOING THE DEMOS, *supra* note 18, at 116. Political rationality conceives of normative social relations and qualities, such as relationships among citizens, rights, society, states, and laws, that determine how the world should be ordered. *Id.* at 116, 121. As such, political rationality opens up and forecloses possibilities for instruments of governing by shaping normative reason from which such instruments flow. *Id.* at 121.

at least partly self-organized.”³²⁷ Through this conceptual shift in relations among the state, market and citizenry, “governance” reformulates the political into “a field of management or administration” rather than an area for contestation among varying perspectives. The public realm becomes a space for problem solving and program implementation rather than for “deliberation about justice and other common goods, contestation over values and purposes, struggles over power, [and] pursuit of visions for the good for the whole.”³²⁸

Practically, this change from governing to governance under neoliberalism can be seen in devolution of authority from the state (here, PHAs) to other actors (private landlords, management companies and developers) as well as the responsabilization of the citizenry, or in other words, making it a moral imperative for citizens to adhere to certain codes of conduct.³²⁹ The state increasingly uses benchmarking and so-called best practices, presenting them as neutral tools. But these technocratic terms hide the fact that setting benchmarks and deciding which practices are “best” involves underlying value judgments and assumptions.³³⁰ As such, neoliberal rationality prescribes a specific model of politics and public life that, Brown contends, is antithetical to democracy.³³¹

Beyond changing the way nation-states govern their citizens, neoliberal rationality’s reach is even deeper, according to Brown. Neoliberalism is also a “moral-political project that aims to protect the traditional hierarchies by negating the very idea of the social and radically restricting the reach of democratic political power in nation-states.”³³² Neoliberal rationality thus attacks the idea of “society,” a space where citizens, despite differences, come together because of a common bond and future, as the *demos*, to engage in self-rule and address key issues such as inequality.³³³ By attacking the concept of “society,” neoliberal rationality cultivates an antidemocratic culture among the citizenry that in turn legitimates antidemocratic governance at the top, effectively erasing the *demos* and our ability to imagine and enact different and better collective futures through popular sovereignty.³³⁴ Brown argues that neoliberalism replaces the *demos* with authoritarianism and “traditional morality,” effectively undermining calls for equal protection under the law.³³⁵

All of this is aided and abetted by the juridical’s importation of neoliberal rationality that produces and creates certain kinds of social relations, ways of living and new subjectivities.³³⁶ As described *supra*, this is not only in the courts’

327. *Id.* at 123, 122–50.

328. *Id.* at 127.

329. *Id.* at 131–34.

330. *Id.* at 135–50.

331. *Id.* at 127.

332. BROWN, IN THE RUINS OF NEOLIBERALISM, *supra* note 19, at 13.

333. *Id.* at 26–27.

334. *Id.* at 28–29, 37, 50–53.

335. *See id.* at 56–160, 182–84.

336. Knox, *supra* note 15, at 92–93.

use of certain forms of logic and reasoning laden with specific value judgments. Neoliberal rationality is evident in the proliferation of the use of the judicial form altogether to resolve difficult questions previously left for the *demos* to answer through democratic contestation in the political realm.³³⁷ The resulting fracturing of the *demos* and the social has grave consequences for democracy that are playing out all across society, including in spaces where the most marginalized are seeking to make their voices heard.

1. RAD and the Blueprint for Change are “governance” of the most vulnerable citizenry and their need for affordable housing

As it has faced increasing criticism from tenants, advocates, and public officials for the privatization of public housing, NYCHA has turned towards “governance,” as defined by Brown, to beat back such criticism. Specifically, NYCHA has argued that RAD and the Blueprint are not being imposed on tenants through hierarchical state power, but rather being accepted by semi-self-organized tenants who have partnered with NYCHA to undertake the privatization and repairs of their homes.³³⁸ One method of governance has been implementing seemingly democratic procedural processes into the conversion process beyond what is mandated by the RAD statute, such as seeking permission from tenant association presidents before commencing privatization at any given development, as explained *supra*; allowing a vote on tenants’ preferred funding schemes, as detailed *supra*; and giving resident committees input on the conversion and construction process. However, in all these instances, the offering of a democratic procedural process is more akin to a façade of democratic engagement rather than truly allowing the *demos* to act.

Although NYCHA tries to tout their commitment to engaging tenants on the construction and conversion process, their engagement also seems biased, if not entirely superficial. For example, based on my experience, NYCHA allows tenants to have input on which developer will perform construction at the development post-conversion under RAD, but the only developers that can be chosen are those on NYCHA’s pre-approved list. Those on the list have already

337. *See id.* at 94, 105–111; *see also* Brabazon, *supra* note 15, at 182–83.

338. *See, e.g.*, Press Release, N.Y.C. Hous. Auth., Mayor Adams, NYCHA, and Partners Announce Financial Closing of \$783 Million PACT Modernization Project at Edenwald Houses, (June 28, 2023), <https://www.nyc.gov/site/nycha/about/press/pr-2023/pr-20230628.page> [<https://perma.cc/5BDV-DRPS>] (“The PACT partner team, which was selected by resident association leadership, worked closely with residents and NYCHA over the past several years to design every aspect of the development’s transformation”); Press Release, N.Y.C. Hous. Auth., NYCHA and Resident Leaders Select Hope Community and Brisa Builders to Deliver Over \$75 Million in Capital Improvements for More Than 1,200 Residents at Wilson Houses (Mar. 7, 2023), <https://www.nyc.gov/site/nycha/about/press/pr-2023/pr-20230307.page> [<https://perma.cc/78D2-TCJC>] (“The selection of the PACT partners was made by a resident review committee after an extensive community engagement process beginning in the winter of 2021. Committee members reviewed and compared proposals and conducted interviews with proposing teams.”); *see also* BROWN, UNDOING THE DEMOS, *supra* note 18, at 123, 122–150.

gone through a Request for Qualifications (RFQ) process, meaning NYCHA controls the universe of options from which tenants can choose.³³⁹ The same is true for property managers, social service providers and general contractors.³⁴⁰ While NYCHA might be able to check off certain criteria or benchmarks for tenant or democratic engagement, the reality is that the *demos* cannot act fully and with popular sovereignty within the processes NYCHA has set up because their choices are fundamentally limited.

Another method of “governance” employed by NYCHA is the devolution of responsibilities to other entities through the privatization process.³⁴¹ For example, NYCHA offloads daily management of public housing developments to private landlords and management companies post-conversion. NYCHA has argued in housing court that it is therefore no longer responsible for repairs required under law, despite NYCHA remaining the deed owner of the properties.³⁴² Although courts have rejected such an argument,³⁴³ during my fellowship, NYCHA usually did not appear in court for repairs cases against the new private landlords in RAD conversions and told tenants seeking NYCHA assistance in obtaining repairs that NYCHA could not help them. Indeed, post-RAD-conversion, I often heard complaints from tenants that NYCHA refused to step in to assist with any issues that the tenant was having with the new private landlord, whether that was about repairs, a dispute with a neighbor, alleged arrears or a request to change one’s family composition. All this is in spite of NYCHA’s promises to tenants that their “development will remain under public control” in the RAD program; that NYCHA will “monitor conditions at the development”; and “[w]here needed, NYCHA can step in to resolve any issues that may arise between residents and the new property management team.”³⁴⁴ While NYCHA says one thing to entice tenants and advocates to favor RAD and the Blueprint, such promises are not kept and cannot be enforced post-privatization.

This is also reflected in the transactional documents for each RAD conversion. Through various agreements between NYCHA and the new private

339. See *Permanent Affordability Commitment Together: PACT Procurement Information*, N.Y.C. HOUS. AUTH., <https://www.nyc.gov/site/nycha/about/pact/procurement.page> [<https://perma.cc/E8SG-3HZH>] (last visited Mar. 2, 2024).

340. See *id.*

341. See BROWN, UNDOING THE DEMOS, *supra* note 18, at 131–34, for a discussion of the dynamics of devolution of authority as part of neoliberal governance structure.

342. See Decision and Order, *Berline Pierre v. N.Y.C. Hous. Auth.*, Index No. LT-000145-21/KI, at 2 (N.Y. Civ. Ct. June 3, 2021) (“The motion alleges that NYCHA leased the premises to Hope Gardens I LLC and the managing company PCL Management LLC, and that NYCHA is no longer in control of the premises . . . NYCHA argues that since it is not responsible for the day-to-day management and operation of the building it should not be responsible for correcting violations or for the assessment of penalties associated with the enforcement of housing standards, because for the purposes of this proceeding, it is no longer an owner.”).

343. See, e.g., *id.* at 2–3 (“To allow NYCHA to be relieved from its obligations as an owner would be contrary to the legislature’s intent . . . and would hinder this Court’s core mission to pursue the enforcement of housing standards.”).

344. N.Y.C. HOUS. AUTH., PLANNING FOR PACT, *supra* note 198, at 2.

landlord, management company and developer, NYCHA has an incredibly high degree of control over the material conditions and behavior of the new private entities. For example, NYCHA is often entitled to receive reports on repairs issues at each development and can remove a private management agent for failing to live up to their responsibilities.³⁴⁵ NYCHA also touts in public hearings that it receives detailed reporting on every potential and actual eviction from RAD conversions and has a protocol in place to ensure that “evictions are an extreme, extreme last resort,” including by requiring private management companies conduct pre-eviction outreach prior to commencing eviction proceedings.³⁴⁶ Despite this, the transactional documents explicitly bar tenants from suing NYCHA for failure to exercise oversight over the private entities as third party beneficiaries.³⁴⁷ Under such a provision, NYCHA is able to offload critical responsibilities to private, third-party entities while escaping accountability and responsibility for providing oversight of these entities.³⁴⁸

The devolution of responsibility from NYCHA to private entities thus makes tenants ultimately responsible for enforcing their rights through piecemeal litigation or administrative processes, which are time-consuming, resource-intensive and require legal expertise. Not only are tenants therefore left to fend for

345. *See, e.g.*, Section 28: Reporting and Notifications Concerning, Mold, Elevators, Heating and Pests, Lease Agreement Among New York City Housing Authority, Williamsburg PACT Housing Development Fund Corporation and Williamsburg Housing Preservation L.P., 75 (Feb. 5, 2020) (on file with author) (requiring the new private landlord to provide NYCHA on an annual basis information on mold, elevators, pests, and heating in various NYCHA developments that converted under RAD/PACT within the “Williamsburg” bundle); Section 10(d): Management Agent, *id.* at 40–41 (discussing how the selection of the management company for the Williamsburg Bundle is effectuated pursuant to a Management Agreement and Management Plan, all of which is subject to the approval of NYCHA, how NYCHA has the right to require the new private landlord to “terminate the Management Agreement, and the appointment of the Management Agent thereunder,” subject to notice and cure as laid out in the Management Agreement).

346. *See* N.Y.C. COUNCIL COMM. ON PUB. HOUS., TRANSCRIPT OF THE MINUTES, TESTIMONY OF JONATHAN GOUVEIA AND LAMSAR FENTON 132–37 (2021), <https://legistar.council.nyc.gov/View.ashx?M=F&ID=9101393&GUID=B2202EC6-FC66-488B-A09F-C6F901494501> [<https://perma.cc/HGW2-XHZ7>]; N.Y.C. COUNCIL COMM. ON PUB. HOUS., TRANSCRIPT OF THE MINUTES, TESTIMONY OF JONATHAN GOUVEIA 90–94 (2022), <https://legistar.council.nyc.gov/View.ashx?M=F&ID=11047928&GUID=E58E9557-AA7C-4FF3-BE90-20BAAD8AF2CB> [<https://perma.cc/4JQE-CHVM>].

347. *See, e.g.*, “Third Party Beneficiaries,” Declaration of Restrictive Covenant and Use Agreement between NYCHA, Williamsburg PACT Housing Development Fund Corporation, and Williamsburg Housing Preservation, L.P., at 5 (“No person or entity, other than the parties to this Declaration, has any rights or remedies under this Declaration.”); “Exclusion of third party claims,” HUD RAD Housing Assistance Payments Contract between NYCHA and Brooklyn Housing Preservation, L.P., at 14 (Feb. 6, 2020) (“Nothing in the HAP Contract shall be construed as creating any right of a family or other third party (other than HUD) to enforce any provision of the HAP Contract, or to assert any claim against HUD, the CA or the Owner under the HAP Contract.”).

348. In the context of tax breaks for affordable housing development, lax enforcement of regulatory agreements has allowed private landlords to enrich themselves while failing to provide housing that public money sought to incentivize. *See* Cezary Podkul & Marcelo Rochabrun, *Landlords Fail to List 50,000 N.Y.C. Apartments for Rent Limits*, PROPUBLICA (Nov. 5, 2015), <https://www.propublica.org/article/landlords-fail-to-list-fifty-thousand-nyc-apartments-for-rent-limits> [<https://perma.cc/5MBV-NQCN>].

themselves, but they are actually responsabilized to “discern[] and undertak[e] the correct strategies of self-improvement and entrepreneurship for thriving and surviving”³⁴⁹ In the RAD context, NYCHA can pin the failures of the systemic structure—shoddy constructions, lack of timely and proper repairs, failure to pay rent on time—on tenants themselves. A key example of this is NYCHA’s transfer policy in RAD conversions, which mandates that tenants accept a tenant-based voucher in lieu of a site-based transfer, as discussed *supra*. NYCHA’s policy makes the failure to secure suitable housing with a tenant-based voucher into a personal failing of the tenant to meet their responsibilities rather than acknowledging the difficulty that tenants with vouchers face on the private rental market.³⁵⁰

NYCHA’s turn towards “governance” reduces democratic contestation to a façade of procedural due process; the responsibility to provide safe, suitable and affordable housing is devolved to private entities; and public housing tenants are responsabilized such that their failure to take certain steps (e.g. file, and move for contempt in, a repairs case in court; bring an action to review an administrative decision) is the ultimate reason for why they must live in substandard housing or have their rights violated.

2. The privatization of public housing facilitates the end of “society” at public housing developments

Just as tenants are responsabilized under neoliberalism to protect their rights and dignity in a system that sets them up to fail, tenants also see their organizing and movement power curtailed at public housing developments because neoliberal rationality attacks the idea of “society” writ large. If a “society” is a space in which citizens can join together across their differences to form a common bond, seek a common future, and address issues together as a collective, with an eye towards effectuating self-rule, then the loss of the social means the silencing of the *demos*.³⁵¹ The destruction of the *demos* is already evident at public housing developments as organizing among public housing tenants pales in comparison to organizing in private housing. While many reasons contribute to the loss of the *demos* at public housing developments, two main reasons are that (1) tenants do not have the bandwidth to participate in time-consuming organizing when they are simultaneously dealing with poverty, illness, poorly remunerated work and violence, all of which result from neoliberal inequality; and (2) NYCHA and HUD have sought to frame issues raised by tenants and advocates as individual, rather than systemic, issues, thereby de-politicizing the conversion process and continuing the responsabilization of tenants.

349. BROWN, UNDOING THE DEMOS, *supra* note 18, at 132–33.

350. *See id.* at 131–34.

351. *See* BROWN, IN THE RUINS OF NEOLIBERALISM, *supra* note 19, at 27–28.

One of the many concerns I heard among organizers dedicated to organizing public housing tenants across NYC was that it was very difficult to build a solid and engaged base at public housing developments despite pouring energy and resources into canvassing and holding workshops and meetings. One organization with which I worked for much of my fellowship—perhaps the only one exclusively organizing Asian American NYCHA tenants—decided to close their program organizing in public housing in favor of working with private market tenants because they had “exhausted” their “base building in public housing” and “still don’t have enough power.”³⁵² Often, the reason tenants gave for not joining in organizing was because they did not have the time or energy to join. Indeed, my clients were often faced with multiple intersecting crises all at once, including wage theft, job insecurity, loss of public benefits, homelessness of family members, unaddressed mental health needs, domestic violence and personal safety concerns. Others were scared of the possible consequences of organizing and preferred to keep a low profile in order to maintain a roof over their heads.

The refusal of tenants to join in organizing is partly the result of neoliberalism and what Loïc Wacquant theorizes in *Punishing the Poor* as “welfare state devolution, retraction, and recomposition,” which is “designed to facilitate the expansion and support the intensification of commodification, and in particular to submit reticent individuals to the discipline of desocialized wage labor.”³⁵³ In other words, and as applied to the public housing context, just as neoliberalism has sought to fundamentally re-shape public housing—the source of affordable housing for the poorest and most marginalized Americans—neoliberalism’s work in removing and re-shaping the social safety net and job protections has deeply impacted public housing tenants.³⁵⁴ These tenants, who are “essential workers” in grueling and often dangerous jobs,³⁵⁵ have been conditioned³⁵⁶ by the recomposition of the welfare state to accept social insecurity in their jobs, healthcare, public benefits and even personal safety in service of capital accumulation.³⁵⁷ Now, they face conditioning to accept insecurity in their housing in exchange for not having to face loss of their substandard housing. The practical

352. CAAAV *Strategy and Shifts*, CAAAV, <https://caaav.org/strategy-and-shifts> [<https://perma.cc/UWC7-JL8Z>] (last visited Mar. 4, 2024).

353. LOÏC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* 307 (2009).

354. *See id.* at 1–20, 41–58.

355. *See* Joe Anuta, *Coronavirus Wreaks Havoc on New York City’s Public Housing*, POLITICO (April 10, 2020), <https://www.politico.com/states/new-york-city-hall/story/2020/04/10/coronavirus-wreaks-havoc-on-new-york-citys-public-housing-1274821> [<https://perma.cc/ADY3-UZW9>]; Yuh-Line Niou, Opinion, *At NYCHA, Home is No Safe Harbor – But It Must Be*, GOTHAM GAZETTE (June 12, 2020), <https://www.gothamgazette.com/130-opinion/9489-nycha-home-is-no-safe-harbor-but-it-must-be> [<https://perma.cc/S92M-GK2K>].

356. In using the term “conditioning” here, I am not suggesting that public housing tenants do not resist this conditioning nor that they are not making rational choices between competing evils. Rather, I use this term, as well as “disciplining,” to describe patterns of reduced choice and freedom among tenants that are the product of neoliberal policies and logics.

357. WACQUANT, *supra* note 353, at 7, 12, 42–44, 48–58, 307, 305.

outcome on the ground has thus been little organizing that activates the *demos*, meaning important changes and decisions on public housing are left to the state and to private capital.

The disciplining of tenants under neoliberalism is not just due to increased precarity in almost every aspect of life but is also imposed on tenants by the de-politicization of the privatization process wherein enforcement of individual rights is privileged over systemic complaints and change. For example, during my fellowship, my organization and I raised a slew of systemic concerns about the implementation of RAD in NYC with HUD and NYCHA; this included many of the issues discussed *supra* Section II. In response to such concerns, NYCHA asked for the names of tenants and their developments rather than considering big-picture changes. Although we received permission to share some tenants' information, we stressed to NYCHA that we were seeing these issues across the city and that we could not possibly share the names and information for all our clients experiencing these issues for various reasons (i.e., we were involved in ongoing litigation with their legal department; we had closed clients' cases; or tenants were scared to share their information). In their reply, NYCHA focused almost exclusively on the particular facts of each individual tenant's complaint.

Similarly, HUD has a RAD complaint process in which tenants and other stakeholders can lodge a complaint about the conversion process.³⁵⁸ Notably, the procedure requires a complainant to submit a property name and location where the issue is occurring and suggests that the complainant will be asked in minute detail about their "observations and experience."³⁵⁹ HUD also says that it will "[d]etermin[e] whether HUD could facilitate communication between the complainant and another party (for example, between a resident and the PHA)" and issue a response with "a summary of the issues, the outcome of the investigation, actions that have been taken and a description of recommended next steps as applicable," similar to an individual court decision.³⁶⁰ The framing of this complaint process suggests that it likely has and will continue to focus on rights violations of individual tenants and ensuring a remedy for such violations, rather than investigating systemic and structural issues with the RAD program. NYCHA and HUD's individualized approach to tenant and advocate complaints about RAD allow them to effectuate short term, band-aid solutions to make it appear as if the issues were corrected. But this approach leaves unchanged the structural issues, such as lack of oversight or under-performance of the new private entity, that created the problem for the individual tenant in the first place. Moreover, this individualized focus, rather than on patterns of misconduct, serves the interests of private capital, which can typically escape oversight and increased costs.

358. U.S. DEP'T OF HOUS. & URBAN DEV., RAD COMPLAINT PROCESS, https://www.hud.gov/sites/dfiles/Housing/documents/RAD_Resident_Complaint_Process.pdf [<https://perma.cc/TAK3-8U2Z>].

359. *Id.*

360. *Id.*

While vindication of individual rights is privileged over systemic change in the privatization process, state and private actors are often hostile towards dissent from tenants opposing RAD or the Blueprint. They tend to characterize such opposition as undermining a program that most tenants want and will benefit everyone. Further, the government and private entities could rely on the law to crush tenant dissent through threatening tenants' housing stability. As I saw during my fellowship, tenants opposed to RAD often rallied, garnered media attention and organized tenants to refuse to sign the new RAD PBV leases, hoping that this would stall or stop the conversion.³⁶¹ The tenants would typically gain press coverage and cultivate local outrage, but failed to stop the conversion. When tenants refused to sign the new leases, they put themselves in a precarious legal position. The RAD statute authorizes the termination of tenants' public housing leases by a date certain by operation of law;³⁶² without a valid lease, tenants who remained in their homes would often be sued in a licensee holdover. This is a type of eviction case brought on the grounds that the person residing in the apartment is not a tenant engaged in a tenant-landlord relationship, but a licensee (more or less a guest) without long-term rights to remain in the apartment.³⁶³ By relying on state power to silence tenant dissent, RAD short-circuits democratic contestation, including discussions and organizing among tenants to evaluate and choose the best funding stream for themselves, in exchange for elites forcing a particular choice on tenants.

NYCHA's reaction to tenant protests of RAD exemplifies what Brown *à la* Foucault called the replacement of individuation and political contestation with consensus under neoliberalism and what Brabazon argued was the reframing of the state's relationship to dissent under neoliberalism.³⁶⁴ Since, under neoliberalism, "the state no longer has a mandate to pursue a broad conception of

361. Rachel Holliday Smith, *RAD Revs Up in Manhattan as Deadline for NYCHA Tenants to Sign Private Leases Looms*, CITY (Oct. 20, 2020), <https://www.thecity.nyc/2020/10/20/21521405/rad-revs-up-in-manhattan-as-deadline-for-nycha-tenants-to-sign-private-leases> [https://perma.cc/Z6KZ-7XFC]; *Tenants From All Five Boroughs Rally At Harlem River Houses To Stop Rad/Privatization Citywide*, UNITED FRONT AGAINST DISPLACEMENT (May 3, 2021), <https://theunitedfrontagainstdisplacement.org/2021/05/03/tenants-from-all-five-boroughs-rally-at-harlem-river-houses-to-stop-rad-privatization-citywide/> [https://perma.cc/3J3K-VLGB]; Maria Monica Fernandez, *PACT impact: Privatization Fears at Lower East Side Public Housing*, VILL. SUN (Jan. 3, 2023), <https://thevillagesun.com/pact-impact-privatization-fears-at-lower-east-side-public-housing> [https://perma.cc/YT8W-3BHL]; Michael McDowell, *Meet The Women Behind Friday's 'Occupy NYCHA' Rally At City Hall*, GOTHAMIST (July 24, 2019), <https://gothamist.com/news/meet-the-women-behind-fridays-occupy-nycha-rally-at-city-hall> [https://perma.cc/A9DV-KQJ8]; Dashiell Allen, *Public Housing Leaders Don't Trust Preservation Trust 'Privatization' Bill*, VILL. SUN (May 28, 2023) <https://thevillagesun.com/public-housing-leaders-dont-trust-preservation-trust-privatization-bill> [https://perma.cc/M5N8-JCLX].

362. U.S. DEP'T OF HOUS. & URBAN DEV., NOTICE H-2019-09 PIH-2019- 23 (HA), RENTAL ASSISTANCE DEMONSTRATION – FINAL IMPLEMENTATION, *supra* note 52, at 68–69, 113.

363. See Grounds for holdover proceeding against a non-tenant—Licensee, N.Y. Prac. Series, Landlord and Tenant Practice in New York § 15:80.

364. BROWN, UNDOING THE DEMOS, *supra* note 18, at 69–70; Brabazon, *supra* note 15, at 177–79.

the public interest, and political advocacy is meant to be individual, not collective,” “collective advocacy is often portrayed by government officials as akin to bullying and as a circumvention of the democratic process rather than a quintessential feature of it.”³⁶⁵ By characterizing dissent as an aberration, the state is able to simply ignore or refuse to engage with dissent, rather than engaging in compromise or strategy changes.³⁶⁶ This is exactly what NYCHA and HUD have done in response to criticism of RAD and the Blueprint. When collective action yields few results and encourages the violence of the state against those dissenting, tenants may seek to channel their frustration and grievances away from democratic contestation, such as protests or collective action, to procedural or legal remedies that neoliberal rationality accepts. Yet these individual procedural and legal avenues are not based on public deliberation and self-rule.

3. *Social movements have come to depend on the courts for relief*

One of the end results of neoliberalism is therefore social movements’ increasing dependence on the juridical to achieve their aims, which essentially pushes political issues to be resolved by technocrats rather than won by the *demos*. Indeed, during my fellowship, organizers and tenants alike were very interested in legal actions they could take against NYCHA, HUD, private entities, and others in order to achieve their aims, whether that was forcing repairs, ensuring continued and adequate public funding of public housing, or stopping RAD and the Blueprint. The key issues with the turn to the courts in organizing has been well-documented by community- and movement-lawyers.³⁶⁷ By turning to the juridical, tenants are not only disadvantaged by complex procedural barriers to litigation, such as standing, sovereign immunity and lack of jurisdiction, but tenants also lose their voice, relying on lawyers and legal-speak. They also lose their control over building pressure on actors to the long timeline of complex litigation.³⁶⁸ A reliance on litigation can also chill the solidarity involved in collective action, as tenants might take a court ruling as the end-all, be-all of social change, rather than enacting and imagining various possibilities for change.³⁶⁹ Further, since lawyers have an ethical obligation to represent individual client interests that can be at odds with collective interests, tenants involved in litigation may reasonably seek to settle their own cases in lieu of waiting longer for systemic

365. Brabazon, *supra* note 15, at 177.

366. *Id.* at 177–78.

367. *See generally* Marika Dias, *Stepping Aside, Standing Back, and Raising Up: Lawyering Within Grassroots Community Movements*, 22 GEO. J. ON POVERTY L. & POL’Y 405 (2015); Charles Elsesser, *Community Lawyering - The Role of Lawyers in the Social Justice Movement*, 14 LOY. J. PUB. INT. L. 375 (2013); Shauna I. Marshall, *Mission Impossible: Ethical Community Lawyering*, 7 CLINICAL L. REV. 147 (2000); William P. Quiqley, *Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations*, 21 OHIO N.U. L. REV. 455 (1994).

368. *See* Scott Cummings & Ingrid Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. Rev. 443, 490–502 (2001).

369. *See, e.g.*, Quiqley, *supra* note 367.

change.³⁷⁰ In a system where settlement of cases is often favored by the courts and litigation is slow, choosing to “cash out” is sometimes the most rational thing to do for tenants.

IV. PATHS FORWARD FOR RESISTANCE AND DEMOCRATIC TRANSFORMATION

The privatization of public housing marks a turning point in the U.S.’s housing policy for the country’s poorest and most marginalized. Indeed, in the U.K., when Margaret Thatcher’s government privatized social housing by allowing tenants to own their homes, the long-term effect was that low-income families were forced out of central locations, leading to homelessness and long commutes for the working poor and widespread gentrification in cities.³⁷¹ While HUD, PHAs and proponents of privatization might contend that programs like RAD will have no such effect, history tells a different story.³⁷² Further, as discussed *supra*, privatization has dramatic effects on the organizing potential of these same communities and their power not just in housing policy, but in our democracy writ large. If we are to resist neoliberal rationality and the normative vision that neoliberalism imposes on our world, we must not only seek to prevent the possible dire consequences of privatization on housing affordability, but also to reinvigorate the *demos* at public housing developments; such is a microcosm of American democracy, capable of sparking widespread organizing among the most marginalized Americans for change.

Any path forward for resisting the neoliberal transformation of public housing and all of its calamitous effects should center the holistic well-being of public housing tenants and their ability not just to live in a suitable apartment, but to thrive in a community. Moreover, resisting and stopping the privatization of public housing is but one goalpost that tenants, organizers and advocates should keep in their sights. After all, public housing is a product of deep racism, segregation and exclusion. Although it had and still has the potential to overcome its dark history and revive a movement for de-commodified housing across the country, that will only be possible if reforms to public housing are calculated, principled and motivated by a radical imagination and set of values.

As Amna A. Akbar lays out in *Reform and Struggles Over Life, Death, and Democracy*, left social movements have turned to “‘non-reformist reform’ as a framework for reconceiving reform: not as an end goal but as struggles to reconstitute the terms of life, death, and democracy.”³⁷³ Akbar defines non-reformist reforms as having two key qualities that push forward a theory of change: (1) seeking to undermine the current political, economic and social system while pointing towards a “fundamentally distinct system of set of relations in

370. See Cummings & Eagly, *supra* note 368.

371. HARVEY, *supra* note 179, at 164.

372. See *id.*; see also *supra* note 40.

373. Amna A. Akbar, *Reform and Struggles Over Life, Death, and Democracy*, 132 YALE L. J. 2497, 2507 (2023).

relation or towards a particular ideological and material project of worldbuilding”; and (2) coalition-, power- and consciousness-building among different groups sufficient to achieve a new and different vision.³⁷⁴ At its core, non-reformist reform seeks to change the underlying power relations in society and forge new, more just relations by targeting not just the law, but the social, economic and political as well.³⁷⁵

In the context of resisting the privatization of public housing, two large goals based on Akbar’s theory of non-reformist reform should be key: (1) preserving de-commodified housing because of the corrupting forces of the market on both equity and the *demos*; and (2) transferring power from economic elites, policymakers and advocates to public housing tenants themselves. These goals not only undermine the current set of relations, as described *supra*, but they also seek to redistribute power to a class of people who are most directly impacted by the rise or fall of public housing.

To prevent the threat to de-commodified housing, advocates and activists, together with tenants, must redouble their efforts to call for (1) an immediate halt to RAD and the Blueprint and (2) obligatory public funding of public housing as an entitlement, such as Social Security. In addition to protecting existing public housing, we must repeal the Faircloth Amendment, which prohibits new construction of public housing, and increase construction of de-commodified housing, whether in the form of public or social housing. Only through such affirmative intervention protecting de-commodified housing can we ease the housing crisis and mitigate the destruction of the *demos* at public housing complexes.

Well-meaning advocates may contend that such a call is politically infeasible and will only result in tenants living in dire conditions until public housing is demolished. But this argument’s defeatism will ultimately result in more harm to public housing tenants and American democracy. Rather, advocates must practice hope by seeing the endless possibilities in front of us. Elected officials in New York State have already introduced legislation that would empower cities and the state to build social housing.³⁷⁶ Nationally, localities are looking towards similar policy solutions in the midst of a housing affordability crisis.³⁷⁷ There is clearly more of an appetite for publicly-constructed housing than in decades. Further, most public housing tenants with whom I spoke identified dire conditions as their top concern, a trend that organizers also often noted. The issue of conditions is

374. *Id.* at 2527.

375. *See id.* at 2527–31.

376. Mindy Isser, *Public Ownership of Housing Could Be Closer Than You Think*, IN THESE TIMES (Feb. 15, 2024), <https://inthesetimes.com/article/social-housing-new-york-crisis-shortage> [<https://perma.cc/9P7P-XMVW>]. The reliance on bond financing in this plan is of particular concern for the reasons discussed *supra*.

377. Rachel M. Cohen, *What if Public Housing were for Everyone?*, VOX (Feb. 10, 2024), <https://www.vox.com/policy/2024/2/10/24065342/social-housing-public-housing-affordable-crisis> [<https://perma.cc/P7EE-X7L4>].

therefore a gateway to the solution to political infeasibility: building sufficient power to counteract the political impasse.

To build up the power of public housing tenants to push for these legal and policy changes, legal advocates should encourage tenants to join in collective action with their neighbors when tenants reach out for legal assistance. This could include, for example, referring tenants to active organizing groups at the intake stage. Even better, legal services organizations could employ organizers to work with public housing clients as well as their family and friends to achieve their goals. All this, of course, will take funding, and advocates should continue to call for robust funding of tenant organizing. Some of this funding could come from federal funds, similar to the HUD-funding of tenant organizers via the AmeriCorps VISTA in the 1990s.³⁷⁸ But a large part of this funding should also incentivize tenants to participate in organizing, especially because tenants face constraints on their time and energy, as described *supra*. Advocates, activists and tenants could push for compensation for tenants who engage in organizing, whether that is in the form of material assistance (e.g. groceries, household items, gift cards), cash payments, or rent discounts.³⁷⁹

Advocates must also seek to counteract neoliberal rationality in the legal realm by pushing the courts to apply new doctrinal lenses to cases involving RAD and the Blueprint. Such doctrinal changes should include a focus on the processes and values at stake in a particular legal proceeding, rather than just the outcome. For example, in the case of NYCHA's RAD transfer policy, courts must include the burden of tenants conducting their own housing searches in the private rental market, especially when tenants have less power than landlords and wealthier tenants, in weighing what constitutes an equivalent right as between public and RAD housing. Similarly, the courts must remove procedural and doctrinal barriers for tenants to challenge administrative agencies' actions, including by implying more rights of action for tenants to enforce contracts or regulations meant to protect them. While the turn to the juridical has thus far had a negative impact on the organizing power of tenants and served to short circuit the *demos*, redirecting judicial power—that is, the power to force powerful entities to act according to popular will—is also essential. The key for organizers and movements will be strategically deploying litigation in the service of the *demos* and in order to build solidarity.

378. See Josh Cohen, *HUD Has Money for Tenant Organizing. Why Isn't the Agency Spending It?*, SHELTERFORCE (Mar. 19, 2021), <https://shelterforce.org/2021/03/19/hud-has-money-for-tenant-organizing-why-isnt-the-agency-spending-it/> [<https://perma.cc/YM6H-F8N9>].

379. All of these forms of compensation have benefits and downsides. Their effectiveness in building solidarity will depend on how they are implemented. For example, tenants may be suspicious of rent discounts applied by the PHA because they may believe that the PHA will refuse to apply the discount if they do not act as the PHA wishes. Tenants should play an active role in deciding the form of compensation and how it will be disbursed in order to foster collective solidarity.

Tenants, organizers and advocates must also challenge NYCHA's use of certain procedural processes, such as voting and consultation meetings, as a democratic façade. These procedural processes do not give power back to tenants, but instead give NYCHA cover to move forward with the actions that it ultimately wants, often at the expense of tenants. In so doing, there may be an opportunity for tenants, organizers and advocates to push for changes in rules and regulations in public housing that allow for a more robust *demos* at public housing developments. Truly democratic forms of engagement could include implementation of participatory budgeting; a tenant veto or filibuster of PHA actions; and collective bargaining of tenants via their resident association or a tenant union.

Public housing is at a crossroads today. It is caught in between a death spiral instigated by neoliberal forces and "salvation" from continued deterioration and demolition in the form of privatization, driven by those same neoliberal forces. Only by pushing against commodifying public housing can we ensure that this valuable public resource remains available for the most marginalized to live, thrive and agitate for a more democratic and equitable future.