COMMENTS

TRADING DUE PROCESS RIGHTS FOR SHELTER: RUCKER AND UNCONSTITUTIONAL CONDITIONS IN PUBLIC HOUSING LEASES

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INTRODUCTION

Many of this nation’s public housing projects are the sites of concentrated and persistent drug-related crime. While there are several potential solutions to this problem, the United States Congress adopted one particular approach when it passed the Anti-Drug Abuse Act of 1988 (the “Act”)—automatic eviction for drug activity, sometimes called the “one-strike” policy. The Act imposes a strict liability standard on public housing tenants who are directly or tangentially involved in drug crimes and has been the impetus for federal regulations that direct local Public Housing Authorities (“PHAs”) to use

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2 Rather than addressing the problem after the drug crime has occurred, public housing authorities could attack the root of the problem: poverty and violent crime. See, e.g., ALEX KOTLOWITZ, THERE ARE NO CHILDREN HERE (1991) (describing life in Henry Horner Homes, one of Chicago’s most violent public housing projects). Public Housing Authorities could also seek community participation for alternative drug elimination programs. See Robin S. Golden, Toward a Model of Community Representation for Legal Assistance Lawyering: Examining the Role of Legal Assistance Agencies in Drug-Related Evictions from Public Housing, 17 YALE L. & POL’Y REV. 527 (1998). See also Drug Policy Alliance, Reducing Harm: Treatment and Beyond, at http://www.dpf.org/reducingharm (last visited Aug. 29, 2003) (stressing the importance of treatment rather than punishment for drug users).


4 See, e.g., Robert Hornstein et al., One Strike for the Poor and How Many for the Rest of Us?, LEGAL TIMES, March 18, 2002, at 66 (decrying the unfairness of the “one-strike” policy).

leases with one-strike provisions.\textsuperscript{6} Tenants who knowingly or unknowingly violate these provisions are subject to immediate lease cancellation and an unlawful detainer proceeding in municipal court if they do not leave the premises.\textsuperscript{7}

This strict-liability standard was challenged in \textit{HUD v. Rucker},\textsuperscript{8} and in March 2002, a unanimous United States Supreme Court\textsuperscript{9} held that Congress intended to give local public housing authorities the power to evict tenants under the one-strike eviction policy, even if the tenants were not aware that they were violating their leases.\textsuperscript{10} The Court also decided that this policy was constitutional.\textsuperscript{11}

\textit{Rucker} was initiated by tenants of Oakland Housing Authority ("OHA") who were served with notices explaining that they had violated a provision of their leases and directing them to leave their homes within three days.\textsuperscript{12} The provision in question forbade drug-related criminal activity by tenants, guests of tenants or anyone under the tenants' control, on or near the public housing authority grounds.\textsuperscript{13} OHA instituted the policy pursuant to 42 U.S.C. § 1437d(l)(6), which directed all local housing authorities to adopt this provision.

The statute does not provide a defense to tenants who were unaware of any drug-related criminal activity. While individual public housing authorities have the discretion to adopt the "innocent tenant" defense to counteract this \textsuperscript{14} problem,\textsuperscript{15} others are free to reject it, and do. Therefore, in all 3,400 local public housing authorities,\textsuperscript{16} it is possible for a tenant to be evicted despite a lack of individual wrongdoing and without notice that she is in violation of her lease before it is terminated.

By finding that innocent tenants are not entitled to defend themselves when they are charged with violating their leases, the \textit{Rucker} decision undermines the doctrine of unconstitutional conditions, which was established to protect the rights of those who contract with

\textsuperscript{6} See id.

\textsuperscript{7} The district court in \textit{Rucker v. Davis} mentions the fact that tenants are provided with hearings after lease cancellation. See infra note 141.

\textsuperscript{8} 535 U.S. 125 (2002).

\textsuperscript{9} The decision was 8-0, as Justice Breyer took no part. See id.

\textsuperscript{10} Id. at 136.

\textsuperscript{11} Id. at 135.


\textsuperscript{13} See id. at *3.

\textsuperscript{14} See infra text accompanying note 29.

\textsuperscript{15} There are approximately 1.2 million households living in public housing units. These units are operated by over 3,400 local public housing authorities. See Rue Landau, \textit{Criminal Records and Subsidized Housing: Families Losing the Opportunity for Decent Shelter}, in \textit{EVERY DOOR CLOSED: BARRIERS FACING PARENTS WITH CRIMINAL RECORDS} 43, available at http://www.clasp.org/DMS/Documents (last visited Sept. 8, 2003).
the government to receive public benefits. Had the Court applied an unconstitutional conditions analysis to *Rucker*, the statutory scheme would most likely fail on due process grounds. Furthermore, the decision continues the recent trend away from *Goldberg v. Kelly* in that it affirms the right/privilege distinction the *Goldberg* Court rejected. This trend amounts to an undervaluation of the property rights of public assistance recipients, while recent Supreme Court takings decisions have done the opposite for private property owners.

This comment addresses the constitutional issues at stake in *Rucker*, a matter that was given little attention by the Supreme Court in its written opinion. In Part I, I will explain the development of the one-strike policy and the debate over the innocent tenant defense. I will also describe the facts of the *Rucker* case, the lower courts' holdings and the Supreme Court's decision. In Part II, I will lay out the framework of the unconstitutional conditions doctrine and scholars' interpretations of its purposes. I will continue by exploring the place of public housing and due process in an unconstitutional conditions analysis, also focusing on scholars' and the Supreme Court's positions on the rights of public assistance recipients. Part III details the arguments against the Court's holding regarding the constitutional questions in *Rucker*. The importance of *Rucker* in Supreme Court doctrine remains to be seen, although it could signify an end to *Goldberg*-era protections of the property rights of the poor.

I. THE “ONE-STRIKE” POLICY AND *RUCKER*

A. Congress Responds to Crime in Public Housing Units

In the late 1980's, the Reagan and Bush Administrations brought the issue of drug crimes to the top of the national political agenda. Seeking to extend its “war on drugs” to public housing authorities, Congress passed the Act. Congress then statutorily required public housing agencies to use leases which provided that any criminal activity or drug-related criminal activity on or near the public housing premises...
premises may be cause for the termination of the tenancy. The Department of Housing and Urban Development ("HUD") in turn adopted these requirements as regulations in 1991. Local Public Housing Authorities receive money from HUD and in exchange agree to abide by HUD's regulations. PHAs were thus required to adopt the one-strike policy in their leases. Although the regulation was adopted, most agencies rarely followed the policy. This changed when President Clinton signed an executive order in 1996 encouraging public housing authorities to exercise the one-strike policy more often and favoring authorities that did with increased funding.

Congress did not instruct HUD whether to provide in its regulations a defense for tenants who did not know about the drug-related activity at issue. HUD considered this and decided not to include an "innocent tenant" defense in its regulations. Motivated by notions of personal contractual responsibility, HUD broke from the common practice of including such a defense in forfeiture regulations. In the civil forfeiture context—when the government seizes an individual's property that has been used in a drug crime—Congress has included an "innocent owner" defense in the governing statute. Furthermore, Congress has recognized a leasehold interest as a form of property. Congress's intent as to the innocent tenant defense was the issue in Rucker as it made its way through the courts. The Supreme Court decided that Congress did not intend to include an innocent tenant defense in the Act.

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22 See 42 U.S.C. § 1437d(l)(5) (1991). This is known as the "one-strike" policy. Congress redesignated section 1437d(l)(5) as subsection (l)(6) in 1998, but the language was left unchanged. I will continue to refer to this provision as (l)(5).

23 See Rucker v. Davis, 203 F.3d 627, 632 (9th Cir. 2000).

24 See id. at 631.


27 See id.


29 See Rucker v. Davis, 203 F.3d at 633 ("Ultimately, however, HUD decided not to accept [the] suggestions [of legal aid and tenant organizations], instead choosing to grant local PHAs the discretion to evict a tenant whose household members or guests use or sell drugs on or near the public housing premises regardless of whether the tenant knew or should have known of such activity.").

30 See id.


32 Congress amended the civil forfeiture provision of the Controlled Substances Act to include "any leasehold interest" as subject to civil forfeiture. See 21 U.S.C. § 881(a)(7) (2003). See also Rucker v. Davis, 237 F.3d 1113, 1121 (9th Cir. 2001) (en banc) (discussing the meaning of this amendment).


34 See id. The Court ruled on statutory interpretation grounds and gave little attention to the constitutionality of the statute without an "innocent tenant" defense.
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B. The Rucker Case

In 1997 and 1998, Pearlie Rucker, Herman Walker, Willie Lee and Barbara Hill, all residents of public housing units managed by the OHA, received notices that instructed them to leave their homes within three days.\(^\text{35}\) The notices terminated the residents' tenancies on the ground that they had violated paragraph 9(m) of their leases. The paragraph provided that "[the tenant], any member of the household, or another person under the tenant's control, shall not engage in . . . [a]ny drug-related criminal activity on or near the premises (e.g., manufacture, sale, distribution, use, or possession of illegal drugs or drug paraphernalia, etc.)."\(^\text{36}\)

All four residents were unaware that they were in violation of the lease provision.\(^\text{37}\) Rucker's son and daughter possessed cocaine several blocks away from Rucker's apartment, Walker's in-home caregiver kept cocaine in his apartment, and Lee's and Hill's grandsons were in possession of marijuana in the parking lot of their housing complex.\(^\text{38}\) All four residents acted within his or her power to comply with the lease provision: Rucker searched her daughter's room for illegal drugs regularly;\(^\text{39}\) Lee and Hill warned their household members of the possibility of eviction for illegal drug activity;\(^\text{40}\) and Walker was physically disabled and had little control over the actions of his in-home caregiver, though he informed all guests of OHA's policy.\(^\text{41}\)

After receiving the notices of termination, the residents brought an action against HUD, the OHA and its director in the United States District Court for the Northern District of California.\(^\text{42}\) They sought injunctive relief against the unlawful detainer actions, claiming the lease provision was administered against the intent of Congress, and that it violated the Administrative Procedure Act ("APA"), the Americans with Disabilities Act ("ADA"), state contract law, and federal constitutional law.\(^\text{43}\)

The plaintiffs claimed that the crux of the problem was that the lease clause (and the provision of the Act that required it) imposed a standard of strict liability on tenants without leaving them any de-


\(^{36}\) See id. at *3-4.

\(^{37}\) See id. at *5-7.

\(^{38}\) See id.


\(^{41}\) See Plaintiffs' Memo at 8.


\(^{43}\) See id.
More specifically, plaintiffs who had no knowledge of illegal drug activity were not entitled to claim that they were innocent. There was no innocent tenant defense.

Plaintiffs' constitutional claims were that the lease provision violated the Due Process Clause of the Fourteenth Amendment, and the First, Fourth, and Fifth Amendments. The provision violated due process because of the practice of evicting tenants who had no knowledge that their associates were engaging in the prohibited conduct. Plaintiffs claimed that the First Amendment was violated because the lease allowed the state to interfere with their right to freedom of association. The Fourth and Fifth Amendment violations stemmed from the part of the Anti-Drug Abuse Act's provision that allowed OHA officials to conduct warrantless searches of tenants' homes and the provision that required tenants to report one another to the authorities, respectively.

Plaintiffs relied on Tyson v. New York City Housing Authority to support their due process and First Amendment claims. In Tyson, residents of various New York City public housing projects were evicted on the grounds that they were "non-desirable." Relatives of the plaintiffs in Tyson (who did not live with them) were found engaging in criminal activity without the knowledge of the plaintiffs. The District Court for the Southern District of New York indicated that the housing authority regulation that authorized eviction for "non-desirability" would "run afoul" of tenants' First Amendment right to freedom of association. The court's analysis was based on the notion that such punishment was based solely on tenants' relationships to wrongdoers. Tyson articulated an eviction standard that had to be followed in order to comply with due process: "[t]here must be some causal nexus between the imposition of the sanction of eviction and the plaintiffs' own conduct." Rucker plaintiffs argued that Tyson stood for the proposition that an eviction for offensive behavior violated due process when the tenant could not reasonably foresee the wrongful conduct of third parties. The plaintiffs also relied on the

44 See Plaintiffs' Memo at 12-13.
45 See id. at 29-37.
46 See id. at 29-32.
47 See id. at 32-33.
48 See id. at 33-37.
50 See Plaintiffs' Memo at 29-32.
51 See Tyson, 369 F. Supp. at 516-17.
52 See id.
53 See id. at 519.
54 Id. at 520.
Tyson holding to support their claim that such an eviction violated the First Amendment.\textsuperscript{56}

Although the Rucker plaintiffs argued that Tyson should rule, the Rucker district court did not address plaintiffs' constitutional claims, and in fact suggested that they might likely fail. However, the court granted a preliminary injunction because it determined that the APA claim would likely succeed.\textsuperscript{57} Specifically, the court concluded that Congress had not spoken on whether or not the Act required an innocent tenant defense.\textsuperscript{58} Because Congress had not spoken, it was conceivable that OHA's lease provision was in conflict with the authorizing statute, thus violating the APA.\textsuperscript{59} As to the constitutional claims, the court concluded that since the tenants could theoretically do something to prevent the violation of the lease, they were not being punished for their association with the actual drug possessors.\textsuperscript{60}

The defendants appealed the decision to the Court of Appeals for the Ninth Circuit, and the court held in their favor, vacating the injunction.\textsuperscript{61} After deciding that the lease provision and the Act were properly interpreted to preclude an innocent tenant defense, the court dismissed plaintiffs' constitutional claims including the First Amendment claim and two new claims: (1) that the provision violated plaintiffs' substantive due process right to privacy under the Fourteenth Amendment; and (2) that the provision violated plaintiffs' right to be free from excessive fines under the Eighth Amendment.\textsuperscript{62}

After the decision, the court of appeals granted a rehearing en banc, vacating the decision of the original panel, and reinstated the preliminary injunction.\textsuperscript{63} The panel reconsidered whether Congress had intended to omit the innocent tenant defense from the Act and held that it did not.\textsuperscript{64} Relying on the doctrine of constitutional avoidance, the court determined that because the statute raised a substan-

\textsuperscript{56} See id.
\textsuperscript{58} Id. at *14.
\textsuperscript{59} Id. at *15-19.
\textsuperscript{60} Id. at *34-35 ("A tenant may control what occurs in her unit by ensuring that no one is present when she is not and searching her apartment and perhaps, her guests and household members before they enter. In other words, terminating the lease of a tenant for her failure to maintain a drug-free environment in her apartment holds the tenant responsible for something over which she has some control."). The hypothetical actions the court proposes that tenants take would not have prevented any of the behavior that led to the eviction of the four plaintiffs. All of them (except Walker, who the court concedes could not control the situation) were punished for drug activity that occurred outside the apartment.
\textsuperscript{61} See Rucker v. Davis, 203 F.3d 627 (9th Cir. 2000).
\textsuperscript{62} See id. at 648.
\textsuperscript{63} See Rucker v. Davis, 237 F.3d 1113 (9th Cir. 2001) (en banc).
\textsuperscript{64} Id. at 1127.
tial constitutional concern, it should be interpreted in favor of the innocent tenant defense. That constitutional concern was due process.

The United States Supreme Court granted certiorari and overturned the en banc decision. The Court held that it was the intent of Congress to omit the innocent tenant defense from the Act's one-strike provision. Furthermore, since the meaning of the provision was unambiguous, it was unnecessary to invoke the doctrine of constitutional avoidance. Eight Justices dismissed the due process claims before them, first because the government was acting in its capacity as a landlord and not a sovereign, and second because the state court eviction proceeding was sufficient to satisfy procedural due process. However, the Court conceded that Greene v. Lindsey properly held that tenants had a property right in their tenancy.

The Supreme Court also dismissed plaintiffs' First and Eighth Amendment claims, citing Lyng v. International Union. According to the Court, "[Lyng] forecloses respondents claim that the eviction of unknowing tenants violates the First Amendment guarantee of freedom of association . . . [a]nd termination of tenancy 'is neither a cash nor an in-kind payment imposed by and payable to the government' and therefore is 'not subject to analysis as an excessive fine.'"

In Lyng, union workers challenged section 109 of the Omnibus Budget Reconciliation Act of 1981 ("OBRA") because it excluded striking workers from its food stamp program. OBRA conditioned the benefit of food stamps on refraining from striking. The plaintiffs argued that this violated their right to freedom of association and freedom of expression. Using a rational basis test, the Supreme

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6 Id. at 1124 (citing United States v. X-Citement Video, 513 U.S. 64, 69 (1994)).
66 Id. at 1124-25. The Court asserts that penalizing a person without any intentional wrongdoing violates the due process clause and that tenants have a property interest in their tenancy. "HUD's interpretation would permit tenants to be deprived of their property interest without any relationship to individual wrongdoing." Id. at 1125.
68 Id. at 130.
69 Id. at 135.
70 The Court asserted that when the government is not acting in its capacity as sovereign, the due process inquiry is entirely different. "The government is not attempting to criminally punish or civilly regulate respondents as members of the general populace. It is instead acting as a landlord of property that it owns, invoking a clause in a lease to which respondents have agreed and which Congress has expressly required." See id.
72 The Court also asserted that the deprivation of this right—and the tenants' opportunity to dispute the actual violation of the lease provision—would take place during the eviction hearing and thus satisfy due process. See Rucker, 535 U.S. at 135-36.
74 Rucker, 535 U.S. at 136 n.6 (quoting Rucker v. Davis, 203 F.3d at 648).
75 See Lyng, 485 U.S. 360 at 363.
76 See id. at 369-64.
Court determined that the statute was constitutional. The facts of the case did not demand a stricter analysis, the Court held, because the statute did not violate any fundamental rights. Further, the Court distinguished withdrawing a government benefit from "physical and economic reprisals" and "civil liability." In the case of withdrawing a benefit, the Court concluded, the government's actions did not pose as great a danger to the associational rights of the recipients. This is in line with the argument that the state's power to establish or eliminate a benefit (the food stamp program in this case) includes the lesser power to impose conditions on the receipt of such a benefit.

Because the Rucker Court used Lyng to reject plaintiffs' First and Eighth Amendment claims and because it asked questions at oral arguments about the conditions imposed on tenants, it seems as though the doctrine of unconstitutional conditions was not far from the Justices' minds. Yet, the Court did not mention the doctrine, nor did it give the extra protection to the plaintiffs' due process rights that is required by the doctrine. This was not a trivial oversight, for had they considered the case in light of the doctrine, it might have come out the other way.

II. THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS AND THE DEMISE OF PROPERTY RIGHTS FOR THE POOR

The doctrine of unconstitutional conditions stands for the proposition that the state cannot grant a privilege or a benefit on the condition that the recipient must waive a constitutional right. Some scholars, Kathleen Sullivan in particular, see the Court's new approach to substantive due process during the Lochner era as the be-

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77 See id. at 370-73.
78 See id. at 370.
79 See id. at 367 n.5.
80 See id. at 366-67.
81 See infra note 99.
82 The transcript of the oral argument shows that some Justices had the doctrine of unconstitutional conditions in mind. See United States Supreme Court Oral Argument at 7, HUD v. Rucker, 535 U.S. 125 (2002) (Nos. 00-1770 and 00-1781) (Feb. 19, 2002) (transcript available at http://www.supremecourts.gov/oral_arguments/argument_transcripts.html) ("QUESTION [by the Court]: Is it your position that the Government can place any terms and conditions whatever on leases as long as it doesn't violate some other constitutional provision like the First Amendment? ANSWER [by petitioner's counsel]: Yes, I think that is our position. QUESTION: And so this is a condition that the Government has a right to impose. Is that your basic position? ANSWER: That's right.").
83 See Epstein, supra note 16, at 6-7 ("[The] doctrine holds that even if a state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of constitutional rights.").
ginning of the doctrine.\footnote{See Kathleen M. Sullivan, \textit{Unconstitutional Conditions}, 102 HARV. L. REV. 1415, 1416 (1989) ("The \textit{Lochner} Court first fashioned the doctrine.").} This theory categorizes the doctrine as another check on government regulation. That said, it is not surprising that the unconstitutional conditions doctrine reemerged in the late 1960's to protect individual rights from government interference, as did substantive due process.\footnote{See id.}

The Supreme Court has recently been growing more hesitant to apply the unconstitutional conditions doctrine to individual rights cases,\footnote{Lyng is the latest example of the erosion of the doctrine (in the First Amendment context). \textit{See supra} text accompanying notes 75-81.} but it has not abandoned it altogether. Indeed, when the constitutionality of forfeiture of property comes into question the Rehnquist Court is almost always willing to invoke the doctrine. For example, Justice Scalia used an unconstitutional conditions analysis in \textit{Nollan v. California Coastal Commission}.\footnote{483 U.S. 825 (1987).} The Court held that the government acted unconstitutionally when it refused to issue a building permit to the Nollans unless they agreed to grant an easement on their property.\footnote{\textit{Id.} at 841-42.} In his analysis, Justice Scalia introduced a new "nexus" test for determining whether conditioning benefits was constitutional.\footnote{\textit{See id.} at 837.} Under the nexus test, the government must prove that the permit conditions imposed on landowners further the same purposes that would be furthered by a complete prohibition on building.\footnote{\textit{See id.} ("[U]nless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'").} This is a high burden for the government, reflecting the extra protection Justice Scalia gave to property holders in the Nollans' situation. The nexus test has been used in other takings cases.\footnote{See, e.g., \textit{Goss v. City of Little Rock}, 151 F.3d 861 (8th Cir. 1998) (affirming the district court's application of the nexus tests in both \textit{Nollan} and \textit{Dolan v. City of Tigard}, 512 U.S. 374 (1994)); \textit{Christopher Lake Dev. Co. v. St. Louis County}, 35 F.3d 1269, 1275 (8th Cir. 1994) (noting that in due process takings claims the "plaintiff can allege that the regulation is arbitrary, irrational, and not substantially related to a legitimate governmental purpose."); \textit{Walz v. Town of Smithtown}, 46 F.3d 162, 169 (2d Cir. 1995) (relying on \textit{Dolan}'s nexus test).} Why should the Court not, then, hold that conditions on public housing leases require the same nexus test? Perhaps it is the Court's opinion that the property interest public housing tenants have in their leaseholds do not demand the same level of protection as the property interest landowners have in their land. Such an opinion conforms with traditional theories regarding the superiority of claims of right to land over all other property rights. However, these theories are at
best outdated, and at worst they blatantly favor wealthy individuals over the poor.\textsuperscript{92}

A. The Development of the Doctrine

Justice Scalia's nexus test is designed to protect individuals from contracting away their constitutional rights, and it is one way of invoking the unconstitutional conditions doctrine. The doctrine imposes extra requirements on contracts between the government and individuals than ordinary contract law would impose.\textsuperscript{93} Such contracts may meet the requirements of contract law—offer, acceptance, consideration, and consent—yet be invalid under the doctrine of unconstitutional conditions.\textsuperscript{94} Justification for the extra protection demanded by the doctrine lies in the high value the Court has placed on the individual liberties guaranteed by the Bill of Rights within the last thirty-five years.\textsuperscript{95} Some have debated the appropriateness of interfering with the right to contract away individual liberties.\textsuperscript{96} However, the doctrine remains viable in modern constitutional law.\textsuperscript{97}

The doctrine corrects an imbalance in bargaining power between the government and individuals that can lead to the erosion of constitutionally protected rights and individual autonomy. While indi-

\textsuperscript{92} For a discussion on re-conceiving property rights in the modern era, see Charles Reich, The New Property, 73 YALE L.J. 733 (1964). Reich classifies government largess as the new property and advocates for protection of the rights associated with it.

\textsuperscript{93} See Epstein, supra note 16, at 8 ("Duress, force, misrepresentation, undue influence, and incompetence may be used to set aside contracts that otherwise meet the normal requirements of offer, acceptance, consideration, and consent. But none of these conventional grounds accounts for the doctrine of unconstitutional conditions, which comes into play only after all these conventional hurdles to consensual union have been overcome.").

\textsuperscript{94} See id.

\textsuperscript{95} The Warren Court revived the doctrine of unconstitutional conditions in the 1970's to protect individual rights. With the re-emergence of the doctrine, the Court was able to shield certain constitutional rights from the forces of a market economy. See Lynn A. Baker, The Prices of Rights: Towards a Positive Theory of Unconstitutional Conditions, 75 CORNELL L. REV. 1185, 1188 (1990).

\textsuperscript{96} Justice Holmes and others disapprove of any interference into the government's ability to contract. See, e.g., W. Union Tel. Co. v. Kansas, 216 U.S. 1, 52 (1910) (Holmes, J., dissenting) ("[T]he right to prohibit, regulate or tax foreign corporations in respect of business done wholly within a State is not taken away by the fact that they also are engaged there in commerce among the States."); McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 518 (Mass. 1892) (holding that the city "may impose any reasonable condition upon holding offices within its control"). On the other side, Professor Sullivan contends that the doctrine serves a crucial role in that "[i]t identifies a characteristic technique by which government appears not to, but in fact does burden [constitutional] liberties, triggering a demand for especially strong justification by the state." Sullivan, supra, note 84, at 1419. Professor Epstein claims the doctrine is "a 'second best' approach to controlling government discretion." Epstein, supra note 16, at 28. The best approach, he says, would be to limit governmental power, but in the absence of that, the doctrine is useful as a "mop-up" solution when government's power is too broad. Id.

\textsuperscript{97} See Epstein, supra note 16, at 11 (describing several recent cases employing the doctrine).
individuals who agree to waive their rights in return for a government benefit can be said to exercise their own autonomy in certain situations, it is not true that the individual is acting autonomously when she has little to no choice but to waive those rights. When the individual must agree to the terms the government is offering in order to obtain a benefit necessary for survival, the choice she makes is always going to be to accept the terms and survive. The doctrine protects individuals who make compromising choices because they can see no alternatives.

For the purposes of the doctrine’s application, it makes no difference whether the public benefit in question is a “right” or a “privilege”—that is, whether the recipient is constitutionally entitled to the benefit or the benefit is bestowed on the recipient because of government largess. Although some Justices have made a distinction between the state’s responsibility in both situations and refused to protect individuals in cases where they were not constitutionally entitled to the benefit they received, the Supreme Court has for the most part avoided this distinction. To say that an individual is not entitled to constitutional protection simply because the benefit she receives is not guaranteed by the Constitution is to equate state benefits with private benefits. Certainly a private landlord can condition tenancy on particular behavior, but the state is subject to different obligations. The Court developed the doctrine of unconstitutional conditions to hold the state to these obligations. Thus, the doctrine prohibits the state from forcing individuals to contract away constitutionally protected rights.

98 See Seth F. Kreimer, Allocations Sanctions: The Problem of Negative Rights in a Positive State, 132 U. PA. L. REV. 1293, 1388-84 (1984) (“A doctrine respecting individual choices... requires that such choices should at least result from conscious choice. Thus, in situations where no real choice exists vis-a-vis the proffered incentive, one cannot claim comfort from discussion of waiver.”).

99 Often critics of giving extra protection to individuals in their contracts with the government point to the argument that the government has no responsibility to protect constitutional rights when the thing the individual is contracting for is a privilege and not a right. This “greater includes the lesser” approach, although adopted by Justices like Holmes and Rehnquist, is seen by many as flawed. See Kreimer, supra note 98, at 1311-12 (explaining that this approach is misguided and inapplicable); William A. Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 HARV. L. REV. 1439, 1441 (1968) (positing that if the right-privilege distinction were uniformly applied, it would have devastating effects on constitutional claims in the public sector).

100 See Van Alstyne, supra note 99, at 1440.

101 See id. at 1460-61.

102 See id. (“[T]he fourteenth amendment leaves private infringements unaffected, and it does so whether such infringements are great or small, reasonable or arbitrary. That, after all, was the lesson of the Civil Rights Cases in their literal rendering of the amendment: that it is only a ‘state’ which is forbidden to ignore due process and equal protection in its dealings with individuals.”).
B. Property Rights and Public Assistance Recipients: Applying the Unconstitutional Conditions Doctrine to Public Housing Leases

Academic discourse about the unconstitutional conditions doctrine usually arises when the government benefit is employment and the right waived is the First Amendment right to freedom of speech or freedom of religion. In practice, however, the Supreme Court has afforded extra protection to fundamental rights in cases involving benefits other than employment and rights other than freedom of speech. Further, if one were to accept Professor Sullivan's conception of the doctrine as comparable with a substantive due process test, the right waived need not be specified in the Bill of Rights, but instead can be a generally-accepted liberty, as freedom of contract was in *Lochner* or the right to privacy was in *Roe v. Wade* and its progeny.

A prospective tenant of a public housing authority that offers no innocent tenant defense waives her right to a fair hearing (to procedural due process) as a condition of receipt of the benefit. This violates unconstitutional conditions, and thus deprives tenants of the substantive due process rights guaranteed to them by the Fourteenth Amendment. The Court's reluctance to apply the unconstitutional conditions doctrine to the one-strike policy demonstrates the erosion of the doctrine's force in constitutional law and a broader unwillingness to protect the rights of the recipients of government aid.

A look at the history of public housing is useful to understand the class of people affected by the one-strike policy. The U.S. government began to provide public housing initially to workers who were manufacturing war supplies during World War I. With the onset of

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103 See, e.g., Epstein, *supra* note 16, at 67 ("[U]nconstitutional conditions issues tend to be raised with respect to restrictions relatively germane to the work at hand: the terms and conditions of individual employment contracts.").

104 In addition to free speech, the Court has protected the right to be free from unconstitutional takings in *Nollan* and *Dolan*, and due process rights in *Frost & Frost Trucking Co. v. Rail Road Commission*, 271 U.S. 583 (1926), and *Western Union Telephone Co. v. Kansas*, 216 U.S. 1 (1910). The Fifth Circuit has protected the right to procedural due process in termination from employment in *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961). The Sixth Circuit considered the right against self-incrimination in an unconstitutional conditions analysis in *Woodard v. Ohio Adult Parole Authority*, 107 F.3d 1178 (6th Cir. 1997), and the District Court for the Northern District of Illinois recently indicated that the Contracts Clause might provide a right that cannot be burdened by unconstitutional conditions. See Northwestern Univ. v. City of Evanston, No. 00 C 7509, 2002 U.S. Dist. LEXIS 17104 (N.D. Ill. Sept. 11, 2002).

105 See *supra* text accompanying note 84.

106 See *supra* note 16 (discussing why *Lyng* is breaking with tradition).

the Depression, it became necessary to increase the public housing supply to accommodate the growing number of unemployed. The Housing Acts of 1937 and 1949 were instituted to begin slum clearance in urban areas and to house the working poor.\textsuperscript{109} The Housing Act of 1949 was so committed to this first goal that it spurred massive demolition in urban areas, often under the direction of private developers and without the input of community members.\textsuperscript{111} This led to a shortage of housing because the program failed to rebuild after clearing the slums.\textsuperscript{112} Massive public housing projects were built to accommodate the growing number of individuals in need of this benefit.\textsuperscript{113} Like welfare and other forms of public assistance, public housing soon became critical to low-income families' survival.

Although public housing was underway long before the creation of a comprehensive welfare program, the latter was able to inspire more substantial and swifter victories for the rights of the poor than the former. This had much to do with timing. The welfare rolls expanded dramatically around the time of the Civil Rights Movement.\textsuperscript{114} In 1960, 745,000 families received Aid for Families with Dependent Children ("AFDC"). By 1972, three million families were receiving assistance from the program.\textsuperscript{115} At the same time, advocates for the poor were gaining support from philosophers and the courts.\textsuperscript{116} In 1964, Charles Reich wrote The New Property,\textsuperscript{117} an article which attempted to dispense with traditional notions of property and recreate them. Reich argued that growing government largess calls for reconsidering the rights of individuals who have a claim to some of that largess and that "those forms of largess which are closely linked to status must be deemed to be held as of right."\textsuperscript{118} He also noted that

\textsuperscript{109} See id. at 254 (arguing that the Housing Acts were not acts of benevolence, but were rather designed to ameliorate the physical conditions of inner cities and unemployment).
\textsuperscript{110} See Georgette C. Poindexter, Who Gets the Final No? Tenant Participation in Public Housing Redevelopment, 9 CORNELL J.L. & PUB. POL'Y 659, 662 (2000) ("Charged with eliminating urban blight, the 'federal bulldozer' of redevelopment efforts leveled entire neighborhoods across the United States.").
\textsuperscript{111} See CHARLES ABRAMS, FORBIDDEN NEIGHBORS 248 (1955) ("Under the public housing program nearly 200,000 substandard dwelling units were eliminated by June 30, 1953; 77 per cent was accomplished through demolition, 17 per cent through compulsory repair, and 6 per cent by barring them to occupancy.").
\textsuperscript{112} See KOTLOWITZ, supra note 2, at 21-22 ("In the middle and late 1950s, publicly financed high-rise complexes sprang up across the country like dandelions in a rainy spring . . . [In Chicago, the complexes] were constructed on the edges of the city's black ghettos. Rather than providing alternatives to what had become decrepit living conditions, public housing became anchors for existing slums.").
\textsuperscript{114} See id.
\textsuperscript{115} See id.
\textsuperscript{116} Reich, supra note 92.
\textsuperscript{117} Id. at 785.
the growing control of government over property and institutions makes individuals more vulnerable to government power and that welfare recipients are some of the most vulnerable. This view was embraced by many legal scholars and welfare rights activists. Using Reich's conception of property as both traditional property and government largess, they claimed that welfare recipients were entitled to all the constitutional protections afforded to private property owners.

In 1968 to 1970, the Warren Court gave three major victories to welfare rights activists. King v. Smith, Shapiro v. Thompson, and Goldberg v. Kelly recognized the legal entitlements of welfare recipients to their benefits. In King, the Court ruled that families who qualified for AFDC had a statutory right to receive the benefits and therefore could not be denied them because of the sexual relationships involving the head-of-household. Shapiro held that a one-year waiting period for new residents of a state to obtain welfare payments violated the right to interstate travel. Goldberg, which I discuss in greater detail below, held that welfare recipients must receive a hearing before their benefits are terminated in order to comply with procedural due process requirements.

These victories were short-lived, as the Court's membership changed and public assistance again developed a stigma. Conservative thinkers like Martin Anderson and George Gilder influenced

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119 Id. at 758.
121 See id. at 267 ("[L]egal scholars and social-welfare advocates"... [argued that]... "if a recipient satisfied the conditions of eligibility in the statute and regulations, he had a legally enforceable right to receive the appropriate benefits... . A second version of the entitlement argument was that since welfare benefits were a legal right defined by statute, they should not be used by government to 'buy up' recipients' constitutional rights.").
125 See King, 392 U.S. 309.
126 See Shapiro, 394 U.S. 618.
127 See Goldberg, 397 U.S. 254.
128 For a discussion of American society's perception of the poor, see KATZ, supra note 114, at 137-38 ("[A] war on welfare accompanied the conservative revival of the early 1980's... . Increasingly worried about downward mobility and their children's future, many Americans returned to an older psychology of scarcity. As they examined the sources of their distress, looking for both villains and ways to cut public spending, ordinary Americans and their elected representatives focused on welfare and its beneficiaries.").
129 See generally MARTIN ANDERSON, WELFARE: THE POLITICAL ECONOMY OF WELFARE REFORM IN THE UNITED STATES (1978) (contending that poverty was almost completely eradicated from the U.S. and proposing a scaled-back version of AFDC).
130 See generally GEORGE GILDER, WEALTH AND POVERTY (1981) (asserting that poverty is a natural and beneficial byproduct of capitalism and welfare serves only to demoralize the poor).
popular thought and the Court adopted their notions of entitlement. Chief Justice Rehnquist and other members of the Court embraced Justice Holmes's distinction between rights and privileges when determining the appropriateness of constitutional protection.\textsuperscript{131} Decisions like \textit{Arnett v. Kennedy},\textsuperscript{132} which held that the government has the power to deny due process protection because it has the power to withdraw the benefit altogether,\textsuperscript{133} eroded the progress made by the Warren Court in earlier years. Thus, it is no surprise that the \textit{Rucker} plaintiffs held little hope of protection from government abuses of power.

Perhaps the \textit{Rucker} Court thought the one-strike policy was not subject to the doctrine of unconstitutional conditions not because of the benefit involved nor the right waived, but rather because of those affected by the policy—the poor. It is hard to imagine that the Court would be as reluctant to find unconstitutional conditions in public housing leases had the tenants been wealthy. For example, had Governors or Presidents—both residents of a kind of public housing—been subject to the policy, it would be doubtful that a court would find their immediate eviction, without warning or opportunity to defend themselves, constitutional.\textsuperscript{134} Further, recent takings decisions indicate that private property owners are entitled to all the protections the Constitution allows.\textsuperscript{135} Still, the Court viewed public assistance recipients less favorably.

Given that the \textit{Rucker} circumstances call for the invocation of the doctrine of unconstitutional conditions, the Supreme Court’s refusal to afford extra protection to the due process rights of public housing tenants is symbolic of the Court’s current social philosophy. Indeed, the Court continued the tradition of cutting back on the rights of public assistance recipients started in the mid-1970s, and, as I will discuss below, this tradition violates fundamental constitutional principles.

\textsuperscript{131} See Kreimer, supra note 98, at 1308-09.
\textsuperscript{132} 416 U.S. 134, 153-54 (1974) ("[W]here the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of [the recipient of the benefit] must take the bitter with the sweet.").
\textsuperscript{133} See id.
\textsuperscript{134} See Hornstein et al., supra note 4, at 66 (pointing out that the one-strike policy without the innocent tenant defense only applies to poor residents of public housing, and not to elected officials, notably Governor Jeb Bush and President George W. Bush); id. ("Rucker and the Bush brothers are all residents of a species of public housing. All have a daughter who at one time or another had legal problems with alcohol or drugs. But the consequences flowing from the Bush daughter's problems are far different from those that Rucker has faced.").
\textsuperscript{135} See supra discussion accompanying note 87.
III. THE RIGHTS THEY WAIVE: AN ANALYSIS OF THE DUE PROCESS ARGUMENTS SO SUMMARILY DISMISSED BY THE COURT

Public housing leases with the one-strike policy condition continued possession of a property interest (the tenancy) on certain behavior. The behavior required is that the tenant, household member, or anyone under the tenant’s “control” (which to date has been defined liberally so as to include people as independent as in-home caregivers) must refrain from engaging in criminal activity on or off the premises. This condition fails to exempt tenants with no knowledge of such activity from eviction and therefore force innocent tenants to waive constitutional rights. First, this forces innocent tenants to waive their right to procedural due process. Secondly, the Act raises serious substantive due process concerns—concerns which the unconstitutional conditions doctrine can address.

A. Procedural Due Process: Do Innocent Tenants Really Get a Fair Hearing?

Leases enforced by § 1437d(l)(5) compel innocent tenants to waive their right to procedural due process in order to qualify for public housing. In Rucker, the Supreme Court found that state unlawful detainer proceedings were enough to satisfy plaintiffs’ rights to procedural due process, but the Court failed to take into consideration the timing of those proceedings. Unlawful detainer proceedings are initiated after the leasehold has been cancelled, and therefore tenants do not receive the process guaranteed by the Constitution until after they have been deprived of their property. The one-strike species of post-termination hearing does not comport with the requirements demanded by Goldberg v. Kelly.

156 See Greene v. Lindsey, 456 U.S. 444, 450-51 (1982) (noting that tenants were “deprived of a significant interest in property[,]... the right to continued residence in their homes”).
157 See Rucker v. Davis, 1998 U.S. Dist. LEXIS 9345, at *5-7 (explaining that Walker’s in-home caregiver was caught with cocaine and that Walker was physically disabled).
158 I believe the Act also forces public housing tenants to waive their rights to freedom of association and to be free from excessive fines, but I will not analyze the Court’s errors here. I will focus on the due process rights waived, as the Court did not attempt to analyze their waiver as unconstitutional conditions.
161 The district court pointed out that the injury had occurred at the time tenants received their notices, not at the state unlawful detainer proceedings. See Rucker v. Davis, 1998 U.S. Dist. LEXIS 9345, at *9-10 (“The notice itself terminated each plaintiff’s tenancy and ordered each plaintiff to vacate the premises.... Plaintiffs were thus injured at the time OHA served each with the notice. It was only because plaintiffs did not vacate as ordered to do so that OHA filed the unlawful detainer actions. If plaintiffs had vacated, thus eliminating the need for an unlawful detainer action, they would... have suffered an injury—the loss of their apartments.”).
162 397 U.S. 254, 264 (1970) (noting that in the welfare context, “termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by
Goldberg held that due process requires an opportunity for notice and a hearing prior to the deprivation of a significant property interest.\textsuperscript{143} The Goldberg plaintiffs (who were recipients of welfare benefits) brought suit complaining that their benefits were terminated without notice and a hearing.\textsuperscript{144} The Court held that this practice violated due process and required that future hearings for welfare termination afford the individual "timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally."\textsuperscript{145} Welfare benefits, the Court concluded, required the pre-termination hearing detailed above because of the importance of welfare to survival and the "immediately desperate" situation the individual would face if deprived of the benefit erroneously.\textsuperscript{146} The Court ruled that "[t]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be ‘condemned to suffer grievous loss,’ and depends upon whether the recipient’s interest in avoiding that loss outweighs the governmental interest in summary adjudication."\textsuperscript{147} This reasoning was upheld in Mathews v. Eldridge\textsuperscript{148} when the Court outlined the factors that contribute to a judicial determination of how much process should be awarded in administrative termination procedures. Those factors were: (1) the importance of the benefit to the individual; (2) the state’s interest in limiting procedures; and (3) the accuracy and fairness of procedures already in place.\textsuperscript{149}

The housing termination policy embodied in the one-strike statute does not meet the Goldberg or Mathews standards. Public housing is as important to survival as welfare benefits. Without the opportunity to live in government-subsidized housing, public housing tenants would face homelessness. The government’s interest in offering no process for the withdrawal of this critical benefit is minimal. It might argue that it has an interest in canceling the leases of tenants whose associates are engaged in drug activity before a termination hearing because of possible danger to society,\textsuperscript{150} but this is illogical. As the

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\textsuperscript{143} See id.
\textsuperscript{144} See id. at 255.
\textsuperscript{145} Id. at 267-68.
\textsuperscript{146} Id. at 264.
\textsuperscript{147} Id. at 262-63 (citation omitted).
\textsuperscript{148} 424 U.S. 319 (1976) (per curiam).
\textsuperscript{149} See id.
\textsuperscript{150} This justification is explored in the Supreme Court opinion. See Rucker, 535 U.S. at 134 (“Regardless of knowledge, a tenant who ‘cannot control drug crime, or other criminal activities by a household member which threaten health or safety of other residents, is a threat to
Rucker district court pointed out, the policy gives tenants greater incentives to not report drug crimes to the authorities. 151 If an innocent tenant were to find out that someone under her control was using drugs, she would risk eviction by seeking help. 152 If despite this inconsistency the policy were effective, one could go down the slippery slope and advocate for evicting all current tenants because of the crime and drug problems in public housing units. Why hold one individual accountable for drug activity outside of her control when the whole public housing complex can be held responsible for drug activity outside its control? This logic is simply irrational. And the more attenuated the connection between individual wrongdoing and punishment, the more due process rights are thwarted.

The proceedings in place for tenants who face eviction under the policy do not come close to being extensive enough to promote accuracy and fairness. When tenants unknowingly violate the one-strike provisions of their leases, they receive no warning other than a piece of paper informing them that they have violated their leases and must leave their apartments. 153 In Pennsylvania, tenants evicted under this policy are not entitled to the administrative grievance hearing that other evictees are allowed. 154 They go through an expedited eviction process and are not informed how to defend themselves from the charges against them until after their leases have been cancelled and the PHA sues them for unlawfully remaining in their units. 155

There is question over whether the Goldberg Court intended the same procedural protections governing welfare termination to cover public housing termination. Judging from the opinions of the federal courts and legislative history, it did. The Second, 156 Fourth, 157 Fifth, 158 Sixth, 159 Seventh, 160 and D.C. 161 Courts of Appeals, as well as


152 See id. ("[T]erminating the leases of ‘innocent’ tenants may facilitate, or least conceal, criminal drug-activity by ensuring that tenants who learn of such activity by their household members or guests will not report the activity to the public housing or other authorities. If a tenant were to report such conduct she would be advising the housing authority that she is in breach of the lease and subject to termination of her tenancy since her guest or household member engaged in drug-related criminal activity.").

153 See supra text accompanying note 35.


155 See id.


159 See Thomas v. Cohen, 304 F.3d 563 (6th Cir. 2002).

160 See Johnson v. Ill. Dep’t of Pub. Aid, 467 F.2d 1269 (7th Cir. 1972).

district courts in the Third,\textsuperscript{162} Ninth,\textsuperscript{163} and Eleventh\textsuperscript{164} Circuits, have applied Goldberg's requirements to public housing termination hearings. For example, in Caulder v. Durham Housing Authority, the Fourth Circuit analogized public housing tenants to welfare recipients because they both lacked power to recover from the termination of benefits.\textsuperscript{165}

When an innocent tenant receives notice that her lease has been cancelled, she has been deprived of her property by the government and receives a hearing in municipal court only after this deprivation. The survival of most public housing tenants depends on their retention of their leaseholds, and therefore Goldberg and Mathews demand that they receive adequate notice and the opportunity to defend themselves at a fair hearing before their property rights are violated.\textsuperscript{166} The notice a tenant receives under the one-strike policy is neither timely nor adequate. Furthermore, at the unlawful detainer hearing an innocent tenant is not able to defend herself by presenting the obvious argument—that she was unaware of the conduct leading to the violation of her lease. Forcing public housing tenants to agree to these procedures imposes unconstitutional conditions on the receipt of government benefits.

\textbf{B. Substantive Due Process: The Government-As-Landlord Argument and Its Fallacies}

Public housing tenants who enter into lease agreements that contain the one-strike policy without an innocent tenant defense agree to be deprived of their property interest whether or not they bear any personal guilt. When the government punishes tenants for a wrongdoing when they bear no responsibility, and when the government subsequently denies them the opportunity to defend themselves, the government is acting arbitrarily.\textsuperscript{167} Denying tenants the procedural

\textsuperscript{165} 433 F.2d 998, 1003 (4th Cir. 1970) ("Not only is [the public housing tenant], by definition, one of a class who cannot afford acceptable housing so that he is 'condemned to suffer grievous loss,' but should it be subsequently determined that his eviction was improper the wrong cannot be speedily made right because of the demand for low-cost public housing and the likelihood that the space from which he was evicted will be occupied by others.").
\textsuperscript{167} The en banc court of appeals held that there was a due process violation for this reason. "[The statute] would permit tenants to be deprived of their property interest without any relationship to individual wrongdoing." Rucker v. Davis, 237 F.3d at 1125. "Penalizing conduct that involves no intentional wrongdoing by an individual can run afoul of the Due Process Clause." \textit{Id.} at 1124. The Supreme Court did not dismiss the logic of this argument, but rather analyzed whether the two cases the appeals court used for support ruled. See Rucker, 535 U.S. at 135.
protections to which they are constitutionally entitled violates substantive due process.\textsuperscript{168} The Supreme Court avoided the question of a substantive due process violation by distinguishing the government's acts as a sovereign from those as a landlord. This analysis indicated that as a landlord, the government is not subject to constitutional review.\textsuperscript{169} Although this illustrates the current thinking on the Court in regard to the right/privilege distinction, as a conceptual matter it is somewhat misleading. In the case of public housing, the government is acting as a landlord only because that is how it has decided to disburse the benefit in question—housing. The government could, and does in the case of Section 8 vouchers,\textsuperscript{170} disburse the benefit through contractors who serve as landlords.\textsuperscript{171} In that situation, the government would be acting as sovereign in that it would be the funder, not the operator, of the service provided. Just because the government has decided to retain more intimate control over the disbursement of this particular benefit does not necessarily mean it is an actor in the market of low-income housing.

As the manager of public housing buildings, the government is not acting like any other business. It has not limited itself to purely institutional goals.\textsuperscript{172} Rather, it manages housing units because it has decided to provide citizens with shelter when they cannot afford it. Moreover, managing public housing is not like managing a business, for no private individual would enter into such a business because it is not profitable. This is exemplified by the fact that there are virtually no other providers of low-income housing.\textsuperscript{173}

Perhaps the Supreme Court's landlord/sovereign distinction in \textit{Rucker} was meant to imply that when the government has the greater

\textsuperscript{168} In modern substantive due process cases, procedural rights and substantive rights are often conflated. See Peter J. Rubin, \textit{Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process and the Bill of Rights}, 103 COLUM. L. REV. 833, 848-49 (noting that procedural rights, like the right to a trial by jury, are incorporated as substantive rights).

\textsuperscript{169} See supra note 70. The Court used this argument to assert that \textit{Scales v. United States}, 367 U.S. 203 (1961) and \textit{Southwestern Telegraph & Telephone Co. v. Danaher}, 238 U.S. 482 (1915) did not apply to \textit{Rucker}. Interestingly, the Court did not rule on whether or not the statute actually violated due process. However, in dismissing these two cases, it effectively struck down all of plaintiffs' due process claims.

\textsuperscript{170} The Section 8 program, established by Housing Act of 1974, provides vouchers to qualified low-income residents, which they can use to rent units from private developers.

\textsuperscript{171} In the Section 8 program, private landlords create their own leases.

\textsuperscript{172} See Kermit Roosevelt, Note, \textit{The Cost of Agencies: Waters v. Churchill and the First Amendment in the Administrative State}, 106 YALE L.J. 1233, 1242 (1997) (positing that the Court allows limited checks on governmental action when the government is acting as a business with specific institutional goals).

\textsuperscript{173} There are some private non-profit providers of affordable housing, but the majority of public assistance recipients reside in housing controlled by local PHAs. The private affordable housing options are normally too limited or too expensive.
power to withdraw the benefit of public housing altogether, it has the lesser power to condition the benefit however it sees fit. This is equivalent to Holmes's logic in rejecting constitutional protections on government privileges. This approach certainly goes against Goldberg, which eliminated this distinction for due process purposes, and may therefore indicate a retreat away from Goldberg. But according to Van Alstyne, this approach confuses state action with private action and can lead to overbroad police powers over individuals' lives.

Assuming arguendo that the government is acting as sovereign in the public housing context, and if it is subject to constitutional review even as a landlord because of the doctrine of unconstitutional conditions, it is clear that innocent tenants are denied their right to substantive due process when they are evicted for violating the leases drafted under § 1437d(l)(5). The one-strike policy without an innocent tenant defense arbitrarily punishes unknowing public housing tenants. This amounts to a capricious abuse of power, which is barred by the Fifth and Fourteenth Amendments. By forcing tenants to waive their right to procedural due process and the liberties protected by substantive due process, the government is imposing unconstitutional conditions on their tenancies.

174 See supra note 96.

175 See ADMINISTRATIVE LAW: CASES AND COMMENTS 791 (Peter L. Strauss et al. eds., 10th ed. 2003) (“Goldberg is universally understood as making a sharp break with the traditional analysis by extending constitutional protection to a consummate ‘privilege’—welfare.”).

176 See Van Alstyne, supra note 99, at 1462 (“[G]overnment is playing an increasingly crucial role in . . . areas such as housing, education, and welfare. In the field of welfare especially, the individual’s alternatives to acceptance of arbitrary government action are practically non-existent, and the potential control over his personal life is therefore practically absolute. This substantial influence which expanded governmental activity gives the government over the private lives of its citizenry makes the restraints of substantive due process necessary.”). See also Kreimer, supra note 98, at 1313 (“In reality, selective deprivation may be the less controlled and hence the more dangerous power. In many situations, the government’s absolute denial of a benefit is not practically or politically feasible, absent overwhelming public necessity. It is only this practical or political resistance that makes the government’s possession of the greater power at all tolerable. Allowing the government to deny benefits to some, but not all, of the populace gives it a power that is nowhere implicit in the power to deny benefits absolutely. Conversely, the selective denial of a benefit may be more onerous to a population accustomed to the benefit than the failure to grant it in the first place.”).

177 The Eighth Circuit recently found that the conditioning of a building permit on the creation of a dedication violated substantive due process because of the lack of connection to the purposes behind granting building permits. The court held that “appellants stated a substantive due process claim when they alleged that the City acted capriciously and arbitrarily and imposed an unconstitutional condition on the granting of the permit.” Littlefield v. Afton, 785 F.2d 596, 607 (8th Cir. 1986).
CONCLUSION

The constitutional analysis in *HUD v. Rucker* is limited, but its significance is great. The Court's decision not to address with any attention the due process issues that are glaringly present in *Rucker* should be disturbing to all people concerned with the rights of the poor. It may indicate many things, including a retreat from *Goldberg* and a move back towards the right/privilege distinction, a growing deference to administrative agencies, or a more limited conception of the property rights of the poor.

Fortunately the effects of *Rucker* on public housing residents may not be immediately catastrophic. Local public housing authorities still retain the discretion to adopt the innocent tenant defense. Such local action will ameliorate the effects of the one-strike statute. Legislation and litigation at the state level might also help. States like Pennsylvania have codified the innocent tenant defense,\(^{178}\) and state constitutional actions might succeed where *Rucker* failed. States are free to interpret their due process clauses more broadly than the Court interpreted the federal due process clause.

Another chance for remedy might come through litigation surrounding the part of the one-strike statute that governs the Section 8 program. It contains identical language as the public housing section, and perhaps the lower courts will find that the innocent tenant defense was meant to be included. This could force a newly-comprised Court to reconsider *Rucker* in the future.

Writing for the majority in *Goldberg*, Justice Brennan laid out the Court's thoughts on public assistance and the process its termination demands:

> From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty. This perception, against the background of our traditions, has significantly influenced the development of the contemporary public assistance system . . . . Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.\(^{179}\)

The poor are arguably the class most in need of protection from government infringement on their individual rights, and over thirty years ago, the Supreme Court recognized this and revived the doc-

\(^{178}\) See 35 P.S. § 780-157 (LEXIS through Act 8 of 2003 Legis. Sess.).

\(^{179}\) *Goldberg*, 397 U.S. at 264-65 (footnote omitted).
trine of unconstitutional conditions. *Rucker* represents a move away from the progress made by the Warren Court and a return to less protection for public assistance recipients. It is now up to creative civil rights lawyers and courts that value the rights of the most marginalized members of society to ensure that this trend is temporary and anomalous.