THE RIGHT TO HOUSING

If a person has a low opinion of himself and is unhappy because he lives in a filthy, dilapidated, rat-infested house, you cannot tell him to apply positive thinking—and "Be Happy!" Happiness will begin to blossom only when he finds a way to get out of his physical trap into improved surroundings.

*Harold Cruse**

I. INTRODUCTION

Housing is basic to human survival. When properly constructed and maintained, it provides an essential element for life: shelter from the forces of nature. The 1949 Housing Act[1] recognized the importance of housing by enunciating the national goal of a "decent home and a suitable living environment for every American family." The impact of housing quality on societal well being is undeniable. For example, the quality and character of the family living unit significantly affects the nature of organized family life.[2] Moreover, poor housing has been shown to cause mental and physical illness and is a contributing factor to the cause of crime.[3]

The demonstrated importance of housing quality supports the assertion that the right to habitable housing is a personal interest which is "implicit in the concept of ordered liberty"[4] and thereby deserving of constitutional protection. Yet, in *Lindsey* v. *Normet*[5] the Supreme Court held that access to housing of a particular quality is not a fundamental interest which requires application of a strict standard of review under the Equal Protection Clause of the Fourteenth Amendment. Thus, governmental action which curtails a person's ability to obtain habitable housing need only bear a rational relationship to a permissible governmental objective.[6] Because the range of permissible governmental objectives is broad, a rational relationship can usually be established and a challenged governmental action upheld.[7]

---

* H. CRUSE, THE CRISIS OF THE NEGRO INTELLECTUAL 551 (1967).

1. 42 U.S.C. § 1441 (1977).

2. [W]hether or not any organized family life will be at all possible depends very much on the character of the house or dwelling unit. Children cannot be reared in a satisfactory manner if there is no place for them at home where they can play without constantly irritating the adults or being irritated by them. Overcrowding may keep them out of their homes more than is good for them—in fact so much that family controls become weak. The result is that some of the children become juvenile delinquents. This danger may become even more pronounced if there are insufficient recreational facilities in the neighborhood. . . . Children in crowded homes usually have great difficulty in doing their homework; their achievements in school may suffer in consequence.

G. MYRDAL, AN AMERICAN DILEMMA 375-6 (1962).

3. *Id.* at 376. *See* K. CLARK, DARK GHETTO: DILEMMA OF SOCIAL POWER, 31 (1965) for a collection of sociological data. *See also* L. FRIEDMAN, GOVERNMENT AND SLUM HOUSING, 3-13 (1968).

4. Roe v. Wade, 410 U.S. 113, 152 (1973).

5. 405 U.S. 56 (1972).

6. The rational relationship test is applicable to both the Due Process Clause, U.S. v. Carolene Products, 304 U.S. 144 (1938), and the Equal Protection Clause, Railway Express Agency v. N.Y., 336 U.S. 106 (1949).

7. *See, e.g.*, Berman v. Parker, 348 U.S. 26 (1954), in which the court noted the expansive nature of one governmental objective, protection of the public welfare:

The concept of the public welfare is broad and inclusive . . . . [T]he values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of

Moreover, statutory and common-law measures for achieving habitable housing for all have proven ineffective.[8]

The premise of this Comment is that every person in the United States should be entitled to habitable[9] housing as a matter of constitutional right. Before addressing constitutional issues, it is necessary to examine the need to be fulfilled and to identify difficulties faced by those seeking to obtain an increased standard of housing. The current constitutional status of the right will then be discussed. Several theories which support constitutional status for a right to habitable housing will be advanced. Finally, the necessary scope of the right will be outlined.

II. THE NEED FOR A RIGHT TO HABITABLE HOUSING

Shortage of Habitable Housing

There is an urgent need in the United States for a sufficient supply of structurally sound housing which adequately provides for the physical needs of its occupants.[10] According to Census Bureau data, physically substandard housing units are occupied by over thirty percent of American households with annual incomes under $1000, and five percent of all households.[11] In addition, the existing supply of physically sound housing is often occupied under overcrowded conditions.[12] Moreover, the census figures do not truly reflect the seriousness of the housing shortage. A team of university researchers[13] suggest utilization of three factors—physical adequacy,[14] rent burden[15] and overcrowding[16]—to measure housing quality.

---

the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

Id. at 33.

8. See text accompanying notes 26-51, *infra*.

9. For purposes of this Comment, habitable housing is that which meets minimum standards of quality. Factors which affect housing quality are neighborhood characteristics, compatibility of the housing unit with the surrounding neighborhood, existence of recreational facilities, security and safety, functional design and rent burden. *See* Cooper, *Pointing the Way to Housing Quality*, 2 FORDHAM URBAN L.J. 1 (1973).

10. *See generally* REPORT OF THE NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY [hereinafter cited as Douglass Report], H.R. DOC. No. 9134, 91st Cong., 1st Sess. (1969).

11. BUREAU OF THE CENSUS, U.S. CENSUS OF HOUSING: GENERAL HOUSING CHARACTERISTICS (1970) [hereinafter cited as HOUSING CENSUS]. Based on a 1976 survey, out of approximately 7,711,000 black housing units, an estimated 618,000 lacked some or all plumbing facilities; 448,000 either had no complete kitchen facilities or shared kitchen facilities with another household; 646,000 either had no complete bathrooms or shared bathroom facilities with another household; 43,000 had no heating equipment; 296,000 units lived in, were valued at less than $7500. *See* U.S. BUREAU OF CENSUS, DEP'T OF COMMERCE and U.S. OFFICE OF POLICY DEVELOPMENT AND RESEARCH DEP'T OF HOUSING AND URBAN DEVELOPMENT, *Annual Housing Survey*, Series H-150-76, 32-39 (1976).

12. Occupied units with more than 1.01 occupants per room are considered overcrowded and with more than 1.51 occupants per room, severely overcrowded. HOUSING CENSUS, *supra* note 11.

13. The team consisted of researchers from the Massachusetts Institute of Technology and Harvard University. Its findings were published in JOINT CENTER FOR URBAN STUDIES OF THE MASS. INSTITUTE OF TECH. AND HARV. UNIV., AMERICA'S HOUSING NEEDS: 1970 to 1980 (1973) [hereinafter cited as AMERICA'S HOUSING].

14. Physical adequacy is measured by the soundness of the physical characteristics of the housing unit, the presence of complete indoor plumbing, and adequate heat for the local climate. *Id.* at 4-3.

15. Rent burden negatively impacts upon housing quality if it consumes an excessive amount

Based on these factors, an estimated 13.1 million American families, approximately twenty one percent of the total, occupy dwellings which are in some way substandard.[17] Since housing quality is closely correlated to income, substandard housing is usually occupied by low income persons.[18]

The cumulative effect of the exodus of industry to the suburbs[19] and the use by suburban communities of tactics which prohibit or discourage the construction of low income housing within their borders[20] has also contributed to the inability of low income persons to obtain habitable housing.[21] As industries move to the suburbs, the loss of city-based jobs causes a loss of tax revenue. This adversely affects a city's ability to provide adequate community services, which in turn may have a detrimental effect on urban neighborhood housing quality.[22] Although most American families express the desire to own their own home, even with federal assistance, homeowner-

---

of household income. Rent is considered excessive if it amounts to more than 35% of family income for a single person or household with the heads over age 65. For other households, payment of more than 25% of family income for rent is regarded as excessive. *Id.* at 4-5.

16. Overcrowding becomes a factor only if housing units which are occupied by households with three or more persons have more than 1.5 persons per room. *Id.* at 4-4.

17. AMERICA'S HOUSING, *supra* note 13, at 4-7 to 4-9. Although this standard of housing quality is broader than that employed by the Bureau of Census, it fails to consider many factors which affect housing quality, *e.g.*, the condition of the surrounding neighborhood. *Id.* at 4-2, 5-56 to 5-58.

18. This conclusion is subject to significant reservations. As stated by one commentator:

> [N]ot all of the poor live in bad housing, and not all bad housing is occupied by poor families. Some low-income people manage to live in adequate housing by skimping on other forms of consumption . . . . Their nutrition, education, and medical care may suffer due to the high cost, relative to income, of the dwellings in which they live. Other poor families are able to find decent housing through the assistance of family or friends, private charities, or governmental subsidies. Some older households have paid off the capital cost of their living units, and thus can live in good housing with minimal outlays, while others have savings which can be drawn upon to cover housing costs despite their low current incomes.
>
> At the same time, some non-poor persons elect to live in bad housing for understandable personal reasons. They may have other expenses of unusual magnitude, such as high medical costs. . . . They may live in poor housing out of personal preference, valuing savings or expenditures for other things more highly, or concluding that a particular neighborhood offers advantages (*e.g.*, racial, heterogeneity, homogeneity, or convenience) which outweigh the poor quality of the housing there.

Whitman, *Federal Housing Assistance for the Poor: Old Problems and New Directions*, 9 URBAN LAWYER 1, 4-5 (1977).

19. *See* BUREAU OF LABOR STATISTICS, THE DECENTRALIZATION OF JOBS (1967) (monograph by D. Newman); BUREAU OF THE CENSUS, JOURNEY TO WORK (1974). *Cf.* Bowser, *The Impact of Transportation Policies on the Poor*, 2 URBAN LEAGUE REV. 25 (1976)(suburban development 2nd inner city decline tied to transportation policy).

20. The most common of these are exclusionary zoning practices which have the intent or result of excluding or limiting low priced housing from a community and excluding persons of low or moderate income. *See generally* M. MANN, THE RIGHT TO HOUSING: CONSTITUTIONAL ISSUES AND REMEDIES IN EXCLUSIONARY ZONING (1976). *See also* Note, *The Inadequacy of Judicial Remedies in Cases of Exclusionary Zoning*, 74 MICH. L. REV. 760 (1976). Since many low and moderate income persons are members of minority groups, exclusionary zoning legislation often has a disproportionate effect on racial minorities. *See* Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645 (1971).

21. Burns, *Class Struggle in the Suburbs: Exclusionary Zoning Against the Poor*, 2 HASTINGS CONST. L. Q. 179 (1975). However, some commentators have questioned the conclusion that exclusionary zoning practices have caused a shortage of low income suburban housing. *See e.g.*, Burchell, *Exclusionary Zoning: Pitfalls of the Regional Remedy*, 7 URBAN LAWYER 262 (1975).

22. *See e.g.*, DOWNS, URBAN PROBLEMS AND PROSPECTS 117 (1970).

ship is beyond the economic reach of most low income persons.[23] Ironically, the nation's poor are most in need of habitable housing, yet the main thrust of the federal housing policy has been designed to improve the living condition of middle income families by encouraging home ownership.[24] The result is that limited funds are available for the development of subsidized low income multiple family units which would provide habitable housing for low income persons.[25] Accordingly, persons who are unable to secure a single family home or subsidized public housing are confined to the only housing they can afford, *i.e.*, substandard dwellings located in urban centers with scarce supplies.

Inadequate Statutory Measures

Both state and federal governments have enacted various statutes designed to increase the housing supply, to maintain quality dwellings, and to eliminate racial discrimination. Although a detailed review of these measures is beyond the scope of this Comment, a few examples will demonstrate their inadequacy.

1. *Public Housing*—The Federal Public Housing Program, created by the Housing Act of 1937,[26] authorizes local housing authorities to develop, own, and operate rental units for low income persons. Tenants are charged reduced rental rates which are then supplemented with subsidies from the federal government. One reason the program has not significantly improved the quantity or general quality of housing occupied by low income persons is that congressional appropriations for the construction of low income housing have been miniscule when compared to indirect and direct federal subsidies used to encourage home ownership by middle income and upper

23. *See* Sengstock, *Homeownership: A Goal for All Americans*, 46 J. OF URBAN LAW 313, 457 (1969). As of the 1970 census, sixty one percent of all housing units in the United States were single family homes. HOUSING CENSUS, *supra* note 11, at Table 1, p. 19. For a discussion of how recent increases in the price of single family dwellings have impacted on the ability of different groups to purchase a home, *See* Downs, *Public Policy and the Rising Cost of Housing*, 8 REAL ESTATE REV. 27 (1978).

24. This policy is implemented by both direct and indirect subsidies. Indirect subsidies take the form of tax concessions, such as deductions for interest payments and property taxes, exclusion of capital gains on home sales and imputed net rent to owner-occupants from taxable income. *See*, PRESIDENT OF THE U.S. SIXTH ANNUAL REPORT: NATIONAL HOUSING GOALS 17-18 (1975) [hereinafter cited as HOUSING GOALS]. Direct subsidies are typified by the Veteran's Administration home loan guaranty program, created by the Servicemen's Readjustment Act of 1944, 38 U.S.C. § 1802 (1970), and by the F.H.A. mortgage insurance program, National Housing Act, 12 U.S.C. § 1709 (1970).

25. In terms of magnitude, indirect subsidies far outweigh direct subsidy expenditures. In 1973, tax concessions resulting in implied subsidies for homeownership was estimated at $13.6 billion, while in 1974 total federal expenditures for direct subsidies was estimated to be $1.8 billion. HOUSING GOALS, *supra* at 17-18, 24. In 1977, HUD alloted $76 million for public housing. This figure is trivial in comparison to the $13.6 billion contributed by the federal government in the form of tax benefits to homeowners in 1973. ANNUAL REPORT OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (1976). For a study of one attempt to provide homeownership for low income families, *see* Singer, *Section 235 Housing: One Empriical Study With Recommendations For the Future*, 7 IND. L. REV. 773 (1974).

26. Housing Act of 1937, Ch. 896 § 1, 50 Stat. 888 (1937) (current version at 42 U.S.C. § 1401-1436 (1969).

income persons.[27] In addition, public housing has typically been located in poorer deteriorating neighborhoods.[28] Also, many low income families are deterred from living in public housing because use regulations for such housing are thought to be more restrictive than in private housing, and, because of a perceived social stigma.[29]

2. *Rent Supplements*—Section 8 of Title II of the 1974 Housing Act is intended to assist both moderate and low income persons in renting existing housing.[30] Local public housing agencies pay the difference between fair market rent and the amount the participant is required to pay.[31] HUD sets the Fair Market Rent (FMR) for each area based on local rent data and will not fund rent deficits caused by rents higher than the FMR. A primary reason for the limited success of Section 8 in raising the quality of housing available to low and moderate income persons is that FMR's have been set at unreasonably low levels, making it difficult for developers and public housing authorities to build or operate financially sound projects.[32]

3. *Housing Codes*—Numerous state and local governments have enacted housing codes which generally require dwellings to meet certain minimal standards of cleanliness and repair.[33] The codes are designed to protect the tenant, and are within the police power of the state to promote public health and safety.[34] Despite their salutory purpose and judicial recognition of their validity, housing codes have failed to assure adequate housing, due primarily to lack of enforcement.[35] Heightened enforcement could increase

27. *See* n. 25 *supra*.

28. *See e.g.*, Gautreaux v. Chicago Housing Authority, 363 F. Supp. 690 (N.D. Ill. 1973), *reversed*, 503 F.2d 930 (7th Cir. 1976), *aff'd sub nom*, Hills v. Gautreau, 425 U.S. 285 (1976). *See also* Fuerst and Petty, *Public Housing in the Courts: Pyrrhic Victories for the Poor*, 9 URBAN LAWYER 496, 507-511 (1977).

29. *See generally*, K. BACK, SLUMS, PROJECTS AND PEOPLE (1962).

30. Section 8 of the U.S. Housing Act of 1937, *as amended by* § 201 (a) of the Housing and Community Development Act of 1974, 42 U.S.C. § 1437f (Supp. 1974). Both private developers and public housing authorities may propose projects under Section 8. The family's rent obligation, depending on family size and other factors, is 15-25% of family income. *Id.* § 1437f(c)(3).

31. To be eligible for the Section 8 program the income of a family of four cannot exceed 80% of the median family income for the relevant housing market area. *Id.* § 1437f(f)(1).

32. *See generally*, Whitman, *Federal Housing Assistance for the Poor: Old Problems and New Directions*, 9 URBAN LAWYER 1, 4-5 (1977). *See also*, *Processing Delays Continue to Plague New Section 8 Construction*, 3 BNA HOUSING AND DEVELOPMENT REP. 1191 (May 11, 1976). For other housing subsidy programs, *see* Peabody, *Housing Allowances: A New Way to House the Poor*, 3 HUD CHALLENGE 10 (July, 1972); Weinstein, *Housing Subsidies: An Overview*, 51 J. URBAN L. 723 (1974).

33. *See* Mood, *The Development, Objective and Adequacy of Current Housing Code Standards*, in NAT'L. COMM'N ON URBAN PROBLEMS, HOUSING CODE STANDARDS, RESEARCH REP. NO. 19 (1969): *See generally*, Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093 (1975).

34. F. Grad, *Legal Remedies for Housing Code Violations*, NAT'L. COMM'N ON URBAN PROBLEMS, RESEARCH REP. NO. 14 (1968).

35. *See* Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801 (1965):

> Nowhere . . . has code enforcement been completely successful in preventing the development of slums or in preserving sound neighborhoods . . . . In part this is due to administrative and judicial failures; . . . in part to an unwillingness to enforce strictly provisions that would financially burden property owners or displace persons unable to afford standard housing.

Id. at 801-02. *See also* Brass, *Reform Man Meets the Slumlord: Interactions of New Remedies and*

the quality of existing housing, but it also might force abandonment or withdrawal of units from the market, thus decreasing the supply. Hence, housing codes cannot be depended upon to assure adequate quality housing.

5. *Fair Housing*—Because Black Americans are disproportionately poor,[36] the same impediments to habitable housing suffered by all low income persons also affect them. In addition, Blacks have historically encountered barriers to acquiring "a decent home and a suitable living environment" solely on account of race, regardless of income.[37] Federal and state statutes have attempted to address racial discrimination in housing.[38] Of the federal legislation, Title VIII of the Civil Rights Act of 1968[39] is probably the most comprehensive, proscribing discriminatory activity in each step in the process of selling or renting housing,[40] and applying to an estimated eighty percent of all housing in the United States.[41] Despite its exhaustive coverage, Title VIII has had "little impact on the country's serious housing discrimination problem."[42] Section 1982 of the Civil Rights Act of 1866[43] was construed in *Jones v. Alfred H. Mayer & Company*[44] to apply to private housing discrimination, but the court noted other factors which limit its effectiveness in preventing racial discrimination in all aspects of the sale or rental of housing.[45]

Limited Common Law Doctrines

The doctrine of constructive eviction and the implied warranty of habitability were designed to provide remedies for uninhabitable housing. The former is applicable if the landlord commits acts or omissions "which so affect the tenant's enjoyment of the premises that he relinquishes possession, provided this act is a legal justification for such relinquishment."[46] Thus,

Old Buildings in Housing Code Enforcement, 3 URBAN LAWYER 609 (1971); Gribetz, *Housing Code Enforcement in 1970—An Overview*, 3 URBAN LAWYER 525 (1971).

36. Surveys released by the Department of Commerce in 1970 reveal that 31.4% of Blacks and other minorities who are heads of families earn less than $4,000 annually relative to 13.3% white family heads who are in the same earnings bracket. U.S. DEP'T OF COMMERCE, GENERAL SOCIAL AND ECONOMIC CHARACTERISTICS 1-356 (1970).

37. *See e.g.*, PATTERNS OF RACIAL DISCRIMINATION: VOL. I: HOUSING, (G. von Furstenberg, B. Harrison, A. Horowitz, ed. 1974). *See also* n. 42, *infra*.

38. *See e.g.*, 42 U.S.C. §§ 1982, *3601 et. seq.*, CAL. Health and Safety CODE § 35700 *et. seq.* (West).

39. 42 U.S.C. § 3601 *et. seq.* (1977).

40. Title VIII forbids discrimination in advertising and financing of housing. 42 U.S.C. §§ 3604(c); 3605 (1977). It also contains provisions directed toward traditional tactics used to preserve or create inequality in housing, *i.e.*, blockbusting, § 3604(e) steering, § 3604(d), and limited access to multiple listing services. *Id.*

41. U.S. COMM'N ON CIVIL RIGHTS, UNDERSTANDING FAIR HOUSING 6 (1973).

42. U.S. COMM'N ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT, VOL. II, FAIR HOUSING 328 (1974). *See also*, R. Spencer, *Enforcement of the Federal Fair Housing Law*, 9 URBAN LAWYER 514, 523 (1977).

43. 42 U.S.C. § 1982 (1970) provides:

> All citizens of the United States shall have the same right, in every State or Territory, that is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

44. 392 U.S. 409 (1968).

45. *Id.* at 413. *See also* Comment, *Racial Discrimination in the Private Housing Sector*, 33 MD. L. REV. 289 (1973).

46. TIFFANY, LANDLORD AND TENANT 185 (1910).

the doctrine does not guarantee the tenant an improved dwelling and, upon abandonment, he is forced to seek other shelter in a market with a limited supply of affordable habitable housing. Also, as applied in many jurisdictions, the constructive eviction doctrine has several technical requirements which limit its utility.[47] In addition, the tenant usually must make a critical factual determination: are the acts or omissions of sufficient magnitude to invoke the constructive eviction doctrine? If the tenant vacates the premises and a court later determines that the acts or omissions are insignificant, the tenant is liable to the landlord for all accrued rent.[48] Rather than risk this result, tenants are likely to simply tolerate substandard building conditions.

The same type of risk prevails under the implied warranty of habitability of rental dwellings. This doctrine charges a landlord with an implicit representation that a rental dwelling is fit for habitation. Further, the landlord is required to maintain the premises in a livable condition. If he fails to fulfill this "implied warranty", the tenant's rental obligation is limited to the reasonable rental value of the housing unit.[49] Unlike the doctrine of constructive eviction, the implied warranty does not require abandonment of the premises. But the tenant does have continuing liability for the reasonable rental value of the premises. As the rental value will not be decreased by minor housing code defects, the tenant is never sure if what he considers a major building defect will be considered minor to a court. If he guesses wrong, he is liable for the full rental value of the premises. As applied to the sale of housing, the implied warranty of habitability is also of limited scope. In most jurisdictions, it applies only to mass producers of housing, or commercial builders and sellers.[50] Thus, it would not provide coverage for the sale of existing used housing.

Although inadequate and limited, the above described common law and statutory measures are indicative of some degree of legislative and judicial recognition of the need for an adequate supply of affordable and habitable housing, available on a non-discriminatory basis. Recognition of a constitutional right to housing would provide further impetus toward supplying that need, but Supreme Court precedent is detrimental to achieving that objective.[51]

---

47. For example, the tenant must abandon the premises within a reasonable time after the landlord's acts or omissions and must give notice prior to vacating. TIFFANY, LANDLORD AND TENANT § 185(d) (1910). *See generally* Note, *The Indigent Tenant and the Doctrine of Constructive Eviction*, 1968 WASH. U. L. Q. 461.

48. 2 POWELL, REAL PROPERTY § 225(3) (Rohan, ed. 1977). *But see* Note, *Partial Constructive Eviction: The Common Law Answer in the Tenant's Struggle for Habitability*, 21 HASTINGS L.J. 417 (1970).

49. 2 POWELL, REAL PROPERTY § 225(2)(a). (Supp. 1977). *See also* Moskovitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CAL. L. REV. 1444 (1976). One of the leading cases in this area is Javins v. First Nat'l. Realty Corp., 428 F. 2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970).

50. The leading case is Schipper v. Levitt & Sons, 44 N.J. 70, 207 A.2d (1965) which imposed an implied warranty of quality on mass producers of homes. Subsequently, the *Schipper* principle was extended to a non-mass developer in Totten v. Gruzen, 52 N.Y. 202, 245 A.2d 1 (1968). *See generally* Jaeger, *The Warranty of Habitability*, 47 CHICAGO KENT L. REV. 1 (1970); Gibson, *Implied Warranties—Sale of a Completed House*, 1 CAL. WEST. L. REV. 110 (1965); Ramunno, *Implied Warranty for Fitness For Habitation in Sale of Residential Dwellings*, 43 DENV. L. REV. 379 (1966).

51. 405 U.S. 56 (1972).

III. CURRENT CONSTITUTIONAL STATUS

In *Lindsey v. Normet*,[52] the Supreme Court refused to recognize the right of access to housing of a particular quality as a fundamental interest worthy of constitutional protection. The holding has been subsequently cited with approval[53] and thus represents the Court's current position. Plaintiffs, Donald and Edna Lindsey, were month-to-month tenants of the defendant landlord, Normet. They occupied a single family residence in Portland, Oregon which was inspected by the City and found to be unfit for habitation.[54] The plaintiffs requested that defendant make certain repairs to the building, and when he refused, they withheld rent payments. After being threatened with legal action by defendant's attorney, plaintiffs filed a class action suit in federal district court alleging that defendant's refusal to make repairs violated Section 1983 of the 1866 Civil Rights Act[55] and that the Oregon Forcible Entry and Wrongful Detainer Statute[56] was unconstitutional on its face. On appeal, the U.S. Supreme Court found, with one exception, that the challenged statutory provisions were rationally related to permissible state objectives and, therefore, not violative of the Equal Protection Clause.[57]

The plaintiffs urged that a standard more stringent than rationality should be applied because of the fundamental nature of the interest involved. They argued that "the 'need for decent shelter' and the 'right to retain peaceful possession of one's home' are fundamental interests which are particularly important to the poor and which may be trenched upon only after the State demonstrates some superior interest."[58] In rejecting the plaintiffs' argument, the Court stated:

> We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality . . . Absent constitutional mandate, the assurance of adequate housing . . . [is] a

52. 405 U.S. 56 (1972).

53. Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 259 (1977); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

54. City inspectors found rusted gutters, broken windows, broken plaster, missing rear steps and improper sanitation, all in violation of the Portland Housing Code. 405 U.S. at 58, n.2.

55. 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

56. ORE. REV. STAT. Sections 105.105-105.160.

57. The Court, in an opinion delivered by Mr. Justice White, held that neither the statute's early-trial provision nor the limitation on triable issues violated the Due Process Clause or the Equal Protection Clause. 405 U.S. at 64, 69. However, the Court held that the double bond requirement for appealing a forcible entry and detainer action violated the Equal Protection Clause. *Id.* at 74. In addressing the equal protection issue, the Court concluded that the purpose of the forcible entry and detainer statute was the prompt and peaceful resolution of disputes over the possession of real property and that Oregon was constitutionally permitted to achieve this purpose. *Id.* at 73. The Court also found that the provisions for early trial and simplification of issues were closely related to the legitimate statutory objective, and, therefore, did not violate the Equal Protection Clause. *Id.* at 70.

58. *Id.* at 73.

legislative, not a judicial function.[59]

This statement makes it clear that the right to quality housing is not of sufficient importance to invoke strict judicial scrutiny.

As a result of the holding in *Lindsey*, persons who have been denied affordable habitable housing because of governmental action must establish more than the fact that such action has curtailed their ability to secure habitable housing in order to invoke strict judicial scrutiny. A purpose or intent to discriminate against a suspect classification must be shown. This task is particularly difficult in light of the Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*[60] that wealth is not a suspect classification. It is, therefore, insufficient for equal protection purposes for persons who have been denied habitable housing to establish that the denial is based on an official intent to exclude poor people.

Members of racial minorities are disproportionately represented in the low income group.[61] Thus, official actions which restrict the supply of housing available to low income persons also disproportionately affect members of racial minorities. Where a denial of habitable housing is caused by discriminatory official action, strict scrutiny of the alleged unconsitutional action is required.[62] Although this level of constitutional analysis is more rigorous than the rational relationship test, the complainant must still prove an intent to discriminate because of race.

Under the Supreme Court's decision in *Village of Arlington Heights v. Metropolitan Housing and Development Corporation*,[63] proof of the disproportionate impact of official action on Blacks does not suffice to demonstrate the requisite intent. *Arlington Heights* involved a challenge to the constitutionality of the Village's refusal to grant a requested zoning change which was necessary to construct a low income housing project. The plaintiffs alleged that this action had a disproportionate effect on minorities and, therefore, was racially discriminatory. Citing its earlier decision in *Washington v. Davis*,[64] the Supreme Court held that official actions are not unconstitutional solely because they have a disproportionate racial effect, and that

59. *Id.* at 74.

60. 411 U.S. 1 (1973) (rejecting the plaintiff's assertion of a fundamental right to an education). In *Rodriguez* the Court stated:

> *Lindsey* . . . firmly reiterates that social importance is not the critical determinant or subjecting the state legislation to strict scrutiny. It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is "fundamental" . . . lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution. 411 U.S. at 32-34.

61. *See* n. 36 *supra*.

62. Korematsu v. United States, 323 U.S. 214 (1944); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

63. 429 U.S. 252 (1977) *See* Comment: *Exclusionary Zoning and a Reluctant Supreme Court*, 13 WAKE FOREST L. REV. 107 (1977).

64. 426 U.S. 229 (1976). In *Washington*, the plaintiffs were unsuccessful Black applicants for employment as police officers in the District of Columbia. The plaintiffs alleged that a written test administered to applicants was racially discriminatory and violated the Due Process Clause. This claim of racial discrimination was based on the contention that the written test had excluded a disproportionately high number of Black applicants. The Court rejected this argument and held that a showing of racially discriminatory intent is required to establish the state action to be unconstutional. *Id.* at 235.

proof of racially discriminatory intent is required to invoke strict scrutiny under the Equal Protection Clause.

The Court listed several factors which should be considered in deciding whether official action is motivated in part by a racially discriminatory intent. However, it is manifest that proving discriminatory intent through "a series of official actions taken for invidious purposes",[65] or "a specific sequence of events leading up to the challenged decision"[66] or departures from normal substantive and procedural practices,[67] places an extremely heavy burden of proof on persons challenging official acts on racial grounds.

Obviously, municipal officials who are bent on racial and other invidious forms of discrimination will make every effort to conceal their true intent from the public. It is not difficult to achieve the desired result of denying poor and minority persons habitable housing within the community by using measures which appear to be motivated by concerns for some permissible governmental objective.[68] Moreover, even if local residents reveal some personal racial bias, the plaintiffs must still establish that "a discriminatory purpose has been a motivating factor"[69] in the official denial of habitable housing. While local residents may be unwise enough to publically disclose their personal views on race relations, the local officials are unlikely to provide evidence on the record that their actions were motivated by racial discrimination.[70] The causal relationship between governmental action and an intent to discriminate can thus be greatly obscured by the legislative or administrative process.[71]

Another means of obscuring racial or economic bias is the referendum process. In *James v. Valtierra*,[72] the Court upheld a California statute[73] requiring proposals for low income housing to be submitted to a referendum in the affected community. No other type of housing was subject to this requirement. The plaintiffs, prospective tenants in a proposed low income housing development, argued that the statute disproportionately affected minorities and, therefore, violated the Equal Protection Clause. The Court held that the statute was racially neutral on its face and thus was not unconstitutional. In addition, the referendum was deemed a valid exercise of democratic decision-making and not, as argued by the plaintiffs, an imper-

65. 429 U.S. at 267.

66. *Id.*

67. *Id.*

68. As one commentator concluded, "Because so many goals and factors may properly have influenced a legislative decision, it will be very difficult to discern implicit criteria . . . ." Note, *The Supreme Court 1976 Term: Equal Protection*, 91 HARV. L. REV. 163, 167 (1977).

69. 429 U.S. at 266-7.

70. It has been pointed out that the proceedings and public hearings in Arlington Heights were "replete with explicit racial statements by those attending the public meetings and it would be absurd to suggest that the Village Board was not influenced by their racial overtone." Note, Arlington Heights: Closing Federal Courts to Exclusionary Zoning Litigation, 41 ALBANY L. REV. 789, 804 (1977).

71. 429 U.S. at 266 n.12.

72. 402 U.S. 137 (1971).

73. CALIF. CONST. art. XXXIV, sect. 1, provides: "No low rent housing project shall hereafter be developed . . . until, a majority of the qualified electors of the city . . . approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election."

missible delegation of the legislative function to the electorate.[74]

In addition to contending with significant problems of proof, persons who challenge official action limiting the supply of low income housing may also have difficulty showing the "injury in fact" necessary to establish standing to sue. For instance, in *Warth v. Seldin*,[75] land use legislation promulgated by Penfield, New York, a suburban community near Rochester, was challenged by various plaintiffs, including low income residents of Rochester. The plaintiffs alleged that the regulations excluded persons of low and moderate income and, therefore, violated the Equal Protection Clause. The Supreme Court determined that all of the plaintiffs lacked standing to challenge the zoning regulations. The Court, therefore, refused to consider the merits of plaintiff's claims, concluding that they had not shown that they would benefit from judicial relief because they had no interest in land subject to the ordinances and they could not identify existing or planned housing projects from which they had been excluded by the challenged regulations.[76]

As a result of *Warth*, plaintiffs who question the constitutionality of a zoning scheme must establish that the plan had been used to hinder a particular project that would supply housing within their economic means, and of which they were intended residents.[77] This strict application of the standing doctrine inhibits challenges to practices which limit the supply of housing, as recognized by Mr. Justice Brennan in his dissenting opinion:

> [T]he Court turns the very success of the allegedly unconstitutional scheme into a barrier to a lawsuit seeking its invalidation. In effect, the Court tells the low-income minority . . . plaintiffs they will not be permitted to prove what they have alleged—that they could and would . . . live in the town if changes were made in the zoning ordinance and its application—because they have not succeeded in breaching, before the suit was filed, the very barriers which are the subject of the suit.[78]

Under the requirements of *Warth*, it is unlikely that low income persons will be successful in persuading housing developers to invest the time and resources necessary to develop a viable low income housing plan in a community which employs land use legislation which restricts the supply of low

74. 402 U.S. at 143. *Cf.* City of East Lake v. Forest City Enterprises, 426 U.S. 668 (1976), *noted in* 23 LOY. L. REV. 243 (1977). In that case a real estate developer who planned to construct a multi-family apartment building on land then zoned for industrial use, challenged a provision of the city charter which required that any change in land use agreed to by the city council must also be approved by a 55% referendum vote. In rejecting the plaintiff's claim that the charter provision was an impermissible delegation of legislative power to the people in violation of the Due Process Clause, the Supreme Court stated that the referendum process was a "basic instrument of democratic government" which did not in itself violate due process when used in connection with zoning ordinances. 426 U.S. at 679. It also noted that if the result of a particular referendum were thought to be arbitrary or capricious, the plaintiff could challenge the result in state court. The Court then concluded that ". . . nothing more is required by the Constitution." *Id.* at 677. In *East Lake* the fundamental fairness of the referendum procedure was tested only in relation to the individual requesting a zoning change. This analysis ignores the potential impact this procedure will have on low income persons who would benefit from rezoning. Under this test, the interests of the Village need not be weighed against the interest of low income nonresidents in obtaining habitable housing.

75. 422 U.S. 490 (1975).

76. *Id.* at 505-06.

77. *Id.* at 508.

78. *Id.* at 523.

income housing.[79]

In summary, whether the effort is to expand the supply of low-income housing, (as in *Warth* and *Valtierra*), eliminate racial discrimination (as in *Arlington Heights*), or to improve the quality of existing dwellings (as in *Lindsey*), Supreme Court precedent is not favorable. Arguably, if there were a constitutional right to housing, the aggrieved persons in each of these cases may have been more successful since governmental action is subject to strict scrutiny where a fundamental interest is at stake.

IV. The Right to Housing

In *Lindsey*, the Supreme Court took the position that a right to housing could not be found because it lacked a textually independent constitutional basis.[80] Arguably, this strict constructionist view of the Constitution is inconsistent with earlier cases in which certain interests were afforded constitutional protection because of their fundamental nature despite the lack of supporting constitutional language. In fact, the Court has assumed the power to interpret the important objectives of the Constitution in recognition of the ". . . various crises in human affairs."[81] This power to extend the boundaries of the Constitution[82] beyond rights expressly stated therein has allowed such interests as the right to privacy, the right to interstate travel,[83] and the right to vote[84] to be afforded constitutional protection.

Among the theories previously used by the Supreme Court to extend constitutional protection to unenumerated fundamental interests is the penumbra theory, the protection theory, and a sliding scale approach. The Ninth Amendment has also been used to support the implication of unenumerated rights.[85] In *Southern Burlington County NAACP v. Mount Laurel*[86] the New Jersey Supreme Court used the general concept of public welfare to require governmental action to fulfill the need for housing. Any of these approaches would be a suitable method for establishing a federal constitutional right to housing.

Penumbra Theory

In *Griswold v. Connecticut*,[87] the Supreme Court, speaking through Mr. Justice Douglas, recognized a constitutionally protected right to privacy and stated, "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[88] Had the Supreme Court chosen to do so, this penumbra theory could easily have been used to sustain the plaintiff's claim in *Lindsey* for the recognition of the constitutional right to housing of a particular quality. The

79. In *Arlington Heights*, the plaintiff was a developer who sought a zoning change, so standing was not an issue.
80. 405 U.S. at 74.
81. McCulloch v. Md., 17 U.S. (Wheat.) 415, 427 (1819).
82. Griswold v. Connecticut, 381 U.S. 479 (1965).
83. Shapiro v. Thompson, 394 U.S. 618 (1969).
84. Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).
85. *See* Comment, *Implying Constitutional Rights, supra* at pp.
86. 67 N.J. 151, 336 A.2d 713 (1975).
87. 381 U.S. 479 (1965).
88. *Id.* at 484.

Third Amendment provides that "No soldier shall, in time of peace be quartered in any *house*. . .";[89] the Fourth Amendment provides that "The right of the people to be secure in their persons, *houses*, papers, and effects against unreasonable searches and seizures shall not be violated. . . ."[90] The Fifth and Fourteenth Amendments implicitly recognized the fundamental importance of housing by preventing federal or state governments from depriving individuals of ". . . life, liberty or *property*, without due process of law."[91] Such explicit and implicit references to housing imply that in order to give constitutionally protected rights embodied in the Third, Fourth, Fifth, and Fourteenth Amendments, the ". . . breathing space. . ."[92] necessary for their continued existence, it is necessary to constitutionally protect the right to habitable housing.

Protecting Express Rights

In his dissenting opinion in *San Antonio Independent School District v. Rodriguez*,[93] Mr. Justice Marshall observed that "[T]he determination of which interests are fundamental should be firmly rooted in the Constitution. The task of every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution."[94] Insuring the right to habitable housing is necessary to protect several recognized constitutional rights. For example, the constitutional right to privacy is intimately related to the quality of housing. A person who enters his home should have a reasonable expectation of privacy which is constitutionally protected from unreasonable government interference.[95] Yet, if one's home does not meet certain standards of structural soundness, one cannot be secure in a personal right to privacy because the expectation that activities conducted within the home will not be perceived by those outside the home is no longer reasonable.[96]

Sliding Scale Standard

In *Dandridge v. Williams*,[97] Justice Marshall suggested a flexible approach to determining constitutional rights under which various elements would be weighed in reaching a decision. Dissenting, Marshall stated:

> In my view, equal protection analysis . . . is not appreciably advanced by the *a priori* definition of a "right", fundamental or otherwise. Rather, concentration must be placed upon the character of the classification in ques-

89. U.S. CONST. amend. III (emphasis supplied).
90. U.S. CONST. amend. IV (emphasis supplied).
91. U.S. CONST. amend. V; U.S. CONST. amend. XIV, Section 1.
92. NAACP v. Button, 371 U.S. 415, 433 (1963).
93. 411 U.S. 1 (1973).
94. *Id.* at 102 (Marshall, J., dissenting).
95. Weeks v. United States, 232 U.S. 383 (1914).
96. One example is sufficient to demonstrate the relationship between housing and privacy. Imagine two families who live in separate apartments which share a common wall. If this common wall is perforated with openings caused by water leakage and rodent infestation, neither family can have reasonable expectation that their words or actions will not be perceived by persons outside the apartment. In other words, one cannot speak of a personal right of privacy in one's home without first insuring that this home is structurally sound enough to provide a reasonable expectation of privacy.
97. 397 U.S. 471 (1970).

> tion, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.[98]

On another occasion, Justice Marshall has suggested that, despite the Court's assertion that it was applying the rational relationship test, the Court was in fact applying a variable standard of review.[99] Under this "sliding scale" standard of review the Court could impose an increasingly strict standard of scrutiny as the nature of the classification approaches the suspect status or the interest restricted nears the level of fundamental importance. This approach to equal protection would have the advantage of extending constitutional protection to the right to habitable housing without finding that housing is a fundamental interest. If not of fundamental status, habitable housing is certainly of sufficient importance to call for a showing of more than a mere rational relationship between the contested state action and a permissible governmental objective.

The Ninth Amendment

In his concurring opinion in *Griswold v. Connecticut*,[100] Mr. Justice Goldberg viewed the purpose of the Ninth Amendment as showing ". . . the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection . . . simply because they are not specifically listed in the first eight constitutional amendments."[101] By holding that housing of a particular quality is not worthy of constitutional protection because of the absence of a "constitutional mandate" supporting that right, the decision in *Lindsey* completely ignored the Ninth Amendment. Fundamental interests can emanate "from the totality of the constitutional scheme under which we live"[102] and need not be "explicitly or implicitly guaranteed by the Constitution."[103] By adopting this strict constructionist interpretation of the Constitution, the Supreme Court has attributed extreme foresight to the Framers. It is unrealistic to believe that they could have foreseen the changes in the structure of life caused by technological advancements and provided language in the text of the Constitution to prevent impermissible governmental uses of these advancements. For example, the Framers could not have explicitly or implicitly intended that the Fourth Amendment's prohibition against unreasonable searches and seizures would proscribe warrantless electronic surveillance of calls made from a public telephone booth. Yet, the Fourth Amendment has been construed by the Supreme Court to prohibit such surveillances.[104] Similarly, it is unreasonable to presume that the absence of an expressed right to habitable housing in any way detracts

98. *Id.* at 520-21 (Marshall, J., dissenting) (citation omitted).

99. San Antonio Public School Dist. v. Rodriguez, 411 U.S. 1, 98-109 (1973) (Marshall, J., dissenting).

100. 381 U.S. 479 (1965).

101. 381 U.S. at 492 (1965) (Goldberg, J., concurring).

102. Poe v. Ullman, 367 U.S. 497, 521 (1961) (Douglas, J., dissenting); Griswold v. Connecticut, 381 U.S. 479, 494 (1964) (Goldberg, J., concurring).

103. San Antonio Public School Dist. v. Rodriguez, 411 U.S. 1, 33 (1973).

104. Katz v. United States, 389 U.S. 347 (1967) (Government activities in electronically listening to and recording a phone conversation violated the privacy upon which the speaker justifiably relied while using a telephone booth and thus constituted a search and seizure within the meaning of the Fourth Amendment).

from the fundamental importance which housing has acquired in American society.[105]

The Mount Laurel Approach

The New Jersey Supreme Court acknowledged the nexus between housing and the general welfare in *Southern Burlington County NAACP v. Mount Laurel*.[106] In that case the Court found that a municipal zoning plan which prohibited attached townhouses, apartments, and mobile homes anywhere in the township, had been used to benefit affluent community residents by discouraging the influx of low income persons through the exclusion of low and moderate income housing.[107] The court held that this use of zoning was a violation of the state's due process or equal protection clauses,[108] and the community was required, in the absence of peculiar circumstances, to provide an opportunity for low and moderate income persons to fulfill their housing needs "at least to the extent of the [community's] fair share of the present and prospective regional need therefore."[109] The court's imposition of an affirmative duty to provide an opportunity for the development of low and moderate income housing was based on the importance of housing to the general welfare.

> It is plain beyond dispute that proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation. Further the universal and constant need for such housing is so important and of such broad public interest that the general welfare which developing municipalities . . . must consider be parochially confined to the claimed good of the particular municipality.[110]

Although the Mount Laurel decision dealt specifically with exclusionary zoning practices in developing its reasoning, it has broader implications.[111] The nexus between housing and promotion of the general

105. See text accompanying n. 2 & 3, *supra*.

106. 67 N.J. 151, 336 A.2d 713 (1975). *See generally*, Ackermon, *Mount Laurel Decision: Expanding the Boundaries of Zoning Reform*, 1976 U. ILL. L. F. 1 (1976); Rose, *The Mount Laurel Decision: Is It Based on Wishful Thinking?*, 4 REAL EST. L.J. 61 (1975).

107. The effect of the zoning plan was to minimize local property taxes by excluding all persons who could not add favorably to the community tax base. *Id.*, at 170, 336 A.2d at 723.

108. 67 N.J. at 181, 336 A.2d at 428. It is to be noted that the equal protection issue was framed in terms of income and not in terms of race. The court observed that confining the inquiry to racial terms would not protect "young and elderly couples, single persons, and large, growing families not in the poverty class but who still [could] not afford the only kinds of housing realistically permitted [by the community zoning plan]." *Id.* at 159, 336 A.2d at 717.

109. *Id.* at 188, 336 A.2d at 732 (footnote omitted).

110. *Id.* at 179, 336 A.2d at 727-728.

111. It is of interest to note three additional aspects of the *Mount Laurel* decision. First, the New Jersey Supreme Court recognized that the state action requirement of the state due process or equal protection clauses can be fulfilled by government "action or non-action." *Id.* at 181, 336 A.2d at 728. Second, contrary to the Supreme Court's position in *Arlington Heights*, the court observed in *dicta* that governmental intent is not a factor in determining the constitutionality of the zoning restrictions under the state constitution, and that New Jersey municipalities are obliged to make possible a variety of housing if the effect of unintentional conduct is the same as if governmental actions were deliberate. 67 N.J. at 174, n.10, 336 A.2d at 725, n.10. Finally, in *Mount Laurel*, the court found that nonresidents of a municipality who reside in the region and who are in need of quality housing have standing to attack the validity of the general zoning plan. This is inconsistent with the holding in Warth v. Seldin, 422 U.S. 490 (1975), which denied standing to low income nonresidents of a community because the plaintiffs could not show the requisite causal

welfare is equally apparent in other contexts. For example, if persons are deprived of habitable housing because local building codes are not actively enforced, the general welfare of the community is adversely affected by a general decline in housing quality. Indeed, it may be argued that the effect of this type of government inaction is more adverse than those resulting from situations where, as in *Mount Laurel*, low income housing is completely excluded from a community by local zoning ordinances. Arguably, such government inaction would, under the *Mount Laurel* approach, be a violation of due process or equal protection in the absence of extremely mitigating circumstances.

While the phrases "due process of law" and "equal protection of the laws" are not used in the New Jersey Constitution, the concepts are considered to be part of Article I.[112] Moreover, although not obligated to follow the Supreme Court in construing the State Constitution, in *Mount Laurel* the New Jersey Supreme Court utilized the fundamental interest analysis which is applicable to the Federal Constitution.

Finding a suitable analytical framework for the right to housing is not the only barrier to its creation. To achieve this objective, it is also necessary to define its scope in a meaningful and workable fashion.

V. Scope of the Right to Housing

Various aspects of a right to housing have been outlined by Michelman, who defines the right as "a claim upon organized society, on behalf of each individual or household unit, to be assured of access to minimally adequate housing."[113] Among the possible components of this right, Michelman has identified six: 1) the right not to be tendered substandard housing; 2) the right to choose housing freely without restriction because of socio-economic status; 3) the right to free choice in the use of whatever housing one can afford; 4) the right not to be uprooted, which would place some limitations on the government's power of eminent domain; 5) the right to ownership of a home; and 6) the right to exercise control over one's environment.[114] Further, he distinguishes a constitutional right to be housed from a statutory right to housing,[115] and cautions that claims to the former should be "limited to a common core of need" since such a claim "seems instinctively comprehensible and compelling, though hard to explicate . . . ."[116]

The most compelling need for both quantity and quality in housing exists among low income persons.[117] Similarly, the need for freedom of choice

connection between their ability to find quality housing and the questioned zoning plan. *See* text accompanying notes 63-71 and 75-79, *supra*.

112. N.J. Const., Art. I, Par. 1 provides:

> All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

113. Michelman, *The Advent of A Right to Housing: A Current Appraisal*, 5 Harv. Civ. Rights—Civ. Lib. L. Rev. 207, 207 (1970). *See also* Comment, *Towards Recognition of a Constitutional Right to Housing*, 42 U. Mo. K. C. L. Rev. 362 (1974).

114. Michelman, *supra* note 113, at 213-226.

115. Michelman observes that a constitutional right to housing would be immaterial if there were a statutory based right which could be judicially enforced. Possible claims arising from legislative subsidy programs would include insufficient funding levels, and discriminatory allocation of existing resources. *Id.* at 211-213.

116. *Id.* at 211. It should be noted that the Michelman article was written prior to the *Lindsey* decision.

117. *See* text accompanying n. 10-25, *supra*.

is most acute, given the persistence of racial discrimination[118] and the existence of separate housing markets for Black and White citizens.[119] Accordingly, as an initial step the constitutional right to housing could be limited to the first two components identified by Michelman.

To provide protection to those most in need, it would not be absolutely essential for government to become a real estate developer. As the New Jersey Court pointed out in *Mount Laurel*, "courts do not build housing nor do municipalities."[120] The right to housing could first be indirectly fulfilled by requiring municipalities to strictly enforce building codes so that private owners are forced to maintain existing dwellings in a habitable condition. Since municipal services impact on the quality of housing, local governments could be forced to provide all commodities with a minimum level of usual city services such as police protection, garbage collection, and maintenance of public areas, among others. Similarly, government might be required to enforce existing fair housing ordinances and statutes to remedy the effects of socio-economic discrimination in housing. Further, the supply of housing would be augmented if municipalities were prevented from condemning existing units for renewal or renovation programs unless alternative affordable shelter were immediately available for displaced persons. Prohibiting zoning practices which exclude low and moderate income housing would also help increase the supply of housing.[121]

These minimal steps have the advantage of leaving the initiative for developing and managing housing to the private sector.[122] Although it may ultimately become necessary for government to be the "landlord of last resort", the results to be obtained from the foregoing approaches, render less compelling the acknowledged judicial reluctance to decree the expenditure of public funds without express statutory authority. If housing were a constitutional right, it would be less difficult to implement these minimal steps because aggrieved parties could then show that governmental action was designed to intentionally discriminate against a suspect classification.[123] Moreover, it avoids the *Rodriquez* holding that wealth is not a suspect classification.

Of course, it could be argued that limiting the right to habitable housing

118. *See* n. 37 and 42 *supra*.

119. In Clark v. Universal Builders, 501 F.2d 324 (7th Cir. 1974) *cert. denied*, 419 U.S. 1071 (1974) the court took judicial notice of the presence of a dual housing market in the Chicago metropolitan area. Id. at 334-335.

120. 67 N.J. at 192, 336 A.2d at 734.

121. *See e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

122. State action is a prerequisite to application of the Equal Protection or Due Process Clauses of the Fourteenth Amendment. It is usually thought to require an affirmative governmental act. For example in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), the Court concluded that the refusal of a private fraternal organization to serve Blacks in its dining hall did not violate the Fourteenth Amendment because the only governmental action was the state's liquor licensing procedures. But there are cases which hold that where an affirmative duty to act is ignored by a state or its officials, the Fourteenth Amendment requirement is met by showing the failure to act. *See e.g.*, Lynch v. United States 189 F.2d 476 (5th Cir. 1951); Catlette v. United States, 132 F.2d 902 (4th Cir. 1943); Pickering v. Pa. R. Co. 151 F. 2d 240 (3d Cir. 1965). *See also*, Peters, *Civil Rights and State Non-Action*, 34 NOTRE DAME L. REV. 303 (1959); Goldstein, *Death and Transfiguration of the State Action Doctrine*, 4 HASTINGS CON. L. Q. 1 (1977); Silard, A Constitutional Forecast: *Demise of the State Action Limit on the Equal Protection Guarantee*, 66 COLUM. L. REV. 855 (1966).

123. *See* text accompanying n. 61-71 *supra*.

to low income persons and protecting only those disadvantaged in the housing market because of socio-economic status would be an acceptance of *Rodriquez*. But none of the required governmental actions outlined above are for the benefit of the poor or minorities alone. Indeed, a resident of an affluent neighborhood would have the same right to demand code enforcement, fair housing, alternative shelter prior to urban renewal, minimal levels of municipal service, and all other rights extended to those who possess a lesser quantity of material resources. The only difference is that the affluent may never have the need to exercise the right. Thus, persons who are financially able to secure housing whose quality is greater than that resulting from required governmental action, and who are not pushed out, zoned out, or discriminated out of a community have not been injured by any governmental action taken to protect the housing rights of the less advantaged.

VI. CONCLUSION

The concept of public welfare is a broad one that has been used to support governmental action against claims of infringement of individual rights.[124] Conversely, it ought to be used to require governmental action where the failure to act is injurious to the general public welfare. An inadequate supply of housing, substandard housing, and racial discrimination in housing are all detrimental to the welfare of the public, as well as the persons who are individually damaged. Constitutional protection for the right to housing should be afforded because it is both "comprehensible and compelling," and it serves to promote the general welfare.

ALBERT MATHEWS

124. Euclid v. Ambler Realty Co., 272 U.S. 265 (1926), held that local governments have the authority to protect the public welfare by subjecting privately owned land to restrictions on its use, without compensation. In that case the economic interests of the complaining property owner collided with the governmental interest, and the former was required to yield. For a discussion of the concept of public purpose under the Due Process Clause and its Relation to Housing, *See* Comment, *Towards Recognition of a Constitutional Right to Housing*, 42 U. MO. K.C. L. REV. 362, 368-372 (1974).