Title VIII and Mount Laurel: Is Affordable Housing Fair Housing?

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Like many landmark accomplishments, Title VIII of the 1968 Civil Rights Act[1] has spawned a level of indirect activity whose benefits greatly expand the reach of the fair housing movement. Title VIII did not invent the idea of fair housing, but it certainly brought that idea to the forefront of our social conscience and stimulated attention to a much broader range of fair housing issues. I report here on one of these secondary effects of Title VIII, the Mount Laurel movement in New Jersey.

The Mount Laurel decisions[2] seek to retard economic segregation by holding that state constitutional general welfare limitations require a municipality's land-use regulations to provide for the municipality's fair share of the regional need for low- and moderate-income housing. As implemented in the widely discussed *Mount Laurel II* decision, the doctrine requires municipalities to take affirmative measures to encourage the availability of low- and moderate-income housing, although the court has thus far stopped short of requiring that municipalities actually produce the housing themselves.

Civil rights organizations brought the Mount Laurel cases under the banner of fair housing. The first plaintiff was the NAACP of Southern Burlington County, and it was followed by other plaintiffs from the civil rights community, notably the Urban Leagues of Essex (Newark) and Middlesex Counties (New Brunswick).[3] Before

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1. 42 U.S.C. §§ 3601-3619 (1982).

2. S. Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J. 1975) [hereinafter *Mount Laurel I*]; S. Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390 (N.J. 1983) [hereinafter *Mount Laurel II*]; Hills Dev. v. Township of Bernards, 510 A.2d 621 (N.J. 1986) [hereinafter *Mount Laurel III*]. The term Mount Laurel is used throughout this paper to describe circumstances surrounding these cases, in addition to referring to the decisions.

3. *See* Urban League of Essex County v. Township of Mahwah, 456 A.2d 390 (N.J. 1983) (decided as part of *Mount Laurel II*); Urban League of Greater New Brunswick v. Mayor and Council of Carteret, 359 A.2d 526 (N.J. Super. Ct. Ch. Div. 1976), *rev'd*, 406

being transformed by state constitutional law theories, the Mount Laurel cases were federal civil rights cases. The trial court decision in *Mount Laurel I* rested on the fourteenth amendment,[4] and the Urban League suit used a Title VIII theory in addition to its state "general welfare" claims.[5] Federal claims, both constitutional and statutory, became an impediment after *Mount Laurel I* because they kept open the possibility of certiorari review in an unfriendly United States Supreme Court. Newer cases have therefore brought only state law claims, and the link to Title VIII is no longer apparent.

I seek here to restore that link. After briefly setting the stage with a description of how *Mount Laurel II* compliance has worked, I want to explore whether affordable housing is, in fact, fair housing; that is, is it good for the communities of people that Title VIII seeks to protect?

I. How Mount Laurel Works

The mechanics of calculating a municipality's fair share obligation are interesting, but not of primary importance for present purposes.[6] What counts is how the need, once allocated to municipalities, is met.

A.2d 1322 (N.J. Super. Ct. App. Div. 1979), *rev'd*, 456 A.2d 390 (N.J. 1983) (decided as *Mount Laurel II*). The *Mahwah* case involved a community whose largest taxpayer was a major Ford assembly plant, but whose land-use practices made it impossible for the Ford workers to live there. The *Carteret* case was a county-wide suit (Middlesex County) in the fast-growing central New Jersey region between New Brunswick and Princeton. Unless otherwise indicated, subsequent reference to the Urban League suit indicates the Carteret-Middlesex County matter.

4. S. Burlington County NAACP v. Township of Mount Laurel, 290 A.2d 465, 469 (N.J. Super. Ct. Law Div. 1972).

5. 406 A.2d 1322 (N.J. Super. Ct. App. Div. 1979) (Title VIII claim stated by plaintiffs); *see also* Urban League of Greater New Brunswick v. Township of Cranbury, 536 A.2d 287, 299 (N.J. Super. Ct. App. Div. 1987) (plaintiffs may recover attorneys' fees on Title VIII claim, even though no court decision on merits of this claim).

6. However, some aspects of the methodology currently imposed by the Council on Affordable Housing, to be described below, may actually violate Title VIII. The methodology reallocates housing need from communities that have excessive numbers of poor families to developing communities that have the strong housing markets capable of supporting inclusionary lower-income housing developments. *See generally* N.J. Stat. Ann. § 52:27D-312 (West 1986); N.J. Admin. Code tit. 5 § 92 (1986). Under the law, however, reallocation takes place only within "housing regions," and the Council has drawn them so as to frustrate the effectiveness of the reallocation process. The poorest (and most heavily minority) area of the state, Jersey City, has been placed in a region which has very few developing municipalities to aid it. The most rapidly developing part of the state, mostly white Middlesex and Somerset Counties, has been placed in a region which has only two small urban centers with excess housing need, so that municipalities in these counties have fair shares well below what they could absorb. These regions have a racially disparate impact which arguably violates Title VIII. *See* Payne, Rethinking Fair Share, 16 Real Est. L. J. 20, 30-31 n.26 (1987).

The typical suburban Mount Laurel development is usually a townhouse-style, multi-family project with between 250 and 1500 units, of which 20% are "set aside" for low- and moderate-income households.[7] The project is built at densities ranging from six to twelve units per acre and is sold in condominium form. Because rental projects are currently difficult to achieve through the private market, the state now offers a "bonus" for towns that meet part of their fair share in rental form.[8] The land on which development occurs typically had previously been zoned for less intensive residential use, usually three units per acre or less, or was in a "holding zone" that did not permit residential use at all.[9]

Mount Laurel is simply the privatization of the national housing policy of the 1960s and 1970s. It harnesses private development activity and diverts some of the profit of intensive development to money-losing, price- or rent-controlled units for lower-income families. Mount Laurel may sound like alchemy, but there is little mystery to the source of the subsidy for the lower-income units, which averages about $25,000 per unit.

The subsidy comes, first, from the higher densities which are generally allowed as a tradeoff for building the lower-income Mount Laurel component. Higher densities use the land more efficiently and permit more efficient building techniques. So long as the below market Mount Laurel component is included to drain off some of the profit that results from the efficiency gains, the surplus is not simply capitalized into higher land costs that would defeat the Mount Laurel technique. The only way that the municipality can "create" this surplus, however, is to allow more intensive development of its land area than it had previously allowed. Intensive development, in turn, brings to the municipality a whole host of related social costs, the most obvious of which is the cost of new infrastructure for a denser population. The Mount Laurel subsidy is

7. The mechanisms for pricing the below market units and for qualifying the occupants is also complex. In general, Department of Housing and Urban Development (HUD) standards for the Section 8 program are applied. *See* N.J. Admin. Code tit. 5 § 92-12.4 (1986).

8. Rental units count as 1.33 units when credited toward the municipality's fair share obligation, thus reducing the net number of units for which the municipality must provide. *See* N.J. Admin. Code tit. 92 § 5:92-14.4 (1986). Rental units are more readily available to poor households because no down payment is required and expensive maintenance obligations that accompany homeowning are reduced.

9. These are "typical" developments. Some are atypical, such as a 60–unit project in South Brunswick that will contain only 12 Mount Laurel units and a projected new town in Old Bridge that was to contain 1,668 Mount Laurel units out of some 16,380 total units.

therefore not cost-free, and it is important in Mount Laurel planning to try to direct growth to communities where growth is independently justifiable.[10]

A second source of the Mount Laurel subsidy comes from the marketplace. It is simplistic to flatly conclude that the purchasers of market rate units are "subsidizing" the below market purchasers. The timing of *Mount Laurel II* was felicitous, coming just as the housing depression of the 1970s ended and the market began to react to pent-up demand. That demand, and a booming economy, make it possible in New Jersey to sell anything that has four walls and a roof. In such a market it is not clear whether a developer freed of the subsidized Mount Laurel units would necessarily reduce prices on the market units. Demand may be strong enough so that some or all of the Mount Laurel subsidy could be retained as profit.

These market conditions provide some basis for the New Jersey Supreme Court's assertion that subsidies from other purchasers or tenants are not involved, and that it is the developer's choice whether to forego some of its profit in order to gain the right to build in this style and density.[11] An offer to build Mount Laurel units is a weapon for these developers; absent this offer the municipality would probably be free under conventional zoning law to zone for lower densities and keep the developer out altogether. This perspective also suggests that if the market rate units do increase in price because of the Mount Laurel subsidy, it is the cost these households pay to "purchase" access to a community that would otherwise not allow the type of housing they want.[12] This analysis also suggests one reason why Mount Laurel has not travelled very well beyond New Jersey. Where demand is lower and land is plentiful, generously zoned, and relatively cheap, developers do not need the Mount Laurel weapon, for there is a further frontier where housing can be built without these incentives.[13]

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10. This was the philosophy behind the use of the State Development Guide Plan as a measure of where growth should occur in *Mount Laurel II*. For a different approach, which places somewhat less faith in abstract planning, see Payne, *supra* note 6.

11. *Mount Laurel II*, 456 A.2d at 446 n.30.

12. It might be argued that the Mount Laurel process piles regulation on top of regulation in a market which would function best if free of regulation altogether. *See* Ellickson, The Irony of "Inclusionary" Zoning, 54 S. Cal. L. Rev. 1167 (1981). In any realistic time frame, however, land-use regulation is a given and, in this sense, the Mount Laurel process corrects for distortions that conventional zoning allows.

13. This, however, does not excuse the New York Court of Appeals' rejection of the Mount Laurel process as applied to the Long Island subregion of the New York metropolitan area, where land is neither plentiful, generously zoned, nor cheap. *See* Suffolk Hous. Serv. v. Town of Brookhaven, 70 N.Y.2d 122, 517 N.Y.S.2d 924 (1987).

The major components of the Mount Laurel alchemy come from increased densities, which add burdens to the municipalities, and from market factors, borne in part by developers and in part by market-rate households. A third source of savings is the elimination of cost-generating requirements in the building code. The list of such requirements is endless: dedicated open space requirements, expensive facade treatments, excessive parking space requirements, inefficient plumbing and other code standards, unnecessary studies, impact statements and application fees, and even, in one of the Urban League cases, a ratio of required swimming pools to housing units.

Municipalities give up these cost generators fairly readily when faced with litigation, and while this undoubtedly helps to contain costs, I know of no project where elimination of cost generators alone has been sufficient to induce developer participation in a Mount Laurel proposal.[14] Unlike the other sources of subsidy, removal of cost generators does not involve a shift of a real cost from one party to another so much as elimination of an arbitrary and artificial cost.[15]

A final category of subsidy is direct public assistance to reduce the cost of a project. The Mount Laurel decisions have made it clear that a municipality's affirmative obligation stops short of building the housing itself, but a municipality can often be induced to contribute in order to have the compliance plan structured the way it desires.[16] Before the Tax Reform Act,[17] tax shelters offered good potential for reducing costs so that a higher percentage of a development could be Mount Laurel. Use of nonprofit developers, created initially by the municipality, can still be an effective way of reducing costs.

The biggest source of municipal subsidy, however, remains public land. Many municipalities hold vacant or developable land, mostly

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14. There is some irony in this, since elimination of cost generators was a principal focus of the early suits and of *Mount Laurel I.*

15. Also in the "cost generator" category are restrictions on manufactured and modular (formerly called mobile) homes. Flat prohibitions are now illegal in New Jersey, but there has been no rush to build in this format. *See Mount Laurel II,* 456 A.2d at 450; Robinson Township v. Knoll, 302 N.W.2d 146 (Mich. 1981).

16. Usually to avoid excessive use of the standard 20% inclusionary development which requires four market units for each Mount Laurel one, an obviously profligate use of development resources if other ways are possible. *See* Payne, *supra* note 6, at 27. Direct subsidization has its downside, however, when it is used primarily for rehabilitation of owner-occupied housing. *See infra* note 27.

17. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (codified as IRC (1986)).

as surplus property or as lots acquired through tax foreclosure. Donation of this land, particularly if combined creatively with other techniques such as nonprofit sponsorship and use of manufactured housing components, can achieve spectacular savings. A Princeton project now in progress, for example, uses these three techniques in combination to produce a development that is 50% market rate housing and 50% Mount Laurel housing, thus preserving a substantial element of economic mixing in a community where housing costs are very high.[18]

This overview cannot do justice to the complexity of making Mount Laurel work. However, there can be no doubt about one thing. For better or for worse, Mount Laurel is working in New Jersey. After January 1983, when *Mount Laurel II* was announced, well over 100 developer-plaintiff suits were filed,[19] leading to such absurd situations as 11 developers competing for the privilege of subsidizing several hundred fair share units in Warren Township.[20] However academics or activists feel about it, developers think that Mount Laurel is good business and have not hesitated to take advantage of it.

II. Evaluating Mount Laurel

The central criticism of Mount Laurel in the fair housing community is the assertion that the litigation has not done any good for black or other minority households, and that Mount Laurel is for the marginal middle class of the suburbs, which past racial discrimination has left predominantly white.[21] To the extent that persons of

18. There is also some direct subsidy money available from the state, appropriated as part of the New Jersey Fair Housing Act of 1985, N.J. Stat. Ann. § 52:27D-321 (West 1986), and some vestigial federal funds from the Section Eight and Farm Home Loan programs. In general, however, these subsidies are best used to leverage other Mount Laurel techniques. At an average $25,000 per unit subsidy, a one million dollar appropriation produces only 40 units, in a state where need is estimated at 140,000-240,000 units. *See* Payne, *supra* note 6, at 30.

A troubling phenomenon which has developed recently centers on the Regional Contribution Agreements, to be described more fully below. *See infra* text accompanying notes 43-44. Some municipalities are raising money by bonding, rather than from Mount Laurel-related development activities, in order to cash out their obligation and build the units elsewhere. *See* N.J. Stat. Ann. § 52:27D-312 (West 1986); N.J. Admin. Code tit. 5 § 92-11 (1986). This probably shifts more of the Mount Laurel burden directly to the community than is desirable and, as a result, is not very good politics.

19. *See* Mallach, The Tortured Reality of Suburban Exclusion: Zoning, Economics and the Future of the *Berensen* Decision, 4 Pace Env. L. Rev. 37, 119 (1986).

20. J.W. Field Co. v. Township of Franklin, 499 A.2d 251 (N.J. Super. Ct. Law Div. 1985).

21. *See, e.g.*, Holmes, A Black Perspective on Mount Laurel II: Towards a Black "Fair Share," 14 Seton Hall L. Rev. 944 (1984).

color are advantaged, it is said that the beneficiaries will be the marginal middle class black households still in the cities, thus accelerating their flight from the cities and leaving the cities even more the repository of the poorest of the minority poor.

This criticism should be taken seriously. In their conventional application in "inclusionary developments" in the suburbs, Mount Laurel housing units are mostly for sale in condominium developments, rather than being offered for rent, and require an income of between $14,500 and $29,000.[22] Without especially creative endeavors, Mount Laurel units cannot be priced so that they benefit households earning less than about 40% of the regional median income; even with such creative endeavors[23] it is clear that the poorest of the poor cannot be served. Such is the cost of a program that, as noted above, is essentially a form of privatization.

The statistics lend some support to the criticisms. Reliable hard data are still hard to come by, because there is no central collection mechanism for Mount Laurel activities. By best estimates, however, there are about 1,900 Mount Laurel units constructed and occupied in the state as of early 1988.[24] Alan Mallach, a leading Mount Lau-

22. *See supra* note 8 on the importance of the sales/rental difference. The Council on Affordable Housing estimates median income at approximately $36,000 for a family of four, adjusted upwards and downwards for different sized households. 2 COAH Newsletter, No.3, at 5 (1987). To make the units affordable to households not at the very top of the eligibility range, the monthly cost (30% of income) is usually calculated on a household at 45% of median for low and 65% of median for moderate. This results in monthly shelter costs of about $400 to $600 per month. Sales prices currently range from just under $30,000 to the mid-$50,000 range.

23. *See supra* text accompanying note 18.

24. A study is currently underway, sponsored by the Fund For New Jersey and carried out by the Alliance for Affordable Housing Education Fund, with a formal report expected later in 1988. The estimate in the text was supplied to the author by Alan Mallach on March 17, 1988, based on preliminary results of the Alliance for Affordable Housing study.

Less than 2,000 units may seem paltry as the product of 15 years of litigation. Until *Mount Laurel II* in 1983, however, there was no effective enforcement mechanism at all, and in 1985, just as the fruits of *Mount Laurel II* began to appear, the adoption of the (New Jersey) Fair Housing Act, N.J. Stat. Ann. § 52:27D-301 *et seq.*, and the transfer of all active cases to the newly created Council on Affordable Housing (COAH) (*see Mount Laurel III*, 510 A.2d 621) put everything on hold again. COAH certified its first housing units in May 1987, and by the end of 1987 had approved plans for 4,000 additional units.

COAH estimated that applications pending before it would produce an additional 18,000 units by 1993, and it had speculative plans for an additional 14,000 units. In addition, there are several thousand more units that are or will be provided through court settlements and adjudications separate from the COAH process. The most optimistic total projection is for 37,642 Mount Laurel units by 1993, but many of these will be rehabs rather than new construction. An inclusionary development at 20% requires four market rate units for each Mount Laurel unit; to produce 25,000 new Mount Laurel units through 1993 would require a total of 125,000 new units of residential construction. At best, New Jersey has averaged 50,000 new units per year, which means that

rel planner, has undertaken an occupational profile of the Village Green condominiums, the Mount Laurel component of The Hills of Bedminster, the first Mount Laurel project to be built and occupied after 1983.

Mallach found that 60%-70% of the Mount Laurel units were occupied by blue-collar wage earners or their female, "pink-collar" counterparts, with less than 25% classified as professionals. The professionals, moreover, were generally teachers. There were no "high status" professionals such as lawyers or doctors. Similarly, those occupants classified as "managers" tended to be in low-paying, low-advancement positions rather than being on the first rung of a lucrative corporate ladder. Most significantly, Mallach found that 25% of the households, and one-third of the households qualifying for multi-bedroom units, were female-headed households with dependent children. Although not reported by Mallach, other anecdotal information confirms that there is some degree of racial integration as well.[25] It also appears that a large proportion of the residents previously resided in the suburbs, rather than moving from an urban center.

These data and informal reports give mixed comfort. To the extent that Village Green proves typical, Mount Laurel developments are economically integrated and do not appear to be enclaves of yuppies.[26] However, the majority of beneficiaries are white, which is to be expected whenever poverty rather than race itself is used as the qualifying variable. It is also quite clear that, to date, the Mount Laurel developments are not emptying the cities, which may be either good or bad depending on one's view of what Mount Laurel was supposed to accomplish.

The sample is very small, however, and the big question is what will happen to the demographics once large numbers of units become available. One lesson that Mount Laurel has taught us is that there is a tremendous pool of suburban poverty, one undoubtedly much larger than the count of low- and moderate-income house-

almost one out of three new construction projects would have to have a Mount Laurel component. This is an extremely ambitious goal, although not patently unobtainable, and it still falls short of the lowest, politically motivated estimate of need, that of the COAH.

25. The author has discussed this point, for instance, with C. Roy Epps, President of the Civic League of Greater New Brunswick, plaintiff in the Urban League suit. Epps maintains close watch on affordable housing developments in central New Jersey.

26. For an anecdotal profile, see The Hills Are Alive, Sunday Star-Ledger (Newark), Oct. 11, 1987, at 1.

holds used in the Mount Laurel fair share formulas.[27] Absent special emphasis on recruitment of minority households, the suburban, white makeup of the developments will persist.[28]

Even with special emphasis on minority recruitment, it may be questioned how much movement of minority households from the cities could realistically have been expected when *Mount Laurel I* was brought. I have a vivid recollection of reporting on our Urban League case to a general meeting of the Urban League at a neighborhood center in a black area of New Brunswick. When I described a recent legal triumph in the Township of Plainsboro, some ten miles south of New Brunswick and five miles east of Princeton, in the heart of the richest employment market in New Jersey, I was hooted down by those for whom I ostensibly worked. Plainsboro, a farming-turned-yuppie town, totally dependent on the automobile for transportation, and with no network of social support for the urban black family, might just as well have been on Mars as far as my listeners were concerned.

In attempting to be dispassionate and academic, I must concede that Mount Laurel does not, as of March 1988, stand as a completed triumph of the civil rights movement. One cannot give five years of intensive labor to litigation such as this, however, and remain totally dispassionate.[29] I believe that Mount Laurel is, if not a triumph of

27. The formulas use surrogates for need based on census data about substandard physical housing conditions. *See* AMG Realty Company v. Township of Warren, 504 A.2d 692 (N.J. Super. Ct. Law Div. 1984); Rice, Exclusionary Zoning: Mount Laurel in New York, 6 Pace L. Rev. 135 (1986). Neither the courts nor COAH have included in their counts what is called "financial need," that is, households living in standard housing but paying more than 30% of household income for it. It has been estimated that inclusion of this group would double the need estimates. *See* Payne, *supra* note 6, at 25. Housing advocates have not pressed this issue vigorously, because even the lower estimates are well beyond the capacity of the private market to supply using the now-conventional 20% set-aside technique. This category may become more relevant, however, if and when public subsidy programs are revived so that 100% lower-income developments are once again feasible, as was true when the first Mount Laurel cases were brought. One adverse consequence of the emphasis on physical condition is that COAH has been very generous in approving housing elements that meet the municipality's fair share through rehabilitation of existing occupied housing. By definition, this approach restricts access to the community by non-residents, including minority residents from the urban core.

28. All Mount Laurel protocols contain non-discrimination provisions and affirmative marketing requirements. There is potential for a greatly expanded role for private fair housing agencies in assisting in this marketing. So far as I am aware, no one has suggested imposing specific racial quotas in Mount Laurel developments. *Cf.* U.S. v. Starrett City Assocs., 660 F. Supp. 668 (E.D.N.Y. 1987), *aff'd*, 840 F.2d 1096 (2d Cir. 1988).

29. Should the reader, moreover, favor the printed version of these remarks by citing them in some other place, I will deem it sporting to balance any reference to the

the civil rights movement, nonetheless a small step in a civil rights war that has been measured mostly in small steps for 125 years.

III. Is Affordable Housing Fair Housing?

First and foremost, Mount Laurel is a worthy pursuit because poverty is a civil rights issue.[30] Lawyers tend to forget this, since poverty was stricken from the fourteenth amendment agenda of the civil rights movement in the early 1970s by the United States Supreme Court.[31] Discrimination on the basis of poverty is particularly pernicious in the context of municipal zoning, not just because it is official discrimination, but because municipal land-use decisions burden the non-resident poor who have no say in making those decisions. From this perspective, exclusionary zoning might be described as a voting rights problem.[32]

Discrimination in any form coarsens and weakens society. As a result of Brown v. Board of Education,[33] and its progeny, most overt official discrimination has been ended in our generation. Consequently, the focus of Title VIII has been on eradicating the more subtle and pervasive problem of private housing discrimination. It is therefore remarkable and dangerous to tolerate the overt official discrimination against the poor currently practiced by many suburban municipalities.[34]

Racial discrimination is not far below the surface of economic discrimination. Our society simply would not tolerate the amount of poverty found in black and other minority communities if whites were proportionally as poor as these less-favored groups. Racial

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negative conclusions just drawn with appropriate acknowledgement of the more positive comments to follow.

30. Discrimination on the basis of economic status is different from recognition of legitimate economic limitations. Finding an appropriate line between these two concepts is subtle and tricky and beyond the scope of this paper. One of the classics is Michelman, Forward: On Protecting the Poor Through the Fourteenth Amendment, 83 Harv. L. Rev. 7 (1969). Suffice it to say that Mount Laurel requires only a "realistic" opportunity for housing, an opportunity limited by what a municipality can accomplish through regulatory means. Some of the more visionary applications of the Mount Laurel principle to the problems of the hard-core poor will be noted briefly below.

31. *See, e.g.*, San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

32. *See* Payne, Delegation Doctrine in the Reform of Local Government Law: The Case of Exclusionary Zoning, 29 Rutgers L. Rev. 803 (1976).

33. 347 U.S. 483 (1954).

34. It also bears noting that housing discrimination has increasingly come to be seen as a gender issue, as is exemplified by the proportion of female-headed households claiming the first batch of Mount Laurel units. *Mount Laurel I* was not planned as a "women's case," but it spins off useful subsidiary consequences such as this, which indicate the general correctness of the theory.

fears undoubtedly reinforce and deepen the indifference to economic misery that our society tolerates.

Thus, in negotiating settlements of Mount Laurel cases, the most difficult point on which to reach agreement has frequently been whether to allow local residents, most of whom are white, a waiting list priority in applying for Mount Laurel units. Municipalities know that they cannot overtly discriminate on the basis of race, but they also fear an influx of minorities from the central cities. Residency restrictions are an excellent surrogate for racial exclusions and they have proven difficult to eradicate.

The case for pursuing Mount Laurel claims is a defensible one, both because economic discrimination is wrong on its own terms and because it is a transparent substitute for racial discrimination in all too many cases. But the hard-core poor are still not helped by the doctrine. Is Mount Laurel only for the marginal middle class and therefore not an appropriate investment of social capital?[35]

As noted previously, with creativity and good will, the reach of Mount Laurel housing can be extended to lower levels than is now common, thus softening the edges of the criticism.[36] Admittedly, Mount Laurel is not capable of directly solving the problem of the homeless, for whom an absolute inability to pay is the central truth. But, indirectly, Mount Laurel is legally and politically important even in these cases—sufficiently important that I feel confident in rejecting the "middle class" accusation.

New Jersey's treatment of the homeless is now under litigation on a variety of fronts. An important legal starting point has been the Mount Laurel doctrine, from which public interest litigants have argued that a constitutional right to housing exists in New Jersey. No court has squarely accepted the argument, but the decisions have moved forcefully in the direction of greater statutory protection for the homeless and have taken note that by doing so the constitutional dimensions of the problem need not be resolved.[37]

Similarly, the city of Jersey City is now in court defending an ordinance that imposes sales price controls on condominium conver-

35. Is it a proper criticism of Title VIII generally that enforcement of its anti-discrimination provisions most often benefits minorities of at least adequate means? *See, e.g.*, Irizarry v. 120 West 70th Owners Corporation, (S.D.N.Y. 1986) Fair Hous.-Fair Lending Rep. (P-H) ¶ 15,551 (Sept. 1, 1986). Housing for the very poor is usually offered on an equal opportunity basis, *see* Mallach, *supra* note 19, at 104, because race and poverty are sufficiently correlated that landlords cannot afford the luxury of discrimination.

36. *See supra* text accompanying note 18.

37. *See* Rodgers v. Gibson, 528 A.2d 43, 45 (N.J. Super. Ct. App. Div. 1987).

sions in an effort to stem the tide of gentrification. By limiting conversion prices to the capitalized value of legally controlled rents, rent control avoidance will be eliminated as a motivation for conversion and many low-priced units will remain in the city's housing stock.[38] Gentrification of the previously grim cities along the Hudson waterfront is rapidly eliminating this housing, much of it occupied by families well below the *de facto* 40% floor found in suburban Mount Laurel projects. The American Civil Liberties Union of New Jersey has recently filed an extensive brief in support of the sales control ordinance, again arguing that Mount Laurel supports, if not compels, such regulatory activity.[39]

Just as *Brown* led to many unanticipated developments beyond racially segregated schools, Mount Laurel is changing the legal and constitutional environment in which housing issues are perceived. Like *Brown*, which set in motion the events that led to the Fair Housing Act of 1968, Mount Laurel has altered the political landscape in New Jersey. One of the functions of an activist decision is to break political stalemate on rights issues. *Brown* did this. *Baker v. Carr*[40] did it with voting rights. In New Jersey, *Robinson v. Cahill*[41] broke a political stalemate with respect to education finance, and *Mount Laurel I* and *Mount Laurel II* did it with exclusionary zoning. When an effective remedy for implementing the Mount Laurel doctrine was finally furnished by the New Jersey Supreme Court in 1983, the political pressure on the legislature became intolerable. In 1985, it enacted a flawed but nonetheless far-reaching statutory program for determining and enforcing "fair share" goals throughout the state.[42]

38. In an improvement on traditional rent control, moreover, occupancy controls will be imposed, so that the true beneficiaries of the ordinance will be lower-income households.

39. Committee for Housing Alternatives v. Mayor and City Council of Jersey City, Docket No. A-1586-87T8 (appeal pending in N.J. Super. Ct. App. Div., filed Mar. 14, 1988).

The Mount Laurel theory may also help in efforts by legal services attorneys to prohibit the City of Newark from demolishing 1950s-style public housing projects, where the land is to be redeveloped with middle-class townhouses. *See* letters of Harris David and Melville D. Miller, Legal Services of New Jersey, to Marvin Krotenberg, Regional Environmental Officer, HUD (Jan. 9, 1988) (emphasizing need for affordable housing in Newark).

40. 369 U.S. 186 (1982).

41. 303 A.2d 273 (N.J. 1973).

42. N.J. Stat. Ann. § 52:27D-301 *et seq.* (West 1986); *see Mount Laurel III* (act is facially constitutional and justifies judicial withdrawal from the field until it is implemented). *See* Franzese, Mount Laurel III: The New Jersey Supreme Court's Judicious Retreat, 18 Seton Hall L. Rev. 30 (1988).

The New Jersey Fair Housing Act of 1985 is not concerned solely with suburban exclusion. As a result of the predictably byzantine negotiations which produced the act, one of its principal features provides for "regional contribution agreements," or RCAs, which permit a municipality to finance up to half its fair share obligation in another municipality.[43] The intended effect, borne out by the first RCAs approved by the state, is to link the economic strength of the suburbs to the financial need of the cities. Normally, this is accomplished by requiring developers to make a payment in lieu of constructing actual Mount Laurel units in their developments, which then funds the urban units. Because the RCAs involve cash transfers, instead of actual housing units, the receiving municipalities have more flexibility in determining how to serve housing needs. For instance, the money can be used to fund rent supplements in existing housing for households whose incomes are too low to take advantage of conventional Mount Laurel units.[44]

The RCAs are controversial because they divide those who favor an urban strategy for empowering minorities from those, perhaps more visionary, who seek to hasten the genuine integration of the suburbs. The RCAs play uncomfortably to a sense that white America can buy racial and economic exclusion, not just in the marketplace of realpolitik but with the official sanction of state law. For better or worse, however, the creation of RCAs demonstrates clearly that Mount Laurel's reach is long, and that its potential extends well beyond the marginal middle class and suburbia.

The political issue is also broader than specifics such as regional contribution agreements and urban policy. The civil rights movement is about empowerment, and that is where the Mount Laurel doctrine is heading in New Jersey. The cases, and now the statute, have forced housing policy into the public consciousness and onto the public agenda. A statewide coalition, the Alliance for Affordable Housing, has brought together labor and industry, landlords and tenants, civil rights activists, clergy, and developers into an effective lobbying force that stopped a constitutional amendment to repeal Mount Laurel and has now begun to advance a positive agenda of change in housing policy. Two recent statewide polls revealed broad public concern about affordable housing and surprisingly broad public acceptance of the Mount Laurel decisions and of the state's role in supervising local land-use decisions that affect afford-

43. N.J. Stat. Ann. § 52:27D-312 (West 1986).
44. *See supra* notes 8 and 22.

able housing.[45] Politicians are gingerly beginning to court the housing vote, a dramatic change from a few years ago when space on the anti-Mount Laurel bandwagon was standing room only.

We may not be close to the housing equivalent of Jesse Jackson running effectively for president, but we are also not very far into the Mount Laurel era. Ten years after *Brown*, it will be recalled, Virginia was still engaged in massive resistance.[46] The lasting achievement of *Brown*, I believe, was not desegregated schools, but the stimulus it provided to a public discourse about equality, a discourse that in time produced the Civil Rights Acts of 1964,[47] 1965,[48] and 1968.[49] In its more modest compass, Mount Laurel, I submit, is having and will continue to have a similar effect in New Jersey. It has made working politicians think more closely not only about housing, but about jobs, transportation, and education as they relate to housing. It has, in short, changed the nature of the discourse and has made it impossible not to think about economic discrimination as a social problem. While the technical details are engaging, it is the effect on the public discourse—and in time, I am confident, on public policy as well—that makes Mount Laurel important.

45. *See* Star-Ledger (Newark), Jan. 7, 1988, at 34.
46. *See* Griffin v. Prince Edward County, 377 U.S. 218 (1964).
47. 42 U.S.C. § 2000(a) *et seq.* (1982).
48. 42 U.S.C. § 1973 *et seq.* (1982).
49. 42 U.S.C. §§ 3601-3619 (1982).