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THE HOUSING AND COMMUNITY DEVELOPMENT ACT OF 1974—WHO SHALL LIVE IN PUBLIC HOUSING?

Most families living in the United States today are aware that securing desirable, or even adequate, housing at a price they can afford to pay is becoming increasingly difficult. For those at the lowest income levels, it is virtually impossible.¹ Housing is only one of the areas in which the private market has demonstrated an unresponsiveness to the needs of all economic strata, but it is a highly visible area, and one which has grave implications for society as a whole. For housing is inextricably bound in the knot of serious social and economic problems which interact to produce that most intractable of modern maladies, urban blight.

The need for government to take an active role in subsidizing housing for low income groups is a proposition so well established it is scarcely worth debating.² Federally assisted housing has been with us, in one form or another, throughout most of this century.³ The United States Housing Act of 1937⁴ marked the establishment of the federal housing programs which, with certain modifications, have survived until today.

The history of public housing in this country is a chronicle of frustration and failure. The promise seemed bright in 1949 when Congress spoke of a decent home for every American family "as soon as feasible."⁵ In assessing the country's short-term housing requirements, Congress agreed that we would need 135,000 new public housing units each year for the following six years, or a total of 810,000 units. In looking back over the past 25 years, however, one cannot help but wonder why that promise proved so empty. Actual production of public housing between 1949 and 1968 totalled only about 500,000 units, or roughly two-thirds of the 6-year goal in 20 years.⁶

1. See generally REPORT OF THE NAT'L COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY, H.R. DOC. NO. 91-34, 91st Cong., 1st Sess. (1968) [hereinafter cited as DOUGLAS REPORT].

2. "[T]o expect the free market to supply housing for all Americans without subsidy requires a flight from reality." *Id.* at 10.

3. For a thorough examination of the historical development of assisted housing, see L. FRIEDMAN, GOVERNMENT AND SLUM HOUSING: A CENTURY OF FRUSTRATION (1968).

4. Act of Sept. 1, 1937, ch. 896, 50 Stat. 888.

5. Housing Act of 1949 § 2, 42 U.S.C. § 1441 (1970).

6. DOUGLAS REPORT 14. The inadequacy of this effort becomes even more striking in light of the following statistics:

Demolitions of housing by public action alone destroyed more units of housing than were built, in all federally aided programs.

Although results have been disappointing, there is some consensus that the basic structure of our public housing programs is sound, and that failures can be attributed to meager funding and general public resistance to program implementation.⁷ Federal subsidies for public housing were initially devised to cover only the capital costs of such projects.⁸ Maintenance and operating expenses were to be financed entirely by rent receipts. This system performed adequately for a time, but by the 1960's, the combined effects of inflation and building deterioration had rendered the debt service subsidy unworkable.⁹ Housing authorities were forced to defer maintenance operations and raise rents beyond the means of the very poor.¹⁰ Congress responded by providing small additional subsidies, up to a maximum of \$120 per unit per year, to cover operating costs for units occupied by elderly tenants.¹¹ These too proved insufficient to support public housing for the abject poor,¹² and increasing numbers of public housing operations faced

The total current housing inventory is about 68 million units.

The annual rate of all new housing construction, private and public, in recent years has been less than 1.5 million units.

A conservative estimate of the substandard and overcrowded housing is 11 million units.

Id.

7. *See, e.g.*, Supplementary Views of Mr. Koch on H.R. 15361:

This Committee, among others in the Congress, spent considerable time in exploring the nature and extend [*sic*] of the so-called "scandals" in the existing housing programs. . . . [T]he most glaring weaknesses in the existing program operations can be attributed to inept HUD program management, rather than to defects in the programs themselves. The study of assisted housing programs by the Administration, conducted on an "after the fact" basis to justify the January, 1973 moratorium on new program activity is less than convincing. In fact, on balance the existing housing programs stand up well.

Supplementary Views of Mr. Koch on H.R. 15361, H.R. REP. No. 1114, 93d Cong., 2d Sess. 543 (Comm. Print 1974) [the pagination is taken from Compilation of the Housing and Community Development Act of 1974, Joint Explanatory Statement of the Managers of the Committee of Conference, printed for the use of the Committee on Banking and Currency; hereinafter H.R. REP. No. 93-1114 and S. REP. No. 93-693 are cited as Compilation].

8. *See* Act of Sept. 1, 1937, ch. 896, § 10, 50 Stat. 891.

9. *See* S. REP. No. 392, 91st Cong., 1st Sess. 16 (1969).

10. By 1968, public housing had become too expensive for a substantial number of poor households:

The Commission recognizes that the very low-income groups cannot, in many cases, afford minimum rentals in low-rent public housing. . . . In 1966 the average rental for all low-rent public housing in the Nation was about \$48 a month At 20 percent of income, this would require an annual income of \$2,880, which is in the higher levels of the poverty range.

DOUGLAS REPORT 190.

11. Housing Act of 1961, Pub. L. No. 87-70, § 203, 75 Stat. 149.

12. A simple calculation will illustrate the inadequacy of the additional operating subsidy. Assuming that a public housing unit costs \$50 per month to operate, the an-

bankruptcy. Finally, in 1969, Congress authorized the payment of operating subsidies without the \$120 annual limit, as required "to maintain the low-income character of projects," while providing that no tenant would pay more than 25 percent of adjusted gross income for rent.¹³ This attempt by Congress to maintain public housing facilities for the neediest families could not succeed without adequate appropriations and cooperation from the Department of Housing and Urban Development (HUD). It received neither.¹⁴

Insufficient funding has not been the only difficulty plaguing public housing. Welfare programs generally are not popular in the United States, and race prejudice is undeniably a significant causal factor, since an inordinate proportion of the poor is black.¹⁵ Public opinion runs high against the residents of slum housing who, it is widely felt, are there because they are too lazy or too venal to improve their lot in life.¹⁶ The attitude that the government is not obliged to house those who have somehow shown themselves to be unworthy permeates public housing policy to this day. The welfare recipient, the unwed mother, the female-headed household, the juvenile in trouble with the law: all are likely victims of exclusionary attempts by local housing authorities who feel that theirs is a disruptive, potentially dangerous presence in public housing.¹⁷ Yet these families are

nual operating costs of that unit are \$600. Prior to the amendment providing for operating subsidies, *supra* note 11, a family with a gross income of \$1,500 a year would have to pay 40 percent (\$600) of that income for rent. With the \$120 annual operating subsidy, the amount payable by the family would still be 32 percent of gross income. In reality, the problem was much more severe, since operating costs on units in many urban areas were often substantially higher than \$50 a month. S. REP. NO. 392, 91st Cong., 1st Sess. 19 (1969).

13. Housing and Urban Development Act of 1969, Pub. L. No. 91-152, 83 Stat. 379.

14. The new legislation ostensibly was designed to enable local public housing authorities to serve the very poor by abolishing the rental formula requiring the tenant to cover all or a certain proportion of his unit's operating expenses; the 25 percent rent maximum served to relieve those families who were being assessed at a higher percentage rate. HUD, however, interpreted the amendments to authorize subsidies only for those tenants who were paying the 25 percent maximum rate. See Roisman, *The Right to Public Housing*, 39 GEO. WASH. L. REV. 691, 694-97 (1971).

15. Evidence to support the conclusion that blacks occupy an economic position inferior to that of whites is found in census data cited in DOUGLAS REPORT 45 and Roisman, *supra* note 14, at 720 n.141.

16. See L. FRIEDMAN, *supra* note 3, at 20-21.

17. See, e.g., Starr, *Which of the Poor Shall Live in Public Housing?*, 23 THE PUB. INTEREST 116 (Spring 1971). See also *Thomas v. Housing Authority*, 282 F. Supp. 575 (1967) (city housing authority could not automatically exclude or evict tenant from low rent housing solely because of status as unwed mother). It is difficult to quarrel with the argument that public housing tenants ought to be protected from neighbors who habitually engage in antisocial behavior, but this is reasoning which should be used only to justify the eviction of tenants who have proven themselves unable or unwilling to co-

among the very poorest; they are the ones whose housing plight is most desperate.¹⁸

It is for these two reasons, the funding structure of public housing and a widespread lack of sympathy for and unwillingness to help the poor, that housing relief for those at the lowest income levels tends to be overshadowed by policies aimed at more "affluent" low and moderate income groups.¹⁹ In pursuing the dream of a decent home and suitable living environment for every American family, our best efforts never have been directed at those who need them most.²⁰

Early in 1973, the Nixon Administration impounded funds which Congress had appropriated for housing programs, on the theory that those programs had proved unworkable.²¹ This executive action provided the impetus for the Housing and Community Development Act of 1974,²² which effected a complete revision of the procedures by which communities receive and expend federal funds for housing and development,²³ and which

exist peacefully in their project. The danger arises when the argument is used to exclude a *class* of eligible tenants on the ground that, as a class, they present a greater danger of disruption, or when it is used to enforce certain social mores which have little or no relation to orderly project operation.

18. For example, in 1965, female-headed families comprised 11.4 percent of the total population of the nation's 100 largest standard metropolitan statistical areas (SMSAs), but they constituted 20.4 percent of the poverty area population. Families relying on income other than earnings comprised 8.3 percent of the total population, but 13.4 percent of the poverty area population. DOUGLAS REPORT 52.

19. Too often the dilemmas of housing the poor are masked by considering them in conjunction with the housing problems of the moderate, middle and upper income groups. Problems affecting these latter groups are more readily alleviated. The more encouraging record in this respect, indeed, has virtually no relevance to the urgent needs of the poor

Roisman, *supra* note 14, at 691.

20. See, e.g., REPORT OF THE PRESIDENT'S COMMISSION ON URBAN HOUSING, A DECENT HOME 42 (1968); DOUGLAS REPORT 181.

21. See Compilation 351; Wall St. Journal, Jan. 9, 1973, at 3, col. 1.

22. Act of Aug. 22, 1974, Pub. L. No. 93-383, 88 Stat. 633 (codified in scattered sections of 12, 15, 20, 40, 42, 49 U.S.C.).

23. Title I of the Act, 42 U.S.C.A. §§ 5301-53 (Supp. 1975), eliminates certain federal categorical grant programs for urban renewal, code enforcement, model cities, water and sewer facilities, open spaces, historic site preservation, and rehabilitation loans, and replaces them with a revenue sharing type block grant program. To receive these funds, communities must demonstrate that they are making realistic efforts to provide an adequate supply of low income housing, with the further objective of promoting a wider choice of housing opportunities and avoiding undue concentrations of assisted persons in poverty areas. Extensive analysis of Title I is beyond the scope of this article, other than to observe that the tying of housing programs which many communities do not want to federal aid for more desired programs, such as water and sewers, provides a very strong incentive for the construction of public housing. For a comprehensive analysis of the provisions of Title I, see Kushner, *Community Planning and Development Under the*

amended the United States Housing Act of 1937 to eliminate certain federal housing programs,²⁴ modify others,²⁵ and draft a completely new program for low income housing assistance, known as section 8.²⁶

It is extremely doubtful that any of the programs still nominally in force, other than section 8 and conventional public housing, will be used in the near future to increase low income housing stocks.²⁷ This article will analyze those provisions of the two housing programs which can be expected to have a significant impact on the poor, in order to demonstrate that, although ostensibly designed to distribute housing dollars where they are most urgently needed, the programs actually are heavily weighted toward persons of moderate income.

I. THE PUBLIC HOUSING PROGRAM

The 1974 Housing and Community Development Act makes substantial modifications to standards of eligibility for conventional public housing. By far the most significant change, measured in terms of its potential effect on the poor, is the redefinition of low income. The Housing Act of 1937 provided that "the dwellings in low-rent housing shall be available solely for families of low income," and defined low income families as those who are in the *lowest* income group and who cannot afford to pay enough to cause private enterprise in their area to build an adequate supply of decent housing.²⁸

The 1974 Act deleted the requirement that conventional public housing be occupied solely by families of low income; rather, it targets two distinct

Housing and Community Development Act of 1974, 8 CLEARINGHOUSE REV. 661 (Jan. Supp. 1975).

24. The section 23 program, 42 U.S.C. § 1421a (1970), was phased out of existence as of December 31, 1974. Under section 23, local housing authorities could lease new or existing housing and then sublet it to tenants, paying the difference between the market rent for the unit and the amount the tenant could pay. Basically a rent supplement program, one of its principal strengths was that it enabled low income families to live outside of poverty and racially-impacted areas. Many of the features of the section 23 program now are embodied in the new section 8 program.

25. Of particular interest are the modifications to the conventional public housing program, 42 U.S.C.A. §§ 1437a-d, 1437g (Supp. 1975), discussed pp. 324-29 *infra*.

26. 42 U.S.C.A. § 1437f (Supp. 1975).

27. With the exception of the section 23 program, none of the existing housing programs were specifically dismantled by the 1974 Act. It is HUD's apparent intention, however, that section 8 be used as the primary vehicle for providing subsidized housing. See *Housing and Urban Affairs Daily*, Aug. 23, 1974, at 102, (views of former HUD Secretary James Lynn); *Compilation* 368.

28. 42 U.S.C. § 1402(2) (1970).

income groups for eligibility. "Low income families" are defined as those who cannot afford to pay enough to cause private enterprise in their area to provide an adequate supply of decent housing.²⁹ A second eligible group, "very low income families," is defined as those whose incomes do not exceed 50 percent of the median family income for the area.³⁰ At least 20 percent of all units in any project placed under contract pursuant to the new Act must be occupied by families in the very low income category.³¹

A comparison of census data on median incomes in several large standard metropolitan statistical areas (SMSAs)³² with the incomes of families residing in public housing reveals the practical effect of the new statutory language:

Median Income in Six Major Metropolitan Areas³³

SMSA	Median	50% of Median
Washington, D.C.	\$12,933	\$6,467
Chicago	11,931	5,966
Boston	11,449	5,725
Los Angeles	10,972	5,486
New York	10,870	5,435
Atlanta	10,695	5,347

According to HUD figures, for the 12 months ending September 30, 1973, the median income of all families *actually residing* in public housing projects was \$2,864.³⁴ The obvious discrepancy between the census figures and those of HUD becomes even more significant in view of the fact that 50 percent of median income represents not an eligibility limit for public housing, but the income ceiling for the *lowest* income group. Thus, the poorest families are to be allocated a percentage of the available housing units but are no longer designated the sole beneficiaries of the public housing program.

Three new provisions of the public housing statute are designed to promote the policy of combining a wider range of incomes in subsidized housing projects, a policy generally referred to as income or economic mix. These provisions can be expected to have the net effect of raising average

29. 42 U.S.C.A. § 1437a(2) (Supp. 1975).

30. *Id.*

31. *Id.* § 1437a(1).

32. Use of the word "area" in the Act means standard metropolitan statistical area (SMSA), or a county in nonmetropolitan areas. Compilation 371.

33. Median income figures for SMSAs were obtained from U.S. DEPT. OF COMMERCE, SOCIAL AND ECONOMIC STATISTICS ADMIN., BUREAU OF THE CENSUS, 1970 CHARACTERISTICS OF THE POPULATION, *United States Summary, General Social and Economic Characteristics, Table 184.*

34. U.S. Department of Housing and Urban Development, 1973 HUD Statistical Yearbook, Table 86. Median income for the same period for all black families in public housing was \$2,723. *Id.*

income levels of public housing tenants. The local housing authority is required to comply with HUD regulations to ensure that projects will represent a broad range of incomes, avoiding concentrations of low income and deprived families with serious social problems.³⁵ Only 20 percent of the units in new projects are reserved specifically for occupancy by families of very low income.³⁶ Finally, in order to qualify for operating subsidies, a housing authority must receive in aggregate rentals from all families residing in its projects a sum equal to at least 20 percent of the combined incomes of all tenant families.³⁷ Clearly, this is a statutory authorization for local housing agencies to consider income as a criterion for housing admissions and, when sufficient numbers of very poor families are already being housed, to prefer the more affluent applicants.

While the statute's expansive definition of very low income does not necessarily exclude the poorest families from public housing, neither does it express a policy preference for them. The conclusion seems inescapable that the redefined income standards, together with the method of financing public housing projects which requires partial support through the rent rolls, will work to the disadvantage of the most needy. To ensure the fiscal soundness of public housing operations, it is clearly in the interest of local housing agencies to accord a preference to those families whose incomes are within the upper ranges of the very low income definition. The new Act has no safeguards against this situation, and in fact may be said to compel it through the mandate of economic mix.

The Act does attempt to prevent discrimination in admissions policies in favor of the higher income class by prohibiting the maintenance of vacant units to await higher income tenants when lower income applicants are available.³⁸ Thus, the preferred ratio of 80 percent low income to 20 percent very low income families is somewhat flexible in that it may not be used as justification for empty housing projects. Whether this provides sufficient protection for the poorest families is debatable. The statute prescribes no methods for assigning priorities to applicants, so families with the lowest incomes presumably could languish on a waiting list indefinitely, as long as a higher income applicant is available to fill any vacancy. A significant proportion of very low income households could be, in effect, too poor for public housing.

The new Act deletes the requirement of a 20 percent gap between maximum eligibility limits for public housing and the lowest rents available

35. 42 U.S.C.A. § 1437d(c)(4)(A) (Supp. 1975).

36. *Id.* § 1437a(1).

37. *Id.* § 1437g(b).

38. *Id.* § 1437d(c)(4)(A).

on the private market, as well as maximum income limits for continued occupancy. Public housing authorities are to assume the responsibility for establishing income ceilings, subject to review by HUD, and the local authority must certify to HUD that each tenant family "was admitted in accordance with duly adopted regulations and approved income limits."³⁹ However, standards for the establishment of such admissions policies have been omitted from the Act. The requirement that applicants be notified promptly of decisions regarding their eligibility is unchanged from the prior law, and there is still a statutory right to an informal hearing on the question of eligibility.⁴⁰

The 1937 Act was amended in 1969 to provide that rents in public housing could not exceed 25 percent of family income after certain statutory deductions.⁴¹ Furthermore, it was amended in 1971 to provide that no public agency was permitted to reduce welfare benefits to public housing tenants as a result of this rent limitation.⁴² The 1974 Act changes these provisions: tenants pay from 20 to 25 percent of adjusted income if that percentage is greater than or equal to the "minimum rent," and minimum rent is set at the family's welfare housing allowance or five percent of family gross income, whichever is greater.⁴³

The minimum rent provision was inserted to cope with what Congress apparently perceived as the injustice of some tenants paying no rent. The conference committee expressed an interest in making sure that all tenants were required to pay their fair share.⁴⁴ The effect of this provision is

39. *Id.* § 1437d(c)(2).

40. *Id.* § 1437d(c)(3).

41. Act of Dec. 24, 1969, Pub. L. No. 91-152, Title II, § 213(a), 83 Stat. 389.

42. Act of Dec. 22, 1971, Pub. L. No. 92-213, § 9, 85 Stat. 776, *amending* 42 U.S.C. § 1402 (1970).

43. 42 U.S.C.A. § 1437a(1) (Supp. 1975). The statutory deductions also have been clarified to eliminate certain double deductions. *See* National Tenants Organization, Inc. v. HUD, 358 F. Supp. 312 (D.D.C. 1973). Dependency deductions are limited to those dependents specifically enumerated, and a new exclusion has been added for foster child care payments.

44. Compilation 374. *But see* Supplemental Views of Congressman Joseph Moakley to H.R. 15361:

The minimum rent provision addresses itself, according to this report, to a "substantial portion of tenants who are not contributing a fair share toward costs of their housing units and seeks to prevent zero or minimum rents caused by application of the maximum rent provision of the 1969 Housing Act." In fact, the income derived from those families will be insignificant since the Secretary of HUD advises us that less than one half of one percent of public housing tenants pay zero rent.

Id. at 554-55.

peculiar and perhaps symptomatic of the bias against the poor which is repeatedly made manifest in public housing programs; families take the statutory deductions and pay one-fourth of the remainder as rent, but if they are too sick or too poor, they are assessed at a *higher* percentage of adjusted income.⁴⁵

The Act provides a separate authorization for operating subsidies.⁴⁶ This funding provision is distinct from the annual contributions contract between HUD and the local housing agency, which cannot exceed annual expenditures for principal and interest on housing agency obligations issued to finance the development or acquisition of projects.⁴⁷ Under the new law, local housing authorities will enter into two separate contracts for HUD funds, assuming that Congress appropriates and HUD releases monies for operating subsidies. The Secretary of HUD is not required to provide operating subsidies, but may do so after taking into account "the character and location of the project and characteristics of the families served, or the costs of providing comparable services as determined in accordance with criteria or a formula representing the operations of a prototype well-managed project."⁴⁸ While this authorization for operating subsidies without dollar limits is an absolute necessity if public housing is to serve the neediest families, it must be read in conjunction with the minimum rent and income mix provisions. HUD apparently has discretion to deny operating subsidies to projects which it feels are incurring unusually high maintenance costs, collecting rentals which are too low, or accepting tenants who do not promote a sufficiently broad income mix. Since HUD naturally would want to spread its thin resources as far as possible, this discretion is likely to be exercised to grant operating subsidies only to those projects which can demonstrate a high measure of financial stability, that is, those whose rent receipts reflect a high percentage of moderate income tenants.

The Act directs local housing authorities to comply with any procedures and requirements which may be prescribed by the Secretary of HUD to

45. The minimum rent provision will apply only to families in extraordinarily dire financial straits. For example, a family with an annual gross income of \$1,500 and four minor children would have an adjusted income after statutory deductions of \$225 a year. Under the old law, they would be required to pay only 25 percent of this, or about \$56, for rent. Under the new Act, annual rent is assessed at \$75.

46. 42 U.S.C.A. § 1437g(a) (Supp. 1975).

47. *Id.* § 1437c(a).

48. *Id.* § 1437g(a). The Act thus vests a great deal of discretion in HUD to determine which projects are to receive operating subsidies. A local housing agency undergoing financial pressures must increase its income through either more federal money or more rental receipts. In not making operating subsidies mandatory for every project which needs them, the Act apparently permits HUD to require that increased costs be covered by rent rolls.

ensure that projects will be operated according to sound management practices. The Act specifically includes rules governing such factors as income mix; the prompt collection of rents and processing of evictions in cases of nonpayment; establishment of effective management-tenant relationships for purposes of formulating security and maintenance standards, with joint enforcement of such standards by the housing agency and tenant councils, when they exist; and development by the local agency of viable homeownership opportunities for low income families which are capable of assuming these responsibilities.⁴⁹ Additionally, project operations eligible for subsidy are defined to include tenant programs and services, particularly when there is maximum feasible participation of tenants in the development and administration of such programs and services. Formation and operation of tenant groups which participate in the management of public housing projects, training of tenants in project management, and utilization of tenants' services in actual operation are all activities eligible for subsidy under the Act.⁵⁰

II. THE SECTION 8 LEASED HOUSING PROGRAM

The new section 8 leased housing program represents an attempt to promote economically mixed housing and to partially restore the severed connection between the public and private housing markets. Under the new program, tenants will pay a percentage of income to owners of assisted units, with the difference between the tenant's share and a predetermined fair market rent for that unit made up by HUD.⁵¹

Section 8 creates two separate subcategories of assisted housing: existing, and new or substantially rehabilitated. In administering the program for existing housing, the Secretary of HUD is authorized to enter into annual contributions contracts with public housing agencies, pursuant to which the agencies may contract to make assistance payments to owners. When no public housing agency exists, or when the public housing agency is unable to implement the program, the Secretary may contract directly with owners and perform all the functions normally delegated to the local agency.⁵²

For new or substantially rehabilitated dwellings, the procedure is reversed. The Secretary is authorized to enter into contracts with owners or prospective owners who agree to construct or rehabilitate housing for occupancy partially or totally by low income families. HUD will make the assistance payments

49. 42 U.S.C.A. § 1437d(c)(4) (Supp. 1975).

50. *Id.* § 1437a(4).

51. *Id.* § 1437f(c)(1), (3).

52. *Id.* § 1437f(b)(1).

directly to owners. Alternatively, the Secretary may enter into annual contributions contracts with public housing agencies, and the agencies will contract with the owners or prospective owners for assistance payments.⁵³ Thus, the statute seems to contemplate, at least with respect to new housing stock, that the responsibility for day to day administration of the program will rest primarily with HUD and not with local housing agencies.⁵⁴

Assistance payments may be made on behalf of families whose incomes do not exceed 80 percent of median income for the area.⁵⁵ At least 30 percent of the families assisted under section 8 must be very low income families at the time of initial rental, that is, their incomes must not exceed 50 percent of the median income for the area.⁵⁶ Rental assistance payments may be made only for those units actually occupied by an eligible family.⁵⁷ If the tenant vacates before his lease expires, or if management is making a good faith effort to fill a vacancy, payments may continue for up to 60 days.⁵⁸ Since owners will lose their subsidies for unoccupied units, it is incumbent upon them to find tenants who are least likely to be transient, and it has been suggested that this provision may work to the disadvantage of certain tenant classes which have been stereotyped as unstable, such as welfare recipients, female-headed households, and racial minorities.⁵⁹

The portion of rent paid by the tenant is fixed at between 15 and 25 percent of gross family income.⁶⁰ The statute provides that the 15 percent ceiling is mandatory for large very low income families and very large low income families.⁶¹ For other families, the Secretary is directed to establish rates up to 25 percent of gross income, taking into account relative poverty,

53. *Id.* § 1437f(b)(2).

54. *See* Compilation 312.

55. 42 U.S.C.A. § 1437f(f)(1) (Supp. 1975).

56. *Id.* §§ 1437f(c)(7), 1437f(f)(2). *See* sample median incomes for several large metropolitan areas p. 325 *supra*.

57. *Id.* § 1437f(c)(4). HUD regulations provide that, in the event of a vacancy after initial rental, the owner will receive continuing housing assistance payments in the amount of 80 percent of the contract rent for a period of up to 60 days. HUD Reg. 881.107, 40 Fed. Reg. 18906 (1975).

58. 42 U.S.C.A. § 1437f(c)(4) (Supp. 1975).

59. *See* Bishop, *Assisted Housing Under the Housing and Community Development Act of 1974*, 8 CLEARINGHOUSE REV. 672, 682 (Supp. Jan. 1975), in which the author predicts this effect of the provision permitting discontinuation of subsidy payments on vacant units.

60. 42 U.S.C.A. § 1437f(c)(3) (Supp. 1975).

61. *Id.* HUD regulations define "large family" as one which includes six or more minors, other than the head of household or spouse. A "very large family" contains eight or more minors other than the head of household or spouse. *See* HUD Reg. 881.118, 40 Fed. Reg. 18908-09 (1975).

number of children, and extent of medical or other extraordinary expenses.⁶² Since these rent fixing provisions have not yet been implemented, it is not clear how rent ratios based upon gross income will compare with those based on adjusted income for conventional public housing.⁶³

Contracts executed under section 8 between HUD and owners or local housing agencies and owners, must establish a maximum monthly rent (including utilities and maintenance charges) for each assisted unit.⁶⁴ The maximum rent cannot exceed by more than 10 percent the fair market rentals established by HUD for modest dwelling units of various sizes and types in the market area.⁶⁵ Fair market rentals are to be reviewed annually, or more frequently if necessary, and adjusted upward to reflect increases in housing costs in the general area. Additional rent increases may be approved to provide for increases in property taxes, utility rates, and similar costs. Rent adjustments may not result in material discrepancies between the rents charged for assisted and comparable unassisted units.⁶⁶ It was determined by Congress that the last restriction on rent hikes would adequately cover legitimate cost increases while preventing government subsidy of costs attributable to inefficient management practices.⁶⁷

One of public housing's most formidable problems during recent years has been the attempt to deal with rapidly rising costs and fixed revenues. Local housing agencies have been caught in the financial crunch: forbidden by statute from squeezing additional rents from tenants,⁶⁸ they and HUD have been unable to persuade the courts that staggering losses could justify avoiding the statutory rent ceiling.⁶⁹ The new Act has dealt with this prob-

62. 42 U.S.C.A. § 1437f(c)(3) (Supp. 1975).

63. For very poor families, section 8 housing will be more expensive. For example, a family with three minors and a gross income of \$2,000 would have an adjusted income for conventional public housing of \$1,000. Annual rent for conventional public housing could be no more than \$250. Under section 8, the same family would pay anywhere from \$300 to \$500 annual rent, depending upon the percentage rate of gross income, between 15 and 25 percent, for which they qualify.

64. 42 U.S.C.A. § 1437f(c)(1) (Supp. 1975).

65. Rentals may exceed fair market values by 20 percent when the Secretary determines that special circumstances warrant the increased ceiling, or when the increase is necessary to implement a local housing assistance plan. *Id.* For the current schedule of fair market rents applicable to section 8 existing housing, see 40 Fed. Reg. 15580-860 (1975).

66. 42 U.S.C.A. § 1437f(c)(2)(A)-(C) (Supp. 1975).

67. Compilation 371-72.

68. *See* 42 U.S.C. § 1402(1) (1970).

69. *See, e.g., National Tenants Organization, Inc. v. HUD*, 358 F. Supp. 312 (D.D.C. 1973); *Barber v. White*, 351 F. Supp. 1091 (D. Conn. 1972). Both suits involved tenant challenges to attempts to meet operating deficits through increased rents.

lem in section 8 by placing the responsibility for ensuring that rental assistance payments are increased on a timely basis to meet rising costs squarely upon the Secretary of HUD.⁷⁰

Practices affecting the substantive rights of tenants are, for the most part, delivered into private hands by the new Act. Contracts between public housing agencies and owners for rental of existing housing must permit the owner to select tenants (subject to the terms of the annual contributions contract between HUD and the housing agency), and to establish standard maintenance and repair practices. The public housing agency has the sole right to evict, but the owner may make representations to the agency for termination of tenancy.⁷¹

For newly constructed or substantially rehabilitated units, the contract between HUD and the owner must provide that all ownership, management, and maintenance responsibilities, including selection and eviction of tenants, are to be assumed by the owner.⁷² The owner may, but is not required to, contract with a public housing agency or any other entity approved by HUD for the performance of these functions. Specifically excluded from section 8 is the requirement that applicants who are determined to be ineligible for subsidy be accorded an informal hearing.⁷³ Model lease and grievance procedures are inapplicable to section 8 dwelling units, with the exception of new or rehabilitated units owned by a public housing authority.⁷⁴

70. 42 U.S.C.A. § 1437f(c)(6) (Supp. 1975) provides:

The Secretary shall take such steps as may be necessary, including the making of contracts for assistance payments in amounts in excess of the amounts required at the time of the initial renting of dwelling units, the reservation of annual contributions authority for the purpose of amending housing assistance contracts, or the allocation of a portion of new authorizations for the purpose of amending housing assistance contracts, to assure that assistance payments are increased on a timely basis to cover increases in maximum monthly rents or decreases in family incomes.

This language would seem to impose upon the Secretary a judicially enforceable duty to private owners and housing authorities who are feeling the pinch of inflation. Obviously, HUD will have to commit housing funds rather sparingly in order to guard against unforeseeable cost increases in the future. Moreover, it is in HUD's best interest to house tenants with relatively stable sources of income, in order to guard against possible decreases in rent receipts in the future.

71. 42 U.S.C.A. § 1437f(d)(1) (Supp. 1975).

72. *Id.* § 1437f(e)(2).

73. *Id.* § 1437f(h). *But see* HUD Reg. 881.218(b)(6), 40 Fed. Reg. 18916-17 (1975) (eligibility hearing provided in situations involving rehabilitated housing owned by a public housing authority); HUD Reg. 882.209(f), 40 Fed. Reg. 19621 (1975) (informal hearing accorded families determined to be ineligible for participation in the existing housing program).

74. HUD Reg. 881.226, 40 Fed. Reg. 18918 (1975). The Model Lease and Grievance Procedures are set forth in HUD Circulars RHM 7465.8 (Feb. 22, 1971), and RHM 7465.9 (Feb. 22, 1971).

Although many of the protections afforded tenants under prior law have been removed from the new Act, those rights which are of constitutional dimension are still applicable. Thus, due process requires that a tenant not be evicted without good cause, and without sufficient notice and opportunity for a hearing.⁷⁵ It has been suggested that there may be some difficulty in satisfying state action requirements in cases arising under section 8, when program administration has been assumed by private owners.⁷⁶ It should be possible, however, to find state action in section 8 programs by pointing to the degree of state control over program administration;⁷⁷ for example, the contractual relationship under which local public housing agencies distribute federal subsidies and, in some cases, retain exclusive authority to terminate leases, and under which HUD retains full control over rent levels, significantly insinuates the state in project administration.⁷⁸

Recently published HUD regulations provide a clearer picture of how the section 8 program will work in practice.⁷⁹ For existing housing, families will apply to the local housing agency administering the program for a "certificate of family participation." The agency may issue only as many certificates as it will be able to honor with funds available under the terms of its annual contributions contract with HUD. After issuance of the certificate, the family has 60 days in which to locate a suitable dwelling unit which the owner will agree to lease to it. The local authority will inspect the unit for compliance with HUD housing quality standards, and enter into a contract with the owner for assistance payments. The lease may be for a term of not less than one nor more than three years.

Under this plan, the burden of breaking down existing patterns of economic and racial segregation in housing is placed primarily on the individual family. The regulations do provide that the public housing agency may assist in finding units for families who, because of age,

75. See, e.g., *Caulder v. Durham Housing Authority*, 433 F.2d 998 (4th Cir. 1970), cert. denied, 401 U.S. 1003 (1971).

76. Bishop, *supra* note 59, at 682-83. Ms. Bishop suggests that fifth amendment due process should be pleaded along with the fourteenth amendment claims, since the test of "public action" under the fifth amendment is substantially the same as state action requirements, and both can be satisfied by demonstrating local approval, use of the judicial process, receipt of federal subsidy, supervision by HUD or the local housing agency, and the housing assistance payments contract. *Id.* at 683.

77. In *Joy v. Daniels*, 479 F.2d 1236, 1238-39 (4th Cir. 1973), the court found that operation of privately owned, FHA assisted apartments involved state action, pointing to the local government's authorization for the program, receipt of federal subsidies and financing benefits, and use of state eviction procedures. See also *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

78. 42 U.S.C.A. §§ 1437f(c)(1), (c)(3), (d)(1)(B) (Supp. 1975). These attributes of publicness closely parallel those discussed in note 77 *supra*.

79. See 40 Fed. Reg. 16934-65, 18902-44, 19612-31 (1975).

handicap, or other reasons, are unable to locate a suitable unit. The agency must provide such assistance when the family alleges that discrimination is preventing it from finding an approvable unit.⁸⁰ An inherent weakness in this scheme, however, is that participation by private owners is voluntary, and given the substantial recordkeeping requirements imposed upon owners, along with the prospect of civil liability for constitutional violations, it is difficult to see why many private owners would elect to take part in the program. Public housing agencies are directed by the regulations to undertake certain activities to encourage participation by owners, but for the most part these activities involve publicizing the program to organizations which already have demonstrated an interest in housing low income groups.⁸¹

For new or substantially rehabilitated housing, the agreement to enter into housing assistance payments is executed between HUD and the owner prior to the start of construction or rehabilitation. This provision places upon HUD the responsibility for seeing that the income mix policies of the Act are implemented. Assistance payments may be made with respect to up to 100 percent of the units in a particular building or project; HUD has announced, however, that it will accord preference to those projects in which assistance payments are limited to 20 percent or less of the units.⁸² Sites for new or rehabilitated units must promote greater choice of housing opportunity and avoid undue concentrations of assisted persons in areas containing a high proportion of low income persons.⁸³ The certificate of family participation is not utilized for new and rehabilitated units; the responsibility for taking applications, verifying income, and selecting families is assumed by the owner.⁸⁴

III. THE THRUST OF INCOME MIX

The policy of promoting a mix of families at various income levels in public housing is strongly expressed throughout the 1974 Act. This policy can be justified on the theory that the poorest families, as well as those with severe social problems, can benefit from the role models provided by more stable, higher income families. It also may be desirable to disperse the poor over wider geographical areas, rather than forcing their concentration in urban slums where they present a highly visible target for public opprobrium and official neglect.

80. HUD Reg. 882.103, 40 Fed. Reg. 19614 (1975).

81. *Id.* 882.208, 40 Fed. Reg. 19620.

82. *Id.* 881.104, 40 Fed. Reg. 18906.

83. *Id.* 881.112(c), 40 Fed. Reg. 18907.

84. *Id.* 881.119, 40 Fed. Reg. 18909. The owner may contract with any public or private entity to perform these functions for a fee. *Id.*

If federal housing resources were unlimited, and if a decent home were in reality available for every person in need of one, the economic mix provisions of the Act would likely work to the benefit of the very poor or problem family, and it would be difficult to quarrel with the congressional choice of this method to promote racial and economic integration. The federal government's pockets are not very deep, however, when it comes to funds for public housing, and there are a great many more families who need help than will receive it.⁸⁵ In this situation, when from among the millions of poor households in need of assistance the government must select the few who will receive subsidies, income mix policies present a very real danger that the neediest will be shut out.

The concept of making up operating deficits caused by inadequate federal subsidization of the poor by giving preference in public housing admissions to those families whose incomes will permit them to pay higher rents did not spring full blown from the 1974 Act. HUD attempted to implement such a policy in 1971 by means of an "advisory" circular directed to local housing authorities, which strongly suggested that the local agencies institute economic mix policies.⁸⁶ The circular was successfully challenged by low income persons eligible for public housing in *Fletcher v. Housing Authority of Louisville*,⁸⁷ a case which is instructive on the probable effect of an income mix policy on the very poor. The Housing Authority of Louisville (HAL) had given force to the HUD directive by establishing a "rent range formula" which allocated available public housing units to eligible applicants on the

85. HUD figures indicated in 1972 that there were 12.2 million households with incomes below \$4,000 which presumably were eligible for housing assistance, but only seven percent of these families actually occupied subsidized housing. See Dissenting Views of Congressmen Mitchell and Fauntroy, Compilation 548. HUD Secretary Carla Hills estimates that 400,000 families will be assisted under the section 8 program during the current fiscal year. Carla Hills, Secretary of Housing and Urban Development, broadcast on National Public Radio, Sept. 10, 1975.

86. HUD Circular RM 7465.12 (June 2, 1971). The circular expressed concern over excessively high operating costs and deterioration of projects due to concentrations of low income, problem families, and expressed the need to maintain a cross-section of tenant families in order to achieve socially and financially sound local programs:

Each Local Authority having a graded rent system, if it has not already done so, is urged to immediately establish ranges of specified rents and to make admissions to its projects from among eligible applicants at such rents or within such ranges of rent as may be necessary to achieve, maintain, or improve the solvency of its operation and to insure, insofar as is possible, serving a representative cross-section of the low-income families in its locality.

Id. One of the ways in which HUD suggested that local authorities might upgrade their tenant populations was to take steps to attract more wage earner and two-parent families. *Id.*

87. 491 F.2d 793 (6th Cir. 1974).

basis of the rents such applicants could be expected to pay.⁸⁸ Admissions policies provided for the acceleration of higher income applicants over lower income families on HAL's waiting list in order to obtain a cross-section of tenant incomes which matched the ratios established by the rent range formula. Admissions data for the three months following institution of the income mix policy revealed that while 19.1 percent of all eligible applicants in the highest income bracket were admitted, only 4.9 percent of eligible families in the lowest rent range got into public housing.⁸⁹

While the challenge to income mix mounted in *Fletcher* was based on both constitutional and statutory grounds, the court reached its decision without addressing the constitutional issues. The court held that implementation of the rent range formula by HAL, under the direction of HUD, was an abuse of discretion since use of income as a criterion for public housing admissions was not authorized by the Housing Act of 1937, and was in fact inconsistent with the purposes of that Act.⁹⁰ *Fletcher* thus clearly delineates the dilemma inherent in the public housing funding structure: insufficient government subsidies have a natural tendency to turn low income housing programs into moderate income housing programs. The Sixth Circuit aptly observed that

[i]f the fiscal crisis of local public housing agencies grows sufficiently severe, Congress may face a choice between forcing the public housing agencies out of business or of loosening the constraints which it has imposed upon public housing authorities. But this is not the only choice. Congress may choose to appropriate enough funds to keep the present units in operation under the current provisions of the National Housing Act, and force HUD to release moneys for that purpose. Or Congress may choose to allow HAL to do what HUD urged it to do in this case.⁹¹

Since Congress faced its dilemma by opting for the policy of income mix, *Fletcher* has apparently been overruled.

The second area in which the policy of economic mix can work to exclude the neediest families is through the operation of adverse public opinion. It probably is not inaccurate to observe that existing patterns of income and

88. HAL established a four step rent range and, on the basis of census figures showing the distribution of area families within the income groups corresponding to the rent ranges, determined that it should be housing a much higher percentage of families with high rent-paying ability. Accordingly, admissions were conducted using a rough quota system designed to achieve the desired rental income. *Id.* at 795.

89. *Id.* at 797.

90. *Id.* at 801-06.

91. *Id.* at 807.

racial segregation exist because a substantial number of citizens wish to preserve them. Past housing programs have attempted to break down the barriers to economic integration and have not been successful: "One of the major reasons for the emasculation of the rent supplement and public housing leasing programs was the endeavor to mix richer with poorer, and black with white."⁹² The new Act applies some powerful pressures to communities to comply with its income mix policies by dispersing assisted housing throughout more affluent areas,⁹³ but the underlying supply problem may work to undermine any possible benefits to be derived from this statutory mandate. Since there is not now, and probably will not be in the foreseeable future, enough public housing to supply every family in need of it, communities can interpret economic mix as a permissive policy which allows them to seek out and assist only the most acceptable poor families, the "submerged middle class"⁹⁴ who can be assimilated into the larger community with a minimum of friction.

IV. SHAPING A REMEDY

The months to come will undoubtedly bring a welter of litigation over the housing provisions of the 1974 Act. It can reasonably be expected that attacks will focus principally on the methods by which the statute proposes to allocate its scarce and valuable commodity. In a sense, all tenant suits assailing the government's administration of its housing programs ultimately address the problem of inadequate supply. But the new Act has injected the additional element of income mix into the controversy, and the battle lines now are more clearly drawn. The 1974 Act is so written that it may be expected to shift the heaviest burden caused by housing scarcity to a distinct subclass of public housing eligibles: those at the lowest income levels. The addition of specific statutory authorization for income discrimination in this context invites a new round of argument for the recognition of a constitutional right to public housing.

It can be argued that the failure of housing authorities to provide a supply of subsidized housing adequate for all who require it is a denial of equal

92. Roisman, *supra* note 14, at 704.

93. *See generally* note 23 *supra*.

94. The middle-class citizen does not understand the poor of the slums, and he judges them harshly. . . . One result of this point of view is a search for housing measures which will distinguish between the good poor and the wicked poor. . . .

. . . Housing projects are conceived of as places where the *potential middle class* can profit from a change in environment or where members of the *submerged middle class* can be helped back on their feet.

L. FRIEDMAN, *supra* note 3, at 20.

protection. The threshold question in applying the current two-tiered equal protection analysis is the standard of judicial scrutiny appropriate in the circumstances.⁹⁵ In order to merit strict scrutiny,⁹⁶ it must appear that the state action being challenged either involves a "suspect classification,"⁹⁷ or impinges upon a "fundamental right."⁹⁸

As applied to the Act, the suspect classification argument has two aspects. The income mix provisions of the Act invite the charge of impermissible discrimination based upon income.⁹⁹ A second, related argument is that since blacks are vastly overrepresented in our poor population, it can be demonstrated statistically that the effect of income mix is an invidious classification based upon race.¹⁰⁰

95. For a detailed analysis of the procedure followed by the Court in reviewing equal protection claims, see Comment, *The Mandate for a New Equal Protection Model*, 24 CATH. U.L. REV. 558 (1975); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

96. In order for a statute to survive strict scrutiny, the state must demonstrate that it serves a compelling interest which the state has a legitimate need to protect. This standard of review is to be compared with the more lenient rational basis test, which would uphold a statute against equal protection challenge if it is rationally related, on any conceivable basis, to a legitimate legislative goal. See *United States v. Carolene Prod. Co.*, 304 U.S. 144 (1938).

97. See Note, *A Question of Balance: Statutory Classifications Under the Equal Protection Clause*, 26 STAN. L. REV. 155 (1973).

98. See *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), in which Justice Powell, writing for the majority, defined fundamental interests as those "explicitly or implicitly guaranteed by the Constitution." *Id.* at 33-34. Justice Marshall proposed a somewhat broader, though not inconsistent, formula for determining fundamentality:

Although not all fundamental interests are constitutionally guaranteed, the determination of which interests are fundamental should be firmly rooted in the text of the Constitution. The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.

Id. at 102-03 (Marshall, J., dissenting).

99. See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (exaction of poll tax conditions voting privilege on affluence and violates equal protection); *Douglas v. California*, 372 U.S. 353 (1963) (failure of state to provide free counsel on appeal to indigent defendants was improper discrimination based upon wealth). *But see James v. Valtierra*, 402 U.S. 137 (1971) (no suspect classification in state constitutional provision requiring referendum for low income housing projects but not for other types of subsidized housing).

100. This argument is offered somewhat pessimistically. It was specifically rejected in *Jefferson v. Hackney*, 406 U.S. 535 (1972), which upheld a Texas statute which varied the levels of assistance provided the different classes of welfare recipients, and placed the AFDC class, which had a significantly higher percentage of minority mem-

It seems fair to state that the Supreme Court has refused to view wealth discrimination as a suspect criterion unless the classification also involves a fundamental right.¹⁰¹ Housing has not yet been established as a fundamental interest deserving of extraordinary judicial protection, but a strong argument can be made that it should be so considered. Decent housing certainly is vital to those individuals who occupy it or wish to occupy it; it is one of the bare essentials of life. But more than that, decent housing is important to society, particularly as an effective means of accomplishing the goal of racial equality. It is its fundamentality in the latter sense that has prompted some commentators to mark the similarities between housing and education, and to divine from the recent history of our schools the rationale upon which courts ought to seize to enhance the constitutional status of housing and to take a more aggressive role in promoting adequate housing opportunities to remedy the effects of past discrimination.¹⁰²

Further, employing the definitions of the Court in *San Antonio Independent School District v. Rodriguez*,¹⁰³ housing might be viewed as fundamental since the exercise of specifically guaranteed constitutional rights is implicitly conditioned upon first obtaining a suitable living environment. To extend the parallel between housing and education too far is hazardous, however, for the Court in *Rodriguez* specifically declined to recognize education as a fundamental right; the argument based on wealth discrimination thus failed.

The foregoing arguments are directed toward securing strict scrutiny of the statutory authorization for use of income as a criterion in public housing admissions. The state interest to be advanced against this claim is not insignificant: the efficient allocation of scarce economic resources. It has been suggested that the two-tiered equal protection approach "will never protect the poor against discrimination, since the legislatures will always have a 'valid' reason to discriminate against the poor—preservation of the pricing system and its accompanying benefits."¹⁰⁴

In making the equal protection analysis, it is necessary to compare the two groups who are receiving unequal treatment. To challenge the income mix

bers, at a distinct disadvantage in the disbursement of available funds. *But see* Roisman, *supra* note 14, at 720 & n.141.

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

102. *See* Michelman, *The Advent of a Right to Housing: A Current Appraisal*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 207 (1970); Roisman, *supra* note 14, at 722.

103. 411 U.S. 1 (1973).

104. Wheeler, *In Defense of Economic Equal Protection*, 22 KAN. L. REV. 1, 9 (1973). Professor Wheeler proposes a new equal protection model designed to ensure equal access to all state benefits. He provides some rebuttal to the assertion that the costs of so aiding the poor would be prohibitive by pointing out the costs of *not* helping the poor.

policy of the 1974 Act, it would be sufficient simply to compare public housing eligibles who are receiving subsidies with those who are not. But this comparison might be of little use in reaching the underlying problem of inadequate supply, since a court, even if persuaded that use of the income criterion is constitutionally improper, would be more likely to order the "negative" relief of striking down the income mix provisions than it would be to provide the "affirmative" remedy of directing that additional housing be provided for the victims of the discrimination.

A more fruitful approach might be to compare the extent to which the government subsidizes housing for middle and upper income groups with the amount of assistance provided the needy:

The extent to which Government policy has subsidized the private homeowner is not generally recognized or acknowledged. The homeowner who deducts interest and property taxes as costs in computing his Federal tax return is not required to include the imputed value of rent as a part of his income. This generous but generally unacknowledged Federal subsidy to the affluent or middle-class homeowner needs to be emphasized in view of the self-righteous opposition often expressed toward subsidized housing for the poor.¹⁰⁵

If such an argument prevailed, the remedy would need to be either cessation of favorable tax treatment for the affluent homeowner (a politically impossible solution), or an increase in the supply of subsidized housing for the poor.¹⁰⁶

A second set of arguments might be made under what is generally known as the "substantive due process-natural law" theory.¹⁰⁷ This doctrine, which seems virtually identical to the concept of fundamentality under two-tiered equal protection, would posit for housing a substantive guarantee implicit or explicit in the Constitution, somewhat analogous to the protections which recently have been developed, for example, for the right of privacy¹⁰⁸

105. DOUGLAS REPORT 66.

106. For an extensive comparison of housing assistance afforded affluent and middle income Americans with that accorded the poor, and the equal protection implications of this approach, see *Mixon, Housing Subsidies, Impoundment, and Equal Protection*, 10 HOUSTON L. REV. 793 (1973).

107. For an exhaustive treatment of the origin and development of due process as a substantive limitation on state power, see *Corwin, The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366 (1911); *Corwin, The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149 (1928).

108. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973) (decision to terminate pregnancy was protected by the right of privacy derived either from the ninth or fourteenth amendment); *Doe v. Bolton*, 410 U.S. 179 (1973) (statute restricting abortion improperly in-

and the right to travel.¹⁰⁹ It has been suggested that a fundamental right to decent housing may fairly be implied from the third, fourth, fifth and fourteenth amendments.¹¹⁰

The development of a constitutional right to be housed at public expense for those who are too poor to house themselves seems a tall order. It appears unlikely that courts will take it upon themselves to direct such a vast expenditure of public funds for such an unpopular purpose. Indeed, perhaps it is not the courts' function to do so. But the courts, in failing to act, are not doing so for lack of a plausible constitutional theory. When and if such a constitutional right does appear, the problems of implementation would be enormous, perhaps insurmountable. Yet there are those who believe that the trend is perceptibly in that direction.¹¹¹

V. CONCLUSION

The much touted Housing and Community Development Act of 1974, even if it performs in every respect as Congress intended for the promotion of racial and economic integration, will scarcely make a dent in the nation's grave housing crisis. Of households which presumably are eligible for public housing but for which there are no subsidized units available, 1.5 million have annual incomes below \$1,000; 3.1 million make between \$1,000 and \$2,000; 3.6 million between \$2,000 and \$3,000, and 3.2 million between \$3,000 and \$4,000.¹¹² The new housing programs are not directed primarily toward solving the problems of these families. Although it should not be

fringed right of privacy); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right of privacy is within the penumbra of explicit constitutional rights and protects sale of contraceptives to married persons).

109. *See, e.g.*, *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974) (state durational residency requirement for nonemergency medical care for indigents penalizes constitutional right to travel); *United States v. Guest*, 383 U.S. 745 (1966) (right to travel is guaranteed by the Constitution, although its exact source is unclear).

110. Comment, *Towards a Recognition of a Constitutional Right to Housing*, 42 U.M.K.C.L. REV. 362 (1974). The author states:

Nowhere in the Constitution is housing elevated to the stature of a "right." But the framers did, indirectly at least, suggest that they were cognizant of the fundamental importance our society attaches to a person's home. "No soldier shall, in time of peace be quartered in any house . . ." "The right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated . . ." In addition to these express references to housing, other sections of the Constitution impliedly refer to a person's home. "Nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Id.

111. *See, e.g.*, *Michelman, supra* note 102, at 209.

112. *Dissenting Views of Congressmen Mitchell and Fauntroy*, Compilation 547-48.

suggested that somewhat more "affluent" families, those subsisting at or just above the poverty level, are not in need of better housing than can be obtained on the private market, given the finite nature of our housing resources, the question is compelling: why favor the moderately poor at the expense of those who need help most?

Certainly a cogent argument can be made that successful implementation of these new housing programs on a limited scale is an important first step in demonstrating to the public a fact which has not always been obvious—that government housing programs *can* work. Overcoming traditional public hostility toward housing assistance in general might then pave the way for heavier subsidies in the future. This kind of reasoning, however, is subtle indeed, and offers small comfort to the millions of families who have a substantial (if not a constitutional) interest in decent living conditions which ought to be vindicated without delay. Moreover, the implications of inaction reach far beyond individual families, for as we debate the relative merits of our social programs, few can deny that our cities are in decay.

It would be naive to suggest that remedial social legislation need not be tempered by hard economic realities. It is arguable that the 1974 Act is the most efficient means of allocating limited housing dollars so that the greatest number of people can be assisted while also assuring the fiscal stability of housing programs. It is certainly better than no housing program at all. But it would also be naive to suggest that the Act will effect a cure for the problems of urban blight. The Act may be the answer for the problems besetting public housing operations, but it leaves our housing problem itself scarcely touched.

Barbara Graul