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Reconstructing the Constitutional Theory of *Mount Laurel II*

John M. Payne^{*}

The *Mount Laurel II* opinion, under the heading “Constitutional Basis,” contains the following quite remarkable passage:

It would be useful to remind ourselves that the [*Mount Laurel*] doctrine does not arise from some theoretical analysis of our Constitution, but rather from underlying concepts of fundamental fairness in the exercise of governmental power. The basis for the constitutional obligation is simple: the State controls the use of land, all of the land. In exercising that control it cannot favor rich over poor. It cannot legislatively set aside dilapidated housing in urban ghettos for the poor and decent housing elsewhere for everyone else. The government that controls this land represents everyone. While the State may not have the ability to eliminate poverty, it cannot use that condition as the basis for imposing further disadvantages. And the same applies to the municipality, to which this control over land has been constitutionally delegated.

The clarity of the constitutional obligation is seen most simply by imagining what this state could be like were this claim never to be recognized and enforced: poor people forever zoned out of substantial areas of the state, not because housing could not be built for them but because they are not wanted; poor people forced to live in urban slums forever not because suburbia, developing rural areas, fully developed residential sections, seashore resorts, and other attractive locations could not accommodate them, but simply because they are not wanted. It is a vision not only at variance with the requirement

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that the zoning power be used for the general welfare but with all concepts of fundamental fairness and decency that underpin many constitutional obligations.¹

I have long puzzled over this passage with a mixture of awe and frustration. On the one hand, it lays down, with admirable clarity, the moral justification for the aggressive set of remedies that *Mount Laurel II* adopts, specifically the remedy of inclusionary zoning. It does so, moreover, with an eloquence not usually encountered in judicial writing. On the other hand, however, the eloquence obscures as much as it illuminates. Most notably it obscures the question of why *affirmative* action on the part of governments is constitutionally required to address the housing needs of poor people, and how it is that a court, which normally reviews rather than instigates public policy actions, gets to take the lead. This obscurity suggests a missing link and invites a critical question: how close does *Mount Laurel II* come to declaring a constitutional right to shelter under the New Jersey Constitution?

Sitting at the intersection of land use policy and the law of state and local government, it seemed appropriate to undertake some musings on this large question as my offering to Professor Daniel Mandelker, whose long career of scholarship and advocacy has centered on these areas with thoroughness, insight and spirit.

I. DECONSTRUCTING THE CONSTITUTIONAL BASIS OF *MOUNT LAUREL II*

Let us first work through the passage set out above with a bit more care to catalogue the points that it makes and the questions that it raises. At the outset Chief Justice Wilentz, the author of *Mount Laurel II*, rejects a “theoretical” rationale, looking instead to “underlying concepts of fundamental fairness in the exercise of governmental power.” This puts the court squarely in the territory of substantive due process and immediately sounds alarm bells of judicial process; how can the justices escape the charge that they are

1. Southern Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390, 415 (N. S. 1983) [*Mount Laurel II*].

implementing their own personal values rather than enforcing a legal (theoretical?) text? Are they *Lochnerizing*? An answer of sorts follows immediately, in the famous passage noting that “the State controls the use of land, all of the land.” But this cryptic phrase is hardly self explanatory, as we shall see, and it is followed by normative statements about the need for “decent housing” for “everyone,” suggesting an equal protection rationale as well. Returning to a more traditional mode, the Court acknowledges that “the State may not have the ability to eliminate poverty,” (note the tentativeness of the “may not” phrase, however), and it continues cautiously, implying that a government’s obligation is merely to refrain from making poverty worse by “imposing further disadvantages.” The paragraph concludes with a clear statement that the constitutional obligation applies to the state itself, not just to local governments that exercise delegated state power.

The second paragraph sketches a dismal “what if” scenario worthy of Charles Dickens’ *Ghost of Christmas Future*, a picture of what would ensue if the “constitutional obligation” behind the *Mount Laurel* doctrine were “never to be recognized and enforced,” implicitly asserting an affirmative governmental obligation to create a society where there is decent housing for all. The paragraph ends with a reiteration of “fundamental fairness and decency” as limitations on the general welfare power, limitations that “underpin many constitutional obligations.” This perhaps extends the affirmative action principle of *Mount Laurel II* out beyond shelter needs and towards a general governmental obligation to sustain what Professor Frank Michelman memorably called “minimum welfare.”²

II. BACKGROUND: GETTING TO *MOUNT LAUREL II*

The *Mount Laurel* doctrine was first stated by the New Jersey Supreme Court in a prior case, also involving Mount Laurel Township, that declared exclusionary zoning unconstitutional.³ While

2. Frank I. Michelman, *Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

3. *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (1975) [Mount Laurel I].

the specific holding of *Mount Laurel I* was a radical break with the traditional judicial approach to land use issues, Justice Hall's opinion was deeply rooted in the soil of ancient state constitutional doctrine. Rejecting *sub silentio* the lower court's reliance on federal equal protection cases,⁴ he instead looked to the basis on which any sovereign governmental action must be justified—the police power—and found Mount Laurel Township's exclusionary ordinances wanting.

Justice Hall's syllogism was straightforward: the police power is the power of the state to act for the general welfare of the people of the state; the police power may be delegated to local governments, but only if municipalities also stay within the general welfare requirement; a land use ordinance that serves the parochial welfare of a single community to the detriment of the *general* welfare is therefore unconstitutional as beyond the power of government. The court's thinking was, as Justice Hall himself put it in the opinion, "advanced" in the way it applied the general welfare concept to regional, as opposed to local, interests⁵ and in its refusal to give local governments the deference they had traditionally enjoyed in determining what constitutes "the general welfare." But there was nothing at all remarkable about the court's concern that local governments, as delegates of the state sovereign, must act within the limits of sovereign power as those limits had passed down from king and parliament through the common law to our own state constitutions.

In the period between *Mount Laurel I* and *Mount Laurel II*, it was thought that the remedy for an exclusionary ordinance was to excise, either voluntarily or under court order, the exclusionary features that did not meet the "general welfare" criterion, such as large lot zoning and multi-family prohibitions, requirements that drove up the cost of housing without solving any legitimate health or safety concern. The implicit premise was that less restrictive ordinances, permitting less expensive, more affordable housing, would be a proper exercise of the municipality's delegated police power and would serve "the general welfare." Because so few cases came to judgment between

4. *Id.* at 725.

5. *Id.* at 726.

1975 and 1983, all of this remained mostly speculation. However, in the only Supreme Court opinion to deal with remedies after *Mount Laurel I* and before *Mount Laurel II*, the Court said that more aggressive judicial remedies would be warranted only in rare and unusual circumstances, and for a secondary constitutional purpose.⁶

Finally in 1983 and in the face of massive resistance to the *Mount Laurel* doctrine, judicial stasis, and meager results, the New Jersey Supreme Court in *Mount Laurel II* faced the inevitable. It acknowledged that the remedies issues had to be dealt with, and it dealt with them comprehensively. *Mount Laurel II* purported to leave the doctrinal foundation of *Mount Laurel I* untouched,⁷ but by 1983 the Justices knew that the essentially passive remedies contemplated by Justice Hall a decade earlier could not produce very much housing.⁸ The economic boom of the 1980s was in full swing, and the private housing market was in the grip of rapidly escalating prices driven by an excess of demand over supply. Private developers could sell almost anything that they could build, and more permissive ordinances would simply have resulted in expensive houses at higher (and more profitable) densities, rather than inexpensive houses and apartments at small profits for poorer people. Nor, by 1983, would more permissive ordinances open the door to “social housing”-low cost units subsidized by public agencies or non-profit corporations-because by then the Reagan administration had taken the federal government out of the housing business and state subsidy programs were tiny in comparison to the need.

Faced with these certainties, the *Mount Laurel II* court took the obvious, but very large, next step by holding that if “fair share” housing goals could not otherwise be met, inclusionary zoning ordinances must be adopted.⁹ Since the Justices surely knew that

6. See *Oakwood at Madison, Inc. v. Township of Madison*, 371 A.2d 1192, 1227 (1977). The court mandated “inclusionary zoning,” on one site, as a “reward” to the developer-plaintiff who owned the site for having brought the litigation that policed the municipality’s unconstitutionally exclusionary conduct. This became known as the “builder’s remedy.” *Oakwood* does not suggest that inclusionary zoning should be the norm. see *infra* note 9.

7. *Mount Laurel II*, 336 A.2d at 415.

8. See Martha Lamar et al; *Mount Laurel at Work: Affordable Housing in New Jersey, 1983-1988*, 41 RUTGERS L. REV. 1197, 1210 (1989) (seventy-five percent of all new housing built under *Mount Laurel II* was in inclusionary form).

9. Inclusionary zoning is an ordinance technique linking high-density residential zoning

passive remedies would not produce much affordable housing, *Mount Laurel II* essentially mandates affirmative regulatory action by local governments to correct a market failure in producing such housing.

This history is threaded through Chief Justice Wilentz's "constitutional basis" passage. The "passive virtues" of *Mount Laurel I*, to use a famous legal process phrase,¹⁰ are present in the court's admonition that due process and the general welfare do not permit legislation to make things worse for poor people, even if poverty cannot be cured by the state. The inclusionary remedies of *Mount Laurel II* respond to the affirmative principle of "fundamental fairness and decency" with which the passage ends. The tension, however, between the two approaches is left unresolved. In pointing this out, I do not mean to imply criticism of the direction that *Mount Laurel II* took. I recognize fully the value of bringing affirmative remedies such as inclusionary zoning into the mix. If the goal was to ameliorate poverty by increasing the supply of "affordable" housing, *Mount Laurel II* has "worked," as studies have shown.¹¹ Moreover, for reasons that should become clear shortly, I concede that it was impossible for the court to lay out the actual underpinnings of its decision in 1983. The opinion itself was already pushing the envelope of public acceptance. But lacking a fully-articulated rationale, I fear that the *Mount Laurel* doctrine has not accomplished as much as it might have accomplished. I also fear that what has in fact been

to a requirement that a percentage of the resulting units (twenty percent is the *Mount Laurel* norm) be offered for sale or rent at prices affordable to low and moderate income households. See generally, ALAN MALLACH, INCLUSIONARY HOUSING PROGRAMS: POLICIES AND PRACTICES, (1984). To avoid constitutional takings problems, inclusionary zoning is usually presented as an alternative to much lower density zoning on the same site, so that whatever loss results from selling the "affordable" units can be said to be recouped by the additional profits derived from the extra market rate units permitted by the higher density. As *Mount Laurel II* makes clear, however, where a *Mount Laurel* obligation cannot otherwise be met, it is not sufficient for the ordinance to give the developer a choice between a traditional low density market development and a higher density inclusionary one. 456 A.2d at 446 ("[a] device that municipalities *must* use") (emphasis added). This underscores the extent to which the Court's remedial concern in *Mount Laurel II* shifts from passive (the municipality's ordinances should "get out of the way" and let society do its work) to active (solving the problem itself). *Id.*

10. Alexander Bickel, *Forward: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

11. Lamar, *supra* note 8; see also John M. Payne, *Norman Williams, Exclusionary Zoning, and the Mount Laurel Doctrine: Making the Theory Fit the Facts*, 20 VT. L. REV. 665, 667-73 (1996).

accomplished cannot lay the groundwork for a process that is self-sustaining over time.

A. *The Rationale Rejected*

As we begin sorting out the constitutional basis of *Mount Laurel II*, it is useful to clarify first a rationale that the Court, by its silence on the subject, emphatically rejects. One could argue that the shift to an active affordable housing remedy was necessary to compensate for the years of exclusionary zoning that occurred before, and after, *Mount Laurel I* in 1975, and that the Court was applying, consciously or otherwise, the theory of affirmative remedies developed by the United States Supreme Court to implement *Brown v. Board of Education*.¹² *Brown* began, as did the *Mount Laurel* doctrine, with the passive remedy of invalidation. However, when it became clear that the eradication of *de jure* segregation could not by itself eradicate the effects of segregation, the Court eventually embraced, with a surprising degree of vigor, a set of affirmative race-conscious remedies. These remedies included “forced busing” and the Court was quick to emphasize that it could not have been ordered absent a prior finding of a constitutional violation.¹³ Affirmative, integrative measures were justified as an equitable remedy for past unconstitutional conduct. Recent decisions permitting southern school districts to operate *de facto* segregated schools without busing and other affirmative measures, once the stigma of the prior *de jure* segregation has been eliminated, reinforce the conclusion that federal law requires desegregation, not integration.¹⁴

Like *Brown*, *Mount Laurel I* clearly opts for the cautious, passive remedy of ordinance invalidation,¹⁵ and by using parallel reasoning, the *Mount Laurel II* court could have shifted to the affirmative remedy of *inclusionary* zoning because, but only because, the passive

12. 347 U.S. 483 (1954); *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Green v. County School Bd.*, 391 U.S. 430 (1968).

13. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26 (1971).

14. *See Board of Educ. v. Dowell*, 498 U.S. 237 (1991).

15. The Court’s approach is reinforced by Justice Pashman’s vigorous (and prescient) concurring opinion, in which he argues for affirmative remedies not unlike those adopted eight years later in *Mount Laurel II*.

remedy of dismantling exclusionary zoning was insufficient to eradicate the prior constitutional violation. Inclusionary zoning would not have had an independent constitutional value, but only value as a means to “cure” past exclusion by providing some of the housing that would otherwise have been built had the towns not been exclusionary. By failing to draw the obvious comparison, the *Mount Laurel II* court invites the conclusion that inclusionary zoning is not a remedy for unconstitutional exclusionary zoning, but instead is a remedy for a new theory of constitutional violation that the court declines to articulate.

Chief Justice Wilentz asserts emphatically that the nature of the constitutional obligation has not changed,¹⁶ but the remainder of his opinion belies that bland assertion. Most tellingly, the *Mount Laurel II* opinion is explicit in holding that every one of the state’s 567 municipalities has a constitutional fair share obligation, whether or not it had actively pursued exclusionary policies in the past.¹⁷ Compliance with the constitution does not turn on either good faith or bad faith, but on an objective measure of how likely it is that the needed housing will in fact be built.¹⁸

In hindsight it is somewhat surprising that the Court did not use the *Brown* analogy, which certainly would have lent additional legitimacy to its explanation of why municipalities had to undergo the wrenching process of court-ordered rezoning. The court could still have required the calculation of “fair share” numbers, and could have treated municipalities that didn’t accommodate those numbers as presumptively exclusionary, and in this way the remediation theory would have permitted widespread application of an inclusionary requirement. Moreover, the plain fact was that most suburban communities *were* exclusionary, fair share numbers or not,

16. *Mount Laurel II*, 456 A.2d at 415.

17. *Mount Laurel II*, *supra* note 1, 92 N.J. at 214, 456 A.2d at 418.

18. See *Mount Laurel II*, 456 A.2d at 419. The Court permits evidence of past exclusionary practices as an alternate way of proving the constitutional violation, but does not require it. In practice, once the methodology of a post-*Mount Laurel II* fair share formula was worked out, it was so easy to prove the number and the fact that it wasn’t being met that defendant municipalities almost invariably conceded the violation and concentrated on disputing the form of remedy. See *AMG Realty Co. v. Township of Warren*, 504 A.2d 692 (L.Div. 1984).

and it would have taken some of the pressure off the Court had it been able to excuse from compliance those few communities that had actually sought to create balanced housing patterns.

On the other hand, the remedial model is not without problems of its own and the Court, never addressing the matter directly, nonetheless seems to have been aware of the risks. As opposed to the “realistic opportunity” standard that the court actually adopted, an emphasis on remediation might be seen as less flexible and hence less deferential to other legitimate local needs or concerns. The overriding objective would have been to undo the past, with correspondingly less room to incorporate the broader ecological and planning considerations on which the Court placed so much emphasis in *Mount Laurel II*. Since “undoing the past” is an inherently speculative process¹⁹ an emphasis on “remedial inclusion,” with no obvious end-point in sight, might have exacerbated the problem of judicial policy-making rather than minimized it. In addition, remediation bespeaks “punishment.” Experience in other aspects of civil rights litigation suggests that public agencies will often fight hardest to avoid being branded a moral wrongdoer, thus offsetting the moral advantage that the remedial model has in the eyes of outsiders.

Ironically, the Court may have achieved the worst of both worlds. By eschewing the remedial model, it lost whatever increment of moral appeal there was to outsiders who might have been persuaded that wrongdoing must be undone. At the same time, by embracing inclusionary zoning for builders who successfully sued (the widely-reviled “builder’s remedy”), it introduced a large measure of site-specific inflexibility that proved to be a lightning rod for opposition to the *Mount Laurel* doctrine. The court’s attempts to condition the builder’s remedy on compliance with environmental and other sound planning considerations was simply drowned out in the ensuing controversy.

A long-running case that straddles the regimes of *Mount Laurel I* and *Mount Laurel II* illustrates the pros and cons of “realistic opportunity” versus “remediation.” Madison Township (later renamed Old Bridge) “was the only township in central New Jersey

19. It cannot be known what actually would have been built, and for whom, especially in an economy that gravitates towards higher-income needs.

that had permitted large numbers of multiple dwellings as of right . . . [and the case involved] an ecologically sensitive site.”²⁰ Thus, a case against Madison Township solely to remedy past discrimination would have been relatively weak, compared to the blatant and total exclusion in Mount Laurel Township. Nonetheless, because it was still in the path of growth (to use the formulation of *Mount Laurel I*) and it had a large amount of developable land, Madison Township was eventually found to have a general constitutional obligation under the “realistic opportunity” standard of the *Mount Laurel* doctrine. The decision, *Oakwood at Madison v. Madison Township*,²¹ became the vehicle for the court’s first tentative embrace of the builder’s remedy doctrine,²² but it might never have happened under the remedial model. This is not to say that *Oakwood* was wrongly decided, only to say that the fact that the township lost underscores the point that the remedial model was not what was driving the *Mount Laurel* doctrine.

B. The “Welfare Rights” Model

Ultimately, I think, we are left with no choice but to conclude that the actual “constitutional basis” of *Mount Laurel II* is that the New Jersey Constitution embodies an implicit constitutional right to shelter. If so, explaining *Mount Laurel II* becomes simple (although hardly uncontroversial). Armed with such a right, *Mount Laurel* plaintiffs would have a straightforward case to make, which in its most dramatic form would be that the government must either provide shelter directly to those needing it, or that it must insure that other housing providers do so, at costs affordable to people of all incomes. The affirmative nature of the judicially enforced obligation would follow easily from the citizen’s (presumed) affirmative constitutional entitlement to the commodity in question.

Of course, there is a certain awkwardness in the fact that the New Jersey Supreme Court does not come out and say explicitly in *Mount*

20. Norman Williams, *The Background and Significance of Mount Laurel II*, 26 Wash. U. J. URB & CONTEMP. L. 3, 7 n.14 (1984).

21. See *supra* note 6.

22. *Id.*

Laurel II, and it has rather conspicuously avoided the opportunity to utter the “rights” words in other related cases.²³ Moreover, the *Mount Laurel* cases require only a “realistic opportunity,” not a “realistic house,” a standard that would seem to fall well short of what would satisfy the constitution if there were indeed a full-blown right to shelter. Nevertheless, the internal logic of the shift from the passive remedies of *Mount Laurel I* to the active stance of *Mount Laurel II* is powerful evidence that some kind of “rights” thinking was at work in 1983, whether the Court chooses to say so or not.

Moreover, a source for the Court’s putative rights thinking is readily at hand. Like many state constitutions, New Jersey’s guarantees individual rights in natural law terms.²⁴ Article I, Paragraph 1 (“Rights and Liberties”) confirms (but does not confer, because the rights are, as the Constitution states, “natural and unalienable”) rights and privileges that the people of New Jersey possess as individuals, enforceable not only against public actors but against each other as private citizens as well.²⁵ Paragraph 1 is written in broadly inclusive terms as a set of concrete examples of these rights, rather than a definitive and exhaustive list.²⁶ “Among” the rights recognized are “those of enjoying and *defending life* and liberty, of acquiring, possessing, and protecting *property*, and of *pursuing* and *obtaining safety* and happiness.”²⁷ In other contexts, the New Jersey Supreme Court has not hesitated to find unenumerated

23. See *infra* notes 67-68 and accompanying text.

24. I confine myself in this analysis to New Jersey law and precedent because that is what drives the *Mount Laurel* doctrine. Allowing for inevitable variations state to state, there is nothing about New Jersey law (other than the singular *Mount Laurel* cases themselves) that cannot be replicated to one degree or another in most other states. See *State v. Schmid*, 423 A.2d 615(1980).

25. *State v. Schmid*, 423 A.2d 615, 628 (1980). See also *infra* note 52.

26. See N.J. CONST. art. I, § 21 (“This enumeration of rights and privileges shall not be construed to impair or deny others retained by the people.”)

27. N.J. CONST. art. I, § 1. This language has its origins in George Mason’s highly influential 1775 Committee Draft of the Virginia Declaration of Rights. *Franklin v. New Jersey Dep’t of Human Services*, 543 A.2d 56, 67 n.11 (App. Div. 1988) *aff’d* 543 A.2d 1 (1988). See also THE PAPERS OF GEORGE MASON, 1725-1792, 289 (Robert A. Rutland ed, 1970). The same or similar language can be found in many other state constitutions. See: ARK CONST. art. II, § 2; CAL. CONST. art. I, § 1; COLO. CONST. art. II, § 3; IDAHO CONST. art. I, § 1; IOWA CONST. art. I, § 1; KY. CONST. art. I, § 1; ME. CONST. art. I, § 1; MASS. CONST. pt. I, art. I [§ 2]; MONT. CONST. art. II, § 3; NEV. CONST. art. I, § 1; N.H. CONST. pt. I, art. II; N.M. CONST. art. II, § 4; N.D. CONST. art. I, § 1; OHIO CONST. art. I, § 1; PA. CONST. art. I, § 1. [emphasis added]

rights within the scope of Article I, Paragraph 1, most notably by reading in the right to equal protection of the laws and the right of privacy.²⁸ In this context the Chief Justice's reminder that the constitutional principle of fundamental fairness and decency "underpin[s] many constitutional obligations"²⁹ clearly points in the direction I suggested earlier, towards a generalized social welfare right.

Putting aside for the moment any questions about the generalized right, it would seem almost beyond question that the right to shelter fits within this framework. Shelter is a basic human need. Adequate shelter, particularly in our harsh climate, is essential to the *defense of life* itself. In order to obtain shelter, one must *acquire property*, at least the bare possessory interest of physical occupation of a sheltered space. Acquiring shelter is synonymous with the pursuit and attainment of *safety*, to say nothing of happiness, liberty, and the valuable use of property for self-advancement. The "right to shelter" tracks precisely the language of Article I, Paragraph 1. In addition, shelter can be understood as a necessary precondition to the enjoyment of other constitutionally recognized and protected liberties.³⁰ Just as the poorly-educated child may be foreclosed from effective enjoyment of the liberty of conscience, speech, and political participation,³¹ so too any person who is so poorly fed, clothed, and sheltered from the elements that the struggle to exist becomes the sole focus of life, is going to find the enlightened guarantees of Art. I,

28. *Levine v. Depart. of Institutions & Agencies*, 418 A.2d 229, 241 (1980) (equal protection); *Right to Choose v. Byrne*, 450 A.2d 925, 933 (1982) (privacy; collecting cases).

29. *Mount Laurel II*, 456 A.2d at 415 (emphasis added).

30. See, e.g., Inez Smith Reid, *Law, Politics, and the Homeless*, 89 W. VA. L. REV. 115, 144 (1986) (arguing that homeless persons are deprived of a constitutionally protected right to establish a home); Mark A. Godsey, Comment, *Privacy and the Growing Plight of the Homeless: Reconsidering the Values Underlying the Fourth Amendment*, 53 OHIO STATE L.J. 869 (1992) (arguing that basing the constitutionally protected sphere of privacy on the possession of property deprived homeless persons of privacy); Paul Ades, Comment, *The Unconstitutionality of "Antihomeless" Laws: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel*, 77 CAL. L. REV. 595 (1989) (arguing that laws which proscribe sleeping in outdoor public areas violate the right of homeless persons to travel).

31. This argument is most famously made in Justice Thurgood Marshall's dissenting opinion in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 112-13, (1973); see also *Abbott v. Burke*, 575 A.2d 359, 397 (1990).

Paragraph 1, mostly irrelevant.

Despite all of this, the court's unwillingness to explicitly declare a "right to shelter" is understandable. Given the legal process problems that had already occurred in implementing the *Mount Laurel* doctrine as it had been articulated up to that point, the justices undoubtedly thought that enforcement of a broadly-stated constitutional right to shelter (which I have deliberately put as broadly as possible in order to underscore its open-endedness) would be well beyond the practical capacity of the judicial system. Indeed, the logic of the underlying moral claim is so strong that one has to think that it is only the process problems that hold the court back, to avoid provoking a profound confrontation with the executive and the legislature.

The linkage between the constitutional rights of the plaintiffs and the limitations of judicial process seems to be on the Chief Justice's mind as well. The full title of this part of the opinion, which I earlier rendered as "Constitutional Basis," is actually "Constitutional Basis for *Mount Laurel and the Judicial Role*." [emphasis added] Towards the end of the quoted section, he acknowledges the "social and economic controversy" and the "political consequences" that the *Mount Laurel* doctrine had spawned, and holds out the possibility that the court would "defer" to "substantial actions" by the legislature.³² Far from suggesting a modest role for the courts, however, these passages firmly bolster the conclusion that *Mount Laurel* must be based on a shelter-based right of some sort. He asserts the primacy of the judiciary, "because the Constitution of our State requires protection of the interests involved and because *the legislature has not protected them*."³³ The Chief Justice concludes, "The judicial role . . . will expand to the extent that we remain virtually alone in this field. In the absence of *adequate* legislative and executive help, we must give meaning to the constitutional doctrine in the cases before us through our own devices, even if they are relatively less suitable. That is the basic explanation of our decisions

32. *Mount Laurel II*, 456 A.2d. at 417. That willingness to defer came to fruition three years later in *Hills Development Co. v. Bernards Township*, 510 A.2d 621 (1986), when the Court held that a comprehensive, but flawed, legislative response, the Fair Housing Act of 1985, was facially constitutional.

33. *Mount Laurel II*, 456 A.2d at 417 (emphasis added).

today.”³⁴

The Chief Justice’s tone is almost defiant, but the judicial process concerns are nonetheless real and have to be addressed. In particular, it has to be acknowledged that declaring a constitutional right to shelter would inevitably call into question not only those regulatory decisions that arguably burden the posited right, but also the vastly more difficult question of whether there is an affirmative obligation (implied by *Mount Laurel II*) to provide cash-based subsidies as well. Indeed, one can glimpse the court’s reason for not stating the constitutional basis of *Mount Laurel II* more frankly in its emphatic statements, beginning in *Mount Laurel I*, that municipalities are not required as part of the *Mount Laurel* doctrine to provide actual housing units, but merely the regulatory “opportunity” for such units.³⁵ Part of the brilliance of the *Mount Laurel II* approach is that it essentially induces the private market to provide housing subsidies in exchange for enhanced profitability, subsidies that it says governments could not be ordered to provide, the ultimate in the privatization of a public service.³⁶ But the record is clear that privatization will work only up to a point, and that point appears to be somewhere around forty percent or median income.³⁷ Households poorer than that will require some degree of direct subsidy, either supplementing or replacing what inclusionary zoning can provide.

III. RECONSTRUCTING A MOUNT LAUREL RATIONALE

It would appear, then, that there is an obvious case to be made for the existence of a constitutionally-based right to shelter in New Jersey, flowing directly from the Rights and Liberties Clause of the New Jersey Constitution, taken up and relied upon by the Supreme

34. *Id.* at 417-18 (emphasis added).

35. *Mount Laurel I*, *supra* note 3, at 192, 336 A.2d at 734 (“Courts do not build housing nor do municipalities.”).

36. In this context, keeping in mind that *Mount Laurel II* was decided at high tide of the Reagan Administration’s attack on “big government,” the decision could be seen as the ultimate form of “privatization.”

37. *See* Lamar, *supra* note 8, at 1232-36; *cf.* N.J. ADMIN. CODE tit. 5, § 93-7.2(b) (1994). (“The maximum average rent and price of low and moderate income units within each inclusionary development shall be affordable to households earning 57.5 percent of median income.”)

Court in *Mount Laurel I* and *II*. By extension, a similar right can be found in the many other state constitutions that have roughly similar language.³⁸ At the same time, however, it is difficult to see how a court could fully implement such a right without trenching deeply into the constitutional responsibilities of the political branches of government, most notably when issues of financial subsidies for shelter needs come into play.

It is in this context that it is useful to return to Chief Justice Wilentz's emphasis on the state's control of the use of land as a rationale for *Mount Laurel II*. As the preceding discussion suggests, if there is a constitutional "right to shelter," an individual's claim could easily extend to both regulatory and financial relief, with entitlement to housing subsidies in cash being the most obvious consequence of the "right." To avoid the judicial management problems that would flow from stating the right in such broad terms, Chief Justice Wilentz somewhat arbitrarily extracts the regulatory ("control of land") dimension of the claim, confident (correctly, as it turned out) that the courts could supervise the adoption of ordinances that provide a substantial measure of shelter relief. However, he seems to have believed that he could reach this result without articulating a "right to shelter." He was wrong. As I have already argued, without articulating a right to shelter it is difficult to justify going beyond the regulatory neutrality of *Mount Laurel I* to the affirmative regulatory relief of *Mount Laurel II*.

Note that this puzzle has a number of interesting dimensions. Without a constitutional right, *Mount Laurel II* is not fully explained. Articulating a constitutional right, however, explains too much, in that it would seem to require relief beyond the capacity of the judicial system to enforce. Thus, in place of the ancient aphorism, "[f]or every right a remedy," *Mount Laurel II* implies that because there is no remedy, there can be no right. But without a "right," how is *Mount Laurel II* itself explained?

The answer, I submit, is that *Mount Laurel II* actually establishes what might be termed a "conditional" constitutional right, distinct from "absolute" rights such as free speech and liberty of conscience.

38. See *supra* note 27.

While it probably can't be said that any right is categorically absolute, in a classic First Amendment claim there seldom is a legitimate reason for the government to interfere with an individual's exercise of the right. This is expressed in the familiar legal approach of requiring that the government have a compelling reason to limit free exercise. A "conditional" right, by contrast, is one that cannot as a practical matter be exercised free of entanglement with a larger set of social systems in which the collective citizenry has a strong and legitimate claim. As such, an individual claim of right (as in the case of a right to shelter) is appropriately weighed against society's collective interest in a way that we would not, or should not, tolerate with respect to individual rights.³⁹ "Conditional" rights, in other words, trigger a balancing test.⁴⁰ Society's claims can be substantive, as in its interest in sound land use controls. They can also be procedural, as in preventing undemocratic courts from supplanting the discretionary, interrelated choices made by a democratic political process. At times, both substance (zoning) and procedure (representative democracy) may outweigh the individual's claim to have the assistance of the government in obtaining shelter, but the fact that there is a constitutionally recognized and protected right in the balance insures that the balance will not be struck hastily or insensitively. As reinterpreted, the *Mount Laurel* doctrine requires the government to do as much as needs to be done, unless there is a good reason why more can't be done.

Consider how this works in the case of Chief Justice Wilentz's limiting criterion, the state's control of the use of land. Land is a scarce resource. A complex web of building codes, environmental regulations, financing rules, tenancy codes and condominium conver-

39. The "should not" qualification reminds us that the U.S. Supreme Court has, in recent years, moved steadily away from applying the compelling state interest test when free speech claims come in conflict with general laws. See *Employment Division v. Smith*, 494 U.S. 872, (1990); *City of Boerne v. Flores*, 521 U.S. 507, (1997). These decisions are wrong because, in contrast to the "societal" rights, there is no overriding collective need to enforce general laws that undercut sincerely held religious beliefs.

40. The concept is by no means novel. New Jersey uses a rigorous balancing test in equal protection cases decided under the state Constitution, rejecting the multi-tiered approach that the federal Constitution requires, at least in form. *Greenberg v. Kimmelman*, 494 A.2d 294 (N.J. 1985). Recall that New Jersey's equal protection doctrine derives from the same Rights and Liberties Clause that supports the posited right to housing.

sion rules, to name just a few, reinforces the overwhelming involvement of government in our lives. Many of these public interventions in the land use system are convenient, even necessary, and we need not call for their abolition and a return to an unregulated society in order to recognize their downside for persons on the edge of survival.⁴¹ Absent society's intervention to serve some collective need, individual citizens would have a wider variety of low-cost options in meeting their basic need for shelter. Their solutions might not be pretty, but they would be effective. A harsh example of government's power to forestall self-help solutions to basic needs (although thankfully not a New Jersey government in this instance) is the highly-publicized razing some years ago of an elaborate shantytown of dwellings for the homeless under New York City's Manhattan Bridge.⁴²

There can be no doubt anymore about the constitutionality of land use regulation under the police power. Thus, in exercising the police power, it would seem equally clear that the right to acquire shelter that we might otherwise think to be guaranteed by Article I, Section 1 of the Constitution is significantly undermined for people of limited income. Undermined, that is, unless the concept of the police power is itself required to accommodate individual rights actively, as well as passively, just as *Mount Laurel II* dictates.

The police power, as interpreted in New Jersey and many other jurisdictions, is subject to an overriding rule of reasonableness.⁴³ The police power, in the "protection" and "promotion" of unquestionably legitimate interests, such as orderly control of the use of land, has the potential to undercut the self-reliance of individuals in dealing with their own basic needs, the provision of which (as we have seen) is given constitutional protection. Thus, it can be argued that a "reasonable" exercise of the police power also requires that affirmative

41. On the other hand, some regulations are not useful, or can be misused to drive up costs unnecessarily and exclude persons invidiously, as in the case of exclusionary zoning. These "exclusionary" regulations, can now, twenty-five years into the *Mount Laurel* doctrine, be invalidated without harm to collective interests.

42. See Fisher, For Homeless, *A Last Haven is Demolished*, N.Y. TIMES, Aug. 18, 1993, at B1.

43. See *Katobimar Realty Co. v. Webster*, 828 (N.J. 1956) (cited in *Mount Laurel II*, 336 A.2d 713); see also Payne, *supra* note 7, at 559.

steps be taken by the sovereign or its delegates to minimize where possible those foreseeable adverse consequences of its exercise.⁴⁴ That there is such a duty, including a duty to make reasonable provision for those in need of shelter, is confirmed not only by the choice of active words such as “promote” and “protect” to describe the police power, but also by the inescapable logic of the two *Mount Laurel* decisions themselves.

Viewed as a constitutional rule that requires a realistic balancing of public (zoning) against private (housing) claims, the progression from *Mount Laurel I* to *Mount Laurel II* makes sense. In *Mount Laurel I*, the court could plausibly have thought that if municipalities would “get out of the way,” by repealing exclusionary constraints, existing housing mechanisms, public and private, would work adequately to unlock the aspirations of individuals guaranteed by Article I. Unarticulated in this approach is a sensible conclusion that this limited remedy strikes the proper balance between individual and collective rights, leaving to local governments as much delegated police power control over land use policy as is possible consistent with the constitutional right at stake.⁴⁵

In *Mount Laurel II*, the court concluded (reasonably) that more aggressive measures were required, because the weak balance struck in *Mount Laurel I* had resulted in a perpetuation of exclusionary zoning without an alleviation of the shelter problems of the poor. Because *Mount Laurel I* hasn’t worked, the Court in effect says, a further tilt towards the individual is needed. “[Courts] may not build houses, but we do enforce the constitution.”⁴⁶ Inclusionary zoning,

44. The “police power” argument advanced here has on occasion been expressed in terms of the common law doctrine of *parens patriae*. See, e.g., *Franklin v. Department of Human Services*, 543 A.2d 56, 79 (N.J. 1988) (Pressler, J., dissenting). The common thread, of course, is that of the state’s obligation to actively care for the well-being of its citizens. The majority opinion in *Franklin* distinguished a long line of *parens patriae* cases on the ground that they delineated the powers of courts of equity, not the political branches of government. This difficulty is avoided by placing the analysis on the police power, which directly concerns the political power of legislatures and governors to adopt and carry out the law. *Franklin* concerned the state’s obligation to provide shelter to the homeless, thus making it particularly relevant here. See *infra* notes 64-65 and accompanying text.

45. This approach is similar to the “least restrictive alternative” rule that has various applications in federal constitutional law. See, e.g., *U.S. v. O’Brien*, 391 U.S. 367 (1968) (free speech); *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951) (dormant commerce clause).

46. 456 A.2d at 417. (N.J. 1994).

carefully conformed to environmental and other sound planning criteria, is within the police power of government and, by definition, not harmful. Municipal corporations, whose powers derive from delegation rather than sovereignty, have always been subject to affirmative judicial control.⁴⁷ Judicially mandated inclusionary zoning therefore is within the capacity of courts to order without overriding legitimate collective interests in having social controls on the use of land. Hence, the balance is restruck.⁴⁸

Approached as a “conditional” right, subject to a balancing approach that is inappropriate for the traditional category of “individual” rights, it is easy to see what is wrong with the land use solution sometimes favored by conservative economists who criticize *Mount Laurel* and inclusionary zoning for replacing one imperfect regulatory scheme with another, where their preferred solution would be to eliminate zoning altogether.⁴⁹ Of course, if there were no land use controls, it would be relatively simple for individuals to satisfy their own housing needs, thus effectuating the promise of the constitution’s Rights and Liberties clause.⁵⁰ The class of those utterly unable to meet their own needs would be small enough (and compelling enough) that the state would undoubtedly provide relief from destitution voluntarily, on the basis of elementary compassion.

47. Pane, *NEW JERSEY PRACTICE: LOCAL GOVERNMENT LAW* § 2.20 at 44 and n.1 (W, 1999) (citing *Mount Laurel II*, 456 A.2d at 417).

48. Implicit also in this approach is the explanation of why the court could not simply order the abolition of zoning, leaving individuals and the free market to provide a variety of housing choices. Abolition of zoning would require only a negative injunction, well within the traditional power of the courts, and it might well give housing “pioneers” sufficient room to meet their own needs in their own way. But the cost to society’s collective interest in the legitimate use of the land use control power would be so great as to strike the balance unreasonably between the individual and society.

49. See FISCHER, *THE ECONOMICS OF ZONING LAWS* (1985); *Exclusionary Zoning and Growth Controls: A Comment on the APA’s Endorsement of the Mount Laurel Doctrine*, 40 WASH. U.J. URB. & CONTEMP. L. 65 (1991).

50. Recognizing that not all land use controls are “inefficient,” even in the skeptical framework of microeconomic analysis, Professor Robert Ellickson has proposed a regime of privately-enforced norms measured in substantial part by a common law nuisance rule of “contemporary community standards.” Robert Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 733. Once one accepts going this far, however, judicial balancing of competing interests is inevitable, with all of the attendant judicial process concerns that my approach fairly raises. At that point, there is no reason not to strive for the more equitable balance that would result from the inclusion of a “conditional” constitutional right in the mix.

Judicial intervention to enforce the constitution would not be necessary.

In contrast to this view, the Chief Justice, ever the pragmatist, understood that land use controls have substantial social value in their own right, and he knew that they were not about to wither away anytime soon in the modern state. What *Mount Laurel II*'s "control of land" passage means, then, is that *because* the state, as a practical matter, will continue to decide how land is used, therefore it must cure what otherwise would be a serious defect in its system, the restriction on an individual's ability to provide for him or herself. Moreover, since the state as a practical matter will continue to delegate the land use power to municipalities, it must also cure the inevitable tendency of delegated power to deteriorate into local parochialism, to the extent that it is realistically able to do so.⁵¹ The paradox of this reformulation is that while the nominal focus of the *Mount Laurel* opinions is on the *individual's* "realistic opportunity" to acquire shelter, the actual, practical consequence is to focus on the municipality's "realistic opportunity" to provide it. Moreover, as the progression from *Mount Laurel I* to *Mount Laurel II* demonstrates, the reformulated "realistic opportunity" standard in my revisionist rereading of *Mount Laurel II* appears to permit step-by-step compliance, rather than requiring the most aggressive judicial intervention *ab initio*.⁵²

51. See John M. Payne, *Delegation Doctrine in the Reform of Local Government Law: The Case of Exclusionary Zoning*, 29 RUTGERS L. REV. 803 (1976).

52. The guarantees of Article I, Paragraph 1 of the New Jersey Constitution run against individuals as well as against the state. See *State v. Schmid*, 423 A.2d 615 (1980) (obligation of Princeton University, a private institution, to permit political leafleting on campus). Following from this, a literalist might argue that the constitutional right to shelter obligates every private property owner to accommodate the shelter needs of those less fortunate, whether they can pay or not. If a purported right to shelter could only be enforced in this absolutist way, we can be absolutely certain that a court would simply construe the claimed right out of Article I, Paragraph 1's language. Far from doing so, however, *Schmid* actually reinforces the argument that shelter is a "conditional" constitutional right.

Under the circumstances of *Schmid*, involving a campus open to a wide variety of persons and groups, the court's conclusion that the classic right of a property owner to exclude weighed less than the leafletter's right to communicate makes sense; presumably, however, the same balancing test would have denied the leafletter permission to harangue dinner guests at the university President's home. Under this reasoning, the natural right to find shelter from the elements implicitly guaranteed by our constitution does exist as to private persons, but in most conceivable circumstances it would be outweighed by the inappropriateness of imposing the

IV. THE CONSEQUENCES OF A RIGHT TO SHELTER

One reason to inquire into the constitutional basis of the *Mount Laurel II* decision is that doing so shows us much more clearly what remains to be done. Lacking such an inquiry, the *Mount Laurel* process has stagnated, as the Council on Affordable Housing promulgates an ever-more complex delineation of the rules for implementing inclusionary zoning, while at the same time wringing its metaphorical hands at its inability to solve problems that do not yield to inclusionary zoning solutions. There is much more that could be done, and even if one accepts the step-by-step method implied by the progression of cases, further recalibration of the balance would seem to be in order.

Without attempting comprehensiveness, it is possible to identify at least six holes in the *Mount Laurel* doctrine's social safety net:⁵³

- (1) a failure to address the needs of households at or near the poverty line; at present, virtually no *Mount Laurel* housing is created for households with less than 40% of the regional median income;⁵⁴
- (2) a failure to address the needs of younger families with larger numbers of children, as opposed particularly to age-restricted senior housing;
- (3) a failure to produce large amount of rental housing, as opposed to for-sale housing, with rental housing being much more accessible to truly poor families;
- (4) a failure to deal the problem of "cost burdened" households, those who live in physically adequate housing but pay an excessive portion of their income to do so; this number

obligation to assist on private persons. Thus, it is an efficient shorthand to speak in of the constitutional guarantee running against governments alone because the government's interest will less often be as weighty as a private individual's.

53. This catalogue is based on the author's experience handling *Mount Laurel* cases, and can also be discerned generally from Lamar et al., *supra* note 7; Payne, *supra* note 9; and Naomi Wish & Stephen Eisdorfer, *Mount Laurel Housing Symposium, The Impact of Mount Laurel Initiatives: an Analysis of The Characteristics of Applicants And Occupants*, 27 SETON HALL L. REV. 1268 (1997).

54. *See supra* note 37.

is double or triple the number of households living in substandard quarters, the only ones who are presently counted as part of the “need” addressed by *Mount Laurel’s* fair share requirement;

(5) a failure to achieve fair share compliance in older, more fully developed suburbs closer-in to center cities; and

(6) a failure to extend *Mount Laurel’s* benefits to households of color.

Reformulating the *Mount Laurel* doctrine to emphasize the constitutional right to shelter and the governmental obligation to meet the housing need to the maximum practicable extent would not necessarily solve all of the problems listed above, but I am confident that it would move us firmly in that direction. Many of the problems just identified flow from the fact that market-driven inclusionary zoning is not well adapted to meeting the needs of the very poor and very large households, the need for rental housing, and the need for infill housing in urban areas. That is not the kind of housing, with or without an inclusionary component, that most large developers feel they can build or want to build.⁵⁵ New Jersey’s Council on Affordable Housing (COAH), which now administers most *Mount Laurel* compliance, has tried to provide incentives that move the market in the desired direction, but at some cost. COAH has demonstrated, for instance, that some municipalities will require construction of rental housing, but only by giving them a “bonus” in the form of a reduction in their numerical fair share obligation, presently a credit of two fair share units for every one unit of rental housing.⁵⁶

A reformulated *Mount Laurel* doctrine would not cast aside inclusionary zoning, which has worked very well under some circumstances, but it would require asking what else can be done. It may be time to require provision of rental housing, for instance, without any “bonuses” that perversely reduce housing opportunities

55. The most prominent exception on my list is the problem of racial disparity, which could be addressed much more aggressively using presently-available fair housing laws.

56. See N. J. ADMIN. Code 5:93-5.15(d)(1).

for other households. It may be time to require that every municipality's compliance plan address alternate ways to provide housing to families below the income level that is the de facto floor on private developer's willingness to do so, such as by facilitating the participation of non-profit and governmental housing sponsors that have the will and the ways to dig deeper. Non-profits can also contribute to the provision of affordable housing in older, more developed suburban areas, where inclusionary zoning does not work very well because of the absence of large developable tracts of land. A reformulated *Mount Laurel* doctrine would also require municipalities to creatively package available subsidies to supplement, rather than replace, inclusionary solutions, so that as much is accomplished with the total bundle of resources, rather than the least. Lacking a full constitutional rationale for *Mount Laurel II*, it has been difficult to persuade COAH and the courts that such steps could be constitutionally required.⁵⁷ Yet all of these potential remedial devices, essentially absent from the compliance mix at present, are "realistic" when balanced against collective interests because they would increase housing opportunities for individuals without cognizable detriment to the collective interests of the municipalities involved (a baldly stated interest in excluding poor people no longer being cognizable).⁵⁸

A further salutary consequence of reformulating the *Mount Laurel* doctrine as suggested here is that a more candid focus on the right to shelter would make plain that the *Mount Laurel* obligation lies not only with municipalities, but also with the state itself. Because New Jersey, like all states, delegates virtually all zoning power to local governments, and *Mount Laurel* compliance has been largely equated with inclusionary zoning, it is predictable that *Mount Laurel* litigation has concentrated on municipalities. It is beyond question, however,

57. A reformulated *Mount Laurel* doctrine would require the Supreme Court to look again at the question of permitting attorney fee awards to public interest plaintiffs who successfully pursue a *Mount Laurel* claim. It is beyond argument that, if adequately financed, public interest litigants will pursue a broader range of solutions than will private developers, whose "fee" derives only from the profit in an inclusionary development. SEE GENERALLY, Payne, *supra* note 11, at 677 n.48.

58. Sensitively (and sensibly) applied, the balancing approach would appear to satisfy the microeconomist's criterion of pareto optimality.

that the state itself has the ultimate responsibility for guaranteeing the rights and liberties of its citizens, and so the whispered hint in *Mount Laurel II* about the state's obligation needs to become a shout.⁵⁹

Because land use regulation is so pervasively delegated to local governments, the scope of potential state action is correlatively reduced. One response, of course, would be to argue that some of the delegated power should be reclaimed by the state, in order to use it in a more effective, less parochial way. The legislature has already partially accomplished this with the passage of the 1985 Fair Housing Act⁶⁰ and the creation of COAH. But the Fair Housing Act is a deeply flawed statute from the perspective of maximizing housing opportunities, and much more could be done. Under the reformulated *Mount Laurel* doctrine, for instance, the courts could be asked to order elimination of the voluntary feature of the act, so that all 566 New Jersey municipalities would be required to participate and present a fair share plan. By definition, COAH compliance is something municipal governments can do consistent with the public interest, since the law (to say nothing of the constitution) permits them to do so. Just as occurred in the shift from *Mount Laurel I* to *Mount Laurel II*, shifting the Fair Housing Act from a passive to an active mode, from voluntary to mandatory compliance, simply recalibrates the rights balance once the weaker balance proves inadequate, without adversely affecting any legitimate collective interest in the process.

V. HARD QUESTIONS

Expanding the breadth and depth of the *Mount Laurel* doctrine, as I have suggested in the foregoing paragraphs, is well within the competence of the judicial system and soundly mandated by the restated constitutional logic of *Mount Laurel II*. Candor compels recognition, however, that the implications of a "right to shelter," even the more limited "conditional right" that I have posited here, can

59. "While the state may not have the ability to eliminate poverty, it cannot use that condition as the basis for imposing further disadvantages. And the same applies to the municipality . . ." 456 A.2d at 415.

60. N.J. STAT. ANN. 52:27D-301 (1994).

be pushed close to the margins of judicial process. These marginal implications require more extensive analysis than is possible here, but I will mention two problems briefly in the hopes of demonstrating that they need not prove fatal to the recognition of the constitutional right in the first place.

One problem has already been hinted at. The state's primary role in meeting the shelter needs of its citizens (as compared to that of local governments) is to provide housing subsidies, and it requires little, I presume, to persuade the reader that judicial management of state budgetary matters is difficult at best and potentially disruptive of democratic self-government. The other is that once a right to shelter has been established, there is no obvious reason why a similar process of reasoning could not justify a whole set of welfare rights claims. The Chief Justice tries to limit this with the "control of land" rationale, but land is just one of many aspects of modern life that is subject to state control. Public utilities are much more closely regulated than land, for instance,⁶¹ but there is no constitutional doctrine requiring "affordable heat."⁶² Automobile insurance is mandatory and subject to comprehensive state control,⁶³ but there assuredly is no such thing as affordable auto insurance in New Jersey.⁶⁴ The state owns most mass transit systems,⁶⁵ and closely

61. See N.J.S.A. § 48:2-13 (New Jersey Board of Public Utility Commissioners granted "general supervision and regulation of and jurisdiction and control over all public utilities. . . . and their property, property rights, equipment, facilities and franchises"); *Lambertville Water Co. v. New Jersey Bd. of Pub. Util. Comm'rs.*, 401 A.2d 211 (1979) (regulatory agency has "broad powers over all aspects of public utility including the power to fix the rates which a utility may charge its customers.")

62. *Sterling v. Village of Maywood*, 579 F.2d 1350, 1353 n.7 (7th Cir. 1978) *cert. denied*, 440 U.S. 913 (1979) (utility consumer without direct contractual relationship to supplier has no constitutionally protected interest in continued service); *Lamb v. Hamblin*, 57 F.R.D. 58, 61-62 (D. Minn. 1972) (procedural due process rights of utility consumers are limited to those willing to assume financial responsibility for that service).

63. See N.J.S.A. § 39:6A-3 (automobile insurance mandatory); *In re "Plan for Orderly Withdrawal from New Jersey"* of Twin City Fire Insurance Co., 609 A.2d 1248, 1285 (1992) (upholding regulation requiring insurer to either sustain losses or market certain specific services as consistent with due process).

64. See Michael S. Smith, *State Hunts Insurance Cheaters*, PHILADELPHIA INQUIRER, Oct. 19, 1991, at B1 (New Jersey auto insurance rates are among the highest in the country, starting at over \$800.00 per car).

65. See Neil Hamilton et al., *A Comparison of Governance of Publicly-Owned Mass Transit*, 6 CANADIAN-U.S. L.J. 1, 5 (1983) (only 9% of the 117 largest metropolitan areas in the country are served by private mass transit operators).

regulates the others,⁶⁶ yet poor people do not ride for free. The cost burden of heat and hot water, insurance, and transportation to work are often crucial to the elemental survival of low and moderate income households, but there is no Council on Elemental Survival; at best, poor people are assured some minimum procedural due process rights before losing their access to most regulated commodities for inability to pay.⁶⁷

As these examples show, pondering the implications of a right to shelter will be challenging, to say the least. So long as it is understood that “conditional” rights claims are not absolute, however, but instead are subject to a sensible balancing process, there should be no reason to fear asking the questions in the first place. The constitutional claim “counts,” but it does not outweigh all other societal interests. It is always there, but not always possible to vindicate. But when vindication is impossible, both the government and a reviewing court should be obligated to give reasoned explanations of why not, in salutary contradistinction to the present regime of legal doctrine, which muzzles moral dialogue by denying even the existence of claims to basic subsistence needs met under at least some circumstances.

Thus, it may sometimes (but not always) be appropriate for courts to venture into financial matters in order to effectuate shelter rights. In a series of cases arising after *Mount Laurel II*, for instance, the New Jersey Supreme Court overrode an effort by the political branches to sharply limit shelter benefit for homeless individuals to a few months, holding that benefits had to be continued.⁶⁸ This humane result was achieved even though the court studiously ignored a claim that homeless people had a constitutional right to shelter, the most straightforward explanation for the outcome. Instead the court

66. See N.J.S.A. §§ 48:4-1 to 4-6 (state regulation of the rates, routes, operations and maintenance of privately-owned autobuses).

67. See *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 18 (1978) (observing that “[u]tility service is a necessity of modern life,” and holding that due process requires an opportunity for a hearing prior to termination of service).

68. See *Williams v. Department of Human Services*, 561 A.2d 244 (1989) (*Williams I*); 583 A.2d 297 (1989) (*Williams II*); 583 A.2d 351 (1990) (*Williams III*); *L.T. v. Department of Human Services*, 633 A.2d 964 (1993) (summarizing earlier cases). I represented the ACLU of New Jersey *amicus curiae* in these cases, inconclusively arguing the constitutional point. Some of the research for these briefs has found its way into earlier sections of this essay.

strained to construe both administrative regulations and statutory law as mandating continued benefits, an analysis which had little persuasive power when one consults the actual texts. Obviously, the Court thought that it was feasible to order the state to continue spending money that the state wanted to divert to other purposes. Apparently, however, the court also thought this result would be more “legitimate” if it was seen as dictated by the will of the political branches, but it undercuts the search for legitimacy if the court first has to distort the will of the political branches, as it did in these cases, in order to nominally follow that will. Better, I submit, to acknowledge frankly the extent to which constitutional rights legitimately dictate the outcome, while at the same time fashioning reasonable limits on the extent of the right, rather than leaving everything in doctrinal limbo, as the court did in the actual cases.⁶⁹

Expanding the concept of a right to shelter into a general theory of welfare rights is, needless to say, an even more difficult matter, one requiring a good deal of careful analysis. Suffice it to say here, as a prelude to further consideration of this interesting question, that at the time of *Mount Laurel II* shelter needs were the least well provided for of any of the basic set of subsistence needs that could be placed under the state constitution. While the state had then (and still has) extensive, state-level programs supporting health, education, and alleviating destitution, housing policy was left largely to the federal government or delegated away to local governments without meaningful supervision. The same could be said partially about education, in that huge financial responsibilities were shifted to local governments despite a glaring maldistribution of the property tax

69. The tension between what the court means and what it says is palpable in its peroration at the end of the *L.T.* case:

The question before us is not whether the homeless have a constitutional right to shelter. Rather, it is, for now, what the Legislature intends. In *Williams I, supra*, we concluded that then-Governor Kean, by his allusion to the poet Robert Frost’s description of home, “surely intend[ed] that every citizen of New Jersey has a place to go where they must take you in.” We believe that the executive and legislative branches of New Jersey’s government still share that intention. The question still “need[s] to be answered in the plain language of the streets: who is in charge here and how is the problem to be solved?”

633 A.2d at 974 (internal citations omitted).

base that virtually guaranteed inequitable results. Thus, it is no surprise that the two leading areas of human rights reform that have been stimulated by judicial review in New Jersey have been shelter policy under the *Mount Laurel* doctrine and education finance under *Robinson v. Cahill*⁷⁰ and its successor, *Abbott v. Burke*.⁷¹

VI. CONCLUSION

This being a *festschrift*, and in light of the unconventional position staked out herein, it is probably appropriate to paraphrase the standard government disclaimer by noting that the honoree bears no responsibility for the author's opinions, which do not necessarily reflect the honoree's, or anyone else's, point of view. While it is true that Dan Mandelker is quintessentially careful and precise in his scholarship, it is also true that his work has always been infused with humane, inclusionary concerns and by a willingness to put doctrine to the use of social justice. He has never hesitated to tell me when he thought I was slipping into error (editing a casebook together provides plenty of opportunity for those discussions). But at the same time he has always encouraged me, as others, to reach for new and interesting ways to think about age-old problems. It is in that spirit that I have offered these thoughts.

70. 351 A.2d 713 (1975).

71. 643 A.2d 575 (1994). For a full citation list of the eight *Robinson* cases and three (thus far) *Abbott* cases, see Paul L. Tractenberg, *A Clear and Powerful Voice for Poor Urban Students: Chief Justice Robert Wilentz's Role in Abbott v. Burke*, 49 RUTGERS L. REV. 719 (1997).