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Imagining a Right to Housing, Lying in the Interstices

Shelby D. Green*

*"[T]he majestic quality of the law . . . prohibits the wealthy as well as the poor from sleeping under the bridges, from begging in the streets, and from stealing bread."*¹

I. INTRODUCTION

In this quotation is the notion that the law affords the same legal protections to all persons in making their life choices, regardless of their station in life. Also implicit in this quotation is the notion that the poor possess the autonomy to make choices—that they may choose to sleep under bridges instead of in conventional housing.² The latter suggestion is an uncomfortable one and prompts the question whether the state has some obligation to facilitate the making of those life choices, particularly with respect to a place to live.³ In the last two decades, the

* Associate Professor of Law, Pace University School of Law. J.D., Georgetown University Law Center, B.S. Towson State University. © 2012, Shelby D. Green.

1. ANATOLE FRANCE, *LE LYS ROUGE* 87 (1905).

2. France's cynical comment on the seeming indifference of the law as to those lacking economic resources has proved enlightening in a number of other contexts. *See e.g.*, Joy Gordon, *The Concept of Human Rights: The History and Meaning of its Politicization*, 23 BROOKLYN J. INT'L L. 689, 723-724 (1998) (citing Anatole France and explaining that "Under the dominant conception, political equality is purely formal; the fact that all citizens of a certain age have the right to hold public office does not mean that substantively they have the means to do so. Political equality—the formal equality of all citizens in relation to government and to law—does not entail economic equality—substantively having the means to exercise one's political right."); Cheryl I. Harris, Symposium, *The Constitution Of Equal Citizenship For A Good Society: Equal Treatment And The Reproduction Of Inequality*, 69 FORDHAM L. REV. 1753, 1756 n.7 (2001) (speaking on how equal protection can be violated and stating that "So it was with the majestic equality of French law, which Anatole France described as forbidding rich and poor alike to sleep under the bridges of Paris As the Supreme Court observed in *Jenness v. Fortson*, 'sometimes the greatest discrimination can lie in treating things that are different as though they were exactly alike'" (quoting LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1438-39 (2d ed., 1988) (citation omitted)); Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1499 n.2 (1991) (citing Anatole France and suggesting that "When the Court ignores the differences between people in poverty and those not in poverty, the result can be especially pernicious rhetoric.").

3. *See* Sheila Crowley, *The Affordable Housing Crisis: Residential Mobility of Poor Families and School Mobility of Poor Children*, 72 J. NEGRO EDUC. 22, 23 (2003) (describing in stark terms the detrimental effects of unaffordable or inadequate housing, including having less funds available for other necessities, including food and medical care, and having to move in with other family or friends in small spaces).

lack of affordable housing has reached worrisome proportions.⁴ As housing becomes less affordable, it becomes less available.⁵ Households with the lowest incomes feel this crisis most acutely.⁶

If housing were regarded as a fundamental right, should it impose burdens upon the state, not only to refrain from interfering with access and retention, but also to ensure that housing is available and affordable? Housing would be regarded as a fundamental right if it were to be considered an inextricable component of liberty. Then, it would also be a political right as guaranteed by our Constitution. Nowhere in constitutional documents is such a right expressed. The Bill of Rights speaks of, and the courts have upheld, rights in property, liberty, and due process, but have been largely silent about housing. Although clearly suggestive, this silence alone should not be taken as conclusive that no such right to housing exists; for other rights, also not expressed, have been found to be fundamental and are protected, including the right to privacy,⁷ travel,⁸ and counsel in criminal proceedings.⁹ These rights have been found in the interstices of the Constitution.

Although property and housing are largely synonymous concepts, control and security of possession of a private sphere are necessary predicates for housing, but ownership *per se* is not. Property has long been viewed as exclusionary, with

4. See OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP'T OF HOUS. & URBAN DEV., AFFORDABLE HOUSING NEEDS 2005: REPORT TO CONGRESS 4 (2007), available at http://www.huduser.org/portal/publications/affhsg/wc_HsgNeeds07.html (reporting that millions of households are in need of adequate and affordable housing: "In 2005, there were only 77 units affordable and available for rent for every 100 very low-income renter households For extremely low-income renter households, the ratio was worse: 40 units per 100 households, down from 43:100 in 2003").

5. See *id.* at 36-37.

6. JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV., AMERICA'S RENTAL HOUSING: MEETING CHALLENGES, BUILDING ON OPPORTUNITIES 6-7 (2011), available at http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/americasrentalhousing-2011_0.pdf (noting that fifteen percent, or 14.9 million households, in the United States considered extremely low income, with a median household income of \$7000 a year, spent an average of fifty-four percent of their income on housing, much higher than the thirty percent believed to be optimal); see also Crowley, *supra* note 3, at 26. As affordable housing has shrunk due to a myriad of causes, including gentrification, conversion, demolition and abandonment, low-income households must compete with those that are more well-to-do. In its 2005 report to Congress on affordable housing needs in the nation, the U.S. Department of Housing and Urban Development reported that there were 5.99 million households with worst case housing needs, a statistically significant increase of 817,000 households (sixteen percent) from 5.18 million in 2003. Households with "worst case needs" are defined as unassisted renters with very low incomes who have one of two "priority problems"—either households shouldering a "severe rent burden" in paying more than half of their income for housing, or living in severely substandard housing. These represent five-and-a-half percent of all American households. In 2011, HUD reported a dramatic increase in the "worst case needs" group when the number of renters in this category rose twenty percent from 5.91 to 7.10 million from 2007 to 2009. While all types of households were affected by the increase, families with children represented the greatest proportion, roughly thirty-nine percent. OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP'T OF HOUS. & URBAN DEV., WORST CASE HOUSING NEEDS 2009: REPORT TO CONGRESS VII, 1-2, 3, 5 (2011), available at http://www.huduser.org/Publications/pdf/worstcase_HsgNeeds09.pdf.

7. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

8. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

9. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

the state backing the owner's right to keep out the world. The interest in housing is currently protected under narrow principles that preclude discriminatory barriers to access, put up by individuals or by governments as they administer housing programs and adopt land use measures, and that require judicial process before an eviction from rental property.¹⁰ Admittedly, a broader right to housing might impose a burden upon the state¹¹ to facilitate its enjoyment in a way different than the state fulfills the right to travel, which, as currently recognized, does not require the government to provide mass transit or a private automobile to all citizens, but only to refrain from and remove state-imposed obstacles to the freedom of movement.¹² Instead, in fulfilling an obligation to effectuate a right to housing, a state may be required to appropriate government funds to needy families for the purchase or rental of property for housing, but the practical infrastructure for this new burden is already in place. Federal and state programs already exist offering funding for housing construction, providing that some amount of newly constructed housing be affordable and ensuring that tenants have affordable rent and security of tenure.¹³ Importantly, a right to housing would require a shift in the prevailing presumptions that are used in evaluating local land use measures and development decisions that have the effect of making housing less available.¹⁴ It would provide a platform for the initiation of measures to ensure housing, establishing a presumption of legality. It would shift the starting point on housing initiatives from whether to undertake measures at all toward issues of the design and implementation of plans for housing.

While the issue of housing, from a deontological perspective, seems easy, the analysis here must also treat the political concerns because our society, though

10. *Compare* *Greene v. Lindsey*, 456 U.S. 444, 456 (1982) (depriving tenant of leasehold without notice violates the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution) and *Hunter v. Erickson*, 393 U.S. 385, 387 (1969) (ordinance providing that regulations of real estate on the basis of race required approval by referendum), with *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713, 719 (N.J. 1975) (zoning ordinance strictly limiting the amount of multi-unit dwellings allowed in the community); see also *infra* notes 247-301 and accompanying text.

11. By "state," I mean government and society in general.

12. See *infra* notes 110-120 and accompanying text.

13. See generally NESTOR M. DAVIDSON & ROBIN PAUL MALLOY, *AFFORDABLE HOUSING AND PUBLIC-PRIVATE PARTNERSHIPS* (2009); Peter Salsich, *Toward a Policy of Heterogeneity: Overcoming A Long History of Socioeconomic Segregation in Housing*, 42 WAKE FOREST L. REV. 459 (2007) (discussing various government programs for affordable housing); Adam Zeidel, *Affordable Housing: The Case for Demand-Side Subsidies in Superstar Cities*, 42 URB. LAW. 135 (2010) (discussing the mix of affordable housing programs in New York City and the importance of demand-side subsidies in stimulating the housing market and revitalizing neighborhoods). The history of public housing programs is discussed *infra* notes 176-199 and accompanying text.

14. Proposals to develop affordable housing are often saddled with the burden of demonstrating that they do not adversely affect the public welfare, by causing increased density, reduction of property values, and even introduction of anti-social elements by poor and ethnic minorities. Zoning ordinances often work in tandem with these expressed concerns to preclude the introduction of such housing in these communities. See, e.g., *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *Reinhart v. Lincoln Cnty.*, 482 F.3d 1225 (10th Cir. 2007). These issues are discussed more fully *infra* notes 247-301 and accompanying text.

founded in part upon abstract principles of justice and morality, is a political system governed by the positive laws and principles set out in the Constitution and the Bill of Rights. If such right is deemed to be fundamental, this characterization would result in greater deference for the right-holder and greater burdens upon those who would interfere. Fundamental rights have been defined by the Court as those that bear some “resemblance to the fundamental interests that previously have been viewed as implicitly protected by the Constitution.”¹⁵ Recently, the process of finding that a right is fundamental was described by Justice Scalia as “mysterious.”¹⁶ I maintain that a right to housing can be found within our existing political structure. The analysis proceeds as follows: I start by recognizing that the right to acquire and hold property without undue interference is unquestioned in our political system. Then I consider that barriers to the enjoyment of this right come in many forms: exclusionary zoning by municipalities; government-supported development projects involving takings of property and tax subsidies; racial discrimination; and the socio-economic status of those seeking housing. From this, I consider that housing—a private sphere that enables individual flourishing—is a prerequisite for humanity and hence liberty. I reason that enjoyment of this liberty interest, therefore should impose some obligation on the part of the state to provide, or at least act, affirmatively to facilitate the availability of affordable housing.

As I set out to explore this proposition, I quickly encountered a seemingly insurmountable roadblock. The Supreme Court’s ruling in *Lindsey v. Normet*,¹⁷ where in a challenge to Oregon’s forcible entry and detainer statute that subjected tenants to immediate eviction upon non-payment of rent even if they had a claim against the landlord arising out of the landlord’s failure to maintain the premises, the Court stated that the Constitution “has not federalized the substantive law of landlord-tenant relations.”¹⁸ Thus, while the right to acquire and hold property was seen as firmly established as a negative fundamental right in favor of the fee-holder landlord, the tenant’s limited interest in preserving his housing would not be protected as a positive right.¹⁹ But, the apparent bar from this case to a

15. *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 229-30 (1985) (finding no fundamental property interest in continued enrollment in medical school); see also a further discussion of rights *infra* notes 121-33 and accompanying text.

16. *Gonzalez v. United States*, 553 U.S. 242, 256 (2008). A further discussion of *Gonzalez* appears *infra* notes 81-98 and accompanying text.

17. *Lindsey v. Normet*, 405 U.S. 56 (1972).

18. *Id.* at 68.

19. A debate on the existence of a constitutional right to housing occurred between Professors Akil Amar, Curtis Berger, and Robert Ellickson. See Akil Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL’Y 37 (1990); Curtis Berger, *Beyond Homelessness: An Entitlement to Housing*, U. MIAMI L. REV. 315 (1990-1991); Robert Ellickson, *The Untenable Case for an Unconditional Right to Shelter*, 15 HARV. J.L. & PUB. POL’Y 17 (1992). However, there may be a few additional points to urge. It seems that the overarching issue being raised by this dialogue is the question of justice as it pertains to the allotment of goods, opportunities, and rewards. John Rawls proposed a theory for treating people according to their (a) desert or merit, (b) needs or abilities, or both or (c) human

"right to housing," if read narrowly, may not preclude finding such a right.²⁰ Instead, it is just that—apparent and not real.

This Article explores whether the philosophical and constitutional predicates for the recognition of a right to housing exist in some form in our nation's jurisprudence and political order. Part II traces the evolution of the concept of "rights" from that embraced by the country's founders to the present, how such a right to housing would fit within the dialogue of property rights, the notion of ownership, and the interest in liberty. Part III discusses the historical role of the court in protecting housing. Part IV discusses the notion of protecting rights to housing under existing equal protection and due process principles. Part V contains a discussion of the heightened scrutiny state courts are applying to land use regulations that affect the availability of housing. Part VI discusses new predicates for an affirmative right to housing. Conclusions are offered in Part VII.

II. EVOLUTION OF RIGHTS: FROM NATURAL LAW TO POLITICS AND SOCIAL ORDER

In eighteenth century political thought, rights were founded in reason.²¹ The idea was that "the world and its relation to human society [was] a single intelligible structure," capable of comprehension through the application of reason.²² The concept of human autonomy emerged, which presupposed a belief in self-regulation, development, and direction.²³ We were no longer bound to a world driven by the exorable movements of the natural world, but now humans could transform their world from one of basic self-preservation to a rational form of conscious planning. Autonomy became the premise for emergent theories of society that presupposed basic needs and legal entitlements.²⁴ It became the duty of government to promote and refrain from interfering with "the integrity of

worth and well-being. Under this theory, "[a]ll social values—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage." JOHN RAWLS, *A THEORY OF JUSTICE* 8-22, 61-65 (1971). Injustice involves inequalities, which are not to the benefit of all, such that redistributions to achieve equality may be required. *Id.* This Article focuses more precisely on the liberty interest captured by the notion of justice.

20. How the Court construed the property interest in *Lindsey v. Normet*, not fully recognizing the tenants' property interest in their tenancies, and the right to a habitable dwelling, will be discussed *infra* notes 145-59 and accompanying text.

21. J.M. KELLY, *A SHORT HISTORY OF WESTERN LEGAL THEORY* 58, 267 (1992). The Founders of our country embraced the ideas of the European Enlightenment. For a thoughtful discussion of this point, see Peter Gay, *America the Paradoxical*, 62 VA. L. REV. 843, 846 (1976) ("The reliance of the Founding Fathers on European political theory was as pervasive as it is obvious The *Federalist*, the most mature and most American statement of the political ideals and political techniques of the Founders, is incomprehensible without a full appreciation of its European sources.").

22. Dieter Henrich & David S. Pacini, *The Contexts of Autonomy: Some Presuppositions of the Comprehensibility of Human Rights*, 112 DAEDALUS 255, 261 (1983).

23. E.J. HOBBSBAWN, *THE AGE OF REVOLUTION: 1789-1848*, at 278 (1962).

24. Henrich & Pacini, *supra* note 22, at 262.

self-determination in human creative action.”²⁵ This also meant that “[w]hether guaranteeing a sphere of freedom in which the [person] can act, or assuring the minimal conditions under which the [person] might live, the notion of rights became inseparable from the conditions of the factual world.”²⁶ Although, “in some sense, any normative principle differs from the factual world insofar as it is an ideal for, rather than a reflection of, the ordering of the world.”²⁷

At the time of the Declaration of Independence, this duty to enable self-determination was not interpreted to mean a duty to ensure some ownership of property to all citizens, even if unequal.²⁸ Instead, the aim was to protect from governmental interference those inalienable rights, identified as “life, liberty and the pursuit of happiness.”²⁹ These rights were interpreted to mean not only protection against physical assault, but also the recognition and identification of a certain personal sphere of autonomy necessary for self-realization and self-fulfillment.³⁰ However, the failure to attempt to spread property ownership seemed inconsistent with the highly influential labor theory of property, famously described and explained by John Locke.³¹

Thomas Jefferson’s political philosophy was greatly influenced by Locke. Jefferson believed that ownership of land by individuals was a necessary ingredient toward freedom, independence, and sustaining a republican form of government.³² He believed that independent labor could enable a man to “divest himself of subordination to superiors and cultivate that inner strength upon which republicanism depended.”³³ That “virtue and judgment produced by such independent labor . . . rendered [men] capable of becoming republicans, and therefore rendered America capable of republican government.”³⁴ Jefferson embraced the Lockean idea that, with the great abundance of land in America, each man was entitled to a share.³⁵ Jefferson’s vision of the republic was one in which there was a wide distribution of land and individuals, secure in their own

25. *Id.*

26. *Id.* at 258.

27. *Id.*

28. JOHN PHILLIP REID, *THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION* 5, 70-73 (1988).

29. See Steven J. Eagle, *The Development of Property Rights in America and the Property Rights Movement*, 1 GEO. J.L. & PUB. POL’Y 77, 82 (2002).

30. Carl J. Friedrich, *Rights, Liberties, Freedoms: A Reappraisal*, 57 AM. POL. SCI. REV. 841, 841 (1963).

31. Locke believed that God gave to all men the natural resources on the earth in common. When an individual applies his labor and skill to the natural bounty, “he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property.” JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT*, paras. 26-32 (1690).

32. Stanley N. Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J.L. & ECON. 467, 474-76, 479-88 (1976).

33. *Id.* at 474.

34. *Id.* at 475.

35. LOCKE, *supra* note 31, at para. 37; see also Katz, *supra* note 32, at 475.

commitment to the idea of public good. To that end, “political representatives would act in an entirely disinterested spirit.”³⁶

But the political realities were different. Though political virtue was at the core of republican political thought, the depression of the 1780s and the seeming ineffectiveness of the government under the Articles of Confederation seemed too frustrating to encourage republican spirit.³⁷ The prevailing idea then became that government should exist to protect property, given that the great majority of Americans would not be landed or possessed of property.³⁸ The Constitution of 1787 omitted guarantees of equality of land ownership, or at least minimal possession, as a basis of republicanism. The emerging federalists bowed to the human instinct for self-regard above all. Indeed, “the primacy of the private passions for individual self-preservation; self-enrichment and self-aggrandizement” were raised in their influences on human behavior.³⁹ The dilemma then for the Founders was how to protect the small propertied class from oppression by those who were landless.⁴⁰ All recognized that “[p]roperty was important for the exercise of liberty, and liberty required the free exercise of property rights; this free exercise would inevitably lead in turn to an unequal distribution of property.”⁴¹ The Founders rightly perceived the connection between property and other basic human goods, especially liberty and security. Yet, perhaps perversely, this belief in the essentiality of property to liberty led the Founders (as can be discerned from the *Federalist* papers) to act to affirm and entrench landholdings of the haves and to ignore the plight of the have-nots.⁴² The Founders framed the concern as one involving fear of oppression by the many against the few, not about the effects of unequal distribution of property *per se*.⁴³ Yet, the Bill of Rights aimed to protect citizens in general against a tyrannical government, not a propertied minority against a demanding majority.⁴⁴ John Adams believed that:

[P]ower always follows property . . . [T]he balance of power in a society [] accompanies the balance of property in land. The only possible way, then of

36. Katz, *supra* note 32, at 473, 482-83.

37. *Id.* at 481.

38. Jennifer Nedelsky, *American Constitutionalism and the Paradox of Private Property*, in CONSTITUTIONALISM AND DEMOCRACY: STUDIES IN RATIONALITY AND SOCIAL CHANGE 241, 252 n.19 (Jon Elster & Rune Slagstad eds., 1988); Katz, *supra* note 32, at 481.

39. “[S]elfish passions were assumed to be fundamental to human nature. [S]elf-interest of the individual was made a yardstick of the public good. [P]rivate passions [would . . .] work to the advantage of the body politic.” Katz, *supra* note 32, at 486.

40. Katz, *supra* note 32; see also Jennifer Nedelsky, *Law, Boundaries, and the Bounded Self*, in LAW AND THE ORDER OF CULTURE 162 (Robert Post ed., 1991).

41. Nedelsky, *supra* note 40, at 164.

42. *Id.* at 163-69.

43. *Id.*

44. See generally THE BILL OF RIGHTS: GOVERNMENT PROSCRIBED (Ronald Hoffman & Peter J. Albert eds., 1997).

preserving the balance of power on the side of equal liberty and public virtue, is to make the acquisition of land easy to every member of society, to make a division of land into small quantities, so that the multitude may be possessed of landed estates. If the multitude is possessed of the balance of real estate, the multitude will have the balance of power and in that case the multitude will take care of the liberty, virtue and interest of the multitude, in all acts of government.⁴⁵

Still, no provisions for redistribution or equalizing property ownership⁴⁶ made their way into the Constitution or the Bill of Rights. Indeed, at the Philadelphia Convention, Alexander Hamilton stated: “It was certainly true that nothing like an equality of property existed: that an inequality would exist as long as liberty existed, and that it would unavoidably result from that very liberty itself.”⁴⁷

Professor Jennifer Nedelsky points out that the Founders were aware of this tension, but that they were preoccupied with “insulating property from democratic decision making.”⁴⁸ “Rights became things to be protected, not values to be collectively determined” and they addressed the widespread fear about threats to property by setting up a “system of institutions that would minimize the threat of the future property-less majority in large part by minimizing their political efficacy.”⁴⁹ The result was an articulation of two categories of rights: civil rights, having property at its center, whose protection was the true aim of government, and political rights, such as the right to participate in government.⁵⁰ While the Constitution contained few formal declarations of rights as would serve as limits on federal government power, the Founders attempted to protect civil rights “in more subtle ways by channeling the power of the people in order to minimize their threat to property and civil rights generally.”⁵¹ But as will be developed later in this Article, the expressed interest in “liberty” has been the predicate for the

45. Adams, however, was doubtful that non-propertied persons possessed the good judgment and reason to be allowed to vote and thought that it was not a wise proposition that “every man who has not a farthing . . . to have an equal voice with any other in acts of state.” JOHN ADAMS, *THE WORKS OF JOHN ADAMS* 376-77 (Charles Francis Adams ed., 1969) (1856).

46. In 1798, there was gross inequality in wealth and land ownership. See Lee Soltow, *The Distribution of Income in the United States in 1798: Estimates Based on the Federal Housing Inventory*, 69 REV. ECON. & STAT. 181, 181-82 (1987) (finding severe income disparities from an analysis of housing properties in 1798, the most valuable house being valued at more than \$30,000, but the average being \$262).

47. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 424 (1787). James Madison seemed to echo Alexander Hamilton’s sentiment when he stated that the “diversity in the faculties of men, from which the rights of property originate, [was] not less an insuperable obstacle to a uniformity of interests”; that it was the “first object of government” to protect these faculties; and that “the protection of different and unequal faculties of acquiring property” would lead to different kinds and degrees of property, which would produce “a division of society into different interests and parties.” THE FEDERALIST NO. 10 (James Madison) (Penn State Electronic Classics Series Publication 2001).

48. Nedelsky, *supra* note 40, at 166.

49. *Id.*

50. *Id.* By this, it seems that Nedelsky means safeguarding the then-unequal distribution of property.

51. *Id.*

finding of other important constitutional rights. The recognition of the importance of property to liberty helps make the case for a right to housing.

What did the Founders understand or mean by “property”? “[T]he existence of a broad understanding of property during the Founding Era has been widely recognized.”⁵² In fact, it has been suggested that the Founders conceptualized many important interests as rooted in “property” rather than in “liberty.” This textual equality of “liberty” and “property” in the Due Process Clause was not idle, but suggests the important political notion that property facilitates personal and political self-determination.⁵³ Despite the absence of measures to facilitate ownership, the idea held by the Founders was that “to have liberty, one had to have property.”⁵⁴ Under this conception, property cannot be viewed as a mere collection of tangible goods and economic rights, but rather as a “broad range of human rights” that are intimately related to “the development of human personality.”⁵⁵ In light of the Founders’ comprehensive understanding of property, Professor Laura Underkuffler rightly asks “why . . . the comprehensive approach [is] often overlooked”⁵⁶ in favor of an approach seemingly limited to ensuring that individuals are accorded procedures before property is affected, rather than protecting the substances of rights for their essence.⁵⁷

Land and its private ownership have been central in the development of our society and political institutions.⁵⁸ Indeed, a well-regarded theory of property is

52. Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 136 (1990).

53. *Id.* at 137-42. English political philosophers, including John Locke, viewed property as including important aspects of self. See LOCKE, *supra* note 30.

54. REID, *supra* note 28, at 5; see also Carol M. Rose, *Property as a Keystone Right*, 71 NOTRE DAME L. REV. 703, 725-30 (1984) (asserting that property interests should be deemed no less important than liberty rights).

55. REID, *supra* note 28, at 138, 140; see also John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 64-71 (1996) (noting the Lockean nature of Madison’s conception of free speech as a kind of property interest).

56. Underkuffler, *supra* note 52, at 141.

57. Professor Underkuffler believes that the Court became spooked by the *Lochner* jurisprudence and enamored by the lure of economics as an explanation for all human behavior. The consequence is the elimination of important subset of fundamental interests from protection against governmental abridgment. *Id.* In *Lochner*, the Court reached to find substantive due process rights from the text of the Bill of Rights, such as the right to sell one’s labor at whatever price one deems fit. *Lochner v. New York*, 198 U.S. 45, 64 (1905) (invalidating law limiting hours of work as an unreasonable interference with the liberty of contract protected by the 14th Amendment).

58. As suggested earlier, in the years preceding the Revolutionary War, land ownership was hardly equally distributed “either among the regions or among individuals.” Indeed, Jones states: “The South was the richest and New England the poorest. It took the wealth of two middle colonists, or two-and-a-half New Englanders, to equal the assets of an average southern free wealthholder.” Alice Hanson Jones, *Wealth and Growth of the Thirteen Colonies: Some Implications*, 44 J. ECON. HIST. 239, 250 (1984). Even within the region itself, New England had great wealth disparities, “ranging from the large wealth of some rich merchants, lawyers, and sea captains to . . . small farmers, poor widows, [and] sailors.” *Id.* at 250-51. This wealth was made up largely of land, which accounted for over half the total physical wealth in the Thirteen Colonies. *Id.* In New England, land was followed by livestock, then “other producers’ goods, then by consumer goods, and lastly by slaves.” *Id.* at 251. But in the South, slaves were second only to land in value.” *Id.*

that society developed to protect property in land.⁵⁹ Innumerable values arise from land ownership—security, wealth, stature, identity, pride, and control are but a few. Property in land has long been regarded as necessary for the development of human aspirations and human flourishing.⁶⁰ The laws that arose to protect property have long-strived to protect these values in one way or another, although the hierarchy among these has shifted over time and continues to do so.⁶¹ But throughout, the importance of land has remained constant. Every parcel of land being considered unique, remedies that developed for its protection have been calculated to offer extraordinary relief—the return of the land.⁶²

Property represents “a concrete means of having control over one’s life, of expressing oneself, and of protecting oneself from the powers of others, individuals or collective.”⁶³ In order for property to serve these purposes, the security of one’s relationship to property is essential. The value of property is realized only when it is protected, that is, backed up by the state.⁶⁴ In this sense, as stated in the beginning of this Article, property is about the right to exclude from the vantage of one with property or with the ability to acquire it. “[T]he power to exclude that our legal structure of property gives us is the starting point of all contracting, all negotiation over use of, access to, and exchange of property and labor.”⁶⁵ The constitutional protection for property can be perceived as protecting individual autonomy by erecting walls around rights beyond which the government or other individuals may not intrude. But where one lacks a sphere of one’s own, and is entirely dependent upon the charity of others, one cannot be said to be autonomous. Like liberty, property facilitates democratic self-governance both directly and indirectly. It does so directly by dispersing power,

59. See generally THOMAS HOBBES, *LEVIATHAN* (Oakeshott ed. 1946). Hobbes ascribed the origins of society to the need to secure possessions against a superior might. He assigns to the sovereign power “the whole power of prescribing the rules, whereby every man may know, what goods he may enjoy and what actions he may do, without being molested by any of his fellow subjects; and that is it [sic] men call ‘propriety’ These Rules of propriety, or *meum* and *tuum*, and of ‘good’, ‘evill,’ ‘lawful,’ and ‘unlawfull’ in the actions of subjects, are the Civil Lawee . . .” Ch. 18 at 113.

60. See Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8, 12-14 (1927) (discussing how property gives power and sovereignty over oneself and others); William H. Taft, *The Right of Private Property*, 3 MICH. L.J. 215, 218-19 (1894) (asserting that protection of property was necessary to encourage man toward gainful activity).

61. In early feudalism, because the whole political regime was premised upon land ownership and the attendant duties that flowed, tight controls over uses and alienation were needed. J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 193-96 (2005). As those controls gradually loosened and property became regarded as a commodity, then rules aimed at protecting the market value of land became more prominent. S.E. Thorne, *Tudor Social Transformation and Legal Change*, in *ESSAYS IN ENGLISH LEGAL HISTORY* 197, 200-01 (1985).

62. JOHN NORTON POMEROY, *A TREATISE ON THE SPECIFIC PERFORMANCE OF CONTRACTS* § 9 (1879).

63. Nedelsky, *supra* note 40, at 165.

64. Cohen, *supra* note 60, at 12.

65. Nedelsky, *supra* note 40, at 180, citing Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 472-73 (1923).

thereby creating a means of enforcing accountability,⁶⁶ and indirectly by facilitating the exercise of other liberties.⁶⁷

A. *Rights in the Interstices*

As stated in the beginning, while ownership and housing are often used synonymously, ownership is not necessary for housing. This means a right to housing could exist without disturbance of traditional understandings of ownership. A right to housing would have a different source and different contours. Its recognition would fit within the general evolution of the recognition of rights based upon the importance of the interest sought to be protected.

In the eighteenth century, four freedoms animated dialogue on political and economic theory:⁶⁸ *laissez-passer*, urged by the export-oriented farmers for international free trade; *laissez-faire*, pushed by commercial interests seeking freedom from governmental interference with the market mechanisms; *laissez-travailler*, pressed by the manufacturers and mechanics for occupational freedom; and *laissez-placer*, demanded by the financial and monied group for freedom in order to buy and sell rights to property.⁶⁹ But these very narrow freedoms seemed to ignore the needs of the great body of citizens who were not capitalists. They reflected the narrow conception of the public interest as defined by economic freedom—that individual self-interest, unfettered, would lead to the ideal society.⁷⁰

In 1941, President Roosevelt offered a new conception of freedom in his Four Freedoms speech.⁷¹ He spoke of the freedom of speech and expression; the freedom to worship God in one's own way; the freedom from want; and the freedom from fear.⁷² President Roosevelt's conception of rights was quite divergent from that which inspired the Declaration of Independence in 1776 and the French Declaration of the Rights of Man and of the Citizen, adopted in 1789.⁷³ The latter were grounded in notions of natural law, principally that man

66. See Rose, *supra* note 54, at 340-45; see also MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 9 (1962).

67. ROSCOE POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 107-08 (1953); Cohen, *supra* note 60, at 14.

68. E.A. J. Johnson, *Federalism, Pluralism, and Public Policy*, 22 J. ECON. HIST. 427, 436 (1962).

69. *Id.*

70. *Id.* at 437, 444.

71. Franklin D. Roosevelt, Address to Congress (1941), in 87 CONG. REC. 36.

72. *Id.* The Roosevelt Administration thus embarked upon perhaps the greatest government social welfare programs in United States history, the New Deal. By 1942, the total government spending as a share of the economy had risen to fifty-two percent and peaked at nearly seventy percent in 1944, when unemployment finally fell to one percent. Steve Lohr, *Something to Fear, After All*, N.Y. TIMES, Jan. 27, 2009, at B1. Among the prominent programs was the Federal Housing Administration (FHA). The FHA was created by the National Housing Act of 1934, 12 U.S.C. § 1701 (2006) (original version at ch. 847, 48 Stat. 1246 (1934)).

73. DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN (Great Neck Publishing 2009) (1789). The Declaration purported to declare "natural, imprescriptible, and inalienable rights", which should be

was endowed with certain fixed and unalterable rights and reason.⁷⁴ They were expressed by Locke as the right to life, liberty, and property and later the pursuit of happiness.⁷⁵ These rights largely aimed to serve as a bulwark for the individual against governmental power that might impact one's physical existence. But, beginning in the nineteenth century, ideas emerged that questioned the belief that the specification of rights was fixed and invariable.⁷⁶ Largely as a consequence of the changing roles and levels of participation in civil society, the theory of natural rights gave way to "civil liberties."⁷⁷ New freedoms emerged that embraced both economic and social interests. They included the freedoms to "social security, to work, to rest and leisure, to education, to an adequate standard of living, [and] to participation in cultural life."⁷⁸ Roosevelt's freedoms from want and fear were necessary "to liberate [man] from restrictions and inhibitions which hinder his full development as a human being," and this required that social and political institutions undertake to ensure that no barriers—either man-made or natural—stood in the way of the enjoyment of new freedoms.⁷⁹

Beginning in the twentieth century, at least up to a point, the Court was disposed to moving beyond the literal specification of rights in the Constitution and the Bill of Rights, toward a recognition of other rights fundamental to a free and ordered society. Nonetheless, in locating these other fundamental rights, the first resort for the Court has been the literal text of the Constitution and the Bill of Rights: right to freedom of expression and religion; right to property; right to freedom from extreme punishment; right to vote; and right to speedy trial by a jury of peers. Then, the Court has looked to the interstices, the penumbra, to find other protections and guarantees.⁸⁰

Justice Scalia described what he meant about the "mysterious" process of determining if a right is fundamental in *Gonzalez*.⁸¹ He stated:

respected by the government. The Declaration states, *inter alia* that "I. Men are born, and always continue, free and equal in respect of their rights. Civil distinctions, therefore, can only be founded on public utility; II. The end of all political associations is the preservation of the natural and imprescribable rights of man; and these rights are Liberty, Property, Security, and Resistance of Oppression . . . IV. Political Liberty consists in the power of doing whatever does not injure another. The exercise of the natural rights of every man, has no other limits than those which are necessary to secure to every *other* man the free exercise of the same rights; and these limits are determinable only by the law."

74. LOCKE, *supra* note 31, at paras. 5-6.

75. *Id.* at paras. 4, 6, 11, 23, 27, 45-50, 34-37, 123-24, 131, 168.

76. Friedrich, *supra* note 30, at 842.

77. Friedrich meant the range of activities of citizens, such as participating in democratic decision-making, to practice one's religion freely, to academic freedom, the freedom to teach and to learn. *Id.*

78. *Id.* at 843.

79. *Id.*

80. See discussion of *Griswold v. Connecticut* and *Shapiro*, *infra* notes 101 to 109 and accompanying text.

81. *Gonzalez v. United States*, 553 U.S. 242, 256 (2008).

One would think that any right guaranteed by the Constitution would be fundamental. But I doubt many think that the Sixth Amendment right to confront witnesses cannot be waived by counsel.⁸² Perhaps, then, specification in the Constitution is a necessary, but not sufficient, condition for 'fundamental' status. But if something more is necessary, I cannot imagine what it might be. Apart from constitutional guarantee, I know of no objective criterion for ranking rights . . . The essence of 'fundamental' rights continues to elude.⁸³

The mysteriousness of this endeavor became quite evident in the Supreme Court's opinion in *District of Columbia v. Heller*.⁸⁴ There, the majority found a fundamental right in individuals to bear arms under the Second Amendment, which provides that "[a] well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."⁸⁵ The reading of this text by the majority and minority of the court could not have been more disparate. The majority looked behind the literal text of the amendment, which on the surface surely guaranteed to a *free State* the right to keep a militia and proclaimed that that language protected an *individual* right to possess a firearm unconnected with service in a militia and to use that firearm for traditionally lawful purposes, such as self-defense within the home.⁸⁶ The Court concluded that the prefatory clause in the Amendment ("A well regulated militia being necessary . . .") announced a purpose but did not limit or expand the scope of the operative clause ("the right of the people to keep and bear Arms . . .").⁸⁷ The majority found that the operative clause's text and history demonstrated that it connoted an individual right to keep and bear arms, and this reading was consistent with the announced purpose of the prefatory clause.⁸⁸

In the dissent's view, this was a strained, if not dishonest, reading of the Second Amendment.⁸⁹ What is remarkable is that both the majority and the dissent approached the resolution of the question in the same fashion, beginning

82. *Id.* (citing *Diaz v. United States*, 223 U.S. 442, 444, 452-53 (1912)).

83. *Id.* at 256-57. The Court concluded that the right to have an Article III judge oversee *voir dire* is not a fundamental right, without answering whether it is even a constitutional right and without explaining what makes a right fundamental in the first place. Justice Scalia pointed out that the Court has avoided addressing whether the right has a basis in the Constitution. *Id.* This mysterious process is further revealed, so to speak, in the subsequent thoughts on the issue by the Court. In *Gomez v. United States*, 490 U.S. 858 (1989), the Court interpreted the Federal Magistrate Act, 28 U.S.C. § 636(b)(3), not to permit a magistrate judge to oversee *voir dire*, making it unnecessary to consider whether there was a constitutional right to have an Article III judge oversee *voir dire*. In *Peretz v. United States*, 501 U.S. 923, 936-40 (1991), the Court held that judicial overseeing of the *voir dire* had been waived, which obviated having to decide whether it was a constitutional right. *See also* *United States v. Olano*, 507 U.S. 725, 732-33 (1993) (holding that waiver extinguishes the error of not complying with a legal rule).

84. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

85. U.S. CONST. amend. II; *Heller*, 554 U.S. at 648.

86. *Heller*, 554 U.S. at 632, 636.

87. *Id.* at 648.

88. *Id.* at 648-49.

89. *Id.* at 686.

with the text of the amendment and then examining contemporary evidence explaining its aims. In the dissent's reading, nothing in the text or the arguments advanced by proponents of the amendment "evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms."⁹⁰ Nothing suggested any intent by the Founders to incorporate a common law right of self-defense in the Constitution.⁹¹ It seems the majority sought to fill a gap, reaching a result that made sense in the present day, even if it was not an important thing at the founding of the republic. At the same time, the dissent seemed to see good reason for not protecting an individual's right to possess a firearm as a fundamental right. The point to be made here is that the specification of rights⁹² is ongoing and new rights will be identified if the court is convinced of their contemporary importance. It will then labor, convincingly or not, to ground that right, either in the literal text of the Constitution or in the interstices.

Implicit in Justice Scalia's opinion in *Gonzalez* is the idea that not all "rights" are considered fundamental, in the sense of deserving the greatest constitutional protection. Some rights are indisputably fundamental, for instance, property and bodily integrity,⁹³ but whether others will be regarded as such is determined on a more nuanced basis—the "mysterious" process. The Court has nonetheless articulated an overarching framework for making this determination, that is, those interests that bear some "resemblance to the fundamental interests that previously have been viewed as implicitly protected by the Constitution."⁹⁴ Some of the existing rights related to housing, particularly the right to be free from discriminatory barriers to access through purchase,⁹⁵ have been regarded as fundamental. This means that the governmental action interfering with these rights will be struck down, absent a compelling justification⁹⁶ that is narrowly tailored to express only legitimate state interests.⁹⁷ Other rights, such as the right to continuation of a public housing tenancy, have not been deemed fundamental and, as such, only require reasonable process before any deprivation.⁹⁸

90. *Id.* at 684.

91. *Id.*

92. The Court has never explicitly acknowledged any kind of hierarchy of fundamental rights. See Kenneth Argan, *When Government Must Pay: Compensating Rights and the Constitution*, 22 CONST. COMMENTARY 97, 115 (2005).

93. *Jacobson v. Massachusetts*, 197 U.S. 11, 26, 29-31, 37-39 (1905) (regarding a compulsory smallpox vaccination).

94. *Univ. of Mich. v. Ewing*, 474 U.S. 214, 229-30 (1985). See also discussion of rights *infra* notes 121-33 and accompanying text.

95. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 (1968) (refusal to sell on the basis of race); *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (restrictive covenants against sale on the basis of race). These cases are discussed at text accompanying notes 202-33.

96. *Moore v. City of Cleveland*, 431 U.S. 494, 499-500 (1977).

97. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969).

98. See *LRL Properties v. Portage Metro Hous. Auth.*, 55 F.3d 1097, 1110-11 (6th Cir. 1995) (rejecting claim that right to participate in federal housing program is fundamental property interest); *Greene v. Lindsey*, 456 U.S. 444, 451 (1982) ("In determining the constitutionality of a procedure established by the State to provide notice in a particular class of cases, 'its effect must be judged in the light of its

So too has the meaning of “liberty” proved to be an elastic, amorphous concept. The Supreme Court stated in *Bolling v. Sharpe*:⁹⁹

Although the Court has not assumed to define ‘liberty’ with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct, which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective.¹⁰⁰

The fulfillment of the right to liberty therefore has required the recognition of other rights not specifically set out in the text of the Constitution or the Bill of Rights, such as the right to privacy and to travel. These cases suggest opposed points: that the Founders were not as prescient as often thought, or that perhaps they were, by using terms that could be interpreted to apply to the realities of a world being shaped by reason and determined by human election. The Court has come to recognize that as the range of human activities and concerns have grown, so must the concept of liberty grow. One of the most significant cases embracing this view was *Griswold v. Connecticut*.¹⁰¹ There, the Court discerned a private sphere around individuals beyond which governments were not free to venture.

The Court was asked to decide the constitutionality of a law that criminalized the use of contraceptive devices and the aiding, abetting, and counseling toward that end. The challenge was made by a physician who had provided such advice to a married couple. Admitting that no specific provision of the Constitution protects the right of a married couple to make such intimate choices about procreation, the Court nevertheless found that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance,”¹⁰² and that various guarantees created zones of privacy.¹⁰³ The right to privacy here was extracted from several fundamental constitutional guarantees (the Fourth Amendment protection against unreasonable searches and seizures; the Fifth Amendment right against self-incrimination;

practical application to the affairs of men as they are ordinarily conducted.”); see also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 98-99 (1973) (Marshall, J. dissenting) (urging a “reasoned approach” to equal protection analysis in which “concentration is placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits they do not receive, and the asserted state interests in support of the classification”).

99. 347 U.S. 497 (1954).

100. In that case, segregation in public education was found to be not reasonably related to any proper governmental objective, and thus it imposed “on Negro children of the District of Columbia a burden that constitute[d] an arbitrary deprivation of their liberty in violation of the Due Process Clause.” *Id.* at 499-500; see also *Gautreaux v. Romney*, 448 F.2d 731, 732-33 (7th Cir. 1971) (holding HUD liable for violating the Due Process Clause of the Constitution by knowingly funding the Chicago Housing Authority as it engaged in deliberately discriminatory practices in the location and population of public housing projects).

101. 381 U.S. 479 (1965).

102. *Id.* at 484.

103. *Id.*

the First Amendment right of association; the Third Amendment right against quartering of soldiers in homes during peace time).¹⁰⁴ These amendments reflected the recognition of a point beyond which government was precluded.¹⁰⁵ Surely, we would not “allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?”¹⁰⁶

In his concurring opinion, Justice Goldberg pointed out that the Court had never held that the Bill of Rights or the Fourteenth Amendment protected only those rights that the Constitution specifically mentioned by name.¹⁰⁷ Instead, the Court stated many years earlier that the Due Process Clause protected “those liberties that are so rooted in the traditions and conscience of our people as to be ranked as fundamental.”¹⁰⁸ Moreover:

To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.¹⁰⁹

“Privacy” then is a fundamental right, as an essential predicate to liberty.

Shortly after *Griswold*, the Court identified another, fundamental right not specified in the text of the Bill of Rights. In *United States v. Guest*,¹¹⁰ the Supreme Court declared:

[The] constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal union. It is a right that has been firmly established and repeatedly recognized [although] . . . [the] right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.¹¹¹

In *Shapiro v. Thompson*,¹¹² the Court embraced the *Guest*’s conception of the right to travel when it found that state residency requirements adopted as a condition of eligibility for welfare benefits improperly impinged upon the

104. *Id.*

105. *Id.* at 485.

106. *Id.*

107. *Id.* at 487.

108. *Id.* at 487.

109. *Id.* at 491. The Ninth Amendment “specifically states that ‘[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.’” *Id.*

110. 383 U.S. 745 (1966).

111. *Id.* at 757-58.

112. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

applicants' right to travel.¹¹³ In subjecting to strict judicial scrutiny a state welfare eligibility statute, the Court explained: "in moving from State to State . . . appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional"¹¹⁴ and the right to interstate travel had long been recognized as a right of constitutional significance.¹¹⁵ The Court's decision, therefore, did not require an *ad hoc* determination as to the social or economic importance of that right.¹¹⁶ The practical effect of this ruling was that the states were required to provide for the needs of these new residents, including housing, food, and medical care.¹¹⁷

Before *Guest* and *Shapiro*, the Court had sought to identify the precise source of a right to travel. Four sources had been considered: the Commerce Clause; the Privileges and Immunities Clause of Article IV; the Privileges and Immunities Clause of the Fourteenth Amendment; and the Due Process Clause of the Fifth Amendment. Three of these sources had been dismissed for varying reasons.¹¹⁸ In the end, the Due Process Clause of the Fifth Amendment is perhaps the most sound basis of the right to travel—as an element of the "'liberty' of which the citizen cannot be deprived without due process of law . . . Freedom of movement across frontiers . . . and inside frontiers as well, was a part of our heritage."¹¹⁹ The freedom to travel was viewed as being closely related to rights of free speech and association.¹²⁰

B. Rights Become Positive

As stated earlier, beginning in the nineteenth century, the prevailing thought became that larger societal concerns might prevail over individual rights in some cases and that in others, new rights should be recognized.¹²¹ These new rights

113. *Id.* at 631.

114. *Id.* at 634.

115. *Id.* at 642.

116. *Id.*

117. *Id.* at 631-32; *see also* *Saenz v. Cal. Dep't Soc. Servs.*, 526 U.S. 489, 506 (1999) (holding that a state may not create classes of welfare recipients based upon length of residence in the state).

118. The Commerce Clause was dismissed because under it, if Congress enacts laws, those laws are upheld. *See Edwards v. California*, 314 U.S. 160 (1941); *The Passenger Cases*, 48 U.S. 283 (1849). The Privileges and Immunities Clause of Article IV was dismissed by the Court because this clause neither limits federal power nor prevents a state from distinguishing among its own citizens, but simply "prevents a state from discriminating against citizens of other states in favor of its own." *See Hague v. CIO*, 307 U.S. 496, 511 (1939). The Privileges and Immunities Clause of the Fourteenth Amendment has been interpreted to extend only to those "privileges and immunities" which "arise or grow out of the relationship of United States citizens to the national government." *The Slaughter-House Cases*, 16 Wall. 36, 77 (1873).

119. *Shapiro v. Thompson*, 394 U.S. 618, 670 (1969).

120. *Id.* at 670.

121. Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733, 786-87 (1964) (describing rights in job retention, state-issued licenses, and permits, as well as continued receipt of public benefits).

could be different in their aim and contours than natural rights and might transcend their individual character.¹²² When we speak of a “right,” we usually mean the expectation or freedom to engage or indulge in a specific act or endeavor, and to insist upon the state’s protection of this freedom against infringement.¹²³ It may be negative, in the sense of imposing constraints upon government.¹²⁴ Or, it may be positive, in the sense that there exists an affirmative obligation on the part of government to impart or confer the benefit or to facilitate some act.¹²⁵ While most rights recognized in our political order are conceived as negative (no deprivation of property or liberty; no infringement of the right to engage in speech), and in the case of rights in property, it is clear from the text of our Constitution that its aim was not the spreading or assuring that every person own a plot of land on which to live and work. Instead, it aimed to enable the retention or preservation of that land. Yet there are some other positive rights bestowed in the Constitution, such as citizenship and the right to trial by jury of one’s peers. Full realization of these rights requires affirmative intervention or assistance from the government. In *Gideon v. Wainwright*,¹²⁶ the Court found that the state had an obligation to ensure the assistance of counsel in a felony prosecution as a safeguard of the Sixth Amendment.¹²⁷ The Court explained that “[the assistance of counsel] was . . . necessary to insure fundamental human rights of life and liberty The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not ‘still be done.’”¹²⁸ Indeed, it seemed an obvious truth, supported by reason and reflection, that “any person hauled into court, who is too poor to hire a lawyer,

122. Value rather than things becomes predominant; property becomes “dephysicalized,” greatly broadening its purview. As pressure mounted to find some way of containing the expansion of property, the view arose to concede that while any valuable interest could be property, it would not necessarily be considered property merely because it was valuable. Instead, a court would consider such interest to be property only if public policy so demanded. Kenneth J. Vandeveld, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 28 BUFF. L. REV. 325, 328-30, 357-64 (1980).

123. See generally H.L.A. HART, *THE CONCEPT OF LAW* 269 (1994).

124. As stated earlier, if the right is a fundamental one, any law apparently impinging on it, is evaluated by a very rigorous standard of review—“strict scrutiny.” “Strict scrutiny,” like any legal test, although subject to the vagaries of imprecision and fluidity, may mean different things in different contexts, but it at least puts the burden on the government to demonstrate a compelling interest to justify any infringement. Shapiro, 394 U.S. at 634 (1969).

125. Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 Wash. L. Q. 659, 681. Professor Michelman writes that positive rights “pose problems largely because the reciprocity and boundedness of duties seem gravely threatened by the idea of being duty-bound to contribute actively to the satisfaction of other people’s interest or needs.” He points out that “[n]eeds are neither equal, nor reciprocal, nor quite finite [T]he resource requirements for satisfying them may be virtually limitless.” Moreover, he observes, the state’s function regarding rights is that of a vindicator; a facilitator of satisfaction of other interests and needs, not a bearer of duties.

126. 372 U.S. 335 (1963).

127. *Id.* at 343.

128. *Id.*

cannot be assured a fair trial unless counsel is provided for him.”¹²⁹ The Court pointed to the essential role of lawyers in the prosecution of crimes:

From the country’s very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. A defendant’s need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in *Powell v. Alabama*: ‘the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law.’¹³⁰

Eight years ago, in *Tennessee v. Lane*,¹³¹ the Court considered the issue of physical access to court as a fundamental right. There, the Court explained that the duty to accommodate the handicapped was entirely consistent with well-established due process principles that “‘within the limits of practicability, a state must afford to all individuals a meaningful opportunity to be heard’ in the courts”¹³² and “ordinary considerations of cost and convenience alone cannot justify a State’s failure to provide individuals with a meaningful right of access to the courts.”¹³³

C. Education is Important, But Falls Short of Fundamental

On other occasions, the Court has recognized the importance of an interest toward fulfillment of other rights, but has declined to name that interest as a fundamental right—the right to education being most prominent. John Adams stated: “liberty cannot be preserved without a general knowledge among the people, who have a right, from the frame of their nature, to knowledge[, which is] an inherent and essential right, a right that was established even before parliament existed.”¹³⁴ While his sentiments might have had a sensible appeal, the Founders were unwilling to go so far as to impose a duty upon the government to ensure that that end be achieved. And, the Supreme Court has since been not willing or able to find such a right existing in the penumbra. In *San*

129. *Id.* at 344.

130. *Id.* at 344-45 (citing *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)).

131. 541 U.S. 509 (2004).

132. *Id.* at 532. The Court identified a number of other “affirmative obligations that flow from this principle: the duty to waive filing fees in certain family law and criminal cases, the duty to provide transcripts to criminal defendants seeking review of their convictions, and the duty to provide counsel to certain criminal defendants.” *Id.* at 532-33.

133. *Id.* at 533.

134. PAGE SMITH, JOHN ADAMS 79 (1962).

Antonio Independent School District v. Rodriguez,¹³⁵ the plaintiffs asserted that the State's system of funding schools impermissibly interfered with the exercise of a "fundamental" right and that accordingly the system must be tested under a strict standard of judicial review. The Court's recognition of the importance of education was clear. In *Brown v. Board of Education*,¹³⁶ a unanimous Court recognized that "education is perhaps the most important function of state and local governments."¹³⁷ The Court stated:

What was said there in the context of racial discrimination has lost none of its vitality with the passage of time: 'Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right that must be made available to all on equal terms.'¹³⁸

Although "the grave significance of education both to the individual and to our society" was beyond question,¹³⁹ the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause. The Court recalled Justice Harlan's dissent in *Shapiro*, which admonished that "[v]irtually every state statute affects important rights."¹⁴⁰ In his view, if the degree of judicial scrutiny of state legislation fluctuated depending on a majority's view of the importance of the interest affected, we would have gone "far toward making this Court a 'super-legislature.'"¹⁴¹ We would, indeed, then be assuming a legislative role and one for which the Court lacks both authority and competence. The Court believed that Justice Stewart's response in *Shapiro* to Justice Harlan's concern correctly articulated the limits of the fundamental rights rationale employed in the Court's equal protection decisions. Justice Stewart pronounced:

The Court today does not 'pick out particular human activities, characterize them as 'fundamental,' and give them added protection.' To the contrary, the

135. 411 U.S. 1 (1973).

136. 347 U.S. 483 (1954).

137. *Id.* at 493.

138. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29-30 (1973) (quoting *Brown v. Board of Ed.*, 347 U.S. 483, 493 (1954)).

139. *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280, 283 (W.D. Tex. 1971).

140. *Shapiro v. Thompson*, 394 U.S. 618, 655, 661 (1969).

141. *Id.*

Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands.¹⁴²

But, “picking” is precisely what the Court has done where it has recognized a right not expressed in the Constitution.

While in *San Antonio* the Court did not foreclose the possibility of “some identifiable quantum of education as a constitutionally protected prerequisite to the meaningful exercise of either [the right to speak or the right to vote],”¹⁴³ in the absence of some radical denial of educational opportunity, the issue was not decided. Since then, the Court has pointed out that the question of whether some minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review has not yet been definitively settled.¹⁴⁴

D. Interest in Housing As Distinct from Ownership

On the question whether liberty embraces a right to housing, some might believe that the Court answered “no” in *Lindsey v. Normet*.¹⁴⁵ There, tenants were sued by their landlord for possession because they had not paid their rent. They had deliberately withheld payment because the landlord had failed to keep the premises habitable.¹⁴⁶ Under Oregon law, a landlord had a duty to deliver and keep premises fit for human habitation for the duration of the lease term.¹⁴⁷ While this duty was a departure from the common law no-repair rule, Oregon still embraced the concept of dependence of covenants, which meant that the tenant’s right to habitable housing was enforceable as an action for damages.¹⁴⁸ Otherwise, the forcible entry and detainer statute guaranteed the landlord a speedy remedy for the recovery of possession through court action, rather than self-help in the event of a tenant’s breach.¹⁴⁹

The complainants challenged the procedural limitations imposed on tenants in suits brought by landlords under the state’s forcible entry and detainer law, and urged the Court to examine the operation of the statute under “a more stringent standard than mere rationality.”¹⁵⁰ Under the law, the only defense to an action for possession based upon non-payment of rent was payment. Furthermore, a counterclaim for damages or a set-off based upon the landlord’s violation of the

142. *Id.* at 642.

143. *Rodriguez*, 411 U.S. at 35.

144. *See Papasan v. Allain*, 478 U.S. 265, 285-86 (1986) (finding that the case did not require resolution of the issues and applying a rational basis test).

145. 405 U.S. 56 (1972).

146. *Id.* at 58-59.

147. *Id.*

148. *Id.* at 63.

149. *Id.* at 71.

150. *Id.* at 73.

warranty of habitability was not permitted. The tenants argued that the statutory limitations implicated “fundamental interests which are particularly important to the poor,” such as the “need for decent shelter” and the “right to retain peaceful possession of one’s home.”¹⁵¹ In refusing to find a fundamental constitutional right, Justice White stated:

We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease, without the payment of rent . . . Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.¹⁵²

The framing of the various interests sought to be protected can be seen as perhaps determinative. The majority saw the case as involving the rights of a landlord, as a fee owner, but did not embrace the tenant’s interest in preserving their possession, which under prevailing conceptions, was a property interest. Justice Douglas, in dissent, perceived the interests to be much larger:

[W]here the right is so fundamental as the tenant’s claim to his home, the requirements of due process should be more embracing. In the setting of modern urban life, the home, even though it be in the slums, is where a man’s roots are. To put him into the street when the slum landlord, not the slum tenant, is the real culprit deprives the tenant of a fundamental right without any real opportunity to defend.¹⁵³

Thinking deeply about the reasoning for recognizing penumbral rights—to privacy, to travel, to court-appointed counsel, to physical access to courts—that is, as necessary in the fulfillment of the liberty interest, then it is difficult to understand why the Court stopped short in *San Antonio* and *Lindsey*. While the connection between privacy and travel with liberty seems large and direct, a more substantial ingredient for liberty than shelter is hard to imagine. Participating in elections, borrowing books from the public library, enrolling one’s children in the local kindergarten—all of these rest upon having a home. The interest in stability (for work, family, and educational opportunities) all require a home. The interest in avoiding spending inordinate time trying to secure housing as opposed to time developing broader capacities for personal and societal enrichment is great. The right to privacy and hence liberty—for engaging in intimate relations; teaching

151. *Id.*

152. *Id.* at 74.

153. *Id.* at 90.

and interacting with children; finding solace—cannot be realized without a sphere of one's own.

What may explain, though not justify, the Court's reluctance to find rights in education and housing was the Court's doubting its ability to define such rights.¹⁵⁴ What is an adequate education? How much should a state spend on education? What quantity or quality of shelter is required? How long can a tenancy last? But, this conundrum might have been avoided by not trying to root the right to housing in ownership. In *Poe v. Ullman*,¹⁵⁵ Justice Harlan spoke about the importance of housing that:

Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right.¹⁵⁶

While the monetary and structural cost of affording this right cannot be denied, these were not determinative of a right in either *Gideon* or *Shapiro*. In any case, these concerns would not be insurmountable. There is a wealth of expert knowledge and practice in designing and funding safe, decent, and affordable housing.¹⁵⁷

In comparing those freedoms and rights currently identified by the Court and the Constitution with those not yet identified, we see many overlapping aspects. The former (to vote, free exercise of religion, privacy) aim to enable a human being to become a rounded self, a fully developed person, to be able to believe what he does believe, to participate in choosing his government, to be active in the sphere in which he could produce and create anew. The deprivation of any of these is readily recognized as de-humanizing, crippling, preventing one person from being a person in the full sense. The former rights are “self-preserving,

154. In *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. at 36, the Court explained that even if it were “conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right,” it had no indication that the present levels of educational expenditures in Texas fell short. This was not the case of an absolute denial of educational opportunities to any of its children, but one alleging only relative differences in spending levels and there was no charge that the system failed to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process. The Court could not perceive the appellees’ nexus theory that it would be difficult to distinguish interests in education from the significant personal interests in the basics of decent food and shelter. *Id.* at 36-37. The Court thought that there were certain decisions best left to local authorities—those involving judgments about raising and spending public revenues. Even if the Court were to invalidate the present scheme, nothing had been offered to replace it. *Id.*

155. 367 U.S. 497, 551-52 (Harlan, J., dissenting).

156. *Id.*

157. See generally DAVIDSON & MALLOY, *supra* note 13; see also a discussion of the federal housing programs *infra* notes 176-99 and accompanying text.

self-asserting, self-developing.”¹⁵⁸ The latter (including education and the right to housing) fit easily within these notions. Surely, they reflect the same characteristics. The adjectives defining both classes echo human rights principles. But, all rights are political rights in the sense that they depend upon the political order for their maintenance and enforcement and in the sense of depending upon the values and beliefs of the political community.¹⁵⁹

E. The Many Permutations of Rights

So far, I have sought to show that rights derive from many sources and exist in many guises. Some rights are inherent in the nature of human existence, while others are constitutional, textual, penumbral, statutory, fundamental, affirmative, or even negative. An intricate matrix can be established. The level of protection and deference afforded by the law to rights holders varies depending upon where a “right” fits within that matrix. To be sure, no right is regarded as absolute, allowing no abridgement or incursion, but the burdens upon one who would intrude is amplified based upon where the right is grounded and how deeply held it is. Incursions into fundamental rights are subjected to strict scrutiny. This means it must be justified by a compelling governmental interest and be narrowly tailored toward that end. Other rights can be curtailed upon a showing that the government’s action has a rational basis.¹⁶⁰ Between these two extremes lie many permutations of analysis. I am arguing here that available and affordable housing be regarded as a right and that a heightened level of scrutiny be required in the case of governmental actions that impact availability and affordability.

1. The Rootedness of Housing in Our Traditions

The step in this mysterious process of identifying a fundamental interest in housing might be easier if we considered the importance of housing as distinct from property through history. That character can be gleaned from an examination of our traditions.¹⁶¹

From ancient times, housing was of central importance to society and hence government. Aristotle defined “polis” as an association of households and the head of a household was a proprietor whose business it was to manage the household’s property (including slaves) for the benefit of its members. The household was in the sphere of economics, or household management, and was quite distinct from politics, which concerned deciding what was best for the city.¹⁶² Thus, for Aristotle, the elemental community of which the polis is

158. Friedrich, *supra* note 30, at 845.

159. *Id.* at 846.

160. *Euclid v. Ambler*, 272 U.S. 365, 388 (1926).

161. *Griswold v. Connecticut*, 381 U.S. 479, 487.

162. ARISTOTLE, *OECONOMICA* I:2 (E.S. Forster ed., 1920).

comprised is the household and the house.¹⁶³ His thought was that the house should be arranged both with a view to one's possessions and for the health and well-being of its inhabitants.¹⁶⁴ "A house was one of a triad of interrelated elements: house, household and organic urban community. The house sheltered the members of the household and afforded them access to a good and healthy life. The household itself was relatively self-sufficient, as a rule. The head of the household was united with other household heads in that network of reciprocity which undergirded the state or urban community."¹⁶⁵ To Aristotle:

[A] house was not a solitary, autonomous, self-subsisting unit, even when occupied by a household, but rather a locus in many partially overlapping environments or complexes: . . . a locus: in the spatial economy of the household; in a social environment; in a physical environment that varies in salubrity and conduciveness to health.¹⁶⁶

In pre-capitalist times, land ownership was mainly "functional" since "it afforded a workman a place to practice his trade and shelter his family, apprentices, and journeyman."¹⁶⁷ The practice of trade was regulated by guilds, which provided the city's physical and philosophical orientation. Guild members provided needed goods and services, but did not aim to amass wealth beyond that needed for comfortable life.¹⁶⁸ In England, the module on which landowning depended was that of "burgage," which was an urban plot that contained a house, yard, and garth. While they could be extended backward from the street, sometimes encroaching upon the ostensibly public lands, it was clear that burgages existed to provide for the land needs of wealthy city men, not to enhance their personal wealth.¹⁶⁹

During the Revolutionary War era, at least half of all household heads were not landowners, but renters and very poor. Most leases were very long term and inherited by sons or other relatives and thereby held by one family for several generations.¹⁷⁰ The provision of housing in the early eighteenth century in

163. *Id.*

164. *Id.* at I:6.

165. Joseph J. Spengler, *Population Pressure, Housing, and Habitat*, 32 *LAW & CONTEMP. PROBS.* 191, 192 (1967).

166. *Id.* at 193.

167. James E. Vance, Jr., *Land Assignment in the PreCapitalist, Capitalist, and Post Capitalist City*, 47 *ECON. GEOGRAPHY* 101 (1971).

168. *Id.* at 105.

169. *Id.* at 102. The prevailing conception was that landowners used rather than possessed the land, which meant that the landowner's "valuation of it was a functional rather than a capitalized one. In such context, locations were not relative but absolute; to exist within a guild area was necessary for the proper practice of a trade and for the receipt of the social beneficence of that organization. In a true sense the value of land in the Middle Ages was the value of social association, and the assignment of sites was accomplished within a matrix of social rather than economic decisions." *Id.* at 103.

170. GREGORY A. STIVERSON, *POVERTY IN A LAND OF PLenty: TENANCY IN EIGHTEENTH-CENTURY MARYLAND* 40 (1977). But, consider that William Penn had been granted 45,000 square miles of land to

industrial cities was largely undertaken by industrialists. In order to ensure a labor supply for the newly launched factories, it was necessary to construct housing conveniently located near the factories.¹⁷¹ While the quality and spaciousness of housing made available varied depending upon the hierarchy within the workforce, it was of solid construction and not devoid of all aesthetic features.¹⁷² As the industrial paternalism that urged the provision of housing waned, laborers were left to their own means. Society's embrace of capitalism changed the prevailing attitudes about landholding. There was separation of employment from the furnishing of housing; and one's rent-paying ability became the determinant of the quality and location of housing.¹⁷³ Class and status were also defined by where one lived.¹⁷⁴ Housing became a symbol of status and a rent-providing commodity.¹⁷⁵ Now, in the post-capitalist world, the availability of decent housing depends in large measure upon economic status.

Our traditions demonstrate a long-standing governmental commitment to providing housing to the poor. The federal government has subsidized both the demand and supply sides of the market for housing.¹⁷⁶ It entered the supply side, owning and operating rental housing for the poor, during the Great Depression¹⁷⁷ under the Housing Act of 1937.¹⁷⁸ In his second inaugural address, President Roosevelt impressed upon the nation that one-third of its citizens was "ill-

dole out as he saw fit and to his personal advantage. See Sharon V. Salinger, *Spaces, Inside and Outside, in Eighteenth-Century Philadelphia*, 26 J. INTERDISC. HIST. 1, 10 (1995).

171. John Coolidge, *Low-Cost Housing: The New England Tradition*, 14 NEW ENG. Q. 6 (1941).

172. *Id.* at 15. The female laborers were often housed six to eight girls per room, two to a bed. *Id.* However, the day laborers were not included in industrialists' plans and were largely relegated to "miserable hovels," clustered about some useless piece of property. But, these laborers represented only some 5 percent of the population. *Id.* at 17.

173. Vance, *supra* note 167, at 113.

174. *Id.* at 113.

175. See generally SUNG BOK KIM, LANDLORD AND TENANT IN COLONIAL NEW YORK: MANORIAL SOCIETY 1664-1775, at 129, 142, 234 (1978) (describing how by the mid-1700s, New York contained as many as thirty great estates, a state of affairs very close to feudalism and not without periodic violence where tenants rose up, but rents were reasonable and tenant obligations were not strictly enforced).

176. See generally Shelby D. Green, *The Public Housing Tenancy: Variations on the Common Law That Give Security of Tenure and Control*, 43 CATH. U. L. REV. 681 (1994) (discussing the history of public housing programs); Cara Hendrickson, *Racial Desegregation and Income Deconcentration in Public Housing*, 9 GEO. J. ON POVERTY L. & POL'Y 35 (2002) (discussing the government policies that resulted in the concentration of tenants in public housing by race and income).

177. Under legislation enacted as part of the New Deal, the Public Works Administration built close to 21,000 public housing units between 1933 and 1937. ELIZABETH WOOD, THE BEAUTIFUL BEGINNINGS, THE FAILURE TO LEARN: 50 YEARS OF PUBLIC HOUSING IN AMERICA 2-7 (1982); see also K.C. Parsons, *Clarence Stein and the Greenbelt Towns*, 56 J. AM. PLAN. ASS'N 161, 161 (1990).

178. 42 U.S.C. § 1437 (2006). See generally Fred Fuchs, *Introduction to HUD Conventional Public Housing, Section 8 Existing Housing, Voucher, and Subsidized Housing Programs, Part I*, 25 CLEARINGHOUSE REV. 782 (1991); Green, *supra* note 176; Michael H. Schill, *Distressed Public Housing: Where Do We Go From Here?*, 60 U. CHI. L. REV. 497 (1993); Michael H. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 CORNELL L. REV. 878 (1990); REPORT OF THE NATIONAL HOUSING TASK FORCE, A DECENT PLACE TO LIVE (1988), reprinted in Senate Hearings 689, 100th Cong., 2d. Sess. 133, 172-75 (1988).

housed,”¹⁷⁹ much of this the result of the Great Depression when hundreds of thousands of homeowners lost their homes to foreclosure and private construction almost came to a standstill.¹⁸⁰ Those who lost their homes had to move to slum tenements because decent and affordable housing was unavailable.¹⁸¹

Long before the Depression, the need to address the unsanitary housing conditions (including overcrowding, inadequate waste disposal and flimsy construction) confronting the poor was pushed by social reformers who asserted that such conditions were breeding grounds for disease and social dysfunction. Some cities responded at first by enacting tenement laws and then building codes to regulate construction quality and utilities.¹⁸² While housing codes, which mandated minimum standards for the health and safety for all private dwellings, became almost universal due in part to federal encouragement offered by the Housing Act of 1954,¹⁸³ they were not designed to guarantee a decent home as envisioned by Congress under the Housing Act of 1937.¹⁸⁴ Indeed, as recently as 2007, the New Jersey Supreme Court found that a substantial number of existing housing structures fell below minimum standards for habitation.¹⁸⁵

Despite great opposition from the private real estate industry, the federal government programs continued to provide construction work during the Depression.¹⁸⁶ In 1949, Congress reaffirmed its commitment to providing

179. President Franklin D. Roosevelt, Second Inaugural Address of Franklin D. Roosevelt (Jan. 20, 1937), available at http://avalon.law.yale.edu/20th_century/froos2.asp. Roosevelt went on to note that “the test of our progress is not whether we add more to the abundance of those who have too much, it is whether we provide enough for those who have too little.” *Id.*; see also Alfred M. Clark, III, *Can America Afford to Abandon a National Housing Policy?*, 6 J. AFFORDABLE HOUSING & CMTY. DEV. L. 185, 185 (1997). At first, the Public Works Administration purchased land and constructed public housing. In 1935, this project was struck down as beyond the eminent domain power of the federal government. *United States v. Certain Lands*, 78 F.2d 684 (6th Cir. 1935). Congress got around this limitation by providing funds to a federal agency which in turn provided loans, grants, and contributions to local public housing agencies to construct and manage public housing projects. See Alexander von Hoffman, *A Study in Contradictions: The Origins and Legacy of the Housing Act of 1949*, 11 HOUSING POL’Y DEBATE 299, 302 (2000).

180. Green, *supra* note 176, at 686.

181. Rachel G. Bratt, *Public Housing: The Controversy and Contribution*, in CRITICAL PERSPECTIVES ON HOUSING 335, 337-38 (Rachel G. Bratt et al. eds., 1986).

182. See RICHARD PLUNZ, *A HISTORY OF HOUSING IN NEW YORK CITY* 21-49 (1990). Plunz recounts that as early as 1856, the New York State Legislature established a formal commission to study the problem of unhealthy, substandard housing. *Id.* at 21. A decade later, a comprehensive building code was enacted followed in 1867 by the first Tenement Housing Act. *Id.* at 22. The Tenement Housing Act Laws 1901, ch. 334 § 112 (1901) was amended in 1879, 1901, and again in 1919. *Id.* at 27, 85, 123. See also Hendrickson, *supra* note 176.

183. See ROBERT ELLICKSON & VICKI BEEN, *LAND USE CONTROLS* 468-69 (2005); Hendrickson, *supra* note 176.

184. Green, *supra* note 176, at 687.

185. *In re Adoption of NJAC 5:94 & 5.95*, 914 A. 2d 348 (N.J. Super. Ct. App. Div. 2007).

186. See Dana Miller, *HOPE VI and Title VIII: How a Justifying Government Purpose Can Overcome the Disparate Impact Problem*, 47 ST. LOUIS U. L.J. 1277, 1279 (2003); Schill, *Where Do We Go From*

housing with the Housing Act of 1949, declaring a national policy of “a decent home and a suitable living environment for every American family”¹⁸⁷ That Act aimed not only to enable the construction of more than 800,000 new public housing units within six years of passage, but also to launch slum clearance and urban renewal efforts.¹⁸⁸ Those construction goals had to be curtailed when the country entered the Korean War in 1950. President Truman reduced the number of new units to 30,000 in order to avoid shortages of construction materials and to hold back inflation in the face of the War.¹⁸⁹ Despite the overt commitment to public housing, in the decades since the Korean War, Congress has been much less generous in appropriating funds.¹⁹⁰ This reluctance was in no small measure due to the reputations that public housing projects had obtained—for high crime and social desolation. In 1973, President Nixon declared a moratorium on all federal housing programs,¹⁹¹ during which, the Housing and Community Development Act of 1974 was passed,¹⁹² which aimed to shift some of the cost of housing to the tenants¹⁹³ and to emphasize demand-side subsidies. The most successful form of demand-side subsidy was the Section 8 program that provided direct subsidies to recipients to acquire housing in privately owned buildings.¹⁹⁴ These subsidies have almost eclipsed those for the construction of traditional public housing.¹⁹⁵

Here?, *supra* note 178, at 502; Schill, *Privatizing Federal Low Income Housing Assistance*, *supra* note 178, at 904 (pointing out that slum clearance was included in the Housing Act of 1937 in order to mollify the private real estate industry). Other measures aimed to quell the opposition of the private industry included requirements that public housing be modest “not be of elaborate or expensive design or materials, and that economy be promoted both in construction and administration.” Housing Act of 1937, ch. 896, 50 Stat. 888 (codified as amended at 42 U.S.C. § 1437). *See also* Hendrickson, *supra* note 176, at 37.

187. 42 U.S.C. § 1425(b) (1949) (repealed 1990).

188. von Hoffman, *supra* note 179, at 310. This number was thought to represent only ten percent of what was needed to meet the nation’s total housing needs. *Id.*

189. *Id.* at 311.

190. The number of units constructed under next three presidential administrations declined significantly: While President Truman sought to increase the allocation to 75,000 units the following year, Congress allowed for only 50,000; President Eisenhower reduced construction of public housing, in his first term, requesting funds for only 35,000 units a year, and requesting no funds for public housing in his second term. *Id.* at 312, 314-15. President Johnson requested construction more aggressively than did President Kennedy. *Id.* at 314; Hendrickson, *supra* note 176.

191. von Hoffman, *supra* note 179, at 320.

192. Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (codified as amended in 42 U.S.C. § 1437(f) (2001)).

193. Currently, tenants may be required to pay up to thirty percent of their total income for rent. Thirty percent of total income is widely considered to be the most that low-income persons should spend on housing without risking extreme deprivation in their overall living standards, and some have such low incomes that even thirty percent is more than they can afford. In the early years of public housing, tenants were a bit better off and could pay more for housing. The 1949 Act largely limited public housing to the very poor, which meant lower rents and the need for greater federal subsidies for operating and maintenance costs. Operating expenses include mostly utilities, ordinary maintenance (upkeep and minor repairs), administration, and insurance. Hendrickson, *supra* note 176, at 39-40.

194. 42 U.S.C. § 1437(f) (2001).

195. von Hoffman, *supra* note 179, at 320.

Other demand-side federal government housing subsidies include the creation of the Federal Housing Administration, which provides mortgage insurance for low- to moderate-income borrowers;¹⁹⁶ federal tax benefits;¹⁹⁷ the Low-Income Housing Tax Credit program;¹⁹⁸ and low-interest rate loans to private developers.¹⁹⁹

III. PROTECTING ACCESS AND RETENTION

While ensuring availability and affordability would be a new position, the Court has long protected access to and the retention of housing. This protection came not from provisions in the literal text of the Constitution, but through an interpretation aimed at securing other important express rights.

A. Constitutional Bases

Fundamentally, the Constitution protects the right to acquire and to retain property on a basis available to all citizens as a component of the privileges and immunities guaranteed by the Constitution.²⁰⁰ By express language, it is clear that among the rights guaranteed to the citizens of this country is the right to own and enjoy property. Under the Fifth Amendment, property cannot be taken without due process of law. The Fourteenth Amendment extends these prohibitions to the states.²⁰¹ But, in order for a cause of action for the denial of privileges and immunities to be asserted, there must be some state action.

196. The FHA was created by the National Housing Act of 1934, 12 U.S.C. § 1701 (2006) (original version at ch. 847, 48 Stat. 1246 (1934)). The Act also authorized the creation of Federal National Mortgage Association (Fannie Mae) and later the Federal Home Loan Mortgage Corporation (Freddie Mac) in order to create a secondary market for mortgages insured by FHA, further facilitating home ownership by ensuring greater liquidity to banks. 12 U.S.C. § 1452, 1716. *See generally* David Wheelock, *The Federal Response to Home Mortgage Distress: Lessons from the Great Depression*, 90 FED. RES. BANK OF ST. LOUIS REV. 133, 137 (2008), available at <http://research.stlouisfed.org/publications/review/08/05/Wheelock.pdf>.

197. Most prominent is the deductibility from taxable income of mortgage interest. 26 U.S.C. § 163(h)(3)(A)(i) (2006).

198. 26 U.S.C. § 42 (2006). *See generally* NAT'L COUNCIL OF STATE HOUS. AGENCIES, *2011 Housing Credit Fact Sheet*, <https://www.ncsha.org/resource/2011-housing-credit-fact-sheet> (last visited Mar. 16, 2012).

199. Under Section 235 of the National Housing Act, HUD provided assistance to low-income purchasers of homes by insuring their mortgages against default and by making a portion of their monthly mortgage payments. 12 U.S.C. §§ 1715Z(i), (a). The housing was built by a private developer who obtained mortgage commitments from a HUD-approved lender. 24 C.F.R. § 235.39(a). Upon HUD approval, Section 235 funding sufficient to subsidize the mortgages on the proposed houses was reserved for the ultimate purchasers. *See generally* Green, *supra* note 176, at 696; Peter Salsich, *A Place to Call Home? Affordable Housing Issues in America: Article: Toward A Policy of Heterogeneity: Overcoming A Long History of Socioeconomic Segregation in Housing*, 42 WAKE FOREST L. REV. 459 (2007) (discussing the history of federal and state support and initiatives for housing low-income persons and families).

200. Article IV, Section 2 of the Constitution guarantees to the citizens of each state all the "Privileges and Immunities of citizens in the several states." U.S. CONST. art. IV, § 2.

201. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. art. XIV, § 1.

1. Privileges and Immunities

In *Shelley v. Kraemer*,²⁰² the Court found that the enforcement by injunction of a private racially restrictive covenant to be state action, sustaining a challenge to the covenant by the purchasers of property burdened by the covenant.²⁰³ However, the Court, early on in the opinion, pointed out that “restrictive covenants, standing alone, cannot be regarded as violative of any rights guaranteed . . . by the Fourteenth Amendment.”²⁰⁴ This means that if all landowners conspired to deny housing to blacks and all adhered to the conspiracy, there might have been nothing the state could do. However, the Court explained that equality in the enjoyment of property rights was regarded by the Founders of the Fourteenth Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee,²⁰⁵ and “freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives” of that amendment.²⁰⁶ Thus, any law or state enforcement of a private agreement, purporting to restrict the ability of persons to own and reside on property in certain areas, solely on account of race cannot be squared with the Fourteenth Amendment.²⁰⁷

In *Barrows v. Jackson*,²⁰⁸ the Court found a state court award of damages for the breach of a restrictive covenant was also a violation of the Equal Protection Clause of the Fourteenth Amendment, extending the rationale in *Shelley v. Kraemer*.²⁰⁹ However, Chief Justice Vinson, in dissent, seemed to find merit in the belief held by the covenantors that:

[A]ny influx of non-Caucasian neighbors would impair their enjoyment of their properties,” that “whether right or wrong, each had a right to control the use of his property against that event and to exact a promise from his or her neighbor that he or she would act accordingly . . . Moreover, we must at this pleading stage of the case, accept it is a fact that respondent has thus far profited from the execution of this bargain; observance of the covenant by petitioners raised the value of respondent’s properties. By this suit, the plaintiffs sought only to have respondent disgorge that which was gained at the expense of depreciation in her neighbor’s property.”²¹⁰

Justice Vinson went on:

202. 334 U.S. 1 (1948).

203. *Id.* at 19.

204. *Id.* at 13.

205. *Shelley v. Kraemer*, 334 U.S. 1, 10-11 (1948).

206. *Shelley*, 334 U.S. at 20.

207. *Id.* at 11.

208. 346 U.S. 249 (1953).

209. *Id.* at 254 (citing *Shelley v. Kraemer*, 334 U.S. 1 (1948)).

210. 346 U.S. at 267-68.

[W]e can only interfere in this case if the Fourteenth Amendment compels us to do so, for that is the only basis upon which respondent seeks to sustain her defense. While we are limited to enforcement of the Fourteenth Amendment, the state courts are not; they may decline to recognize the covenants for other reasons. Since we must rest our decision on the Constitution alone, we must set aside predictions on social policy and adhere to the settled rules which restrict the exercise of our power of judicial review—remembering that the only restraint upon this power is our own sense of restraint.²¹¹

By these expressions of “restraint,” Justice Vinson seemed not inclined to consider how these restrictive covenants would be incompatible with the overarching aims of the Constitution, that is, to ensure equality of enjoyment of privileges and immunities.

The question whether states may take a neutral stance in the face of known discriminatory practices or must act to prohibit discrimination was addressed in *Reitman v. Mulkey*.²¹² There, the Court approved the position taken by the California Supreme Court in striking down a constitutional amendment adopted by citizen referendum, which by its terms barred the state legislature from adopting any measure that limited the right of a landowner to refuse to sell or rent housing property to any person, even on account of race. The California Supreme Court undertook to analyze the constitutionality of the state law in terms of its “immediate objectives,” its “ultimate effect,” and its “historical context,” and the conditions existing prior to its enactment. Though the court conceded that the State was permitted to take a neutral position with respect to private racial discrimination and that the State was not bound by the federal Constitution to forbid private racial discriminatory practices, it concluded that a prohibited state involvement could be found “even where the state can be charged with only encouraging,” rather than commanding discrimination.²¹³ The state court could “conceive of no other purpose for an application of the amendment aside from authorizing the perpetration of a purported private discrimination.”²¹⁴ The amendment was intended to repeal two civil rights acts that were aimed at prohibiting discrimination.²¹⁵ The ultimate impact of the amendment was to encourage and significantly involve the state in private racial discrimination contrary to the Fourteenth Amendment.²¹⁶ The bottom-line effect of the law was that:

211. *Id.* at 269. It is fair to ponder the result if a non-Caucasian had been a party to the suit, claiming injury from having to pay a higher purchase price or from the seller’s refusal to sell out of fear of liability for breaching the covenants, whether Justice Vinson would have taken a different meaning from those facts.

212. 387 U.S. 369 (1967).

213. *Id.* at 375.

214. *Id.* at 375.

215. *Id.* at 376.

216. *Id.*

[A] right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing racial discrimination would no longer need to rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources.²¹⁷

The Court pointed out that it had never attempted the "impossible task" of formulating an infallible test for determining whether the State "in any of its manifestations" has become significantly involved in private discriminations.²¹⁸ Instead, the determination must be made by weighing all the circumstances on a case-by-case basis. The view of the State of California was that the amendment would significantly encourage and involve the State in private discrimination. The Court concluded that it had been presented with no persuasive considerations indicating that these judgments should be overturned.²¹⁹

2. Badges and Incidents of Slavery: The Thirteenth Amendment and Civil Rights Acts

In *Jones v. Alfred H. Mayer Co.*,²²⁰ the Court found the Civil Rights Act of 1866,²²¹ which by its terms reached acts of purely private discrimination, a valid exercise of congressional power pursuant to the Thirteenth Amendment.²²² There, the plaintiff, a black person, sought to purchase certain real property, but was refused on account of his race.²²³ The Court read the Thirteenth Amendment as not merely a prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude was not to exist in the United States.²²⁴ Further, under that Amendment, Congress had the power to determine and to eradicate the badges and incidents of slavery.²²⁵ Congress could eliminate restraints upon "those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sell, and convey property, as is enjoyed by white citizens."²²⁶

It is interesting to note these fundamental rights pertaining to housing stood out

217. *Id.* at 377.

218. *Id.* at 378.

219. *Id.* at 381.

220. 392 U.S. 409 (1968).

221. 42 U.S.C. § 1982 (2006). The Civil Rights Act of 1866, passed to effectuate the guarantees of the Fourteenth Amendment, provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property." Civil Rights Act of 1866, 42 U.S.C. § 1982 (2006)).

222. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 (1968).

223. *Id.* at 412.

224. *Id.* at 438.

225. *Id.* at 439.

226. *Id.* at 441 (citing Civil Rights Cases, 109 U.S. 3, 22 (1883)).

among other interests a free person would hold. In the *Civil Rights Cases*,²²⁷ where such other interests were at issue, the Court did not read the Civil Rights Act of 1866 as expansively, concluding:

[T]he act of . . . the owner of the inn, the public conveyance or place of amusement, refusing . . . accommodation [cannot be] justly regarded as imposing any badge of slavery or servitude upon the applicant . . . It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business.²²⁸

The Civil Rights Act of 1871 was enacted largely to deal with the growing terror of the Ku Klux Klan.²²⁹ When first enacted, it imposed liability upon persons, who “under color of any law . . . cause . . . the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States.”²³⁰ Congressman Bingham, the primary sponsor of the Act, explained that Congress intended to provide for better enforcement of the Constitution and laws of the United States.²³¹ Revisions made in 1874 were intended to “amend the imperfections of the original text” without altering its meaning, such that the new language protected “any rights, privileges, or immunities secured by the Constitution and laws” of the federal government.²³² The new language signaled Congress’ “accepted understanding that the Privileges and Immunities Clause was to be co-extensive with rights found within the text of the Constitution as well as rights defined by Congress exercising its authority as defined by Article I of the Constitution.”²³³

3. Takings Clause of the Fifth Amendment

The Fifth Amendment of the Constitution protects individuals against government taking of their private property, except for a public use and only then with

227. 109 U.S. at 3.

228. *Id.* at 24-25. Mr. Justice Harlan dissented in the *Civil Rights Cases*, expressing the view that “such discrimination practiced by corporations and individuals in the exercise of their public or quasi-public functions is a badge of servitude the imposition of which Congress [could] prevent under its power, by appropriate legislation, to enforce the Thirteenth Amendment. *Id.* at 4. Of course, the position taken by the Court in the *Civil Rights Cases*, was largely overruled by the enactment of the Civil Rights Act of 1964, which outlawed discrimination in public accommodations. See *Heart of Atlanta Hotel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

229. Civil Rights Act of 1871, ch. 31, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (2006)).

230. *Id.*

231. Cong. Globe, 42nd Cong., 1st Sess. App. 81 (1871).

232. Act of June 27, 1866, ch. 140, § 1, 14 Stat. 74.

233. William J. Rich, *Why “Privileges or Immunities”? An Explanation of the Framers’ Intent*, 42 AKRON L. REV. 1111, 1117 (2009).

just compensation. However, in *Kelo v. City of New London*,²³⁴ the Court gave no special consideration to the fact that the property being taken by a city consisted of homes that the owners had resided in for many years. The Court agreed that economic redevelopment is a valid public purpose and deferred to the city for that determination.²³⁵

B. Statutory Bases

Over the decades, the Court has protected rights in housing as expressed in various statutes.

1. Fair Housing Act

The Fair Housing Act was enacted in 1968.²³⁶ It makes it unlawful to “refuse to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.” A dwelling can be made otherwise unavailable by, among other things, action that limits the availability of affordable housing.²³⁷ The Fair Housing Act can be violated by either intentional discrimination or disparate impact on a protected class.²³⁸

2. Public Housing

Under the National Housing Act, which authorizes the construction and funding of public housing, tenants are entitled to perpetual renewal of their leases, except that termination may be had for good cause.²³⁹ They are entitled to due process (notice of the charges and an opportunity to contest them) before termination of their tenancies.²⁴⁰ However, in *U.S. Department of Housing and Urban Development v. Rucker*,²⁴¹ the Court upheld the termination of a public housing tenancy for misconduct of a family member, even when the evicted tenant did not participate in the misconduct and had no ability to control the family member. The Court found that the National Housing Act’s plain language

234. 546 U.S. 469 (2005).

235. *Id.* at 485-86, 490.

236. 42 U.S.C. § 3604 (a) (2006).

237. *See, e.g.*, *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 928-29, 938-39 (2d Cir. 1988); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1059, 1062-64 (4th Cir. 1982); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 130 (3d Cir. 1977).

238. *Mt. Holly Gardens Citizens in Action, Inc. v. Mount Holly*, 658 F.3d 375 (3d Cir. 2011); *Magner v. Gallagher*, 619 F.3d 823 (8th Cir. 2011); *Cmty. Servs., Inc. v. Wind Gap Mun. Auth.*, 421 F.3d 170, 176 (3d Cir. 2005); *National Cmty. Reinv. Coal. v. Accredited Home Lenders Holding Co.*, 573 F.Supp. 2d 70 (D.D.C. 2008).

239. Discussed at *infra* notes 176-99 and accompanying text.

240. Green, *supra* note 176.

241. 535 U.S. 125 (2002).

unambiguously required lease terms that give local public housing authorities the discretion to terminate the lease of a tenant when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should have known, of the drug-related activity.²⁴² Congress' decision not to impose any qualification in the statute, combined with its use of the term "any" to modify "drug-related criminal activity," precludes any knowledge requirement.²⁴³ Moreover, by the Act, Congress sought to protect other residents from the violence typically associated with drug activity.²⁴⁴

3. Rent Control

The Supreme Court upheld a rent control ordinance in *Pennell v. City of San Jose*,²⁴⁵ rejecting a takings and equal protection challenge. The ordinance contained a provision that allowed a hearing officer to consider, among other factors, the hardship to a tenant when determining whether to approve a landlord's proposed rent increase in excess of eight percent. The landlords made a facial challenge that the provision obligated private landlords to assume public burdens without just compensation, thereby violating their rights under the Fifth and Fourteenth Amendments. The Court ruled that the ordinance was not facially invalid under the Due Process Clause of the Fourteenth Amendment because the tenant hardship provision represented a rational attempt to accommodate the conflicting interests of protecting tenants from burdensome rent increases while at the same time insuring that landlords were guaranteed a fair return on their investment.²⁴⁶

IV. FACILITATING HOUSING AVAILABILITY AND AFFORDABILITY THROUGH EQUAL PROTECTION AND DUE PROCESS THEORIES

The principle of equal protection proscribes actions by a state or its instrumentalities that invidiously discriminate against persons.²⁴⁷ While a classification on the basis of race or religion is inherently suspect, placing the burden on the government to justify that classification by a compelling governmental interest, such classifications are not the only occasions for equal protection claims. A classification that unduly impacts a fundamental interest also requires strong justification.²⁴⁸ Where the government adopts programs, appropriates funds, and enacts legislation that disproportionately impacts certain impor-

242. 535 U.S. at 130.

243. 535 U.S. at 131.

244. *Id.*

245. 485 U.S. 1 (1988).

246. *Id.* at 13. Inasmuch as no occasion had arisen whereby such a hardship had been established, the Court limited its ruling to the facial challenge. *Id.* at 14-15.

247. U.S. CONST. amend. XIV, § 1.

248. *Shapiro v. Thompson*, 394 U.S. at 638.

tant interests of similarly situated persons, equal protection issues are raised. A case for heightened scrutiny could be asserted in the following scenario: a city might act to develop a waterfront with the larger aim of revitalizing the community. The project might include housing and commercial uses. To enlist developers to undertake the effort, the government offers to use its powers of eminent domain to acquire property, to contribute to the costs of development through grants, and also to provide tax subsidies to the developer. If the government does not also offer subsidies for low-income households for housing in the new development, then it is creating two classes of persons affected by the effort—those able to buy or rent at market rates and those who are not—but treating them differently. Those who purchase would benefit from the tax subsidies, while those who cannot purchase receive no comparable benefit. But the difference that would obtain if housing were deemed fundamental would be that unless the government could articulate a compelling governmental interest (something other than an interest in protecting the public fisc) for the disparate treatment, the programs could be struck down.²⁴⁹ In other words, the level of judicial scrutiny, if strict, may well lead to greater regard for facilitating the acquisition of housing by those who need this assistance.

A. Existing Obstacles to Success Under Constitutional Theories

There are several reasons why challenges as just described have failed under current equal protection analysis, the most significant being the absence of “proof of racially discriminatory intent or purpose.”²⁵⁰ Much of the reason for a lack of affordable housing has been the persistence of facially neutral zoning ordinances limiting uses to “single-family dwellings” on large lots and precluding multiple unit dwellings.²⁵¹ In zoning matters, the Supreme Court has shown a great deal of deference to decisions by municipalities, even when they make land use extremely restrictive.²⁵²

In one of the earliest Supreme Court cases on the power of municipalities to zone land within their boundaries, *Euclid v. Ambler Realty*,²⁵³ the Court ruled that a zoning ordinance would be upheld if there was a rational relationship between the ordinance and the municipality’s interest in the protection of health, safety, morals or general welfare.²⁵⁴ That relationship would be found to exist if the issue was “fairly debatable.”²⁵⁵ That case involved an act by the Village of Euclid, Ohio to rezone certain areas of the town, which had the effect of limiting

249. See *id.*, at 631-632 (rejecting the concern for budgetary issues as a justification for the waiting period for welfare benefits as it infringed upon the right to travel).

250. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

251. Salsch, *supra* note 194.

252. *Euclid v. Ambler Realty*, 272 U.S. 365 (1926).

253. *Id.*

254. *Id.* at 392.

255. *Id.* at 388.

much of plaintiffs' theretofore-undeveloped land to certain uses, precluding other uses for which the landowner thought the land was best suited.²⁵⁶ Before the ordinance, the land was valued at \$10,000 per acre, but after it was valued at \$2500 per acre.²⁵⁷ The landowner made a facial challenge to the ordinance, as he had not attempted to use the land in a way that was precluded by the ordinance.²⁵⁸ A facial challenge succeeds if the plaintiff can demonstrate that under no set of facts could the law be applied in a fashion that was constitutional. The claim was only that the ordinance made it theoretically impossible to realize the expected value of the property prior to the ordinance—a substantive due process violation.²⁵⁹

But *Euclid* did not consider whether an ordinance could be struck down on equal protection grounds—that is, that the ordinance treated similarly situated landowners differently. The Court has nonetheless ruled that municipalities may enact zoning ordinances that preclude certain kinds of housing in designated areas, so long as there is a rational basis supporting the measures.²⁶⁰ Ironically, though municipalities have asserted that zoning land for single family dwellings serves to support the family as important socializing institutions, such zoning operates to exclude families who cannot afford single-family dwellings from seeking the quiet and solitude of the communities so zoned. Moreover, the Court has found that nothing in the constitution requires cities to take advantage of available funds for the construction of affordable housing.²⁶¹ The Court has also taken a rather narrow view of the requisite standing for challenging zoning decisions.²⁶²

In all of these contexts, the Court has not applied any degree of heightened scrutiny in the absence of evidence that the municipality's aim was to exclude persons based on race. While the level of scrutiny that the Court gives to equal

256. *Id.* at 384.

257. *Id.* at 384.

258. *Id.* at 386.

259. *Id.*

260. See e.g., *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. at 265-66; *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974) (upholding single family zoning, recognizing governmental interest in encouraging "family values, youth values and the blessings of quiet seclusion and clean air mak[ing] the area a sanctuary for people").

261. *James v. Valtierra*, 402 U.S. 137, 143 (1971).

262. *Warth v. Seldin*, 422 U.S. 490 (1975). There, the Supreme Court ruled that non-residents of a town lacked standing to challenge a zoning ordinance which they maintained effectively excluded persons of low and moderate income from living in the town, in contravention of the First, Ninth, and Fourteenth Amendments and in violation of 42 U.S.C. §§ 1981, 1982, 1983. *Id.* at 493. A challenger to a town's ordinance must allege specific, concrete facts demonstrating that the challenged practices harm him, and that he personally would benefit in a tangible way from the court's intervention. *Id.* at 499-500. In the case, none of the plaintiffs had any particular interest in any property found in the town, nor was any housing within their means precluded by the ordinance, instead relying on the remote possibility that their circumstances might be improved. *Id.* at 504. The perversity of the result was that because the plaintiffs could not afford housing in the town, they lacked standing to challenge an ordinance that rendered the housing in the town unaffordable.

protection claims will vary depending upon whether those adversely impacted are members of a discrete and insular minority group or a protected class under the law, the Court has declined to find that poverty or economic status is a protected class.²⁶³ Nevertheless, poverty often correlates very strongly with race as well as certain ethnicities.²⁶⁴ In this respect, ordinances, which are neutral on their face, but which have a disproportionate impact upon certain groups should be subjected to heightened scrutiny. And, while it is the case that whether the Court applies heightened scrutiny has depended not only upon the groups affected, but also upon the protected interest affected by the classification,²⁶⁵ absent recognition of housing as an important interest, no heightened scrutiny will be had.

The three cases that have reached the Court involving measures by towns to facilitate the construction of affordable housing have reached disparate results. On the one hand, the Court concluded that giving citizens a say in whether to authorize such housing alone does not violate equal protection rights.²⁶⁶ On the other hand, where a city charter provided for referendums only for ordinances regulating real estate on the basis of race, such a classification did affront the Equal Protection Clause.²⁶⁷

263. *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973).

264. See e.g., *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1*, 377 F.3d 949, 972 (9th Cir. 2006); *Bontton v. City of New York*, 2004 U.S. Dist. LEXIS 22105, *13 (S.D.N.Y. 2004); Shani King, *The Family Law Canon in a (Post) Racial Era*, 72 OHIO ST. L. J. 575, 616 (2011); UNITED STATES CENSUS, CHILD POVERTY IN THE UNITED STATES 2009 & 2010: SELECTED RACE GROUPS & HISPANIC ORIGIN 1, 3, (2011), available at <http://www.census.gov/prod/2011pubs/acsbr10-05.pdf> (reporting that black children represented 26.6% of the population of children in poverty, but only 14.4% of all children; that 38.2% of all black children were poor, while white and Asian children had poverty rates below the national average).

265. See *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (stating that “any classification which serves to penalize the exercise of [a constitutional] right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional”).

266. In *James v. Valtierra*, the Court upheld an article to the state constitution providing that no low-rent housing project should be developed, constructed, or acquired in any manner by a state public body until the project was approved by a majority of those voting at a community election. The Court found nothing per se unconstitutional about the referendum procedure, where the constitutional amendment created no classifications based upon race. 402 U.S. at 141. Instead, it pointed out that a wide variety of governmental acts required enactment by referenda. *Id.* at 142. Given that public housing projects, by their nature imposed burdens (municipal services, but lower tax revenues) upon the municipalities in which they were situated, it was not unreasonable to give the citizens a say in whether to undertake those burdens. *Id.* at 143.

267. *Hunter v. Erickson*, 393 U.S. 385 (1969). There, citizens of Akron, Ohio, amended their city charter to require that any ordinance regulating real estate on the basis of race could not take effect until the ordinance was approved by the electorate in a mandatory referendum. *Id.* at 387. The Court held that the amendment created a classification explicitly based upon race because it required that laws dealing with racial matters could take effect only if they survived a mandatory referendum, while other housing ordinances took effect (upon enactment by the city council) without any special election. *Id.* at 391. The racial classification created a special burden on racial minorities within the governmental process by making this process more difficult for minorities to secure legislation on their own behalf. *Id.* at 391. Because the City of Akron could not justify this racial discrimination, the Court found a denial of equal protection and held that the mandatory referendum was unconstitutional. *Id.* at 393.

Most recently, the Court upheld a referendum to block an ordinance providing for affordable housing, despite clear evidence that the referendum was motivated by racial animus. In *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*,²⁶⁸ the Court essentially upheld the right of citizens acting through the referendum process to adopt measures to affect adversely members of other racial groups.²⁶⁹ There, the city adopted an ordinance authorizing a nonprofit corporation to construct a low-income housing complex.²⁷⁰ A group of citizens filed a formal petition with the city requesting that the ordinance be repealed or submitted to a popular vote.²⁷¹ The city's charter provided that an ordinance challenged by a petition could not go into effect until approved by a majority of the voters.²⁷² Immediately upon the submission of the proposal for the housing, residents of the town expressed opposition.²⁷³ Initially, the developer agreed to various conditions, including that it build an earthen wall surrounded by a fence on one side of the complex.²⁷⁴ After the planning commission approved the plans, public opposition resurfaced and coalesced into a referendum petition drive.²⁷⁵ Citizens expressed various concerns: that the development would cause crime and drug activity to escalate, that families with children would move in, and that the complex would attract a population similar to the one in the town's only African-American neighborhood.²⁷⁶ The voters passed the referendum thereby blocking the ordinance from going into effect.²⁷⁷ The Ohio Supreme Court declared the referendum unconstitutional, holding that the state constitution authorizes referendums only in relation to legislative acts, not administrative acts, such as site-plan ordinances.²⁷⁸ The city thereafter issued the building permits and construction commenced.²⁷⁹ While the state court litigation was ongoing, the developer brought suit in federal court seeking injunction against the referendum and an order that the city issue the building permits.²⁸⁰ It maintained that in allowing the site plan ordinance to be submitted to the electors through referendum, the city violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment, as well as the Fair Housing Act.²⁸¹

The United States Supreme Court rejected the challenge on two grounds. First, there was no proof of racially discriminatory intent or purpose behind the

268. 538 U.S. 188 (2003).

269. *Id.*

270. *Id.* at 191.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.* at 191.

275. *Id.*

276. *Id.* at 192.

277. *Id.*

278. *Id.* at 193.

279. *Id.*

280. *Id.*

281. *Id.* at 191.

referendum procedure itself.²⁸² While the developer relied upon evidence of discriminatory voter sentiment, the Court ruled that statements made by private individuals in the course of a citizen-driven petition drive, while sometimes relevant to equal protection analysis, do not, in and of themselves, constitute state action for purposes of the Fourteenth Amendment. Second, the developer failed to show that the “private motives that triggered” the referendum drive “[could] fairly be attributed to the state.”²⁸³

The result in *City of Cuyahoga Falls, Ohio* is indeed a sad commentary on efforts of citizens to exclude based upon rank racial prejudice. If housing is a fundamental right, then a discriminatory purpose would not need to be shown, only some form of state action. While the referendum mechanism itself seems fairly innocuous, its use for the avowed purpose of denial and exclusion seems hardly different from that in *Hunter v. Erickson*.²⁸⁴ Indeed, it seems that the only real difference between the mechanism here and the one in *Hunter* is that the latter involved express language in the charter making distinctions based upon race, but *City of Cuyahoga Falls, Ohio* permitted express exclusion based on race with the law’s backing. It seems that there was no less state action here than in *Shelley v. Kraemer*,²⁸⁵ as the ability to deny rights was only available through a mechanism enforced by the state.

Due process claims regarding housing have been found in a variety of contexts—arbitrarily denying building permits to construct low-income housing,²⁸⁶ knowingly and deliberately locating and populating public housing projects on the basis of race,²⁸⁷ and arbitrarily terminating the tenancies of public housing tenants.²⁸⁸ While this principle might enable certain housing projects to proceed, it will not serve to foster affirmative efforts to afford housing or ensure affordability.

V. HEIGHTENED SCRUTINY UNDER STATE LAW

While not imposing an affirmative burden upon cities to construct housing at public expense for all who need it, in recent years state courts have been analyzing land use ordinances to ensure that land is available for affordable housing. They have ruled that towns have an obligation to attend to the housing

282. *Id.* at 195.

283. *Id.* at 196.

284. 393 U.S. 385 (1969).

285. 334 U.S. 1 (1948).

286. *Scott v. Greenville*, 716 F.2d 1409, 1417-21 (4th Cir. 1983) (finding a due process violation through denial of building permit to construct low-income housing).

287. *Gautreaux v. Romney*, 448 F.2d at 73233 (7th Cir. 1971).

288. *See Green*, *supra* note 176, at 720-30.

needs of its citizens²⁸⁹ and that to deny citizens desiring to reside in a particular community the opportunity for affordable and decent housing is a denial of substantive due process.²⁹⁰ Perhaps the most famous case expressing these views is *Southern Burlington County NAACP v. Township of Mount Laurel*.²⁹¹ There, a nonprofit group sought a building permit to construct fifty garden-style apartments.²⁹² The permit was denied. The organization sued, alleging discrimination and a violation of the federal and state constitutions.²⁹³ The court reached its conclusions under state law, finding it not necessary to consider federal constitutional grounds.²⁹⁴ It explained that adopting land use regulations are within a state's police power, but all police power enactments must conform to the basic state constitutional requirements of substantive due process and equal protection of the laws.²⁹⁵ A zoning regulation, like any police power enactment, must promote public health, safety, morals, or general welfare—any zoning enactment contrary to the general welfare is thus invalid.²⁹⁶ When a regulation has a substantial external impact, the welfare of the state's citizens beyond the municipality cannot be disregarded and must be recognized and served.²⁹⁷ Because shelter and food are the most basic human needs,²⁹⁸ providing adequate housing to all categories of people is essential in promoting the general welfare required in all land use regulations.²⁹⁹ When a municipality in its land use regulations has not made it realistically possible to create a variety and choice of housing, a facial showing of violation of substantive due process or equal protection has been made and the burden shifts to the municipality to establish a valid basis for action or inaction.³⁰⁰

289. See e.g., *Fernley v. Board of Supervisors of Schuylkill*, 502 A.2d 585 (Pa. 1985); *Surrick v. Zoning Hearing Bd*, 382 A.2d 105 (Pa. 1977); *Associated Builders v. Livermore*, 18 Cal.3d 582 (Cal. 1976); *Berenson v. Town of New Castle*, 38 N.Y.2d 102 (N.Y. 1975).

290. *Berenson v. Town of New Castle*, 67 A.D.2d 506 (N.Y. App. Div. 1979); *Utah Hous. Fin. Agency v. Smart*, 561 P.2d 1052 (Utah 1977); *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 557 P.2d 473 (Cal. 1976); *Southern Burlington Cnty. NAACP v. Mount Laurel*, 336 A.2d 724 (N.J. 1975).

291. *Mount Laurel Twp.*, 336 A.2d 713 (N.J. 1975).

292. *Id.* at 722.

293. *Id.* at 716.

294. *Id.* at 724.

295. *Id.*

296. *Id.* at 725.

297. *Id.* at 726.

298. *Id.* at 727.

299. *Id.*

300. *Id.* at 727. On remand, the town offered to grant a permit on a tiny area, one in a flood zone and not served by water and sewer connections. When this case made its way back up on appeal, the Supreme Court was quite angry and exasperated with the town. It decided that stern measures were in order. *Southern Burlington County NAACP v. Mt. Laurel Township*, 456 A. 2d 390 (N.J. 1985). The Court set up a three judge panel of overseers for zoning decisions, requiring zoning ordinances to be approved by the judges, set up a builder's remedy, under which a builder that proposed to maintain a percentage of the units as affordable would be issued a building permit. *Id.* at 418-21. These measures did not sit well with the communities and the state enacted comprehensive housing legislation—the Fair Housing Act, which

While affordable housing measures are being adopted on the local and state levels, and despite the broad thinking position of *Southern Burlington*, such measures are still often met with opposition by local owners and developers.³⁰¹ These battles and confrontations could be averted by the recognition of a “right to housing.”

VI. NEW PREDICATES FOR AN AFFIRMATIVE RIGHT

So far, I have sought to moor a right to housing in the interstices of the Constitution, next to or within the interest in liberty. The identification of rights in the penumbra or interstices of the Constitution has rested on the conclusion that they were predicates toward the fulfillment or enjoyment of the express rights. Without privacy, one is truly not free. To be free, one must be able to travel where and when one chooses, even if this adds to a state’s burden of providing welfare benefits to the newly arrived needy. One cannot be assured a fair and meaningful trial without the assistance of counsel to explain the proceedings and advise on courses to take. Essentially, the court determined that these penumbral rights were essential to enjoy, and resided within, the larger express rights. The connection between housing and liberty is no less direct.

The rationale for finding the right to travel as a fundamental component of the right to liberty should also provide the basis for striking down ordinances that preclude the construction or making available of affordable housing. The unavailability of affordable housing has no less impact on one’s freedom to travel as the ineligibility for welfare benefits in another state. The parallel is exact. Indeed, many municipalities adopt such ordinances for the specific purpose of excluding certain undesirable populations.³⁰²

Not only does housing unavailability interfere with the right to travel as a component of liberty, it also affects liberty in the more abstract sense. This

set up the Council on Affordable Housing (“COAH”). COAH’s mission was to assess the affordable housing needs and to promulgate rules and dictate the requirements to municipalities. It was given the authority to prescribe formulas, establish housing needs, oversee implementation, and develop a process for addressing affordable housing. Initially, using a convoluted formula, COAH established state-wide and local quotas for affordable housing. It devised various categories of needs (present, prospective, unmet). It set up a program for sharing needs under “Regional Contribution Agreements,” under which communities could pay other communities to create affordable housing. COAH has adopted three rounds of rules, the latest after a remand of the Second Round in *In re* N.J.A.C. 5:94 & 5:95, 390 N.J. Super. 1 (N.J. Super. Ct. App. Div. 2007), *cert. denied*, 914 A.2d 348 (N.J. 2007). The Third Round Rules are currently under challenge. Criticism includes that COAH had designated parks, highway medians, and cemeteries as available land for housing; imposed an affirmative obligation upon such towns to actually construct new housing; that COAH’s projection of growth was based on outdated or flawed information.

301. See e.g., *United States v. Yonkers Bd. of Educ.*, 29 F.3d 40 (2d Cir. 1994); *United States v. Yonkers Bd. of Educ.* 927 F.2d 85 (2d Cir. 1991); C. THEODORE KOEBEL ET AL., CTR. FOR HOUS. RESEARCH & METRO. INST., COMMUNITY ACCEPTANCE OF AFFORDABLE HOUSING (2004), available at [http://www.realtor.org/ncrer.nsf/files/koebellangfr.pdf/\\$FILE/koebellangfr.pdf](http://www.realtor.org/ncrer.nsf/files/koebellangfr.pdf/$FILE/koebellangfr.pdf).

302. *Yonkers Bd. of Educ.*, 29 F.3d 40; *Yonkers Bd. of Educ.* 927 F.2d 85; *Reinhart v. Lincoln Cnty.*, 482 F.3d 1225 (10th Cir. 2007).

abstract sense of liberty—a private sphere for flourishing—has been embraced by the Supreme Court and Congress in numerous ways. *Griswold* serves to protect families in the intimate details of their lives as they express themselves within their homes;³⁰³ *Roe v. Wade* ensured decisions concerning whether to procreate were reserved to the affected person;³⁰⁴ *Shapiro* removed obstacles to traveling freely to a better place.³⁰⁵ Housing should be considered to be among these other liberty interests long-protected by the Court and supported by Congress.

Housing is an essential predicate for economic and social power, and the absence of power results in marginalization. Max Weber's theories on social and economic organization are particularly apt on this point. He explains what most significantly drives the structure of every legal order is the distribution of power, economic or otherwise, within the respective community. Power is understood to mean "the chance of a person or of a number of persons to realize their own will in a communal action even against the resistance of others who are participating in the action."³⁰⁶ The achievement of "social honor" stands squarely alongside the economic benefits in the concept of power. "Indeed, social honor . . . may be the basis of political or economic power."³⁰⁷ Power and social honor succeed in marking one's place in the community, in part through the existence of some guarantee by the existing legal order.³⁰⁸ While the legal order operates to enhance one's chances to hold power or honor, it cannot always secure them. This appears so, also in part, because the "economic order" dictates the way in which social honor is distributed within the community.³⁰⁹ Thus, using Weber's logic, secure and decent housing seems required to ensure a place in the social order with some ability to influence the contours of the legal order.³¹⁰

Nothing more substantially ties one to a community than housing. Communities are agglomerations of individuals for the achievement of shared ends: spiritual and moral support; identity; economic interdependence; and intellectual stimulation. It is said that the individual is bound to the community both by mutual agreement and by the desire for shared ends.³¹¹ At a minimum, human flourishing seems to contemplate the ability to achieve self-fulfillment, including the capacity to make meaningful and autonomous choices about alternative life structures. Achieving self-fulfillment seems to require a life without substantial want of basic human necessities such as warmth from the cold, physical nourishment, safety from predators, and an environment conducive to

303. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

304. *Roe v. Wade*, 410 U.S. 113, 152-54 (1973).

305. *Shapiro v. Thompson*, 394 U.S. 618, 642 (1969).

306. MAX WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 180 (H.H. Gerth & C. Wright Mills eds., 1946).

307. *Id.*

308. *Id.*

309. *Id.* at 181.

310. *Id.*

311. Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 772-74 (1999).

calm, contemplation, and intellectual exchange and/or exploration.³¹² These all mean security and control over one's physical space.

The community is the vehicle that mediates the resources needed for human flourishing.³¹³ What makes a community? The physical space, the residents, the common history, and common sought-after ends. Communities play a "crucial role[] in the formation of our preferences, the extent of our expectations, and the scope of our aspirations."³¹⁴ Communities create and foster social relations, encouraging norms that may include those of "equality, dignity, respect, and justice as well as freedom and autonomy."³¹⁵ They enable economic interdependence and foster environments for intellectual stimulation through exchange and social relations.³¹⁶

Ownership, or at least an abode in which one has a measure of security of tenure, is an important determinant of choices by the community. Property owners are consulted, but non-owners are not—their well-being is ignored. Merely having access along with other members of a community does not fulfill the conditions necessary for human flourishing. Instead, today most seem to recognize the need for an individual domain, a place to call one's own—whether that is legal title to an estate in property or a rental property,³¹⁷ so long as one's tenure is not wholly subject to the whims of another.

Because the majority of people in the nation have decent, adequate housing, the centrality of housing to well-being, employment, schooling, childrearing, and nutrition is often not appreciated. Housing that is overcrowded, dilapidated and that threatens health causes tremendous stress on the residents. Housing costs that exceed the household's means threaten economic stability, with the possibility of foreclosure or eviction.³¹⁸ Children in unstable, unhealthy housing experience a

312. *Id.* at 774.

313. Gregory S. Alexander, *The Social Obligation Norm in American Property Law*, 94 CORNELL L. REV. 767 (2009).

314. *Id.* at 766.

315. *Id.* at 761-68.

316. *Id.*; Dagan, *supra* note 311, at 771-74. Despite the deep and essential connection between housing and community and human flourishing, sadly for many, the history of housing development in America has been a tale of exclusion. Communities that were planned and developed in the suburbs were designed to be homogenous and bourgeois. Developers sought to keep them that way, by including covenants in deeds, precluding sales to non-Caucasians. If a grantee violated the covenant, he stood to suffer damages or the sale might be enjoined. Municipalities also aimed to control the introduction of certain kinds of housing in their communities through various land use devices: large lot zoning and single-family home zones. Over time, these devices were challenged in court. *See, e.g., S. Burlington Cnty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713 (N.J. 1975), discussed *supra* notes 289-301 and accompanying text.

317. One can make the argument that land ownership more strongly encourages the desirable behavior of investment in the property than merely the right to use the land such as comes from a lease or easement.

318. *See* Shelby D. Green, *Disquiet on the Home Front: Disturbing Crises in the Nation's Markets and Institutions*, 30 PACE L. REV. 7, 12 (2009). In the midst of the financial industry crisis of 2008, where millions of homeowners defaulted on unaffordable mortgage loans, improvidently taken, millions of families were facing foreclosure.

greater risk of health issues, and rates of infant mortality are raised for mothers in poor surroundings.³¹⁹ Inadequate and/or insecure housing leads to poor academic achievement in school, detachment from surroundings, and social alienation.³²⁰

Housing is necessary for self-fulfillment and self-realization. Housing is necessary for health and thriving. The absence of decent, adequate housing affects well-being, employment, childrearing, and nutrition. That the interest in housing is deeply important to society can be discerned from the attention the government has devoted to it—through government financial support, through the Court's striking down barriers to it, and its recognized positive effects.³²¹ Only formal recognition of this stature is lacking.

A. *International Norms and Conventions*

Worldwide, we are in an era where basic rights are said to include those tools, facilities and avenues necessary to ensure freedom from fear and want, and to facilitate the full enjoyment of one's status as a human being. That is, the right to self-realization³²²—is another expression of the right to freedom. These rights are usually said to include the right to work and to shelter. Housing involves these most basic needs and is part of the larger discussion of what it means to be human. It can create the conditions necessary for the development of human capacity and the fulfillment of freedom and rationality. The capacity for reason and free moral action is fundamental for human society. In this respect, the right to housing has become recognized as a human right.³²³

This evolution may be attributed to conventions. Conventions are shared understandings or implicit agreements adhered to because of a general expectation that others will follow.³²⁴ They arise in response to a felt need and then, through routine practice and application, take on the force of law. They guide behavior and set the contours of rights and obligations.³²⁵ David Hume described property rights as "conventions"³²⁶ that arise spontaneously from "a general sense of common interest; which sense all the members of the society express

319. Crowley, *supra* note 3, at 23.

320. *Id.*

321. See discussion of housing policies and programs *infra* notes 176-99 and accompanying text.

322. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982); Sandy G. Smith, *The Essential Qualities of A Home*, 14 J. ENVTL. PSYCH. 31, 31 (1994) (discussing the psychological relationship people have with their homes and finding the qualities of continuity, privacy, self-expression and personal identity, and warmth were associated with home environments. "[The] feeling of control within the home is salient for most people, and is linked to the satisfaction of basic psychological needs.").

323. The Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); The International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, U.N. Doc. A/6316 (1966) (recognizing housing as a human right and a fundamental freedom).

324. THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 454 (Peter Newman ed., 1998).

325. DAVID HUME, TREATISE OF HUMAN NATURE, Book 3, Part 2, § 2 (1740) (Oxford, Clarendon Press 1965).

326. *Id.*

to one another, and which induces them to regulate their conduct by certain rules”³²⁷

Developing conventions may be seen in the broadening of protectable interests and persons (such as right to work, marry, maternity leave); governmental commitments to furthering and protecting interests (funding housing programs, health care); as well as evolving international notions and standards.³²⁸ Almost universally, despite vast cultural, economic, and political differences, national constitutions all over the world explicitly treat the government’s obligations for ensuring housing for its people.³²⁹ Support for housing for all in need appears on a number of different fronts. There are market-based approaches, in which countries provide support to its citizens as consumers of housing. This support will take the form of mortgage subsidies, first-time buyers’ grants, subsidized sites, and other kinds of individual subsidies.³³⁰ Suppliers of housing stock may also receive various kinds of subsidies under urban renewal programs.³³¹ The European Union has also acted to facilitate transactions in housing through measures regulating mortgage lending, standardization of building components,

327. *Id.*

328. In *Roper v. Simmons*, 543 U.S. 551 (2005), in determining the constitutionality of the death penalty for one who committed a capital crime at age 17, the Court looked to international norms for guidance.

329. SCOTT LECKIE, UNDP HUMAN DEVELOPMENT REPORT 2000: HOUSING RIGHTS 5 (1999), available at <http://hdr.undp.org/en/reports/global/hdr2000/papers/leckie.pdf>. Leckie explains that if human rights are linked to and found to be indispensable for the enjoyment of housing rights (e.g., freedom of movement and to choose one’s residence, privacy and respect for the home, equal treatment under the law, the right to human dignity, the right to security of the person, certain formulations of the right to property or the peaceful enjoyment of possessions), the overwhelming majority of the constitutions of nations make reference, at least implicitly, to housing rights. *Id.* He cites a law in the United Kingdom, the 1985 Housing Act, that requires local city councils to provide adequate accommodation to homeless families and persons in priority need, and a French law of 1990 that purports to “guarantee a right to housing [as a duty of solidarity for the nation as a whole].” *Id.* at 33. Any person or family finding difficulties because of the inability of his resources to meet his needs has the right to collective assistance under conditions fixed by law that will ensure access to decent and independent housing where he can maintain himself.” *Id.* (citing Law 90/449 of 31 May 1990 (visant à la mise en oeuvre du droit au logement [“Loi Besson”], France)). In Germany, an official submission by the government states that “[I]n the case of homelessness, Article 1(1), in association with Articles (2)(1) and 28(1) of the Basic Law on the principle of a social state based on the rule of law, gives rise to the homeless person’s subjective right to be allocated accommodation enabling him to lead a dignified existence. Furthermore, the said principle obligates the state to take into account the creation of sufficient living space when shaping the economic order and making provisions for the general good.” *Id.* (citing Note verbale by the Permanent Mission of Germany to the U.N. Centre for Human Rights, 23 February 1994, pp. 8-9). Leckie points out that “an independent commentator has backed this view, asserted that German case law can be construed to reveal a right to housing, although an independent right to housing is not established pursuant to the German Basic Law.” *Id.* at 33 (citing K. Bernd Ruthers (1993) “Ein Grundrecht auf Wohnung durch die Hintertür” in *Neue Juristische Wochenschrift* (2.588)).

330. Padraic Kenna, *Housing Rights—The New Benchmarks for Housing Policy in Europe?*, 37 THE URB. LAWYER 87, 90 (2005). These forms of support compare on many levels to those available in the United States.

331. *Id.* at 90-91.

and prohibiting discrimination on account of race or migrant status.³³²

The larger, better-developed approach to housing is to enfold housing rights within the larger philosophy of human rights. This strategy is long-standing and well grounded in a number of human rights initiatives and directives. Nearly half of these contain specific provisions on housing and if the “human right to adequate housing” is construed broadly, such a right may be found within the matrix of national laws dealing with housing acts; rent regulations; rights of the homeless; landlord-tenant law; urban reform laws; civil and criminal codes; land use regulation, planning, development, and environmental standards; housing and building codes and standards; laws relating to inheritance rights for women; land acquisition and expropriation acts; non-discrimination; equality rights; and eviction laws, as well as in judicial decisions interpreting these laws, in all the other countries.³³³

In addition, several international covenants specifically address and provide for a right to adequate housing.³³⁴ Under these covenants, governments are obliged to take whatever steps are necessary for the purposes of the full realization of the right to adequate housing, including, but not limited to, the adoption of necessary legislation.³³⁵ While no particular sum or portion of public spending that should be devoted to housing is specified, governments must yet devote the “maximum of its available resources” towards securing the various rights to its people.³³⁶ Many of these core contents of housing rights will require no expenditure of money and few positive interventions by governments, only a commitment to implementing governmental policies and effective structures for facilitating these rights.³³⁷ Even when ‘available resources’ are verifiably inadequate within countries, international law requires “governments to ensure

332. *Id.*

333. *Id.* In 1991, the U.N. Committee on Economic, Social and Cultural Rights adopted *General Comment No. 4 on the Right to Adequate Housing*. *General Comment No. 4* indicates that the following seven components form the core contents of the human right to adequate housing: “(a) legal security of tenure; (b) availability of services, materials, facilities and infrastructure; (c) location; (d) habitability; (e) affordability; (f) accessibility; and (g) cultural adequacy.” Comm. on Econ., Soc. and Cultural Rights, *General Comment No. 4: The Right to Adequate Housing*, ¶ 8, U.N. Doc. E/1992/23 (Dec. 13, 1991). The General Comment stipulates that the right to housing should not be interpreted in a narrow or restrictive sense which equates it with the shelter provided by merely having a roof over one’s head or views shelter exclusively as a commodity. Rather the norm should be seen as the right to live somewhere in security, peace and dignity. *Id.* at para. 7.

334. International Covenant On Economic, Social And Cultural Rights (1966), adopted by United Nations General Assembly (UNGA) resolution 2200A(XXI), 16 December 1966, entered into force on 3 January 1976. Article 11(1) (recognizing the right of everyone to an adequate standard of living . . . [including] housing); International Covenant On Civil And Political Rights (1966), adopted by United Nations General Assembly (UNGA) resolution 2200A(XXI), 16 December 1966, entered into force on 3 January 1976. Articles 12 & 17 (guaranteeing everyone lawfully within the territory of a State . . . the right to liberty of movement and freedom to choose his residence).

335. Comm. on Econ. Soc. & Cultural Rights, *General Comment No. 3: The Nature of States Parties’ Obligations*, ¶ 9, UN Doc. E/1991/23 (Dec. 14, 1990) [hereinafter *General Comment No. 3*].

336. *Id.* ¶ 10.

337. *Id.* ¶ 11.

the widest possible enjoyment of the relevant rights under prevailing circumstances, and to demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, these minimum obligations.”³³⁸ At the same time, it is generally understood that the human right to adequate housing does not necessarily imply a duty on governments to substantively provide a house to anyone who requests it—that is, the state is not required to build housing for the entire population; provide it free of charge to all. Nor is it required necessarily to fulfill all aspects of this right immediately upon assuming duties to do so or exclusively assume control over the provision of this right. Governments are also not required to fulfill the right in precisely the same manner in all circumstances and locations.³³⁹ Instead, the right is conceived more broadly and is generally understood to mean:

(a) [t]hat once such obligations have been formally accepted, the State will endeavor by all appropriate means possible to ensure everyone has access to housing resources, adequate for health, well-being and security, consistent with other human rights; (b) [t]hat a claim or demand can be made upon society for the provision of or access to housing resources should a person be homeless, inadequately housed or generally incapable of acquiring the bundle of entitlements implicitly linked with housing rights; and (c) [t]hat the State, directly upon assuming legal obligations, will undertake a series of measures which indicate policy and legislative recognition of each of the constituent aspects of the right in question.³⁴⁰

The government’s duties take on a quadruple aspect. First, there is the duty to *respect* housing rights, which essentially means respecting limits of state action.³⁴¹ Second is the duty to *promote*, which requires affirmative effort by the state to avoid and strike down measures that may have the effect of hindering the enjoyment of the right.³⁴² These efforts may be quite varied and may range from “comprehensive legislative review; the adoption of laws, policies, and imperatives toward ensuring the full realization of housing rights; the identification of “discernable benchmarks” for measuring efforts towards full housing for all; and the adoption of national housing strategies and time-frames for achieving housing goals.”³⁴³

Third is a duty to *protect* the right to housing, which obliges the state to

338. *Id.* annex III, ¶ 10.

339. Comm’n on Human Rights, Subcomm. on Prevention of Discrimination and Protection of Minorities, *The Realization of Economic, Social, and Cultural Rights: The Right to Adequate Housing*, ¶ 11, U.N. Doc. E/CN.4/Sub/2/1995/12 (July 12, 1995).

340. *Id.* at para. 12.

341. LECKIE, *supra* note 329, at 19.

342. *Id.*

343. Such a strategy should reflect extensive genuine consultation with, and participation by, all those affected, including the homeless, the inadequately housed and their representatives. Subsequent steps must be taken by governments to ensure coordination between ministries, and regional

intervene “to prevent the violation of any individual’s rights to housing by any other individual or non-state actor, including from abuse by landlords, property developers, landowners or any other third party capable of abusing these rights,³⁴⁴ as well as from forced evictions, racial or other forms of discrimination, harassment, withdrawal of services, or other threats.”³⁴⁵ The duty to *fulfill* the right to adequate housing is said to require the state to act positively, including appropriating public funds (for housing subsidies, public housing and basic services), adopting regulatory measures to respond to market inequities (monitoring rent levels and other housing costs), as well as offering tax relief.³⁴⁶

Security of tenure has been identified as indispensable to the right to adequate housing. It has been interpreted to mean “the right to feel safe in one’s own home, to control one’s own housing environment and the right not to be arbitrarily forcibly evicted.”³⁴⁷ This right in security of tenure “raises the baseline—or minimum core entitlement—guaranteed to all persons who possess housing rights based on international human rights standards. It serves to protect the rights of dwellers and promotes individual and family investments in the improvement of their own homes.”³⁴⁸

VII. CONCLUSION: CASTING HOUSING AS A “RIGHT”

In *State v. Shack*,³⁴⁹ the New Jersey Supreme Court pronounced that “[p]roperty rights serve human values” and are “recognized to that end.”³⁵⁰ It made that pronouncement as it was called upon to mark the outer boundaries of a private landowner’s rights over his land.³⁵¹ In doing so, however, it also marked the rights of non-owners to a private sphere they control and enjoy without unwanted interference from others.³⁵²

and local authorities in order to reconcile related policies with the obligations arising from the Covenant. *Id.*

344. Where such infringements do occur, public authorities should act to preclude further deprivations as well as guaranteeing access to legal remedies for any infringement caused. *Id.*

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.* Comment No. 4 on the Right to Adequate Housing (E/1992/23) approved in 1991 by the U.N. Committee on Economic, Social and Cultural Rights. Under this provision, security of tenure is given particular prominence, in applying it to a variety of housing forms, including rental, cooperative, owner-occupied and prescribes that States should take measures aimed at conferring legal security of tenure on all persons.

349. 277 A.2d 369 (N.J. 1971).

350. *Id.* at 372.

351. *Id.* at 372.

352. There, the New Jersey Supreme Court held that a landowner had no right to exclude social service workers who sought to render services to migrant workers hired by the landowner. *Id.* at 374. In the 1970s, in New York, there was a movement aimed at establishing a state constitutional right to shelter. In *Callahan v. Carey*, 831 N.Y.S.2d 352 (N.Y. Sup. Ct. 2006), a state supreme court ruled that the

In the current Supreme Court membership, there does not seem to be a straight-line view for determining individual rights. On the one hand, in *Kelo v. City of New London*,³⁵³ the Court gave great deference to local governments in determining what is a public use for purposes of eminent domain (including a desire for economic development), thereby compromising individual property rights. On the other, in *Heller*,³⁵⁴ the Court upheld an individual's right to possess firearms against government prohibition despite great societal interest in curbing gun violence. In *Kelo*, individual interests in preserving long-held rights in particular property were determined to be subordinate to the governmental interest in stimulating the economy.³⁵⁵ But in *Heller*, individual interests in bearing arms in their homes trumped the societal interests in curbing gun violence. The respective interests were equally compelling. Can the disparate results be explained by the connection between the interest at issue and the benefit from the award of protection—that if the government could show a close connection between its taking and the expected benefits that would justify the result? In *Heller*, where the impact of the stringent limits on gun possession could not be demonstrated, then the intrusion was too great. But what might distinguish both these cases is the starting point of the analysis. In *Kelo*, the landowner's constitutional right to property was not in debate,³⁵⁶ whereas in *Heller*, it was necessary for the Court to find such a right, but it was clearly not from the literal text of the Second Amendment.³⁵⁷ Even if we were able to convince the Court to read the Fifth and Fourteenth Amendments as liberally as it read the Second, and to find or infer some unstated right to housing, such a right would impose an affirmative duty on the state, unlike in the right to possess a weapon, where the duty is negative. Under the present conception, housing rights are protected as negative rights, which guard against undue interference with possession or the opportunity to obtain housing, but do not operate to facilitate possession through providing the means and availability of affordable housing. Equal protection theory might require a heightened level of scrutiny over governmental measures that are calculated to have a different impact on those who need housing.

The lower federal courts have taken from *Lindsey* the conclusion that there is no right to have the government provide a decent, safe and affordable place to live.³⁵⁸ But, as I have asserted throughout this Article, the provision of housing

homeless held a constitutional right to nocturnal shelter, but that ruling was overturned in *McCain v. Guiliani*, 252 A.D.2d 461 (N.Y. App. Div. 1998). See generally Elisabetta Grande, *Against the Poor: Homelessness in U.S. Law*, GLOBAL JURIST (2011), available at [http://www.degruyter.com/view/j/gj.2011.11.1/gj.2011.11.1.1375/gj.2011.11.1.1375.xml?rskey=aUSS42&result=5&q=Elisabetta Grande](http://www.degruyter.com/view/j/gj.2011.11.1/gj.2011.11.1.1375/gj.2011.11.1.1375.xml?rskey=aUSS42&result=5&q=Elisabetta%20Grande).

353. 546 U.S. 469, 485-86, 490.

354. 554 U.S. 570, 648.

355. *Kelo*, 546 U.S. at 485-86.

356. *Id.* at 477.

357. *Heller*, 554 U.S. at 632, 636.

358. See e.g., *Jaimes v. Toledo*, 758 F.2d 1086, 1102 (6th Cir. 1985). There, plaintiffs who were poor black residents of Lucas County, Ohio, sued alleging violations of various civil rights acts, the Fair

would not be the sole consequence of a right to housing. Instead, a new conception of a “right to housing” would require efforts by the state to strike down arbitrary and discriminatory barriers to housing; would give rise to a presumption of validity for governmental measures undertaken to provide housing; and would subject to a heavier burden of justification measures that are ostensibly neutral but operate to deny housing. To be sure, it might also require the state to undertake measures to ensure adequate, affordable, decent, and secure housing to all in need. In this last conception, there would inevitably be some thorny issues that would need resolution. Would the needy have standing to sue to force the government to provide housing? Who is eligible for such housing; what quality of housing is required; can the right ever be terminated? However, these issues would not be insurmountable as courts frequently make such line-drawing decisions to protect and define the other express and penumbral rights.³⁵⁹ What is important is that we bear in mind that every society is necessarily an amalgam of its constituent economic components, and that every society has a duty to intervene in those areas that will be socially protective and collectively useful.³⁶⁰ We must go beyond merely imagining such a society.

Housing Act, and the National Housing Act, due to the local housing authority’s failure to construct or otherwise make housing available to them in areas of the county that were not “black-impacted.” The court explained that the Constitution does not require that defendants (or others) provide any particular quality housing, nor even “adequate housing,” for plaintiffs or the class whom they purport to represent; Title VIII sets out “a policy . . . to provide, within constitutional limitations, for *fair* housing . . .” 42 U.S.C. § 3601; that language has consistently been interpreted as meaning a policy to bar *discriminatory* practices in housing, and should be read together with 42 U.S.C. § 1982. *Id.* at 1101-02 (citing *inter alia* *Hunter v. Erickson*, 393 U.S. 385, 388 (1969)). The court went on to rule that “Plaintiffs have no constitutional right to be furnished “safe sanitary and decent housing” by defendants; they are constitutionally and by statute entitled to be free of any impediment or conduct on the part of defendants for discriminatory reasons to deny them ‘fair’ housing otherwise reasonably available to those in the same position.” *Id.* at 1102.

359. For example, how much must states expend on education for disabled students? *See e.g., Florence Cnty. Sch. Dist. Four v. Carter by & Through Carter*, 510 U.S. 7, 15-16 (1993) (“There is no doubt that Congress has imposed a significant financial burden on States and school districts [to provide a free public education to disabled students]”, yet “total reimbursement [to a parent who places her child in a private school] would not be appropriate if the . . . cost of the private education was unreasonable”). Must states provide welfare benefits to all newcomers to the state? *See, e.g., Saenz v. Cal. Dep’t Soc. Svcs.*, 526 U.S. 489, 506 (1999) (rejecting the state’s two-tiered approach for doling out welfare benefits, notwithstanding the state’s legitimate interest in saving money). How much physical space is a prisoner entitled to? *See, e.g., Brown v. Plata*, 131 S. Ct. 1910, 1947 (2011) (ordering radical prison population reduction, that might require construction of new prison facilities, early release of prisoners or transfer to county facilities, as necessary to remedy for violation of prisoners’ constitutional rights).

360. The current health care debate notwithstanding.