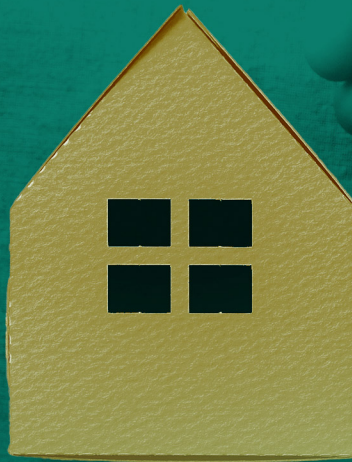


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IS HOUSING A HUMAN RIGHT?

Property Rights and Public Housing
Assistance in Conflict

Caitlyn McKenney



THE Center ON
WEALTH & POVERTY

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IS HOUSING A HUMAN RIGHT? PROPERTY RIGHTS AND
PUBLIC HOUSING ASSISTANCE IN CONFLICT

Caitlyn McKenney*

ABSTRACT

The U.S. Constitution establishes life, liberty and property as unalienable rights but makes no room for a human right to the provision of housing. The negative rights—to life, liberty, and property—upheld by the Constitution are categorically distinct from the positive rights to social and economic goods and services created in law, and they are in conflict by virtue of this fact. It follows that positive rights to public housing assistance are in conflict with negative property rights, creating a government obligation both to protect the property of its citizens from infringement and to redistribute their resources in the form of housing assistance. This tension is apparent in international treaties that establish housing as a human right and conflate property rights and positive rights to housing assistance in doing so. A clear understanding of categories of rights and the responsibilities that flow from them reveals that a human right to housing is incompatible with the Constitution, and necessitates not mere policies but political systems at odds with the constitutional democracy of the U.S.. Property rights, and the political system that upholds them, are worth defending in service to the goal of housing for all Americans without compromise to their most fundamental rights.

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INTRODUCTION

Ten years ago, an Illinois man named Willie Flemming started the Anti-Eviction Campaign. His grassroots group would scour the outskirts of Chicago for foreclosed homes, break into them, and take them over for families in need of housing. Armed with a drill and a new set of locks, Flemming considered decaying and forgotten properties invitations for a feat of modern pioneering. What many would consider theft, even if Robinhood-style, Flemming justified by his firm belief that housing is a human right.¹ That belief, that housing is a human right, is shared by a growing contingent of scholars, politicians, and activists.

In September 2024, U.S. Representatives Alexandria Ocasio-Cortez and Tina Smith introduced the *Homes Act* and wrote in a New York Times op-ed that the bill was created “because we believe that housing is a human right.”² In 2021, U.S. Representative Pramila Jayapal of Washington introduced a *Housing is a Human Right Act* to Congress with the aim of expanding federal programming and funding to address homelessness.³ The bill died in the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, reflecting both the salience of housing rights in U.S. politics and the framework of American government that checks the establishment of new human rights. Scholars have noted that the U.S. is “historically suspicious” of establishing new social or economic rights that “might be amenable to any method of enforcement.”⁴

While the American Constitution makes no mention of housing, the Universal Declaration of Human Rights (UDHR), set forth by the United Nations in 1948, sought to establish in international law a set of fundamental rights. The declaration establishes “the right to a standard of living adequate for the health and well-being” of everyone that includes

¹ Kira Leadholm, *An eviction crisis looms in Chicago. The Chicago Anti-Eviction Campaign has a solution*, Redacted Magazine (February 1, 2021), <https://redactedmagazine.wordpress.com/2021/02/01/eviction-crisis>. Ben Austen, *The Death and Life of Chicago*, The New York Times Magazine (May 29, 2013), <https://www.nytimes.com/2013/06/02/magazine/how-chicagos-housing-crisis-ignited-a-new-form-of-activism.html>.

² Alexandria Ocasio-Cortez, Tina Smith, *Our Solution to the Housing Crisis*, The New York Times (September 18, 2024), <https://www.nytimes.com/2024/09/18/opinion/aoc-tina-smith-housing.html>.

³ H.R. 3772, 117th Cong. (2021-2022).

⁴ Ann Piccard, *The United States' Failure to Ratify the International Covenant on Economic, Social and Cultural Rights: Must the Poor Be Always with Us?*, Scholar St. Mary's Law Review 13, 2, 231 (2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1794303.

housing.⁵ Inspired in part by the UDHR, the San Diego city council voted unanimously to pass a resolution declaring “housing as a human right” in 2023.⁶

The UDHR is not the only doctrine that establishes a right to housing in international law. In 1966, the United Nations adopted the International Covenant on Economic, Social, and Cultural Rights (ICESCR). The covenant recognized a similar “right of everyone to an adequate standard of living...including adequate food, clothing and housing.” The covenant was never ratified by the United States, drawing criticism from proponents of “housing as a human right.”

“Housing as a human right” confronts us with two objective goods: housing and human rights. But connecting those two goods as intrinsically linked warrants careful discussion. What does it mean for housing to be a human right? And what would it take to make that the case?

To answer those questions, we must first understand the “rights” in question and how we distinguish between them. The premise of my argument is that property rights and rights to housing are categorically distinct and in conflict by virtue of that fact. While the U.S. Constitution protects property rights, American jurisprudence has never recognized a human right to housing. I argue that proponents of a human right to housing—including bodies of international law—conflate categories of rights, ignore conflict between those categories, and fail to extend the logical implications of a human right to housing. When those inconsistencies are accounted for, the matter of housing as a human right becomes one of political systems, not merely policies, that are incompatible with the principles of the American Constitution. It is worth upholding property rights as serving the aim of housing for all, rather than subordinating property rights to those aims.

I. RIGHTS AND RESPONSIBILITIES

Common sense tells us that the right to government financial aid is categorically different from the right to gather in church on a Sunday without government interference. But what makes them distinct? A clear delineation between the categories of rights helps parse claims to certain

⁵ Universal Declaration of Human Rights, United Nations, art. 25, Dec. 10 1948.

⁶ Phillip Molnar, *San Diego declares 'housing as a human right' but does it mean anything legally?*, San Diego Tribune (January 25, 2023), <https://www.sandiegouniontribune.com/business/story/2023-01-24/san-diego-declares-housing-as-a-human-right>.

freedoms, protections, and provisions as “rights.” Rights “do not exist in a vacuum,” explain the authors of the *Report of the Commission on Unalienable Rights (RCUR)*, rather “they imply responsibilities, beginning with the responsibility to respect the rights of others.”⁷ In this section, I will examine different types of rights and the responsibilities that flow from those understandings.

In the Declaration of Independence, the nation’s founders declared that “all men are created equal, that they are endowed by their Creator with certain *unalienable* rights, that among these are life, liberty and the pursuit of happiness.” The word “unalienable” attests to the inseparability of the rights from their possessors. To alienate is to separate, and thus rights that are unalienable cannot be separated from what it means to be human. They are fundamental to human nature. For that reason, unalienable rights are “human rights” and will be referred to as such in this paper. There is much to be said about what authority bestows humans with rights—God, nature, reason—but in this paper, I will assume that human rights exist and that they have existed for all of human history. For much of that history, human rights have gone without name or respect. And while many philosophers would eventually put words to the idea of human rights and the nature of government, the United States would become the first grand experiment of government born out of and structured around unalienable rights.

Unalienable rights are secured in law by the U.S. Constitution, in which the Fifth Amendment echoes the Declaration of Independence: “No person shall be...deprived of life, liberty, or property.” Additional rights widely understood to be unalienable include those to free exercise of religion, freedom of speech, and the freedom to peacefully assemble as established and protected by the First Amendment.

Of course, the American Constitution did not bestow humans with inherent rights; rather it established them in law as had never been done before. None of the unalienable human rights—life, liberty, property, religion, speech, assembly—are goods or services to be provided. Rather, they are fundamental aspects of humanity that cannot be taken away. The responsibility of the government is to refrain from action that negates unalienable rights, and to protect them from being taken away by fellow citizens or government itself. In this way, unalienable rights are negative

⁷ Mary Ann Glendon, Peter Berkowitz, et al., *Report of the Commission on Unalienable Rights*, U.S. Dept. of State, 12 (July 2020), <https://www.state.gov/wp-content/uploads/2020/07/Draft-Report-of-the-Commission-on-Unalienable-Rights.pdf>.

rights.⁸

The government cannot, nor can its citizens, take away your right to life, to liberty, to property, to speech or to gathering. This does not mean that you are entitled to the government provision of any of those things. The government has no responsibility to keep you alive, to give you property, or to provide you a platform for your speech. In order to ensure unalienable rights, the government is responsible to act to *protect* them both from threat of fellow citizens and threat of government.

In this paper, I will refer to positive rights as those that the government acts to *provide* to its citizens through the creation of law. Such rights confer a responsibility for the government towards its citizens to provide a good or service. Often, they are created to further the pursuit of an unalienable right. After all, life and liberty surely benefit from the goods and services of healthcare, education, housing, and nutrition, and no one denies that some material provisions are required for the subsistence of life. But is it the government's responsibility to secure these goods for its citizens? While positive due process rights to juries, courts, and counsel are established in the Constitution, increasingly throughout American history, positive rights have found their expression in social and economic responsibilities the government has created towards its citizens through legislation. Unlike the positive rights to a ballot, jury, judge, or law enforcement, these are positive rights to "public assistance, social benefits, economic intervention," and other provisions deemed necessary for maintaining life, liberty, and the pursuit of happiness.

A. Response to a Critique of the Negative-Positive Rights Distinction

The categorization of rights and their corresponding duties as negative or positive is debated. Oxford scholar Henry Shue and New York University legal philosopher Jeremy Waldron argue against a negative-positive distinction.⁹ They claim that all rights demand both negative and positive duties, and so cannot be categorized as one or the other. In particular, Shue argues that "subsistence rights" to provisions like food, clothing, and shelter obligate both positive and negative duties and are

⁸ Not all negative rights are unalienable. For example, the right to bear arms is a negative right, but not an unalienable one. Although it exists in service to the protection of life, liberty, and property, the freedom to own guns is not a fundamental right of humans "endowed by their Creator." The government is nevertheless responsible to protect the right from being taken away. Unalienable rights fall under the broader category of negative rights.

⁹ Jeremy Waldron, *Rights In Conflict*, Ethics, Vol. 99, No. 3. (April, 1989).

thus immune to arguments presupposing the negative-positive rights distinction.¹⁰

In response, Oxford philosopher Cecil Fabre defends the negative and positive rights categories.¹¹ The fact that the right to freedom of speech without interference may obligate a positive right to police protection while speaking does not blur the distinction between negative and positive rights, it simply parses them out. Similarly, rephrasing rights to fit either category does not erase the categories, rather it forces categorical clarity. Fabre provides the example of rephrasing a positive right to food as a negative right not to be deprived of food and outlines four different meanings of such a right:

1. *The right not to be deprived of a minimum diet is a right to be given food.*
2. *The right not to be deprived of a minimum diet is a right not to be interfered with when we try to get food.*
3. *The right not to be deprived of a minimum diet is a right not to be left without means to support ourselves.*
4. *The right not to be deprived of a minimum diet is a right that this food not be taken away from the right-holder once he has it.*

The second and fourth rights in Fabre's list are negative rights to move freely and to possess property without interference and thus strip the right of "any significance as a right *to food*." The only way to "restore its meaning," Fabre concludes, is to understand the right as a positive right, obligating the provision of food or funding. Linguistic efforts to blur the distinction between negative and positive rights are unhelpful.

I will use a similar line of reasoning to critique prescriptions for housing as a human right, but I come to a different conclusion than Fabre. While Fabre argues that positive social rights such as a right to housing should become constitutional, I argue that a right to the provision of housing is incompatible with the principles of the U.S. Constitution.

For the purposes of this paper, the distinction between positive and negative rights cannot be understated. Negative rights cannot be taken away, positive rights must be given. The government is responsible to protect negative rights from interference and to provide positive rights in the form of a good or service. Negative rights rely on the judicial system

¹⁰ Johan Vorland Wibye, *Reviving the Distinction between Positive and Negative Human Rights*, *Ratio Juris*, Vol. 35, No. 4, (December, 2022).

¹¹ Cecil Fabre, *Constitutionalising Social Rights*, *JPP*, Vol. 6, No. 3, (1998).

for their protection, positive rights rely on the legislative branch for their creation and provision. When the Declaration of Independence and the Constitution's Bill of Rights were penned, the authors understood this distinction. The unalienable rights America's founding documents uphold are strictly negative rights.

II. NEGATIVE AND POSITIVE RIGHTS IN CONFLICT

In his review of Robert Nozick's *Anarchy, State, and Utopia*, philosopher Thomas Nagel presents a tension between two ideals of American liberalism: individual liberty and the public good. To pursue one ideal in full comes at some cost to the other.¹² Individual liberty is served by negative rights to life, property, speech, and worship. The public good is served by positive rights to goods and services by way of taxation and regulation. It is inevitable that the two categories of rights, and the ideals they serve, come into conflict.

Positive rights obligate the use of individual resources, and yet negative rights obligate protection of those resources. Thus, every positive right infringes on a negative one. How far a positive right infringes on a negative right depends on the resources it obligates. If everyone who uses a wheelchair has the right to a ramp in public spaces, every business owner is obligated to devote money towards ramps. If everyone with kidney disease had the right to a kidney transplant, healthy kidney owners would be obligated to become donors. Ramps provide freedom to wheelchair users and kidneys provide life to people with kidney failure, but the resources both obligate differ significantly—one requires taking some of your money and the other requires taking part of your body.

Although they serve the aims of life and liberty, the positive rights to ramps and kidneys are at odds with negative unalienable rights. Your money and kidneys are your property, and to force their removal to serve a public good is an affront both to your property and your liberty.¹³ But the degree of threat to those unalienable rights varies. There are some tensions between positive and negative rights that Americans willingly accept. The *Report of the Commission on Unalienable Rights* points out that “social and economic rights are most compatible with American founding principles when they serve as minimums that enable citizens to

¹²Thomas Nagel, *Libertarianism Without Foundations*, Yale L.J., Vol. 85, (1975).

¹³ The kidney-scenario is a hypothetical, but it is good to remember that some of the worst violations of liberty in American history involve surgical or medical procedures against a person's will. Lobotomies and forced sterilizations were done in service to the “public good.”

exercise their unalienable rights.”¹⁴ Obligating financial resources to build ramps is, many believe, a minimum that enables the exercise of freedom. When such positive rights extend beyond the minimum, as they would with coerced organ donations, they present increasing conflict with unalienable human rights and America’s founding documents that protect them.¹⁵

Adjudicating rights conflicts shapes the bounds of those rights, drawing lines and ordering them in relation to each other. Our most contested matters of civic life are often issues of conflicting rights. When rights come into conflict, it is because the responsibilities associated with each are incompatible. If the government unilaterally provides the positive right to a kidney transplant, it cannot simultaneously unilaterally protect the negative right to ownership and freedom over one’s own body. It is impossible to guarantee both rights. In this hypothetical, some people would have to become kidney donors against their will.

Resolving rights conflicts in the public sphere and the court room center around understanding what rights and responsibilities exist for whom and which is the more fundamental. The question is rarely whether the positive right at hand is *good*. Wheelchair ramps, healthy kidneys, education, housing, and emergency services are all *good*. The question is whether the competing negative right is worth violating in some measure in order to provide the positive right. As Nagel writes, the decision to infringe on a negative right to provide a public good is a “function of the gravity of the violation and the desirability of the ends.”¹⁶

That question is the point on which debates about housing as a human right hinge. The inherent conflict between negative and positive rights is a crucial premise to the discussion. For now, I will set aside the question of whether housing is an unalienable human right in the same way that life, liberty, and property are. Instead, I will focus on the tension between the provision of housing in the form of housing assistance and the protection of property. This tension is a conflict between a positive right and a negative right, and understanding the conflict helps make sense of a human right to housing.

¹⁴ Glendon et al., 21.

¹⁵ This is not to say that negative rights never conflict with each other. By definition, negative rights restrict unfettered individual liberty. The right to move freely and do as one pleases is restricted by others’ rights to not be assaulted or to gather to worship without interference. The fact that negative rights can come into conflict has no bearing on the relationship between positive and negative rights.

¹⁶ Nagel, 145.

In the most positive light, public housing assistance serves to allow people to exercise their property rights, and yet the promise of housing assistance careens towards conflict with property rights by obligating private resources to serve a public good. The result is a tension between the government obligation to provide resources in service to housing and to protect those same resources from interference.

I will examine the historical legal support for property rights as an unalienable human right and the later establishment of positive rights to housing assistance. If the rights are indeed in conflict, then to resolve the conflict we must weigh the gravity of property rights violations with the desirability of the public provision of housing.

III. PROPERTY RIGHTS—UNALIENABLE HUMAN RIGHTS

From the perspective of the founders of the United States, property rights and religious liberty are “foremost among the unalienable rights that government is established to secure,” because “without the ability to maintain control over one’s labor, goods, land, home, and other material possessions, one can neither enjoy individual rights nor can society build a common life.”¹⁷ While “home” and “land” may come to mind first, property encapsulates everything a person possesses for themselves. It is for this reason that property rights can be viewed as the common thread that holds all unalienable rights together, because “individuals are independent or free to the extent that they have sole or exclusive dominion over what they hold.”¹⁸ In other words, life, liberty, speech, and religion assume possession of the body, the mind, and the goods created by them. It is in this vein that James Madison described individual conscience as “the most sacred of all property.” The proceeding discussion will focus on property rights specific to housing and land but flows from the founders’ understanding of property rights at large as a keystone of human rights.

Property rights were preeminent in the minds of English political philosophers who would influence the thinkers behind the American Revolution, the Declaration of Independence, and the Constitution. But the concept of property rights extends far back into the very beginnings

¹⁷ Glendon, et al., 13.

¹⁸ Roger Pilon, *Property Rights and the Constitution*, Cato Institute (2022), <https://www.cato.org/cato-handbook-policymakers/cato-handbook-policymakers-9th-edition-2022/property-rights-constitution#legal-protection-property-rights>.

of human history and scholarship. From the Tenth Commandment of Judeo-Christian scriptures — “thou shalt not covet thy neighbor’s house” — to Aristotle’s defense of private property over “common property” in the 4th-century B.C., the valuing of individual ownership charts a strong course through history.¹⁹

Centuries after Aristotle’s time, political philosopher John Locke would greatly influence the founding of American government and, in particular, the Declaration of Independence. For Locke, the protection of property rights was encompassing of life and liberty. In his *Second Treatise of Government*, authored in 1689, Locke writes that humans by their very nature have the power “to preserve [their] property, that is, [their] life, liberty and estate against the injuries and attempts of other men.”²⁰

Following Locke, William Blackstone’s interpretation of English common law would influence early American jurisprudence. In 1753, Blackstone characterized property rights as the “sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”²¹ James Madison would cite this characterization at the forefront of his writing on property, claiming that a just government is one “which impartially secures to every man, whatever is his own.”²²

The right to use one’s property without trespass or intrusion is well established in U.S. common law—the cumulation of court rulings. The covenant of quiet enjoyment, long upheld in the courts, protects the ability of homeowners and tenants to live in their homes peacefully without disruption. For example, Washington State law codifies the “comfortable enjoyment of the life and property,” protecting individuals

¹⁹Aristotle, *Politics* Book 2, 1263a. “Now if the tillers of the soil be of a different class there might be another and easier system, but if the citizens do the work for themselves, the regulations for the common ownership of property would give more causes for discontent; for if both in the enjoyment of the produce and in the work of production they prove not equal but unequal, complaints are bound to arise between those who enjoy or take much but work little and those who take less but work more...It is clear therefore that it is better for possessions to be privately owned, but to make them common property in use...And moreover to feel that a thing is one’s private property makes an inexpressibly great difference for pleasure.”

²⁰ John Locke, *Second Treatise of Government*, VII, sec. 87 (1690).

²¹ Sir William Blackstone, *Commentaries on the Laws of England*, Vol.1, Book II, ch.1, sec. 2 (1753), <https://oll.libertyfund.org/pages/blackstone-on-property-1753>.

²² James Madison, *On Property*, *The Founders’ Constitution*, Vol. 1, ch. 16, doc. 23 (1792), <https://press-pubs.uchicago.edu/founders/documents/v1ch16s23.html>.

from “an obstruction to the free use of property.”²³ But while the covenant of quiet enjoyment protects individuals from property rights violations against each other, the term is present in the philosophical underpinnings of law as a whole. Referring to rights at large, William Blackstone wrote that “the *quiet enjoyment* and protection of all our civil rights and liberties, which are the sure and general consequence of obedience to the municipal law, are in themselves the best and most valuable of all rewards.”²⁴ Note that quiet enjoyment is not a right to the possessions worth enjoying, but to the freedom to enjoy them.

Following the thinking of English political philosophers, the Declaration of Independence, and the judgements of early American common law, the U.S. Constitution’s Fifth Amendment established property rights in law: *No person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

Property rights, like the right to life and liberty, are unalienable and negative. They exist regardless of man-made law, and when established in the U.S. Constitution, prevent the government, or its citizens, from taking them away. The government is responsible to protect against the invasion or destruction of private property: “*no person shall be deprived.*”

The government is also responsible to provide fair compensation in the event that it takes private property for public use. The Takings Clause of the Fifth Amendment — “*nor shall private property be taken for public use without just compensation*” — protects civilians from unjust government intrusion on their property rights. In doing so, the clause recognizes that some government authority exists to use or interfere with private property for public good. The Takings Clause is not the creation of a new government power, but rather the limitation of a pre-existing sovereignty that is inherent to government.²⁵ In the 1960 Supreme Court case *Armstrong v. United States*, the Court explained that the inclusion of “just compensation” in the takings clause “was designed to bar Government from forcing some people alone to bear public burdens

²³ Revised Code of Washington 7.48.010: Actionable Nuisance Defined.

²⁴ Sir William Blackstone, Commentaries on the Laws of England, Vol. 1, Intro., sec. 2 (1753), https://oll.libertyfund.org/titles/sharswood-commentaries-on-the-laws-of-england-in-four-books-vol-1#lf1387-01_label_598.

²⁵ *Boom Co. v. Patterson*, 98 U. S. 403, 406 (1879). The Court recognized that the right of eminent domain “appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty.”

which, in all fairness and justice, should be borne by the public as a whole.”²⁶

When Congress adopted the Fourteenth Amendment to secure the protection of life, liberty, and property from threat of state governments, not just the federal government, it served to protect emancipated slaves from states that sought to limit their ability to acquire and establish a home, their property rights.²⁷ According to the *Report of the Commission On Unalienable Rights*, many abolitionists believed that true freedom for former slaves hinged on their acquisition of property and the subsequent protection of that unalienable right.²⁸ It’s no surprise then that the first section of the Civil Rights Act of 1866 ensured citizens of “every race and color” the right to “inherit, purchase, lease, sell, hold, and convey real and personal property,” signifying the fundamentality of property rights to human freedom.²⁹

In 1923, the case *Meyer v. Nebraska* introduced the freedom to “establish a home” into American case law and became a “vital cornerstone for the protection of personal liberty.”³⁰ The U.S. Supreme Court elucidated in that case the meaning of “liberty” in the Constitution’s protection of life, liberty, and property. Justice McReynolds wrote that liberty “denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.” These rights were to be protected from government action that, “under the guise of protecting the public interest,” is “arbitrary or without reasonable relation to some purpose within the competency of the State to effect.”³¹ Government interference with the right to establish a home is a threat to unalienable liberty even if it claims to serve a public good.

²⁶ *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

²⁷ John G. Sprankling, *The Constitutional Right to “Establish a Home,”* 90 *Geo. Wash. L. Rev.* 648 (2022), <https://scholarlycommons.pacific.edu/cgi/viewcontent.cgi?article=1633&context=facultyarticles>.

²⁸ Glendon et al., 13.

²⁹ The Civil Rights Act of 1866, 39th Cong. (1st Sess. p.27 1866).

³⁰ William G. Ross, *A Century of Meyer v. Nebraska: The SCOTUS Case that Defined Personal Liberties*, *Jurist* (June 2 2023), <https://www.jurist.org/commentary/2023/06/meyer-v-nebraska/>.

³¹ *Meyer v. Nebraska*, 262 U. S. 390, 399, 400 (1923)

The right to “establish a home” and to acquire property without government interference has been upheld consistently in case law. The 1898 case of *Holden v. Hardy* held that protection against the deprivation of property implies that property is acquired and that laws which “deprive any class of persons of the general power to acquire property” would be an affront to property rights.³² The legal system would continue to protect citizens against government action to restrict access to housing. In the 1917 case of *Buchanan v. Warley*, the Supreme Court protected Black Americans from an ordinance that stripped them of equal access to home buying on the basis of race. In its ruling, the Court stated that “property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it.”³³ The government has a responsibility not just to protect its citizens from the invasion or destruction of their property, but to protect their access to the acquisition and use of that property.

In sum, history attests that property rights are fundamental human rights, that the U.S. Constitution protects liberty and property as unalienable rights, and that U.S. case law has unceasingly defended these rights. Nowhere in the language of the Constitution exists a positive right to housing and corresponding government responsibility to secure and provide housing. Further still, there is no unalienable, human right to the government provision of housing. The nonexistence of a recognized human right to housing does not bar the fact that the philosophers, founders, and judges who have shaped American law all recognized that the freedom to “establish a home” and to have property are basic tenets of human life and flourishing. The question is not whether housing is *good* but whether its provision as a positive right warrants the violation of property rights. If housing is a *human right*, that balance begins to shift in its favor. But to address that question, we must first examine the history of the provision of housing in the form of housing assistance.

IV. PUBLIC HOUSING ASSISTANCE—A POSITIVE, ECONOMIC RIGHT

In service to unalienable rights, and in light of the principle that housing is a basic tenet of human flourishing, lawmakers began to create positive rights to economic and social assistance beginning in the 1930s.

³² *Holden v. Hardy*, 169 U. S. 366, 391 (1898). The protection of acquisition of housing and property as “one of the natural, inherent, unalienable rights of man” was upheld by Federal Judges in *Vanhorne’s Lessee v. Dorrance* and *Corfield v. Coryell*.

³³ *Buchanan v. Warley*, 245 U. S. 60, 74 (1917).

Caitlyn McKenney *Is Housing a Human Right?*

In his 1944 State of the Union address, President Franklin Delano Roosevelt voiced a significant shift in the role of government, from protecting unalienable rights to providing economic security in addition: *This Republic had its beginning, and grew to its present strength, under the protection of certain inalienable political rights—among them the right of free speech, free press, free worship, trial by jury, freedom from unreasonable searches and seizures. They were our rights to life and liberty. As our Nation has grown in size and stature, however—as our industrial economy expanded—these political rights proved inadequate to assure us equality in the pursuit of happiness. We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence.*” Roosevelt would proceed to outline a “second Bill of Rights” based on “economic truths [that] have become accepted as self-evident.” Among rights to jobs, adequate wages, and medical care, Roosevelt declared “the right of every family to a decent home.”³⁴

The “right to a decent home,” and corresponding legislation, is categorically distinct from the property rights—to own, establish, and acquire a home—that had been protected from government interference up until this point. In contrast to the responsibility to protect negative rights from interference, the positive right to housing assistance required that government *provide* housing to those in need. While property rights rely on the judiciary system for defense in the courts, the positive right to housing assistance relies on the legislative system to determine “the just use of limited resources.”³⁵

The legislative groundwork had been set a decade prior to Roosevelt’s “second Bill of Rights” speech, when Congress passed The Home Owner’s Loan Act of 1933 as part of the New Deal. The Act created a Home Owner’s Loan Corporation which was authorized to issue up to \$2 billion in bonds to provide loans to help families pay their mortgages.³⁶ This would be one of the first forms of government assistance in housing, spurred into existence by high rates of unemployment and home foreclosures following the Great Depression. In 1934, Congress passed the National Housing Act which set up a Federal Housing Administration and the Federal Savings and Loan Insurance Corporation to protect mortgage lenders, furthering federal involvement in home financing.

³⁴ Franklin D. Roosevelt, State of the Union Message to Congress, (January 11, 1944).

³⁵ Glendon et al., 24.

³⁶ Home Owners’ Loan Act of 1933, 73rd Cong. (1933).

The Federal government's participation in financing the home market would pave the way for the Wagner-Steagall Housing Act of 1937. The Act established the United States Housing Authority "that provided \$500 million in loans for low-cost housing projects across the country."³⁷ The Federal government would subsidize one-third of the rent for tenants of USHA housing projects, establishing local-led public housing authorities and becoming the first form of truly public housing. The law states that "our Nation should promote the goal of providing decent and affordable housing for all citizens through the efforts and encouragement of Federal, State, and local governments" in addition to the private sector.

When in 1949 President Harry Truman signed into law another National Housing Act, he stated that the legislation "establishes as a national objective the achievement as soon as feasible of a decent home and a suitable living environment for every American family."³⁸ The Federal Government would fund roughly 200,000 public housing units by the end of the 1940s.³⁹

Just over a decade later, the modern era of public housing assistance would be in full swing. The Department of Housing and Urban Development (HUD) was created in 1965, and the number of federally funded public housing units would reach over 800,000 during this time. Also during this time, disillusionment with the problems of large scale public housing projects in urban areas was growing. A shift occurred away from funding public housing units and towards public housing assistance in the form of rental subsidies for families in private market housing units. This shift would be solidified in 1974 by the creation of the Section 8 program and later, the Section 8 voucher system authorized in 1983. The Section 8 program, operated by HUD, provided federal subsidies to the owners of Section 8 housing projects whereas the Section 8 housing choice vouchers provided rental assistance directly to tenants to use in private market housing. As of October 2024, 2.3 million households across the country use Section 8 housing choice vouchers, and the Housing Choice Voucher program is operating on a budget of \$25 billion.⁴⁰

³⁷75th Anniversary of the Wagner-Steagall Housing Act of 1937, Franklin D. Roosevelt Presidential Library (2012), <https://www.fdrlibrary.org/housing>.

³⁸ Statement by the President Upon Signing the Housing Act of 1949, Harry S. Truman Library (1949), <https://www.trumanlibrary.gov/library/public-papers/157/statement-president-upon-signing-housing-act-1949#>.

³⁹ Maggie McCarty, CRS Report for Congress: Introduction to Public Housing, p.2 (2014), <https://sgp.fas.org/crs/misc/R41654.pdf>.

⁴⁰ Housing Choice Voucher Data Dashboard, U.S. Department of Housing and Urban Development,

As the federal government, and local governments, became increasingly involved in providing housing assistance to low-income citizens, it followed naturally that provisions for the poorest—those without a home—were needed as well. The first piece of federal homelessness legislation, the McKinney-Vento Homeless Assistance Act, was signed into law by President Ronald Reagan in 1987. The Act created a plethora of programs in response to homelessness and federal funding in the form of grants for the various programs to distribute. Today, government economic and social assistance for those with low-incomes, those in poverty, and those experiencing homelessness is well-woven into the fabric of federal policy.

In recent years, cities like New York have recognized a positive right to shelter and cities like Seattle have recognized a positive right to legal defense and financial aid for tenants who receive a notice of eviction. While not rental subsidies or public housing, tenants' rights laws are housing assistance, providing goods and services to keep people housed. Seattle is a helpful case study. There, low-income tenants facing an eviction for non-payment of rent have the positive right to free legal support.⁴¹ The city has also passed laws creating legal defenses to eviction for tenants with children during the school year and for eligible tenants during the winter, establishing a 3 to 9.5-month eviction moratorium every year. The eviction moratorium laws provide tenants a positive right to remain housed without payment of rent for a varying period at the sole cost of the property owner.

Additional City of Seattle laws include a Roommate Ordinance that gives a broad set of persons legal rights to a rental property without owner consent, and the Fair Chance Housing ordinance prohibiting landlords from rejecting a rental applicant based on criminal history, a de facto ban on criminal background checks.⁴² Further, the city regulates landlord

https://www.hud.gov/program_offices/public_indian_housing/programs/hcv/das_hboard.

⁴¹ Seattle Municipal Code 22.205.110. In addition, eligible tenants cannot be evicted during the Winter (December 1-March 1) according to Seattle Municipal Code 22.205.080.

⁴² The Washington State Supreme Court upheld the 30-day pay or vacate notice in *Sherwood v. Pinzon*, No. 84119-0-I (Wash. App. 2022). Plaintiffs in *Yim v. City of Seattle* argued that the city's Fair Chance Housing ordinance (2018) infringed landlords' "fundamental property right to exclude prospective tenants based on their criminal history." However, the United States Court of Appeals for the Ninth Circuit rejected this claim, arguing that the right to exclude is a "non-fundamental property right," invoking a rational basis review of the

ability to generate revenue from their property by requiring six-month notice of all rent increases and requiring the landlord to pay for three months of rent for their tenants should they move following a rent increase of more than 10%.

The positive right to public housing assistance in law now follows the full scope of interaction with housing—from the right to shelter for those without a home, to the right to affordable housing for those with low incomes, to the right of tenants to remain housed under eviction. Housing and shelter are good ends, but the central issue is whether the means used to provide them as positive rights justify those ends. The more fundamental a right, the more important it is to guarantee and the higher the cost we are willing to pay to secure it.

V. PROPERTY RIGHTS AND HOUSING ASSISTANCE IN CONFLICT

American history, we have seen, makes clear that property rights are negative unalienable rights and that housing assistance is a positive right created by legislation. While the positive rights to public housing assistance “entail difficult judgements about the allocation of material resources,” the unalienable right to property entails the protection of every person’s material resources as their own.⁴³ The government’s responsibilities are twofold then, both to use individual resources to provide public housing assistance and to protect individual resources from government overreach. It is no surprise, that at some level—if not at every level—these two rights are incompatible.

A clear example of this incompatibility is the conflict between tenants’ rights laws and unalienable property rights of homeowners who are landlords. Seattle is a case study on property rights infringement created by laws and regulations that force individual landlords to bear the public burden of providing housing for those who cannot afford it.

Data from King County’s Superior Court (King County is home to the City of Seattle) reveals a backlog of 2,151 unlawful detainer cases as of March 2024. On average, the backlogged cases have been pending for 268 days since the eviction was filed, with 10% of cases pending for

ordinance instead of strict scrutiny. *Yim v. City of Seattle*, No. 21-35567 (9th Circ. Mar. 21, 2023).

⁴³ Glendon et al., 21. “These relatively modern kinds of rights are not privileges to act or immunities from government action—like the right around which the Declaration and the Constitution revolve—in that they entail difficult judgements about the allocation of material resources.”

more than 970 days. During the nine months to 2.5 years that an individual eviction case is ongoing, the property owner has no option under the law but to surrender the use of their property without compensation to the unlawful tenant until the time that the case is resolved. The property owners involved in such eviction cases not only lose compensation for their property, but they also shoulder legal costs and potential losses in damages to their property. At the same time, owners must continue covering the expenses of property ownership, many of which expose them to personal liability. Failure to cover the cost of taxes and utilities can result in judgements or liens against their property, and failure to cover the costs of unforeseen maintenance can result in claims of negligence by tenants.

Imagine a parallel scenario in which an airline is forced to provide free flights for passengers who are unable to pay. Not only must the airline forfeit the revenue for their service, but they must also incur the costs of fuel, staff, insurance, repairs and maintenance. At the same time, they open themselves to a host of liabilities should something go wrong on the flight. Of course, airlines refuse service without payment and would never assume the risk of flying a plane full of passengers who didn't pay.

Property owners involved in lengthy eviction proceedings temporarily lose the asset of their home, the revenue generated by rent, and the protection of their property ensured by law. They are left with the property expenses, liability of facing liens or negligence claims, the expenses of legal support, and the duty to continue providing the use of their home without compensation, nonetheless. This constitutes a clear violation of one person's unalienable property rights to serve another's positive right to housing assistance. Tenant's rights legislation in Seattle provides a stark example of the conflict between housing assistance and property rights, but such legislation is not unique to Seattle. From Tacoma, WA to Washington, D.C., the positive right to eviction assistance presents a challenge to the property rights of landlords. Below, I will examine ways in which tenants' rights laws infringe on fundamental protections of property. Again, the question is not whether housing assistance is *good* but whether it warrants some violation of the unalienable right to property.

A. Housing Assistance in Violation of the Takings Clause

First, I will examine the tension in law between the Takings Clause of the Fifth Amendment—a facet of property rights—and eviction moratoriums. The Takings Clause has been interpreted in several ways that are relevant to the property rights of landlords and the positive rights

of tenants created in law. In 1922, the Supreme Court in *Pennsylvania Coal Co. v. Mahon* interpreted the Takings Clause to protect against both physical and regulatory takings.⁴⁴ Justice Oliver Wendell Holmes wrote that “while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.” In a statement that could not be more applicable to tenants’ rights laws, Justice Holmes pushed back on the idea that “a man’s misfortunes or necessities will justify his shifting the damages to his neighbor’s shoulder.”

In *Armstrong v. United States*, the Supreme Court ruled in 1960 that the Takings Clause was “designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” The infringement of property rights cannot be justified by the serving of a public good. A landlord cannot be forced to bear the burden of providing housing for those who are unable to pay for it. In 2021, the Supreme Court interpreted the Takings Clause to protect the “right to exclude” as an “essential attribute of property” in *Cedar Point Nursery v. Hassid*. The case regarded the government appropriation of private property for the enjoyment of a third party as a *per se* physical taking even if that taking was temporary.⁴⁵

While none of the cases above involved tenancy, the interpretations of the Takings Clause set forth in each have lent themselves to legal disputes about tenants’ rights law. The Takings Clause protects property owners from overregulation of their property, violations of their right to exclude individuals from their property, and from use of their property to bear a public burden alone. The Takings Clause was invoked by property owners in two separate lawsuits against the governors of Minnesota and Washington State for ordering eviction moratoriums in response to COVID-19. The eviction moratoriums, both sets of plaintiffs argued, prohibited them from excluding individuals from their property for non-payment of rent, forcing them to provide housing without compensation.⁴⁶

⁴⁴*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). A regulatory takings must satisfy three factors: the “economic impact of the regulation on the claimant,” “the extent to which the regulation has interfered with distinct investment-backed expectations,” and the “character of the governmental action.” According to the ruling in *Heights v. Walz*, No. 21-1278 (8th Cir. Apr. 5, 2022).

⁴⁵ *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021). https://www.supremecourt.gov/opinions/20pdf/20-107_ihdj.pdf (in syllabus).
⁴⁶ *Heights v. Walz*, No. 21-1278 (8th Cir. Apr. 5, 2022), *Gonzales v. Inslee*, No. 100992-5 (Wash. 2023). In 2021, the U.S. Court of Appeals for the Eighth Circuit ruled in favor of the plaintiffs in *Heights Apartments v. Tim Walz*, deciding that the Minnesota eviction moratorium constituted a *per se* physical

The eviction moratoriums at issue in those lawsuits were executive orders made under emergency authority, but they provide a helpful framework for understanding the conflict between property rights protections and the provision of housing assistance in the form of tenants' rights laws. This kind of housing assistance presents a plausible Takings Clause violation.

B. Housing Assistance in Conflict with Quiet Enjoyment

Aside from the takings clause, another tenet of property rights is the covenant of quiet enjoyment well-established in U.S. common law. Unlike the rights conflicts between landlords and tenants described above, the right to quiet enjoyment may invoke a conflict of rights between tenants. A tenant's right to quiet enjoyment of the property they lease is threatened by tenants' rights laws that delay the eviction of other residents who create nuisance. Laws like Seattle's Fair Chance Housing Ordinance prevent landlords from excluding tenants with a history of behavior that could violate neighbor's rights to quiet enjoyment. Lengthy eviction proceedings and the outlawing of criminal background checks have been well documented in Seattle as slowing landlord efforts to protect the quiet enjoyment of their residents from destructive or dangerous behavior of tenants.⁴⁷

C. Housing Assistance and Role of Taxation

Positive rights to housing assistance in the form of tenant's rights laws should be recognized as a clear infringement on property rights. But the threat to property rights extends beyond the landlord-tenant relationship. Almost all of the positive rights to housing assistance involve the allocation of taxpayer resources, and taxation presents a broader tension between the government's responsibility both to provide resources to its citizens and to protect their resources from infringement. This is not to say that taxation for public benefit is *prima facie* a violation of property

taking in which property owners were deprived of their "right to exclude existing tenants without compensation" and a regulatory taking in which property owners suffered damages and losses due to government action. A similar case was heard in Washington State. However, the Washington State Supreme Court ruled in *Gonzales v. Inslee* that the governor's eviction moratorium did not constitute a *per se* takings because property owners were not required to "submit to physical occupation or invasion of their land."

⁴⁷ Tenants in Oregon have recently filed a lawsuit against their property management and the City of Gresham for neglecting to evict another resident for violent and threatening behavior.

rights, but that there is surely a line that can be crossed, and it is by the consent of the people, not the whim of the government, that the line is set.

John Locke's theory of government clearly captures this idea: "*If any one shall claim a power to lay and levy taxes on the people, by his own authority, and without such consent of the people, he thereby invades the fundamental law of property, and subverts the end of government: for what property have I in that, which another may by right take, when he pleases, to himself?*"⁴⁸ Property is not limited to physical land or dwellings, and taxation is the consensual surrender of private property for personal and public benefit. Section 8 housing vouchers, grant programs, subsidized affordable housing buildings, public legal assistance, and housing development funding are financial burdens borne by taxpayers for public good. At some level, they present a rights conflict between the government's responsibility to protect private property and to provide housing assistance as a positive right.

The conflict between property rights (negative, unalienable) and rights to housing assistance (positive) could not be clearer than in Seattle's tenant's rights laws. The question at hand is whether some violation of property rights is an acceptable price to pay for the positive right to housing assistance. The answer rests in what we stand to lose, and if the positive right to housing is a *human right*, the stakes are raised. But as I will examine below, the basis of American jurisprudence makes no room for housing as a human right.

VI. AMERICAN JURISPRUDENCE: NO HUMAN RIGHT TO HOUSING

At the time that Franklin Delano Roosevelt introduced housing into the lexicon of rights, he declared a pivot from the ideas that founded America: "*these political rights (unalienable rights) proved inadequate to assure us equality in the pursuit of happiness. We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence.*" In America's early years, the pursuit of happiness, individual freedom, and independence were thought to be best accomplished not through the provision of goods but through a strong defense of property rights and freedom.

Housing was understood to be a freedom that the protection of unalienable property rights served and furthered. A robust understanding

⁴⁸ John Locke, *Second Treatise of Government*, ch. XI, sec. 140 (1690).

of individual ownership and a recent collective memory of government overreach kept government out of the business of providing housing assistance, or any rights-based economic or social assistance for that matter. It is not the case that the founders or early leaders of our nation disregarded the importance of a home to the flourishing of individuals in a free society. Quite the opposite, the home was regarded—even more than today—as the center of American life and the human pursuit of happiness.⁴⁹

In this vein, the U.S. government has a history of supporting and incentivizing housing long prior to the start of the provision of housing assistance as a positive right. Less than a decade after the nation's founding, the government sold public land into private ownership at low costs to encourage the settling of the West.⁵⁰ In 1862, the government would pass the Homestead Act in which “a settler could obtain 160 acres of land ‘for the purpose of actual settlement’ for ten dollars, as long as he resided on and cultivated the land for five years.”⁵¹ The Supreme Court would later affirm that the goal of the Homestead Act was to enable the establishment of homes.⁵² The incentivization of housing continues in much more recent history with tax credits and incentives designed to promote homeownership and private investment in housing that benefits those in need.⁵³ Rather than redistributing the resources of taxpayers, tax credits keep earnings in the hands of the owner for the service of a public good.

⁴⁹ In his paper *The Constitutional Right to “Establish a Home”*, John G. Sprankling quotes Margaret Radin: “the home is a moral nexus between liberty, privacy, and freedom of association.” And Gerald Dickinson: “Americans’ admiration ‘for the sanctity of the home’ is linked to the individual, the family, and the fabric of society.” John G. Sprankling, *The Constitutional Right to “Establish a Home,”* 90 *Geo. Wash. L. Rev.* 637 (2022), <https://scholarlycommons.pacific.edu/cgi/viewcontent.cgi?article=1633&context=facultyarticles>.

⁵⁰ *The Land Ordinance of 1785*, *Journals of the Continental Congress*, v. 29, p.923 (May 18, 1785).

⁵¹ John G. Sprankling, *The Constitutional Right to “Establish a Home,”* 90 *Geo. Wash. L. Rev.* 648 (2022), <https://scholarlycommons.pacific.edu/cgi/viewcontent.cgi?article=1633&context=facultyarticles>.

⁵² *Ibid.*

⁵³ *Low-Income Housing Tax Credit: Property Level Data*, U.S. Department of Housing and Urban Development. In 1986, Congress would create the Low-Income Housing Tax Credit program to provide federal support, by way of a tax break, for the development or rehabilitation of low-income affordable housing units. The program has funded the creation of more than 3.65 million units since its start. Similar tax exemptions like the 2017 Opportunity Zones tax incentive or the First-Time Homebuyer Credit, are designed to promote homeownership and private investment in housing that benefits those in need.

From the earliest incentivization of housing to the modern proliferation of housing assistance, at no point in American law has a positive right to housing been declared an unalienable human right on par with those to life, liberty, and property. The legislative branch has given life to positive rights to housing assistance, but a right to housing, let alone a *human right* to housing, has never been expressed as a Constitutional right by the Supreme Court. Positive rights to housing are categorically distinct from the unalienable human rights protected in America.

The Supreme Court heard a case in 1972 in which tenants refused to pay rent on the grounds that their landlord failed to maintain the property as fit for habitation. In the *Lindsey v. Normet* decision, Justice Byron White wrote that, “the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.” Justice White argued that for eviction cases, “speedy adjudication is desirable to prevent subjecting the landlord to undeserved economic loss and the tenant to unmerited harassment and dispossession when his lease or rental agreement gives him the right to peaceful and undisturbed possession of the property.”

Acknowledging the threat to property rights, the tenants’ attorney had argued that the government had a compelling interest in the tenants’ “right to retain peaceful possession of one’s home” that could warrant infringing on constitutionally protected property rights. In response, Justice White states in the decision that there is no “constitutional guarantee of access to dwellings of a particular quality,” and no constitutional “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.” Solidifying the protection of property rights, he wrote “nor should we forget that the Constitution expressly protects against confiscation of private property or the income therefrom.”⁵⁴

The Supreme Court has not acknowledged a right to housing or even to basic shelter. This year, the Court decided in *Grants Pass v. Johnson*, that laws banning public camping—even when shelter beds are unavailable—are not in violation of the Constitution. Although the ruling focused on the Eighth Amendment, it rejected a lower court decision that “imbu[ed] the availability of shelter with constitutional significance,” and “created a right that has proven ‘impossible’ for judges to delineate.”⁵⁵ Shelter, according to the underpinnings of the ruling, is not a constitutional right.

⁵⁴ *Lindsey v. Normet*, 405 U.S. 56, 74, 73, (1972).

⁵⁵ *City of Grants Pass v. Johnson*, 603 U. S. 5, 29 (2024).

American jurisprudence recognizes housing as a freedom, not an unalienable human right, conferring no responsibilities to the government beyond the existing duties to protect unalienable property rights. These protections—to establish, use, acquire, and sell property free from discrimination or intrusion—all serve the freedom to own, rent, build, buy, and inhabit a house. They do not guarantee the provision of housing as a positive right.

As we will see, international law in favor of housing as a human right conflates the responsibility to protect negative property rights with the responsibility to provide positive rights to housing assistance. Untangling this conflation allows us to more clearly envision what a human right to housing would look like and how that human rights status might alter the conflict with unalienable property rights.

VII. ENVISIONING GOVERNMENT THAT RECOGNIZES HOUSING AS A HUMAN RIGHT

A. International Law Conflates Rights

If positive rights to housing assistance infringe on property rights, surely a *human right* to housing with more binding responsibilities would conflict with property rights even more so. What would it look like for government to recognize housing as an unalienable, human right, and are there any governments that have successfully done so?

International treaties like the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) declare a human right to housing. The United Nations Human Rights Commission produced a report on the “Right to Adequate Housing” in which the authors outline the freedoms, entitlements, and responsibilities that a human right to housing confers. One of the most common misconceptions about the right to housing, the authors claim, is that the government has an obligation to supply enough housing for its entire population and that its citizens can demand housing from the government.⁵⁶

In a brief titled *Housing as a Human Right*, Senior Policy Director of the National Law Center on Homelessness and Poverty, Eric Tars, puts forth the same negative premise—that housing as a human right does not

⁵⁶ Office of the United Nations High Commissioner for Human Rights, The Right to Adequate Housing Fact Sheet No. 21, Rev. 1, p. 6 (Nov. 2009), https://www.ohchr.org/sites/default/files/Documents/Publications/FS21_rev_1_Housing_en.pdf.

obligate governments to “build a house for every person in America and give it to them free of charge.”⁵⁷ Rather than requiring the government to provide housing to all of its citizens, both authors reference the ICESCR’s standard that States “achieve progressively the full realization of the right to adequate housing.” While the goal is “full realization,” the human right to housing is qualified by the reality that governments have limited resources and that it will take time to implement a guarantee to housing.⁵⁸

With a standard of progressive achievement in mind, the authors of the United Nations report set forth responsibilities for the government that underscore the importance of a clear distinction between negative and positive rights. The report bestows on government the responsibility to respect, protect, and fulfill both freedoms from government interference and entitlements to government provisions. At times, the responsibilities echo unalienable property rights against intrusion or to acquire housing free from discrimination. In other instances, the responsibilities are for the provision of positive rights, created by legislation, to government assistance such as housing subsidies “and other measures.” The obligation to “fulfill” the right to housing is restricted only to those unable to secure housing for themselves “for reasons beyond their control.”⁵⁹

Tars, of the National Law Center on Homelessness and Poverty, offers a similar set of responsibilities reflecting a mix of unalienable rights, negative rights, and positive rights. Tars recommends that government treat housing as a *human right* by, “devoting resources to public housing and vouchers, by creating incentives for private development of affordable housing...through market regulation such as rent control, [and] through legal due process protections from eviction or foreclosure.” These imprecise recommendations and those in the United Nations report all betray a lack of clarity around categories of rights and the responsibilities that flow from them.

⁵⁷ Eric Tars, *Housing as a Human Right*, National Low Income Housing Coalition (2018), https://nlihc.org/sites/default/files/AG-2018/Ch01-S06_Housing-Human-Right_2018.pdf.

⁵⁸ Office of the United Nations High Commissioner for Human Rights, *The Right to Adequate Housing Fact Sheet No. 21, Rev. 1*, p. 30 (Nov. 2009), https://www.ohchr.org/sites/default/files/Documents/Publications/FS21_rev_1_Housing_en.pdf. “In other words, the Covenant acknowledges that States have resource constraints and that it may take time to ensure the right to adequate housing to everyone.”

⁵⁹ *Ibid.*, p.34. “Under the obligation to fulfil, States must also...ensure adequate housing to individuals or groups unable, for reasons beyond their control, to enjoy the right to adequate housing, notably through housing subsidies and other measures.”

Proponents of housing as a human right define the right to housing as encompassing property rights, and yet, the responsibilities to protect negative property rights are at odds with those to provide positive rights to housing. How can a right to housing encompass a responsibility that it is diametrically at odds with?

It's difficult to measure any nation's adherence to housing rights by these unclear standards. The lack of categorical clarity on rights and responsibilities is further reflected in the list of nations the United Nations report cites as having an established right to housing in their constitution. The constitutions of Belgium, Russia, Belarus, Spain, Venezuela, and Mexico all establish a right to housing. The country of Belarus, although not listed in the report, spells out the guarantees of a right to housing very clearly: "*Citizens of the Republic of Belarus shall be entitled to housing...The State and local self-governments shall grant housing free of charge or at available prices in accordance with the law to citizens who are in need of social protection.*"⁶⁰ Other nations listed, like South Africa, affirm a right to *access* housing, distinct from a positive entitlement to housing, and Iran's constitution includes a goal to abolish housing deprivation. Still other nations, like Scotland, establish in legislation a positive right to shelter but not in their constitution.⁶¹ It is hard to see these guarantees as anything more than aspirational.

B. Enforcing a Human Right to Housing

Not only is the standard for "housing as a human right" unclear, the mechanism by which a citizen could enforce a rights claim against the government is lacking. If a government wants to establish a human right to housing not just in word but in practice, citizens must have a legal defense against the violation of that right. France bridges the gap between establishing a human right to housing and realizing that right for its citizens, making a key step away from the vague standard of the ICESCR and towards a clear and consistent understanding of housing as a human right.

⁶⁰ Belarus Const. art. 48 (1994, rev. 2004).

⁶¹ Belgium Const. art 23 (1831, rev. 2014). Russian Federation Const. art. 40 (1993, rev. 2014). Iran has a goal to abolish housing deprivation (Iran Const. art. 3.12), but not an established right to housing. Mexico establishes the right to "enjoy a decent and respectable house. The law will set the instruments and supports necessary to achieve such objective." Mexico Const. art. 4 (1917, rev. 2015). The country of Scotland secured a right to shelter or housing for everyone who is "unintentionally homeless" in its Homelessness Act of 2003.

The French Constitution states in broad terms that “the Nation shall provide the individual and the family with the conditions necessary to their development.” While this doesn’t explicitly establish a right to housing, French case law affirms that “the right to housing is a fundamental right,” and that “guaranteeing the right to housing is a duty of solidarity incumbent upon the whole nation.” However, citizens had no means to legally challenge the government when it failed to provide them with housing until almost two decades ago. In 2007, French Parliament passed the Enforceable Right to Housing Act, enabling the courts “to order the State to house the applicant and if they fail to do so will be subject to a default fine.”⁶²

The enforcement law in France has not led to the provision of housing for all qualified citizens. In fact, a 2022 national audit of the enforcement law revealed that the French government had failed to procure housing for more than half of the households claiming their right to housing.⁶³ In 2015, France was challenged in the European Court of Human Rights by a citizen who the government failed to house even after being ordered to do so by the Paris Administrative Court under the Enforceable Right to Housing Act. The plaintiff invoked the protection of property article of the European Convention on Human Rights, arguing that she had the right to use of a property that she neither owned nor leased. Although the court decided that her rights claim to government housing did not constitute the possession of property, the court found France in violation of a just enforcement of its own enforcement law.⁶⁴ The national audit recommended enforcing the private housing sector’s responsibility to house individuals in need, revealing the necessary reliance on private citizens to secure the provision of a public good of this scale. In practice, France’s supposedly enforceable right to housing has proven ineffective. However ineffective in securing housing for all in need, it is a logical step towards that end.

C. A Right to Housing on Par with Life, Liberty, and Property

There are additional logical steps towards securing housing as a human right. To define a clear and robust human right to housing, let us imagine

⁶² Marie Loison, *The Implementation of an Enforceable Right to Housing in France*, *European Journal of Homelessness* vol. 1, p.190 (Dec. 2007), https://www.feantsaresearch.org/download/ejh_vol1_eval28312346268548145523.pdf.

⁶³ French Court of Audit, *The Enforceable Right to Housing Public Report*, p.4 (2022), <https://www.ccomptes.fr/sites/default/files/2022-04/20220126-summary-Implementation-enforceable-right-to-housing.pdf>.

⁶⁴ Tchokontio Happi v. France, *European Court of Human Rights* (April 2015), <https://hudoc.echr.coe.int/eng?i=001-15391>.

a system of government that recognizes housing as an unalienable human right on par with the right to life, liberty, and property. As a reminder, unalienable human rights are inherent by virtue of being human. It does not make sense to describe a human right to housing as something reserved for those of a particular economic status. No other human right is status or class dependent, nor are human rights protections reserved for those most vulnerable to their violation. The right to free speech is not protected only for those most vulnerable to censorship, nor the right to life only protected for those most likely to have their life taken. Every U.S. citizen enjoys the same rights to life and liberty. Therefore, housing as a human right necessitates the right to a home for every citizen, not just those most financially insecure. If, like the right to life, the right to housing is guaranteed regardless of economic status, then it is also illogical to require that citizens pay or be able to pay for the enjoyment of their right to housing. Finally, citizens must have a legal route to hold the government accountable for violations of the human right to housing just as it can be held accountable for violating the unalienable rights to life or liberty.

Defining a human right to housing by drawing parallels to the unalienable rights to life, liberty, and property exposes a glaring difference between the unalienable rights upheld by the U.S. Constitution and the notion of an unalienable right to housing.

While proponents of housing as a human right describe the right as inclusive of more than the provision of housing, the additional responsibilities and freedoms they outline are effectively indistinguishable from the negative property rights already well-established. Property rights, as understood in the U.S., protect not just ownership of land or home but the acquisition and peaceful enjoyment of one's possessions without intrusion or interference. In truth, many of the directives outlined by the United Nations and other proponents of housing as a human right are merely property rights protections. When property rights protections are sifted out, the right to housing is at its core a positive right to the provision of a good recognized to be a fundamental, human right. As such, housing as a human right cannot be truly realized apart from a political system that enables the provision of positive rights established as unalienable, human rights.

D. A Matter of Political Systems, not Policies

The role of political systems in establishing housing as a human right is avoided by the United Nations but argued by scholars such as Columbia professor Peter Marcuse and London School of Economics sociologist

David Madden in their book *In Defense of Housing*. Capturing the centrality of a positive provision of housing, the authors set forth that “merely declaring a universal right to housing is not the same as actually providing housing for all.”⁶⁵ As described in a review, the authors argue that “housing should be treated as a fundamental human right, removed from the market and distributed according to need rather than wealth or income.” Quoting Marx and Engels, the authors blame capitalism for turning housing into a “commodity to enrich the few,” and advocate instead for “universal and unconditional housing...as a matter of right rather than a commodified privilege.”⁶⁶ In an effort to de-commodify housing, the authors recommend actions including the public ownership of land and the “Housing First” response to homelessness in which the government provides free, indefinite housing.⁶⁷

At face value, it would seem as though the more involved the government is in the housing market, the more fully it could guarantee the provision of housing. Whether or not any political, economic system has successfully secured housing for its entire population, the only one that could do so in theory is one where government has near unlimited access to resources, where individual goods become collective goods for government redistribution. In other words, where property rights don’t exist. Marcuse and Madden are correct that for the U.S., “an actual right to housing necessarily implies fundamental challenges to the existing system.”⁶⁸ The property-rights-protecting constitution and free-market democracy of the U.S. is ill-suited for this job.

VIII. WHAT WE STAND TO LOSE

The “fundamental challenges” to an actualized human right to housing is “the existing system” rooted in a U.S. Constitution that makes no room for the provision of positive rights as unalienable rights, and thus makes no room for an unalienable right to housing. The founders of America understood that unalienable rights to life, liberty, and property are categorically distinct from positive rights and categorically opposed to them. What few positive rights exist in the Constitution, such as the due process provisions of the Sixth Amendment, serve to limit the government’s power to deprive an individual of their unalienable rights

⁶⁵ David Madden, Peter Marcuse, *In Defense of Housing* 193 (2016).

⁶⁶ Michael B. Tietz, *Is Housing a Human Right? Has capitalism failed to provide adequate housing, and if so, where do we go from here?*, *Stanford Social Innovation Review* (Spring 2017), https://ssir.org/books/reviews/entry/is_housing_a_human_right. See also Madden, Marcuse p.191 and p.10.

⁶⁷ Madden, Marcuse 201.

⁶⁸ Madden, Marcuse 195.

to life, liberty, or property by way of the criminal justice system.⁶⁹ There is no positive right to the provision of housing to be found in the Constitution let alone an unalienable, human right to housing. Rather, the right to acquire, own, use, and sell property is upheld as an unalienable, human right consistently throughout American history and law.

The central question of this paper has been whether the provision of housing as a positive right warrants the violation of negative, unalienable property rights. As we have seen, when positive rights to the provision of housing are created in law, they come into conflict with negative property rights. In some cases, the positive rights go so far as to force individuals alone to bear the cost of providing housing as a public good. Instead of being minimums that serve to further property rights, positive rights to housing have come to threaten unalienable property rights in full. Recognizing this inherent conflict between property rights and rights to housing returns us to Thomas Nagel's balance between the "gravity of the violation" and "the desirability of the ends" in a society that values individual liberty and the public good.

Earlier, I presented a hypothetical right to healthy kidneys and an existing right to wheelchair ramps. Both rights, because they are positive, obligate resources in conflict with negative rights. The reason a free society chooses to provide some positive rights and not others has as much to do with what it stands to lose as what it stands to gain. A life-saving kidney transplant is a greater gain than a wheelchair ramp, but it obligates a far greater surrender of liberty and property. Understanding the obligation that positive rights to housing demand is why the central question has little to do with the objective *goodness* of housing for human life and flourishing. Rather, it has everything to do with what is lost when the provision of housing is promised as a right.

Declaring housing as a human right raises the stakes in the conflict between negative and positive rights. If housing is a human right, it is on equal standing with property rights, and in Marx's view, "between equal rights, force decides." In echo of this sentiment, scholars Madden and Marcuse promote a "struggle" for the right to housing as the ultimate solution for its realization as a human right. Any struggle that ensues is not over mere policy changes but over the founding American principles that have upheld property rights as unalienable for the last two centuries. What exactly do we stand to lose?

⁶⁹ For a thorough review of the relationship between positive rights and the U.S. Constitution, see Currie, *Positive and Negative Constitutional Rights*, U. Chi. L. Rev 864 (1986).

In the minds of the founders and the political philosophers who shaped them, property rights are the keystone of human rights themselves. James Madison saw individuals as having property not only in their material possessions but in their opinions, religious beliefs, the safety and liberty of their body, and the free use of their faculties. Madison even considered the immaterial right to the mind—"the enjoyment and communication of opinions"—as more valuable property than material possessions. The rights to life and liberty are bound up in property rights.

For that reason, property rights, and the Constitution that protects them, are worth defending at great cost. When the positive rights to housing assistance created in law find themselves up against the unalienable property rights, property rights must take precedence. Strengthening the right to establish a home and to acquire, use, and sell property is the best way to serve the goals of housing for all Americans without compromising their most fundamental rights.

James Madison wrote, "*where an excess of power prevails, property of no sort is duly respected. No man is safe in his opinions, his person, his faculties, or his possessions. Where there is an excess of liberty, the effect is the same, tho' from an opposite cause.*"⁷⁰ Freedom protects the unalienable rights inseparable from our humanity, and when freedom is subverted in the pursuit of provisions, we stand to lose them all.

⁷⁰ James Madison, *On Property*, The Founders' Constitution, Vol. 1, ch. 16, doc. 23 (1792), <https://press-pubs.uchicago.edu/founders/documents/v1ch16s23.html>.