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Matthew Fern

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A SUBSTANTIVE(-ISH) RIGHT TO HOUSING: AN AMERICAN PROBLEM

I. Introduction

America: the land of the free and the home of the brave, but not really the nation of the housed. Housing instability, as defined by the U.S. Department of Health and Human Services, is the combination effect of high housing costs, poor housing quality, unstable neighborhoods, overcrowding, and homelessness. American people suffer with unaffordable rent, the inability to buy homes, and a housing deficiency, which has a long history in American property. Homelessness is a tangible issue, where loss of economic ability has forced people to live on the streets, which are full of elemental and personal dangers; in shelters, which require residents to meet specific requirements or obtain other shelters after a certain amount of time; or in vehicles, which can be easily stolen or susceptible to parking and moving fines. With all these issues being “typical” of the American housing market, one may ask why the market remains commodified. How have these issues, which are certainly human rights issues, remained a profit-grab leftover from feudal European ideas of ownership?


4. Chris Arnold et al., There's a massive housing shortage across the U.S. Here's how bad it is where you live, NPR (July 14, 2022, 5:00 AM), https://www.npr.org/2022/07/14/1109345201/theres-a-massive-housing-shortage-across-the-u-s-heres-how-bad-it-is-where-you-live [https://perma.cc/U6R5-YKKS].


These questions can be answered by a change to the current American treatment of housing, accomplished through the judicial system, the legislative system, or even the Constitution, in changing how housing is handled by the government. The first Part of this Comment will discuss the current jurisprudence of the Supreme Court surrounding housing and former legislative attempts by Congress to address housing. The second Part will analyze how the stagnation of housing can be addressed, first in the Supreme Court, second in Congress, and third as a Constitutional amendment. This Part will also discuss where the best move forward lies. Finally, the third Part will discuss the impact housing issues have on American society, and what this Comment’s proposed changes would do for the American people.

II. Background

There have been many attempts to bring a right to housing into the American legal landscape. For example, there have been arguments in support of reading the right to shelter into the Constitution as a substantive due process right, using the Supreme Court’s power of constitutional interpretation. Alternatively, calls to pass new federal housing rights legislation have become more frequent, including implementing already-signed international treaties which would provide a catalyst for new legislation. In pursuit of a solution, actors within the federal government have tried both judicial and legislative responses to improve the housing status quo for millions of Americans.

A. The Judiciary’s Response

Over the years, the Supreme Court has had different opportunities to create a constitutional right to housing. Unlike other rights, “housing” has not been explicitly read into the U.S. Constitution as a substantive right. While arguments have been made to create such a right, the baseline substantive rights are limited to general concepts of “home,” rather than a fundamental right to be housed. When arguments are raised that housing should be afforded to all Americans as a right, a typical response is that it is not a judicial decision, but a legislative one.

7. Lindsey v. Normet, 405 U.S. 56, 74 (1972); infra Part II.A.
8. See infra Part II.B
10. Id.
11. Id. at 634.
There is a string of Supreme Court cases which lead to this thought process, and they are informative as to the way the American Government has come to this conclusion regarding housing.

I. Housing in the Beginnings of Substantive Due Process: Meyer v. Nebraska

In 1923, the Supreme Court heard *Meyer v. Nebraska*, which was an appeal of a conviction of a teacher who had taught children how to speak and read German, their parents’ native tongue. This violated Nebraska state law, which disallowed the teaching of anything but English to students until they completed the eighth grade. Justice McReynolds penned the majority opinion, reversing the teacher’s conviction, striking down the state statute, and creating a new substantive due process right for American parents to direct the education of their children. While not directly relevant to housing, this case created what is now known as a substantive due process right: providing personal protections not explicit in the Constitution. The case is “a corner-stone of modern substantive due process jurisprudence today.”

In a famous quote, McReynolds enumerated several rights, which were implied in the Fourteenth Amendment, including:

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.

McReynolds goes on to say that these protections are vital to prohibit any burdens upon liberty from legislatures under the appearance of “public interest.” This established the beginning of a test to find if the state had violated the freedoms he specified: “legislative action . . . [must have a] reasonable relation to some purpose within the competency of the state to effect.”

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14. *Id.* at 397–98.
15. *Id.*
16. *Id.* at 402–403.
17. Prior to *Meyer* were *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) and *Lochner v. New York*, 198 U.S. 45 (1905), both cases striking statutes which were found to interfere with a freedom to contract. However, *Meyer* is the oldest case still standing and created non-economic substantive due process rights. Sprankling, *supra* note 9, at 655.
18. Sprankling, *supra* note 9, at 634.
20. *Id.* at 399–400.
21. *Id.* at 400.
But why did *Meyer* suddenly include so many rights with which the Court had never specifically considered? And why was this handed down in 1923, within one of the more confounding eras of Supreme Court jurisprudence, the *Lochner* era?22 Some argue that progressive legislation was beginning to show traction, and that this was an effort to take certain rights and protections outside of state jurisdiction.23 The cases cited by *Meyer* are entirely economic, meaning that this move to personal liberties was more of an extension of former substantive rights than was expected.24 Political action like this by the Court is not unheard of, even if the Court holds against political ties in its decision making.25

It is important to understand the beginning of substantive due process in order to know where and how the perception of a right to housing changed with the Court. While Court cases have expanded the right to establish a home as a protection against government interference in small cases, the government has failed to protect housing against the loss and collection of private actors.26 Therein lies the point of this Comment: “the right of the individual to . . . establish a home” and why furthering this right is important to the strength of American society.


Moving forward to 1972, the Supreme Court decided *Lindsey v. Normet*, a class action brought by tenants in Oregon against the state’s eviction procedures.27 Justice White, writing for the majority, discussed both due process and equal protection arguments presented by the Plaintiff tenants in this case.28 Plaintiffs claimed the time the statute provided between filing and trial was too short—and the remedies

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24. Id.

25. Author’s Note: It seems that the longer conservatives are in power, the more sway this seems to hold on decision making. In authoring an opinion in *Meyer v. Nebraska*, a libertarian makes fundamental rights arguments to protect the way of life in its current state. Moving ahead, in *Lindsey v. Normet*, a conservative justice says no fundamental rights are available in order to protect the status quo of current living. The pattern always seems to be to uphold the status quo in conservatism, and not uphold the meaning and apparatus of government and democracy.


28. Id. at 64–75.
provided too limited—to build a winning case, which violated due process.\(^29\) The Court did not find this persuasive, however; Court-held due process requirements were all met, minus a double bond filing requirement, which the Court struck.\(^30\) While this part of the opinion is still important to highlight, the equal protection argument is the highest interest to this Comment.

In the equal protection analysis, the Court first saw that the statute was facially neutral and seemed to affect rich and poor or residential and commercial tenants alike.\(^31\) The Court also found that the speed at which the procedure commenced for an eviction due to nonpayment did not violate equal protection.\(^32\) However, the tenants then argued that the “‘need for decent shelter’ and the ‘right to retain peaceful possession of one’s home’ are fundamental interests . . . to [citizens] and . . . [require] the State [to] demonstrate[] some superior interest.”\(^33\) The argument clearly stated because the poor are more likely to be forced out of their dwellings based on nonpayment of rent, even after property interests have arisen (such as building condemnation), a fundamental protection of housing should be read into the Equal Protection Clause of the Fourteenth Amendment.\(^34\) This theory would have created wealth status as a protected class within the Equal Protection Clause, which means any deprivation to those rights by the government would need to be tied to a compelling government interest in order to proceed.\(^35\)

The Court started its opinion by pointing out the importance of “decent, safe, and sanitary housing.”\(^36\) As the Court has stated, “the right of the individual to . . . establish a home . . . [is] essential to the orderly pursuit of happiness by free men.”\(^37\) However, the Court finished that statement by denying the right to a “constitutional guarantee of access to dwellings of a particular quality.”\(^38\) The Court asserted that there was no constitutional provision that could provide a tenant the right to occupy a landlord’s dwelling, and, in fact, the real property rights of the landlord outweighed any such right of a tenant to have proper housing.\(^39\)

\(^{29}\) Id. at 64.
\(^{30}\) Id. at 65, 74.
\(^{31}\) Id. at 70.
\(^{32}\) Id. at 73.
\(^{33}\) Lindsey, 405 U.S. at 73.
\(^{34}\) Id.
\(^{36}\) Lindsey, 405 U.S. at 74.
\(^{38}\) Lindsey, 405 U.S. at 74.
\(^{39}\) Id.
The Court finally said that a legislative solution would best remedy this issue. This threw the argument back into the statutory scheme being contested, as the legislature did write a law regarding this, and even though the law had been enacted since 1866 and before the ratification of the Fourteenth Amendment, an equal rights claim could not be applied without a protected class. Instead, Justice White’s opinion limited the scope of the right to make a home from Meyer by not including a right of access to quality housing. It begs the question, how does one retain the right to establish the home without quality housing?

3. Modern and Other Derivative Cases

There are other notable cases from the same time period as Lindsey, which reinforce the way courts handle any request for a constitutional right to housing. An Eighth Circuit case, Wilkerson v. City of Coralville, IA, heard just one year after Lindsey, found that residents in an area surrounding Coralville, IA, did not have standing to bring a case under 42 U.S.C. § 1983. The residents alleged a violation of equal protection after not being annexed into the town as requested due to the poverty in the area. Even without finding standing, the court analyzed the merits of the case and found the residents’ poverty was not protected under the Equal Protection Clause of the Fourteenth Amendment. The court found no reason to add a right to be annexed into a town under the Constitution, and state remedies had not been utilized in fighting the annexation. After a lengthy quote from Lindsey regarding the lack of a constitutional right to housing, the court went on to say, “it is not the province of this Court to create substantive Constitutional rights in the name of guaranteeing equal protection of the laws.”

Again, in a Second Circuit case, married students at New York State University challenged the university housing department policy

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40. Id.
42. Lindsey, 405 U.S. at 74.
43. See generally, Sprankling, supra note 9. Sprankling explores how Meyer’s fundamental right to establish a home has a per se element of a right to quality housing. He calls for an overhaul of the whole idea using the near-100-year precedent set forward in Meyer.
44. 478 F.2d 709 (8th Cir. 1973).
45. Id. at 711.
46. Id.
47. Id.
48. Id.
49. Id. at 712.
prohibiting children from living in the married-student suites.\textsuperscript{50} Holding that the district court’s choice in applying rational basis theory to analyze the policy was correct, the court found that the university did not abridge any fundamental rights provided in the Constitution, including privacy in marriage and the right to raise children.\textsuperscript{51} The court then reiterated the lack of a right to adequate housing set up in \textit{Lindsey}, quoting that “the Constitution does not provide judicial remedies for every social and economic ill.”\textsuperscript{52} Using rational basis, the court affirmed the district court in denying that the university was required to provide housing which accommodated children.\textsuperscript{53}

After reviewing these cases, it follows that U.S. courts were not yet ready to recognize a constitutional right to housing or shelter. The positions taken by both sides in these cases show how housing jurisprudence has developed to where it is today. The overall issue still remains, however—what would a housing right look like in the United States? Since housing law has remained unmoved since \textit{Lindsey v. Normet}, perhaps a better solution can be found within both federal and state legislatures.

\textbf{B. Legislative Solutions}

Legislative solutions can be more comprehensive and robust than judicial decisions, and legislatures have historically explored different options to address housing rights in the United States.\textsuperscript{54} Federal statutes must reside within the power of the Constitution given to Congress and create law, which governs the entire country.\textsuperscript{55} State statutes are governed by state constitutions, which affect only those within the state’s boundaries, limiting the scope and reach of the particular law.\textsuperscript{56} State statutes can be more streamlined to their own populace, and therefore can be more specific to the needs of the state at large.\textsuperscript{57} Because of this difference, both state and federal statutes are important to analyze.

\begin{flushleft}
\textsuperscript{50} Bynes v. Toll, 512 F.2d 252, 254 (2d Cir. 1975).
\textsuperscript{51} Id. at 255–56.
\textsuperscript{52} Id. at 255 (quoting \textit{Lindsey v. Normet}, 405 U.S. 56, 74 (1972)).
\textsuperscript{53} Id. at 257–58.
\textsuperscript{54} See infra Part II.B.1.
\textsuperscript{55} U.S. Const. art. I, § 8.
\textsuperscript{57} For example, a statute regarding speed limits in California must attain to the needs of the bustling city of Los Angeles or the Bay Area, while also contending for the much-less populated Northern California. \textit{Cal. Veh. Code} § 22349 (West 2000) (setting the maximum speed in the state to 65 mph). Wyoming, on the other hand, with the least populace by land per capita, have a much different understanding of what is needed for speed. \textit{Wyo. Stat.} § 31-5-301 (West 2016) (stating a vehicle on the highway should not travel a speed greater than is reasonable for the road).
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I. Congressional Housing Statutes Passed

During the Great Depression and Franklin Roosevelt’s “New Deal,” Congress passed several new economic forms of legislation, starting with the National Housing Act (NHA) of 1934. Before the Great Depression, there was a “housing bubble,” in which mortgage rates were low; however, this bubble “popped” as soon as inflation, unemployment, and a stagnant economy stopped homeowners from being able to pay. The NHA looked to provide a solution in the form of a “system of mutual mortgage insurance,” as well as improving standards and conditions of housing at that time. Closely following the NHA was the Wagner-Steagall Act of 1937, which created federal public housing in Section 8 of the Act, known colloquially as Section 8 Housing, in an attempt to “eradicat[e] . . . slums.” This was amended in 1949 under the Truman Administration, which declared that the improvement of the “living standards of [American] people require housing production,” and listed the elimination of the housing shortage, removal of substandard housing, and providing “a decent home and a suitable living environment for every American family” as its purposes. In 1974, Congress then passed the Housing and Community Development Assistance Act to add the Section 8 Housing program, giving payment support to Americans in housing projects, including New Construction, Substantial Rehabilitation, and Existing Housing Certificate programs. It was again amended in 1998 to transition families out of public housing and create a model of Section 8 funding for homeownership assistance.

Congress also created new civil rights reforms with the passage of the Civil Rights Act of 1964. Although some civil rights were given substantial modernization, including forbidding discrimination in public places, segregation of schools and other public facilities, and employment discrimination under new categories, there was no inclusion of housing protections. However, in 1968, Congress passed the

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Fair Housing Act (FHA), which added “Title VIII” to the Civil Rights Act, forbidding discrimination in the sale or rental of housing in most circumstances.\textsuperscript{67} In all of these cases, housing protections stacked up and created a portfolio of options from which to defend and maintain housing.

2. Proposed Solutions in Congress and Internationally

Other options were offered to increase housing rights and other positive entitlements in the United States in the twentieth century, both domestically and internationally.

The “Second Bill of Rights” or “Economic Bill of Rights” was presented by Franklin Roosevelt in his state of the union address to Congress in January 1944, mere months before he passed away.\textsuperscript{68} His proposal asked for eight rights, which would entitle everyone in the nation to a job, a livable wage (with enough to purchase adequate clothing, food, and recreation), a decent home, adequate medical care, economic protection (for old age, sickness, accident, and unemployment), and a good education.\textsuperscript{69} The final two rights were for farmers (ability to raise and sell products for a decent living) and business people (trade with freedom from unfair competition and monopolies).\textsuperscript{70} In his speech, Roosevelt tried to persuade Congress that the next step in our society was to tax unreasonable company profits and create social sustainment programs out of the revenue earned from these taxes.\textsuperscript{71} He went on to say that the United States “cannot be content, no matter how high that general standard of living may be, if some fraction of our people—whether it be one-third or one-fifth or one-tenth—is ill-fed, ill-clothed, ill-housed, and insecure.”\textsuperscript{72}

The American courts and legislatures have since backed away from social welfare programs and have instead created a system focused on less government intrusion and more individual freedom, even if the scheme does not naturally act this way.\textsuperscript{73} While President Roosevelt

\begin{thebibliography}{9}
\bibitem{69} Id.
\bibitem{70} Id.
\bibitem{72} Id.
\bibitem{73} Id. supra note 68, at 572 (discussing whether the Court could have adopted the Second Bill of Rights in full without Nixon’s four Supreme Court picks dashing it on the rocks). See Sunstein, supra note 71, at B10 (explaining that the shift away from “government intervention” and toward property rights and individual freedom only instills government interference in a different
\end{thebibliography}
became less and less available because of his health and eventual death, Congress attempted to enact some portion of the Act, including the Full Employment Act of 1945, which would have provided a public job to any willing, able-bodied person, should they become unemployed.74 Congress also passed the Servicemen’s Readjustment Act of 1944 (GI Bill), which provided healthcare to all servicemen, current and former, but broad nationwide health insurance did not become an option until Medicare was passed by President Johnson in 1965.75 Even with these attempts, the United States has provided few positive rights from Roosevelt’s list in his 1944 speech,76 even though the legacy of Roosevelt’s words had international impact as seen with the adoption of the Universal Declaration of Human Rights (UDHR) partially based on the Second Bill of Rights.77 However, Roosevelt’s right to “a decent home” has not come to fruition.78

On the international stage, the United States signed, but did not ratify, the UDHR presented to the United Nations in 1948.79 The UDHR provides that everyone should have rights to housing as well as food, clothing, medical care, and necessary social services; however, it has not been implemented in the United States.80 In fact, this treaty defined thirty human rights foundational to society, and is said to be the “basis of modern human rights law.”81 However, a treaty must be both signed by the president and ratified by two-thirds of the Senate.82 Since it is not a treaty per se, but a declaration, the Senate has never ratified the UDHR; therefore, it is not binding law.83 Even then, since the declaration would not be self-executing without additional legislation from Congress, it holds no enforcement teeth in the United States.84

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75. Id. at 68.
76. Sunstein, supra note 71, at B9.
77. Id.
78. Piercy, supra note 68, at 571.
80. Id. at 68.
81. Massimo, supra note 12, at 278.
82. U.S. Const. art. II, § 2.
84. Treaties can be self-executing, meaning that the ratification of the treaty would immediately provide a law or right. A treaty then becomes the force of law once ratified, providing the Supreme Court the ability to enforce it judicially. However, most treaties are typically deemed not
Finally, in another United Nations document, the International Covenant on Economic, Social, and Cultural Rights (ICESCR), established and signed by several countries in 1976, is a covenant to provide “adequate food, clothing[,] and housing, and to the continuous improvement of living conditions.”85 The United Nations codified the ideals of the UDHR into the ICESCR in 1976.86 Defined within the covenant, as well as a list of other protected rights, is “adequate . . . housing.”87 Like the UDHR, the ICESCR is not self-executing, meaning it would need meaningful legislation to implement.88 Besides, each attempt to ratify it has been met with opposition, and very rarely has it ever actually made it to the floor of the Senate, where a vote has never occurred.89 Some parties believe that, because it would force a “redistribution of wealth” with which “most constitutional courts . . . are distinctively uncomfortable,” it may never again see the Senate floor.90 However, others find that argument to be of Tea Party activists and financial elitist organizations, such as Goldman Sachs, and is not the popular belief of most United States citizens.91

The United States has been seen as a global leader since the end of World War II in 1945.92 However, the country has not been aligned with the remainder of the globalized world, specifically in the nation’s slow uptake of human rights principles in comparison to all other industrialized countries.93 For Congress to move on these issues, which are politically charged and make compromise difficult, a broad change in the makeup of representatives must first occur.94

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87. Id.
90. Id.
92. See generally William R. Thompson, The United States as Global Leader, Global Power, and Status-Consistent Power?, in MAJOR POWERS AND THE QUEST FOR STATUS IN INTERNATIONAL POLITICS: GLOBAL AND REGIONAL PERSPECTIVES 27 (Thomas J. Volgy et al. eds., 2011) (speaking to how the world has seen the United States as a status-consistent leader mostly because of its military prowess, not necessarily its social endeavors).
93. Piccard, supra note 88, at 232 (showing that the United States shares interesting comparisons to savory international figures by not attaching to the ICESCR).
C. Positive and Negative Rights

Congress’s actions listed above can be compared to the judiciary’s response discussed in Part II.A regarding the Court’s handling of housing. This segues generally into a conversation about how the federal government generally treats constitutional issues. The framework surrounding housing advanced by either branch of government can be categorized as either positive or negative constitutional rights, based on an analysis created by constitutional scholars. Positive rights provide a claim against a government, to which the government must act, where negative rights prohibit the government from interfering with specific activities. In other words, positive rights instill a right, which is granted by the government, and negative rights create intrinsic liberties, that the government cannot violate without good reason. Since neither Congress nor the courts have created a claim against the government to be brought unless rights have been interfered with, scholars would call this a negative right. As discussed, there have been statutory and constitutional proposals, and signed treaties, which would afford Americans the positive constitutional right to housing, but which have failed to garner the necessary support.

III. Analysis

As shown by Part II, the United States has yet to embrace any positive entitlement to housing like most other free nations have come to realize. First, both drastic and incremental changes are possible in the courts, beyond simply extending Meyer v. Nebraska’s right to establish a home into an entitlement to protected shelter. However, this change would need to overcome stare decisis, a line which the Court is doubtful

95. Supra Part II.A.1–2
96. Massimo, supra note 12, at 277 n.24.
97. Id. at 277–78 n.24.
98. Id.
99. Ran Hirschl, “Negative” Rights vs. “Positive” Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order, 22 Hum. Rts. Q. 1060, 1071 (2000). Professor Hirschl reflects that a third theory exists for “collective” rights, which promotes an entitlement of common goods through the collective of the society in question. Id. These are not discussed here because the economic system includes a redistribution of goods and wealth, which is not seen in the United States. Id. at 1072.
100. See supra Part II.B.1–2.
101. Kenna, supra note 79; supra Part II.
102. Sprankling, supra note 9, at 657–66. Professor Sprankling finds that a right is easily definable within the Meyer framework and rationale, and that it does not need to rely on Lindsey v. Normet.
to cross. Next, Congress or state legislatures could pass statutes aiming to curb houselessness or inadequate housing. Congress could also vote to ratify the ICESCR. Additionally, Congress by bill, or the states by constitutional convention, could vote to amend the Constitution to include a right to housing. Finally, changes can come from outside the government first by social movements, spurring change within the national viewpoint, then eventually gaining political power in Washington, D.C. Within these ideas, this Part will explore how the American populace can gain a right to housing.

**A. Judiciary Involvement: Getting Over the Stare Decisis Hurdle**

As seen already, the Supreme Court rejected a claim for housing rights in *Lindsey v. Normet*, limiting *Meyer v. Nebraska*, saying the right to make a home did not include a specific right to quality housing. Housing as a constitutional right has yet to be heard by the Supreme Court again since the *Lindsey* decision, creating an over fifty-year precedent that remains to this day. Beyond the make-up of the current Court, the highest obstacle a litigator in federal court would face is precedent, or *stare decisis*. The Court’s history with *stare decisis* is mixed at best, with different suggested factors to weigh. Scholars

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103. Glen Staszewski, *A Deliberative Democratic Theory of Precedent*, 94 Univ. Colo. L. Rev. 1, 13–14 (2023) (presenting the various statements the Supreme Court has made regarding the importance of *stare decisis*).


105. Supra Part II.B.2.

106. U.S. Const. art. V.

107. See generally Alexander, supra note 86.


110. Supra Part II.A.2

111. Sprankling, supra note 9, at 666–67 n.294.

112. The makeup of the Court at the time of the writing of this Comment seems more likely to deny certiorari on a case, such as this one, than hear it. A majority of the Court seems fixated with issues of federalism above anything else. This seems to be a leftover of the Rehnquist era. For an interesting discussion on Justice Rehnquist’s time on the bench, see Ilya Somin, *Rehnquist’s Federalist Legacy*, Cato Institute (Sept. 9, 2005), https://www.cato.org/commentary/rehnquists-federalist-legacy [https://perma.cc/7XCP-JTVW].


114. Consider the difference in the factors provided in these cases. Arizona v. Gant, 556 U.S. 332, 358–64 (2009) (Alito, J., dissenting) (“Relevant factors . . . include whether the precedent has
have theorized that *stare decisis* instead only protects the personal reflections of the justices that overrule the former precedent.\textsuperscript{115}

In American jurisprudence, a court must follow the precedent of any courts above it if no “special justification” exists.\textsuperscript{116} The Supreme Court is the final arbiter of precedent, yet once it sets a precedent, there are rules that it must follow before breaking it.\textsuperscript{117} Some call this difference vertical and horizontal precedent—vertical meaning a lower court must listen to the courts above and horizontal meaning that a higher court must follow its own former ruling.\textsuperscript{118} Therefore, to overturn *Lindsey v. Normet*, the Court must determine that the precedent was incorrectly decided.\textsuperscript{119}

Of course, getting to this point assumes that a near perfect plaintiff, with standing to challenge their denial of housing, has been found.\textsuperscript{120} “Perfect” plaintiffs are those who can easily demonstrate their controversy or needs and “can provide a concrete context for abstract legal concepts and personalize the stakes.”\textsuperscript{121} These “perfect” plaintiffs are important when overcoming precedent.\textsuperscript{122} When issues become more personal, with stories of American people forced to live as an “other”

engendered reliance, whether there has been an important change in circumstances in the outside world, whether the precedent has proved to be unworkable, whether the precedent has been undermined by later decisions, and whether the decision was badly reasoned.” [citations omitted]); “In this case, five factors weigh strongly in favor of overruling *Roe* and *Casey*: the nature of their error, the quality of their reasoning, the “workability” of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance.” *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2265 (2022) (Alito, J., majority).

\textsuperscript{115} Staszewski, *supra* note 103, at 70–71.
\textsuperscript{116} *Id.* at 16.
\textsuperscript{117} U.S. Const. art. III, § 1, cl. 1.
\textsuperscript{118} Staszewski, *supra* note 103, at 40 n.163.
\textsuperscript{119} Based on the most recent overturning of precedent, *Dobbs* provides the points justices consider when breaking precedent is on the table:

We have long recognized, however, that *stare decisis* is “not an inexorable command,” and it “is at its weakest when we interpret the Constitution.” It has been said that it is sometimes more important that an issue “be settled than that it be settled right.” But when it comes to the interpretation of the Constitution—the “great charter of our liberties,” which was meant “to endure through a long lapse of ages”—we place a high value on having the matter “settled right.” In addition, when one of our constitutional decisions goes astray, the country is usually stuck with the bad decision unless we correct our own mistake. An erroneous constitutional decision can be fixed by amending the Constitution, but our Constitution is notoriously hard to amend. Therefore, in appropriate circumstances we must be willing to reconsider and, if necessary, overrule constitutional decisions.

*Dobbs*, 142 S. Ct. at 2262 [citations omitted].

\textsuperscript{122} *Id.* at 137 (stating that the some of the success of *Obergefell v. Hodges*, 576 U.S. 644 (2015), was the plaintiffs’ stories, which Justice Kennedy uses in his decision).
outside of society, it draws the humanity out of the justices on the Court.123

There are three strong arguments to overcome precedent regarding a right to housing. First, the Supreme Court articulated that each citizen has a right to establish a home in Meyer v. Nebraska.124 Second, the denial of equal protection in housing set by Lindsey v. Normet was not indicative of all Fourteenth Amendment claims for a right to housing, and a new framework can circumvent this ruling.125 Third, the factors presented by Justice Alito in Dobbs v. Jackson Women’s Health Organization weigh strongly toward overruling the precedent.126

1. Persuading the Court to Rule on a Substantial Right to Housing for the First Time

Meyer v. Nebraska has stated that “liberty thus guaranteed” by the Fourteenth Amendment also includes “the right of the individual to . . . establish a home.”127 The full statement added that the rights listed are “essential to the orderly pursuit of happiness by free men.”128 Supreme Court cases are not well known for being particularly great or clear works of writing;129 however, Justice McReynolds’s words here are easily understood and difficult to parse. All the other rights listed here by the Court have been developed further in caselaw; however, the right to establish a home has remained mostly untouched.130 Therefore, the Court should be asked to rule on a substantive right to housing. Giving the Court the opportunity to stabilize a right, which has been undefined for such a long time, may allow the case to move forward.131

124. Supra Part II.A.1–2.
125. Supra Part II.A.2.
128. Id.
130. Sprankling, supra note 9, at 634 (noting that his article is the first to analyze the right set out by the Meyer Court).
131. Id. at 660 n.238.
2. **Distinguish, Distinguish, Distinguish: Cases are Never the Same**

A litigator can bypass the ruling in *Lindsey v. Normet* by properly distinguishing the facts of her case from the precedent.\(^\text{132}\) While this will heavily depend on the facts of the case, an easy difference to articulate is the type of eviction that occurred. The tenants in *Lindsey* were fighting a state statute that allowed a swift hearing and order of removal for nonpayment of rent.\(^\text{133}\) The *Lindsey* Court specifically said that “the Constitution expressly protects against confiscation of private property or the income therefrom,” ruling to allow a tenant to stay on the property while violating an agreement to pay rent would contradict the Constitution itself.\(^\text{134}\)

In other words, this right cannot come from a case involving private landlords and nonpayment of rent. However, there are still other types of cases in which a right to housing can be argued. An eviction without breaching the lease provides a tenant a better argument for winning the case. Also, since the Supreme Court more often hears cases regarding a federal question, an argument for breach of federal statutes or the Constitution could be a more winning strategy.\(^\text{135}\) Finding a scenario that fits this mold could allow an argument for a fundamental right to housing in the United States.

3. **Playing Precedent at Its Own Game: Does it Fit the Factors?**

Finally, the Court recently ruled in *Dobbs* by overturning precedent, using factors to which the Court may look in the future.\(^\text{136}\) Presenting five factors, the Court reviewed “the nature of [the] error” the Court committed; “the quality of [the] reasoning” the Court issued in the challenged case; “the ‘workability’ of the rules [the Court] imposed on the country;” the ruling’s “disruptive effect on other areas of the law;” and finally “the absence of concrete reliance” on the law within the American public.\(^\text{137}\) Looking closely at these factors will determine 


\(^{133}\) Id. at 73.

\(^{134}\) Id. at 74.


\(^{136}\) *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2265 (2022). Is this a precedent for overturning precedent?

\(^{137}\) Id.
where the best arguments for overturning Lindsey lie. Even if these do not fully integrate into a substantive right to housing for which this Comment asks, overturning this case begins the journey of asking the Court to find this right for the American people.

a. Factor One: The Nature of the Error Committed by the Court

This factor shows the Court overlooking the term “right” within Meyer v. Nebraska, leaving the Constitutional protection stated within Meyer bereft of any meaning. The Legal Information Institute defines a “right” as “a power or privilege held by the general public as the result of a constitution, statute, regulation, judicial precedent, or other type of law.”138 Reading the right within the language of Meyer, we find the right to establish a home is immediately surrounded by the right to marry and the right to have children, both which have been ruled on by the Supreme Court as rights with which the government cannot interfere.139 The argument should be that the Court did not think of the property interest of the tenants as well as the property owners when deciding Lindsey. Determining that we have a right and precedent to follow from the surrounding rights in the list provided in Meyer, it is easy to connect that a constitutional right is not being properly upheld by the Supreme Court. This weighs in favor of overturning.

b. Factor Two: The Quality of the Reasoning Presented by the Court in the Original Case

The Lindsey Court presented a narrow approach, which ignored several of the issues presented by the case. The Court relied on the Oregon state statute, which allowed the tenants’ housing loss, rather than the loss itself.140 Even when speaking to the statute, the Court found that a trial for eviction two to six days after notice did not violate the Fourteenth Amendment’s Due Process Clause,141 further showing the Court’s disregard for the constitutional amendment in question.142 The Court also compared potential parties to the proceedings, not finding that a

139. Sprankling, supra 9, at 660 n.238 (showing how precedent has split the list of rights in Meyer into distinct rights which can be argued separately from each other, and citing Obergefell v. Hodges, 576 U.S. 644, 669 (2015) and Stanley v. Illinois, 405 U.S. 645, 649 (1972) to show that a right to marry and a right to raise children have each been decided separately).
141. Id. at 70 n.17.
142. “An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” Greene v. Lindsey, 456 U.S. 444, 449–50 (1982) (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).
disparate impact occurs when the poor are by far the most affected by both eviction proceedings and the speed at which they can find an attorney to build a case.143 The quality of the reasoning here lacks the normal carefulness expected of the Supreme Court when answering constitutional questions. This again weighs toward overturning the precedent.

c. Factors Three and Four: Workability and Disruption

The third and fourth factors, the workability of the rule imposed and the disruptive effects on other law, are not present in an analysis of Lindsey. Justice White simply held that the Court was “unable to perceive . . . any constitutional guarantee of access to dwellings of a particular quality . . . .”144 The Supreme Court did not establish a rule here, as much as determine whether a right exists. Because of this, the workability factor is neutral toward overturning the precedent. Similarly, to say something has disruptive effect requires some perceivable change in the legal landscape. For our purposes, the Court simply denied that a right exists, which made neither disruptive nor accommodative changes in the existing law.145 Beyond this, the Court also upheld a statute, which caused little to no ripples in the legal landscape, versus striking a statute which could have changed the process entirely. Without any change, the disruptive factor is also left without weight.

d. Factor Five: Has the Precedent in Question been Given Concrete Reliance by the Public

The fifth and final factor, the absence of concrete reliance, is more of an even chance when viewing the Court’s decision. On one hand, tenants could say that the premise cannot be relied upon, as Lindsey seems indicative to a retreat from the beliefs prescribed in Meyer.146 Seeing Lindsey as implicitly limiting the fundamental right created in Meyer creates confusion as to which precedent to follow promotes unreliability. Going even further, the Court has directly stated the “cases involving property and contract rights” are prime examples of areas of

143. Lindsey, 405 U.S. at 70 (“The statute potentially applies to all tenants, rich and poor, commercial and noncommercial . . . .”).
144. Id. at 74.
145. Id.
146. Sprankling, supra note 9, at 666–67 n.294. Professor Sprankling makes the original argument that Meyer was promoting a negative right to housing, while Lindsey was promoting a positive right to housing. This argument misses the forest for the trees in the respect that a negative right would disallow the government to aid in a housing disenfranchisement, which would include the hearing of the case in court. Shelley v. Kraemer, 334 U.S. 1, 19–21 (1948). If housing were to be recognized as a fundamental right, any state action inducing the loss of housing would receive strict scrutiny. Washington v. Glucksberg, 521 U.S. 702, 762 (1997) (Souter, J., concurring).
law that have “concrete reliance interests.” On the other hand, a landlord or stakeholder in the property may argue the opposite, saying that they have relied upon the lack of a fundamental right to housing in issuing notice for eviction proceedings since the decision. This argument may hold weight to the current Court, which has routinely upheld that private property is a seminal issue on which to focus. The reliance factor could move either way based on the arguments and the Court’s opinion of it, or it may remain neutral.

e. Conclusion: Lindsey is not Strong Precedent and Should be Overturned

All in all, more factors weigh toward overturning Lindsey than not. The Court overturning precedent would lead to a windfall change in how someone can be removed from housing practically overnight. This change could lead to other lawsuits asking for a substantial right to housing or even simply to allow a defense to eviction suits, allowing the neediest among us to remain in housing without immediate fear of losing it. However, these landmark cases are rare, and more difficult to achieve when the Court feels that the social climate is not apt for it. In those cases, sometimes a more public or incremental approach is preferred before appealing to the Supreme Court for relief.

B. Legislatures Have the Power to Make Changes, Big and Small

In the political sphere, legislatures have the democratic power to make the most wide-spread changes, which include more people in complex schemes better suited to the delivery of benefits to the populace. Because of this, courts often defer to legislatures when they enact large-scale changes that would affect large groups of people. However, dividing viewpoints often stall or end federal legislation before it can be debated. This Part focuses mostly on congressional capabilities to make changes to how housing works in the United States, including passing legislation, ratifying self-executing international treaties, or even proposing a constitutional amendment. However, the states can

149. Lindsey, 405 U.S. at 74.
150. Derek Willis & Paul Kane, How Congress Stopped Working, ProPublica (Nov. 5, 2018, 10:00 AM), https://www.propublica.org/article/how-congress-stopped-working [https://perma.cc/2953-NBLB]. This article discusses Congressional downturn from true lawmaking, including bill amendments and bi-partisan debate, and an upturn in simple presidential nomination confirmations. It points to how both parties have erred in different ways to create the stalemate seen today in Congress.
play a consequential role as well, sometimes at the national level—in ratifying a proposed constitutional amendment—but mostly limited to each state’s respective jurisdiction.

I. Passing Housing Legislation or Passing a Kidney Stone

Modern Congresses seem to have trouble passing much legislation, and civil rights legislation is no different.151 Having congresspeople agree on an issue has become nearly impossible, with current political leaders having to change Senate rules to remove the filibuster on normally routine events, such as confirming presidential nominees.152 With the political divide making most legislation nearly impossible to pass, it is still worth establishing what Congress is able to pass when the time comes.

United States statutes must be rooted on some power given to Congress in the Constitution.153 In choosing constitutional authority from where Congress can implement a right to housing within the nation, one option is the Spending Clause.154 The Spending Clause does what it sounds like—allows Congress to spend the money it collects via taxes.155

The Spending Clause has been the matter of some debate in more recent legislation, however. In National Federation of Independent Business v. Sibelius, the Supreme Court found that conditions hinged on states receiving congressional funding must be unambiguous and uncoercive.156 In other cases, the Court similarly found that conditions must be related to the federal interests involved in the law, that the spending must be in pursuit of “general welfare,” and that funding may not condition a state to act unconstitutionally.157 Even on its current rocky ground, the Spending Clause would allow Congress to pass legislation to give states who opt-in for the program money, conditioned on building a specific housing program.

In more general terms, Congress typically sets up these types of programs in a federalist scheme, meaning that the states receive money from Congress with the condition that they implement its program.158

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152. Willis & Kane, supra note 150.
158. Medicaid was introduced in 1965 as an amendment to the Social Security Act. E.g., Social Security Act, Pub. L. No. 89-97, § 1900, 79 Stat. 286 (1965). It provides a scheme where the state
Similarly, a federalist system could work for housing. In order to make this entitlement program work as it needs to, an automatic registration could be implemented. Adding an option to the census data collected to indicate housing status, or setting up a federal registry to determine who needs housing, could be an option for data collection.\footnote{Local agencies have already shown great success in registering the homeless population in order to learn more about their needs and specifically target when best to help, Elizabeth Daigneau, \textit{Registering the Homeless}, \textit{Governing} (Nov. 8, 2010), https://www.governing.com/archive/homeless-registry.html [https://perma.cc/C2EK-NYDY].} If an automatic registry cannot be set up, an application process is typical of other federalist entitlement programs in the United States.\footnote{Government benefits, USA.gov, https://www.usa.gov/benefits [https://perma.cc/82MX-6GBZ] (last visited Feb. 26, 2023).}

Differentiating this from Section 8 housing, this would be a housing payment assistance program, which includes both renting and owning a home. In adding home ownership to the equation, this could help millions more Americans stay out of foreclosures and tax sales when they strike bad luck.\footnote{John Waggoner, \textit{Older Homeowners Struggle with Mortgage Debt}, AARP (Sept. 28, 2021), https://www.aarp.org/money/credit-loans-debt/info-2021/homeowners-pandemic-foreclosures.html [https://perma.cc/TW3M-F5FK].} Further distancing from Section 8 is the law as an entitlement program, meaning that becoming eligible for the benefit gives the recipient the right to said benefit.\footnote{Andrew G. Biggs, \textit{Means Testing and Its Limits}, \textit{National Affairs} (Fall 2011), https://www.nationalaffairs.com/publications/detail/means-testing-and-its-limits [https://perma.cc/ZCD7-RYZ5].} However, entitlement programs have recently been on the hot seat, mainly by Republican members of Congress, stating that they are too costly.\footnote{Tami Luhby, \textit{Social Security won't be able to pay full benefits by 2035 if Congress doesn't act}, CNN (June 2, 2022, 6:39 PM), https://www.cnn.com/2022/06/02/politics/social-security-medicare-report/index.html [https://perma.cc/N5NV-ATFA].} The main example given is usually Social Security retirement, which politicians have stated would be out of funding by the end of the decade.\footnote{Id.} Therefore, adding a new entitlement program may be more than can be passed by Congress.

Another option is to cover a person's housing cost at a certain income rate.\footnote{Id.} Based on the declining usefulness in other social programs, the legislation should also include housing cost cap equations that factor in changes for inflation, location, and income.\footnote{Lawrence Berger et al., \textit{Anti-Poverty Policy Innovations: New Proposals for Addressing Poverty in the United States}, 4 \textit{RSF: The Russell Sage Found. J. of the Soc. Sci.} 1, 2–5 (2018). This article denotes that current social programs tend to avoid adding location into the eligibility equation, yet the cost of living differences between different areas of the country can be very large. \textit{Id.} at 3–4.} Most programs which
factor in income are based on the Federal Poverty Line (FPL), calculated each year by the Department of Health and Human Services. 167 If used, Congress would set the highest amount of income a person can bring in to be eligible for the program as a percentage of the FPL, such as 200%, or double the FPL, which would include 27.5% of the American populace. 168 Another way to use the FPL would be to set specific caps for specific percentage points; for example, at or below the FPL would receive 100% of their rent covered up to the cap in their area, but those at 150% of the FPL would receive 75% of their rent covered up to the cap in their area. These tiering programs could be used in compromise to attempt to bring moderate congresspeople to the table, which is always a hope to have bills like these passed. 169 Including items in the equation such as location and inflation would help even the field and would include more of the American populace in helping with rent and mortgage payments. 170

Other than the Spending Clause, Congress could also use the Commerce Clause. 171 A bill based on the Commerce Clause would simply need to regulate something involved in interstate commerce. 172 However, Congress can still act if something within one state has an effect on interstate commerce. 173 In this case, the argument would be that rent affects those who wish to move between states or those who commute across state lines, thus affecting interstate commerce. Commerce power allows Congress broader abilities related to anything commerce, not just federal spending. 174 This could include capping rent at certain market values, allowing for federal refinancing loans at low interest rates, or simply protecting homeowners or renters from eviction during particular occasions. Because of the lower relation to commerce, this framework seems weaker than the spending power scheme discussed before. 175

170 The disparity in rental rates is giant across different places in the continental United States. The average rent for a one-bedroom apartment in Arkansas in 2022 was $555, compared to the average for the same in Washington, D.C., at $1,567. 2022 Rent Data by State, RENTDATA.ORG, https://www.rentdata.org/states/2022/ [https://perma.cc/3ZKU-N2FR] (last visited Feb. 26, 2023).
171 U.S. CONST. art. I, § 8, cl. 1, 3.
173 Gonzales v. Raich, 545 U.S. 1 (2005).
174 Morrison, 529 U.S. at 609 (Justice Rehnquist sets out four factors to determine whether a law passed under the Commerce Clause is permissible).
175 Supra Part III.B.1.
A final choice is the Fourteenth Amendment. The Fourteenth Amendment in pertinent part states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.\(^{176}\)

The third clause of the section, the Due Process Clause, is the basis for where \textit{Meyer v. Nebraska} penned substantial due process into fundamental rights.\(^{177}\) The fourth clause of the section, the Equal Protection Clause, is what the Court refused using to create a right to housing in \textit{Lindsey v. Normet}.\(^{178}\) In rectifying the error of the Court, Congress could propose legislation based on the Due Process Clause, saying that \textit{Meyer} created a fundamental right to housing, and more, the Court has been unwilling to uphold said right.

In creating a framework for this statute, Congress could specify issues mentioned in \textit{Lindsey} that were not decided according to Congress’s wishes, such as a time period required for notice of eviction hearings.\(^{179}\) Further, Congress could enact requirements for states to follow, like a requirement that a person who is behind on payments has a specific grace period in which they cannot be evicted. Connecting spending power with the Fourteenth Amendment allows for further defense against challenges in the courts. Congress has several options at its disposal to pass legislation to enact such a right to housing. However, based on the political climate and the make-up of the Court who would be hearing challenges, such legislation may be a difficult pill to swallow.\(^{180}\)

2. \textit{Ratifying the ICESCR with Intent to Implement the Rights Within}

The ICESCR has been codified by the United Nations and implemented by several international governments.\(^{181}\) Ratification of such a covenant falls under the treaty power of the Constitution and is a joint power between the legislative and executive branches.\(^{182}\) Having already been signed by President Jimmy Carter when it was passed in

\(^{176}\) U.S. Const. amend. XIV, § 1, cl. 2–4.
\(^{179}\) Supra, Part III.A.2.
\(^{180}\) Willis & Kane, supra note 150.
\(^{181}\) Supra, Part II.B.2.
\(^{182}\) U.S. Const. art. II, § 2, “He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . .”
1976, the only step left is ratification by two-thirds of the Senate. However, the covenant has not seen any steps toward ratification since then and has not been submitted for recommendation of ratification since Carter’s term ended.

While the ICESCR does create the potential of vast change in the United States, the changes likely point to where our society should lead, especially in the country with the largest gross domestic product by $5 trillion. However, other issues may arise post-ratification. A treaty or international covenant is read carefully by a court to see if it is deemed “self-executing” or not, meaning whether the words of the covenant itself bind the nation or require additional domestic legislation in order to enact it. Therefore, most treaties on their face would not be deemed self-executing by a court, including the ICESCR. However, Article 2, paragraph 1 of the ICESCR includes that parties must work toward “realization of the rights . . . in the present Covenant by all appropriate means” and specifically include the phrase “adoption of legislative measures.” This section in the Covenant might force legislation sooner than might normally be expected with a treaty, and in doing so, would bring a right to housing to the United States.

C. Amending the Constitution to Provide an Easy Platform to Stand and Pass Legislation

Finally, amending the Constitution itself to provide the right to housing is another way to gain this right in the United States. This type of

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184. Id.
185. Piccard, supra note 88, at 232 n.5.
186. The ICESCR goals include “economic, social and cultural rights, as well as . . . civil and political rights.” Id. at 235 (quoting International Covenant on Economic, Social and Cultural Rights, Preamble, adopted Dec. 16, 1966, 993 U.N.T.S. 3.). Professor Piccard goes on to explain through the separate parts of the Covenant, which covers a vast array of rights and obstacles with which the world and United States have long struggled. Id. at 235–37.
191. Professor Piccard does say that these legislative changes could take generations to complete. Piccard, supra note 88, at 242.
change is typically avoided as a first-pass solution, as amending the Constitution is a very difficult process. \(192\) The procedure is laid out in Article V of the Constitution:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress. \(193\)

In other words, either two-thirds of both houses of Congress propose a new amendment to the Constitution or two-thirds of state legislatures propose a constitutional convention, where amendments are proposed. \(194\) Then, the decided language must be ratified by three-quarters of the states. \(195\)

As far as the content of the amendment, an easy solution is to re-introduce President Roosevelt’s “Second Bill of Rights” as constitutional amendments. \(196\) The Bill of Rights was added under the Massachusetts Compromise, which hinged the ratification of the Constitution on its immediate amendment, granting ten protections from federal government overreach. \(197\) Since then, the country has seen more rights taken away by states rather than the federal government, which lead to the Civil War, the Reconstruction Amendments, and the passage of twentieth century Civil Rights laws. \(198\) It follows that the best recompense is to add the aforementioned “Second Bill of Rights” in order to protect citizens from economic hardship and enjoin states from taking those protections away. \(199\) To note, the Second Bill of Rights does not start and end at housing; there are eight separate rights that would be added. \(200\) Instead, it would add rights to a job, livable wage, a decent home, adequate medical care, economic protection, and good education. \(201\)

The quality of the reasoning behind doing all the work to pass a constitutional amendment is that it adds to our government’s most “sacred”

\(192\) U.S. Const. art. V.
\(193\) Id.
\(194\) Id.
\(195\) Id.
\(196\) Supra Part II.B.2.
\(197\) The day the Constitution was ratified, Nat’l Const. Ctr. (June 21, 2022), https://constitutioncenter.org/blog/the-day-the-constitution-was-ratified [https://perma.cc/6JNW-2JQP].
\(198\) U.S. Const. amend. XXIII, XXIV, XXV.
\(199\) Supra Part II.B.2.
\(200\) Id.
\(201\) Id.
document\textsuperscript{202} and becomes nearly impossible to remove.\textsuperscript{203} The main device this provides is that it becomes another bolster for Congress to pass legislation \textit{and} for the Supreme Court to issue rulings which favor a right to housing.\textsuperscript{204} However, as discussed, amendments are not typically right-giving or positive, but negative rights that the government cannot take away.\textsuperscript{205} So, unless the amendment commands the Court to act in a certain way, it still might not have all the protections necessary in the courts without proper legislation.

\textbf{D. Where Do We Go From Here?}

Within all these solutions, finding a singular solution that will be the most helpful for impact is tricky. For instance, as stated previously, in order for the Supreme Court to hear a case to overturn \textit{Lindsey} and establish new precedent, a case must be there to challenge it.\textsuperscript{206} Not only must a case exist, but it must also have a compelling story with a “perfect” plaintiff telling that story.\textsuperscript{207} Even a case that has these points can be denied certiorari by the Court.\textsuperscript{208} The highest Court has always been more likely to grant certiorari on issues of constitutional questions than most other issues, yet, more recently, less likely to accept a pure federal issue without a statute issue, a circuit split, or, better yet, a federalism question.\textsuperscript{209} Herein lies the issue of resting hope in the Supreme Court to undo these issues—if the Court does not deem it important,

\begin{itemize}
\item \textsuperscript{203} This has only been done a few times in our history, and only substantially once. U.S. CONST. amend. XVIII, XXI.
\item \textsuperscript{204} Supra Part III.B.1.
\item \textsuperscript{205} Supra Part II.B.2.
\item \textsuperscript{206} Supra Part III.A.
\item \textsuperscript{207} Supra Part III.A.
\item \textsuperscript{208} The Court accepts an average of 100–150 a year out of the more than 7000 it averages in requests for certiorari. Supreme Court Procedures, USCOURTS.GOV, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 [https://perma.cc/U42Y-WQS3] (last viewed Mar. 11, 2023).
\item \textsuperscript{209} Professor Narechania explains that the Supreme Court grants certiorari differently over time, based on the Supreme Court rules which ask the Court to review “cases it deems sufficiently ‘important.’” Tejas N. Narechania, \textit{Certiorari in Important Cases}, 122 COLUM. L. REV. 923, 926–27 (2022). For example, Table Two shows key terms used when granting certiorari by Chief Justice, starting with Chief Justice Taft in 1925 and ending with the current Chief Justice Roberts in 2018. Id. at 958–60. The Table shows the rise of “state” above any other term starting with Chief Justice Burger (1969–1986). Id. Chief Justice Roberts (2005–present) shows state as the “most suggestive [term] of the Court’s priorities” by nearly eleven percentage points, above constitutional issues by over forty percentage points. Id. The term “Constitution” now currently falls in fourth place in court priority. Id.
\end{itemize}
it is unlikely to hear it. However, lower federal and state courts can make small incremental changes. Courts can require that tenants in eviction proceedings are provided an opportunity for free representation through legal aid, much like the Court did in establishing defense attorney requirements in notifying defendants of immigration effects from plea deals in Padilla v. Kentucky, which would admittedly be a much larger change. Finally, the courts have sometimes successfully ruled that municipalities or states must provide adequate housing to homeless or even affordable housing within the communities.

Separately, this could be handled easily by Congress in passing new housing legislation. However, several issues still impact the ability of Congress to pass legislation—in this case, like the issue aligning with one side of political spectrum rather than the other. Other issues, such as laborious Senate rules allowing amendment and debate of bills indefinitely until the agenda forces a move to a new issue, effectively stymies the chamber which has been split along partisan lines for much of the modern era. Passing legislation may be more arduous than signing the decades-old ICESCR, which would then force the United States to eventually pass laws which would support housing. However, experts have theorized that Congress has been so slow to ratify this treaty because of economic principles that do not work within the current capitalist structure seen in the United States today.

Until new legislation is passed, we have the protections that were started years ago with the HNA and FHA: protections against losing the home you have, incentives to buy homes, paths to having a home if you are unable to afford one, and protections from being discriminated against.

211. E.g., Michigan court rules for eviction proceedings state that summons to court must provide options for Legal Aid. Also, a judge must inform a Defendant of their right to an attorney, as well as providing what legal aid is available, if the tenant appears in court without an attorney. Mich. Cr. R. 4.201(C)(3), 4.201(F)(2).
213. Massimo, supra note 12, at 291–94, showing that New York and New Jersey high courts have upheld a requirement to provide housing for homeless and adequate community housing respectively.
216. Supra Part III.B.2.
217. Piccard, supra note 88, at 248 n.81.
against based on your class. These protections are good, and they were a step forward from what the United States had in the past, but the protections themselves do not create a right to be housed in America.

A constitutional amendment would be the best path in formally securing housing rights for millions of Americans who need it. It forces courts to protect the right, and it allows Congress to pass legislation which can be more comprehensive and less vulnerable to challenges in the courts. However, getting to the passage of a constitutional amendment takes an enormous amount of effort and time, not only in the procedural aspect of agreeing on language and passage by thirty-state legislatures or public polling, but also in the time it can take to convince the states to ratify the amendment.

Entering the scene, however, are the people. Changes at the local level pushed by those organizing for better housing for the community can tip the scales of public view. Social movements, which change public opinion, can slowly edge out old, fixed ideas of constitutional constructs for new, progressive ideas. For instance, Professor Lisa Alexander promotes that housing change can be done locally by

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218. Supra Part II.B.1.
219. Political will in the United States is unfortunately controlled by politically nativist or the “ultra-rich,” and not the American people. Stark, supra note 91; Piccard, supra note 88, at 232–33 n.7. “The wealthiest 10 percent of Americans . . . earned 11.4 times the roughly $12,000 made by those living near or below the poverty line in 2008 . . . . That ratio was an increase from 11.2 in 2007 and the previous high of 11.22 in 2003.” Id. Until these issues change, a long uphill battle awaits those who wish to see America housed.
220. Supra Part III.C.
221. See Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); but see The Civil Rights Cases, 109 U.S. 3 (1883) (noting the span of eighty-five years for equal protection based on the Thirteenth Amendment to be granted by a court).
222. See the conversation regarding the procedures, supra Part III.C.
223. The Equal Rights Amendment was drafted in 1923, approved by Congress in 1972, and ratified by the thirty-eight state Virginia in 2020. Alex Cohen & Wilfred U. Codington III, The Equal Rights Amendment Explained, BRENNA CENTER FOR JUSTICE (Jan. 23, 2020) https://www.brennancenter.org/our-work/research-reports/equal-rights-amendment-explained [https://perma.cc/T9VB-GC3Y]. The amendment now awaits either Congress or the Archivist of the United States to formally certify that three-quarters of the states have successfully ratified. Id. Similarly, the thirty-eighth state to ratify the Twenty-seventh Amendment was certified in 1992, 203 years after Congress first transmitted it to the states. Id.
224. U.S. CONST. pmbl.
225. Alexander, supra note 86, at 263. “Popular constitutionalists have long argued that ‘the people themselves’ can create constitutional meanings without the formal recognition of the state.” Id. at 263. “[W]hen these movements reformulate local property and housing entitlements in a manner that enhances equity and vindicates well-accepted constitutional norms, they give legal content to a future American constitutional right to housing.” Id. at 248.
226. Id. at 267. “These [local] movements exemplify and manifest the right to housing from the bottom-up before it ever becomes codified.” See also The Road to Brown (California Newsreel, 1990) https://video.alexanderstreet.com/watch/the-road-to-brown [https://perma.cc/RQ5Q-YDN2].
convincing municipalities to use eminent domain and zoning to repurpose empty buildings or blighted lots in order to serve the needs of the homeless or home insecure.227

Other movements over time have shown that social uprising can provide protections in law that were not there before.228 Professor Alexander concludes her article with the idea that “social movements can increase Americans’ acceptance of social and economic rights.”229 Leading to another example, Professor Mark Tushnet analyzes the role of the Supreme Court in both the Christian Evangelical and the LGBTQ+ political movements.230 He argues that “legal credibility is insufficient to produce legal change” and instead leans on the acceptance of those arguments.231 Acceptance depends on “a favorable political environment” and a “support structure” in order to carry out the change necessary.232 The professor mentions historical examples where citizens themselves put pressure on local leaders, both actively and tacitly, which eventually lead to a change in national perspective, and, therefore, a change in law from the national representatives.233 Beyond local change, state governments can also enact legislation to protect a right to housing for the state’s citizens similarly to Congress on the national stage—however, this does not easily affect a national issue when nearly all states do not wish to provide a right to housing.234

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229. Alexander, supra note 86, at 300.
231. Id. at 919.
232. Professor Tushnet says that lawyers are the most needed to fight these battles, but for causes such as here, they need “assured sources of financing” in order to be of the most help. Id.
233. Professor Tushnet’s best examples comes from the political will of Black Americans in the South during the Civil Rights Movement. Id. at 911. While the NAACP led the national charge on litigation, other subtle changes led to bigger change, faster, such as a movement of Black Americans from the South to Northern cities, forcing remaining Southern whites to change policies lest lose more economic ability. Id. at 912. Once in the North, Black Americans could enact change, and put more political pressure on national representatives to see that changes would occur in the South. Id.
234. See Yan Goodwin, Comment, A Unique Path to Nationwide Paid Family and Medical Leave: Through the U.S. States, 72 DePaul L. Rev. 107 (2022) (discussing how state legislatures can pick up slack where the federal legislature is too politically locked to act); Tars, supra note 104, at 1–12.
IV. Impact

The impact of having stable housing causes a ripple effect in the lives of those who live in housing insecurity that cannot be understated. Having security in housing provides security from a list of other traumas which can be inflicted upon those in poverty in the United States, including food insecurity, employment opportunity, mental health, physical health, and racial discrimination.

Food insecurity affects more than thirty-four million Americans at any given time, nine million of those being children. The national average of a home which is food insecure is 10.2% or 13.5 million households, but that percentage rises to 26.5% for low-income households. The links between housing insecurity and food insecurity run deep; over half of those serviced by Feeding America, a network of food banks, report needing to choose between paying for housing or food. Studies show that the housing instability and food insecurity share common factors, such as material hardship, depression, and a lack of social support. In providing a “stronger social safety net” in a right to housing, food insecurity would also be associatively reduced by putting less pressure on the factors shared between them, effectively reducing the risk of food insecurity. When families are able to gain housing, it lowers the risk of food insecurity by 40%.

Employment opportunity is also highly correlated with housing stability. In 2013, most families in poverty spent 50% or more of their monthly income on rent, with some spending as much as 70% of their monthly income on rent. Housing insecurity or loss causes several

238. Lauren A. Taylor, Housing and Health: An Overview Of the Literature, HEALTH POL’Y BRIEF (June 7, 2018).
242. King, supra note 235, at 256.
243. Id. at 259.
244. Id. at 258, 269.
245. Che Young Lee et al., Bidirectional Relationship Between Food Insecurity and Housing Instability, 121 J. OF ACADEMY OF NUTRITION AND DIETETICS 84 (2021).
problems which can lead directly to the loss of a job, including needing time off work in order to relocate, distracting from work, causing outbursts or bad behavior, making a longer commute, and other factors.\textsuperscript{247} Also, most areas with the most opportunity for growth also have the highest rates for rent or property values.\textsuperscript{248} Furthermore, exposure to quality housing as a child produced a higher likelihood of finding an income to sustain adequate housing as an adult, based on a study of providing housing vouchers to public housing tenants in order for them to move into higher-income areas where the quality of housing is better.\textsuperscript{249} Thus, where someone lives, and the quality of that housing, has a high probability of affecting where they work, how much they make, and how productive they can be within society.\textsuperscript{250} Providing a right to housing can remove the obstacle of having to prioritize things above work when work is needed to be done, and can remove another barrier in removing poverty from the United States.

Mental health issues have become a pervasive topic in recent years, and in growth of understanding the issue, researchers have also tried to understand the biggest influences of mental health issues in peoples’ lives.\textsuperscript{251} As discussed in employment opportunities as well, housing insecurity and loss can trigger mental strain that bleeds over into other areas of peoples’ lives.\textsuperscript{252} One study showed that those with a “housing instability event” were fourteen percentage points more likely to experience anxiety and thirteen percentage points more likely to experience depression, as well as being more likely to have experienced anxiety attacks.\textsuperscript{253} Mental health issues have collateral consequences involving housing insecurity, including substance abuse and child neglect or maltreatment, which could again lead to continued or increased housing instability if Child Protective Services gets involved.\textsuperscript{254} When housing insecurity is present in a household, choices often have to be made where income is being spent, which includes treating known behavioral or mental health issues.\textsuperscript{255} On the other hand, studies show that children who gain any sort of housing security between the ages of two and seventeen are less likely to have mental health problems for the remainder
of their lives after only two years of living in stable shelter. Mental health and housing stability are indisputably intertwined, and stabilizing housing can have a lasting impact on a person's mental health.

Beyond mental health, physical health is also affected by a lack of stable housing. Housing programs have a long history of being poised to combat physical illness and injury that can come from living in substandard conditions. Studies have shown that those without stable housing are more likely to struggle with obesity and diabetes. Housing instability can often lead to chronic homelessness, which adds a higher likelihood for ailments such as cirrhosis, frostbite, substance abuse, and other chronic medical conditions. As stated previously, using income to cover housing also leaves little room for covering medical expenses, causing avoidance of treating issues until it becomes an emergency. Along the same lines, diverting income to housing costs also makes it difficult or impossible to hold medical or dental insurance, either voluntarily provided or not. Providing housing as a right can alleviate the stress on the body provided by instable housing or homelessness, and can help ameliorate the trauma of poverty.

Finally, the impact a right to housing would have on racial discrimination cannot be overstated. Since 1980, the Black community has been overrepresented in the homeless population in urban areas nearly three times more than in respect to their representation in the national population. Beyond this value, the United States' long history of abuse to Black Americans also presents issues that have hindered Black families from being able to build wealth, leading to augmented numbers of Black families in poverty. Because of this, and physical segregation that continues to occur in urban sprawl, Black Americans have a higher affordability problem compared to White Americans in the same financial situation. While Black Americans are highly more likely to be

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256. Fenelon, supra note 237, at 456–57.
259. Id. at 19–20.
261. Id. at 17.
262. Carter, supra note 239, at 35. George Carter, a survey statistician in a division of the U.S. Census bureau, uses a study from 1992 to show that 44% of homeless were Black, with some cities showing as high as 90%. Id.
264. Carter, supra note 239, at 44. Carter finds a higher percentage of Black Americans rather than White Americans in categories such as inadequate housing, overcrowding, home ownership,
homeless than White Americans. many Black families do not have the same support system to fall back on as White families, due to a long history of financial discrimination.

In providing a right of housing to all Americans, it would alleviate several of the racial barriers seen in housing. Removing housing from the equation allows families to more easily build wealth that can raise generations out of poverty and begin a transformation in the Black community that is overrepresented in both impoverished and homeless populations. A right to housing can lead toward other systemic equalities, allowing for better education and access to basic services such as quality food. By providing a right to housing, the racial burden on Black Americans struggling financially weakens and can lead to a longer and more beneficial build-up of wealth and longevity in generational prosperity.

Overall, the impact of adding a right to housing in the United States cannot be minimalized. Providing the right allows for a chain reaction to flow back into the health and safety of all Americans, but most importantly to the 37.9 million Americans who are experiencing poverty today. Without a right to housing, this leaves nearly ten percent of Americans in housing insecurity and without positive security on which to fall back.

V. Conclusion

This Comment has articulated the paths that the United States can walk in order to secure its citizens a right to housing. The right has been available to the courts as far back as 1923 in *Meyer v. Nebraska*, but the right was not extended to citizens in *Lindsey v. Normet*. The Court

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265. Id. at 64.
266. Hanks, supra note 263.
268. Hanks, supra note 263.
269. Florida TaxWatch, *The Impact of Food Deserts on Public Health & Property Values* (2017). This report states that fast food chains are typically found more often in low-income neighborhoods, but the neighborhoods are missing full-service grocery stores or markets. Id.
270. Hanks, supra note 263.
272. Julie Pagaduan, *Millions of Americans Are Housing Insecure: Rent Relief and Eviction Assistance Continue to be Critical*, Nat’l All. to End Homelessness (Nov. 9, 2021), https://endhomelessness.org/resource/housing-insecurity-rent-relief-eviction-assistance/ [https://perma.cc/L7P-78TM]. This report focuses on the effect of rent relief during the pandemic, which still left 3.7 million out the 55 million people surveyed. Id.
can correct this, however, by overturning the precedent set by Lindsey and create a right to housing as a part of fundamental due process. Furthermore, Congress made great housing strides in the twentieth century, beginning the building blocks for a right to housing, but legislative capital ran out in the late twentieth century and necessary changes to keep up with the rest of the industrialized world have not been made. Congress has options available to it, however, in passing new sweeping legislation to create a substantive right to housing within spending and commerce powers granted to Congress from the Constitution.

However, the best way forward is joining together in social coalition and guiding change toward an amendment to the Constitution. In garnering political support through the public’s voices, the amendment would have more foundational grounding and could allow both the courts and Congress to act through the power from the new amendment. This change would make a substantive impact on the people who desperately need protection in housing, and would pave the way for America to enter the global cohort of industrialized nations which care for their citizens’ shelter needs.

“None of us are home until all of us are home.”

Matthew Fern

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275. Supra Part III.A.
276. Supra Part II.B.
277. Supra Part III.B.
278. Supra Part III.C–D.
279. Id.
280. Supra Part IV.