The Constitutional Right to "Establish a Home"

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Abstract

Everyone needs a home. But exclusionary zoning ordinances in many communities prevent low-income and moderate-income families from securing affordable homes, disproportionately harming people of color. Because these ordinances satisfy the rational basis test, they have been immune from substantive due process attack. This Article provides a new method to challenge the constitutionality of exclusionary zoning.

For decades, the Supreme Court has recognized that the Due Process Clause of the Fourteenth Amendment protects the right to "establish a home." The Clause was adopted, in part, as a response to the "Black Codes" enacted by southern states in the post-Civil War era that prohibited Black Americans from buying or leasing homes. The Court has frequently mentioned the right in dicta but has never squarely relied on it to reach a decision. Perhaps for this reason, it has been overlooked by scholars.

This Article is the first piece of legal scholarship to explore the right to establish a home. This is a negative right: it bars the government from unduly interfering with a person's ability to rent or buy a home. The Article demonstrates that this right is a fundamental right for the purpose of substantive due process analysis, like the right to marry or the right to raise children. Accordingly, a law that infringes the right must be evaluated under either the strict scrutiny or intermediate scrutiny tests. Under either test, exclusionary zoning is probably unconstitutional.

Table of Contents

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INTRODUCTION

Meyer v. Nebraska[1] is a landmark in constitutional law—the first time the Supreme Court used the Due Process Clause of the Fourteenth Amendment to protect personal liberty.[2] It remains a cornerstone of modern substantive due process jurisprudence today. As Professor Peter Nicolas explains, *Meyer* is "consistently presented by the Court in support of the contemporary approach to recognizing and enforcing substantive fundamental rights under the Due Process Clause."[3] Many of the Court's most far-reaching decisions—ranging from *Griswold v. Connecticut*[4] to *Obergefell v. Hodges*[5]—have relied on *Meyer*.

In a famous passage, *Meyer* defined the components of "liberty" guaranteed by the Due Process Clause:

> Without doubt, it 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.[6]

Over time, all the rights enunciated in *Meyer* have been the subject of extensive litigation and intensive scholarly analysis, except for one—the right to "establish a home."[7] The Court has often referred to this right but has never formally used it in reaching a decision.[8] Lower courts have utilized the right infrequently, and scholars have ignored it.[9] As a result, the nature and scope of the right to establish a home remain uncharted.

This Article is the first academic work to analyze the right to establish a home. This is a negative right: it bars the state from unduly interfering with a person's ability to rent or buy a home. Although the

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1 262 U.S. 390 (1923).

2 *See id.* at 401.

3 Peter Nicolas, *Reconstruction*, 10 U.C. IRVINE L. REV. 937, 958 (2020).

4 *See* 381 U.S. 479, 481–83, 485 (1965) (recognizing right to use contraceptives).

5 *See* 576 U.S. 644, 664–65, 667–68 (2015) (recognizing right to marry).

6 *Meyer*, 262 U.S. at 399 (emphasis added).

7 Although the *Meyer* phrasing might imply that the right to establish a home is a component of a larger right that also encompasses the right to marry and the right to bring up children, later developments made it clear that these are separate rights. *See infra* note 238 and accompanying text.

8 *See infra* text accompanying notes 246–78, 282–91.

9 *See infra* notes 279–81, 290.

right has a number of potential applications, it is particularly important as a tool for challenging exclusionary zoning ordinances. Many cities have adopted ordinances that prohibit apartments, condominiums, and other multifamily housing; require large minimum lot sizes for single-family residences; or bar manufactured homes.[10] Indeed, some cities permit only a particularly expensive form of housing: detached single-family homes on large lots. These ordinances harm the public by curtailing the types of homes that are available. A person who is financially able to buy a detached home on a large lot, for example, might strongly prefer to live in an apartment or condominium. Additionally, exclusionary zoning ordinances effectively prevent low-income and moderate-income families from securing affordable homes and disproportionately exclude minority groups.[11]

No court has decided whether exclusionary zoning violates the right to establish a home. Notably, however, the Supreme Court has already held that the right to marry and the right to bring up children—the neighboring rights identified in *Meyer*—are fundamental rights for purposes of substantive due process analysis, which invokes intensive judicial scrutiny.[12] Therefore, although the courts have yet to use the right to establish a home to invalidate exclusionary zoning, this Article demonstrates how the right could be used for this purpose.

Part I of this Article examines the traditional veneration of the home in American legal culture. It develops four themes: (1) the home as a necessity for survival; (2) the home as a sanctuary from other people and the state; (3) the home as the locus of personal liberty; and (4) the home as the center of family life.

Part II traces the origins of the right to establish a home in American law. In its early stages, the right can be traced from William Blackstone's natural law "right of habitation," through the Declaration of Independence, and to the home-centric Bill of Rights.[13] The right is reflected in a catalogue of nineteenth-century policies ranging from land bounties for veterans to the Homestead Act of 1862.[14] And concern that southern states would bar emancipated slaves from ob-

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10 *See infra* notes 406, 408–09.

11 *See infra* note 407 and accompanying text.

12 *See* Obergefell v. Hodges, 576 U.S. 644, 675 (2015) ("[T]he right to marry is a fundamental right . . . ."); Troxel v. Granville, 530 U.S. 57, 66 (2000) ("[T]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.").

13 *See infra* text accompanying notes 55–107.

14 Homestead Act of 1862, Pub. L. No. 37-64, 12 Stat. 392; *see infra* text accompanying notes 108–26.

taining homes helped to spur adoption of the Civil Rights Act of 1866[15] and the Fourteenth Amendment, leading to express recognition of the right in *Meyer*.[16]

Part III analyzes the right to establish a home, as enunciated in *Meyer* and its subsequent evolution. In context, recognition of the right should be viewed as a libertarian response to early zoning ordinances that imperiled the traditional freedom to obtain a home. This Part explores later Supreme Court cases and lower court decisions that have referenced the right and further explained its meaning. Most recently in *Obergefell*, which held that the right to marry is a fundamental right, the Court proclaimed that "[t]he right to 'marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause."[17] Over 400 federal and state decisions have referred to the right to establish a home, many of which occurred in the last decade.[18]

Part IV demonstrates that the right to establish a home is a fundamental right. Under the *Obergefell* approach to identifying fundamental rights—the technique the Court has used most recently—a compelling argument can be made that the right to establish a home is fundamental. Under the older *Washington v. Glucksberg*[19] approach, a persuasive case can also be made for this result.[20] A law that impairs a fundamental right is ordinarily subject to strict scrutiny. Alternatively, such a law might be analyzed under intermediate scrutiny, a less demanding standard.

Finally, Part V evaluates the constitutionality of three common exclusionary zoning techniques: (1) prohibition of multifamily housing; (2) large lot size requirements; and (3) prohibition of manufactured homes. It concludes that these laws are probably unconstitutional infringements of the fundamental right to establish a home under both the strict scrutiny and intermediate scrutiny tests.

I. The Home in American Law

American law venerates the home. As the Supreme Court observed in *Payton v. New York*,[21] "overriding respect for the sanctity of

15 Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1983).

16 *See infra* text accompanying notes 127–51.

17 *Obergefell*, 576 U.S. at 668 (quoting Zablocki v. Redhail, 434 U.S. 374, 384 (1978)).

18 *See infra* note 232.

19 521 U.S. 702 (1997), *superseded by Obergefell*, 576 U.S. 644.

20 *See infra* text accompanying notes 380–96.

21 445 U.S. 573 (1980).

the home . . . has been embedded in our traditions since the origins of the Republic."[22] Similarly, Justice Brennan explained in *United States v. Verdugo-Urquidez*[23]: "For over 200 years, our country has considered itself the world's foremost protector of liberties. The privacy and sanctity of the home have been primary tenets of our moral, philosophical, and judicial beliefs."[24] Indeed, the Court's interpretation of the First, Second, Third, Fourth, and Fifth Amendments embodies a "home-centric jurisprudence."[25]

In the most basic sense, a home is a house, apartment, or other physical structure used as a long-term residence. Yet scholars agree that the concept of home involves far more than a building; it also connotes the experiences, relationships, and values that are associated with living in a home.[26] For example, Professor Margaret Radin posits that "[t]he home is a moral nexus between liberty, privacy, and freedom of association."[27] Professor Gerald Dickinson concludes that "Americans' admiration 'for the sanctity of the home' is linked to the individual, the family, and the fabric of society."[28] Professor John Campbell stresses that "a family's home is important to a person's physical, emotional, and financial well-being" and thus is "central to American culture and identity."[29] And Dean Benjamin Barros notes that "'[h]ome' evokes thoughts of, among many other things, family,

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22 *Id.* at 601.

23 494 U.S. 259 (1990).

24 *Id.* at 285–86 (Brennan, J., dissenting).

25 *See, e.g.*, Gerald S. Dickinson, *The Puzzle of the Constitutional Home*, 80 OHIO ST. L.J. 1099, 1103, 1109–16 (2019); *see also* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 129–30 (2012) (discussing "house-protective" doctrines developed by the Supreme Court); John Campbell, *Where Kafka Reigns: A Call for Metamorphosis in Unlawful Detainer Law*, 49 U. MICH. J.L. REFORM 557, 564 (2016) ("With very few exceptions, American law . . . embraces home exceptionalism or 'home-centric' ideals.").

26 As philosopher Michael Allen Fox comments:

> There is a strong tendency to identify house and home, and even to use the words interchangeably. . . . A home is always a house plus many other ingredients; a house is a home minus many elements. . . . [W]hen we focus too much on the house (or any dwelling structure) as the essence of home, we neglect the most important components: the interactions among people who live together (relationships) and their behaviour regarding the objects (possessions, mementos, artifacts, goods, commodities, and so forth) which fit out their home space.

MICHAEL ALLEN FOX, HOME: A VERY SHORT INTRODUCTION 65–66 (2016); *see also* JOHN S. ALLEN, HOME: HOW HABITAT MADE US HUMAN 13–54 (2015) (discussing attributes of a home); JUDITH FLANDERS, THE MAKING OF HOME 166–68 (2014) (discussing the evolving association of "home" with terms like "comfort" and "relaxing").

27 Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 991 (1982).

28 Dickinson, *supra* note 25, at 1100 (quoting Radin, *supra* note 27, at 1013).

29 Campbell, *supra* note 25, at 564–65.

safety, privacy, and community," which has led to "an ideology of home where the protection of home and all it stands for is an American virtue."[30] As these comments reflect, four themes explain the centrality of the home in American law.

First, shelter is necessary for human existence.[31] As the Court acknowledged in *New State Ice Co. v. Liebmann*,[32] "the shelter of a home" is a "prime necessity."[33] American law adopted a laissez-faire approach to the quality of housing until the twentieth century.[34] During this era, people could live in hovels, shanties, or virtually anywhere. With rapid urbanization, however, living conditions in many cities became abysmal; crime, disease, fire, and overcrowding were constant dangers.[35] Spurred on by the Progressive movement, cities[36] eventually began to regulate the nature and quality of housing through health and safety standards, building codes, and zoning ordinances.[37] The unintended consequence of this regulatory expansion was that some people were unable to obtain homes in communities where they wanted to live, while others have been forced out of the housing market altogether.[38]

Second, the home is a sanctuary against both other people and the state.[39] As an English court phrased the doctrine in 1604, "the house of every one is to him as his . . . castle and fortress."[40] Eventually this doctrine expanded to restrict interference by the state, as embodied by William Pitt's 1763 speech to the House of Commons: "The poorest man may in his cottage bid defiance to all the force of the

30 D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 255 (2006).

31 *See infra* text accompanying notes 320–33.

32 285 U.S. 262 (1932).

33 *Id.* at 277.

34 *See* SEYMOUR I. TOLL, ZONED AMERICAN 16–18 (1969).

35 *See, e.g.*, JACOB A. RIIS, HOW THE OTHER HALF LIVES: STUDIES AMONG THE TENEMENTS OF NEW YORK 1–3, 10 (1890) (discussing living conditions in New York City tenements); TOLL, *supra* note 34, at 21–26, 88 (same).

36 Various types of local governments adopt zoning ordinances, including cities, counties, towns, and villages. For simplicity, this Article refers to a local government as a "city."

37 *See* TOLL, *supra* note 34, at 18, 26.

38 *See, e.g.*, Jacquelynn Kerubo, *What Gentrification Means for Black Homeowners*, N.Y. TIMES (Aug. 18, 2021), https://www.nytimes.com/2021/08/17/realestate/black-homeowners-gentrification.html [https://perma.cc/GR5J-MS6M] (focusing on how Black Americans have been priced out of homeownership in New York).

39 *See infra* text accompanying notes 334–48; *see also* Barros, *supra* note 30, at 259–69 (discussing security in the home); Dickinson, *supra* note 25, at 1113–16 (discussing Fourth Amendment protections).

40 Semayne's Case (1604) 77 Eng. Rep. 194, 195; 5 Co. Rep. 91 a, 91 b.

Crown."[41] American law has long embraced the castle doctrine, which allows a man to defend his home against criminal intrusion.[42] As the Court explained in *Wilson v. Layne*,[43] "[t]he Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home."[44] It noted that "[p]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."[45]

Third, the home is essential for protection of personal liberty.[46] The Court has consistently viewed the home as a place where constitutional rights receive enhanced protection.[47] For example, in *Stanley v. Georgia*,[48] it held that a person has a First Amendment right to possess obscene material "to satisfy his intellectual and emotional needs in the privacy of his own home."[49] And in *Griswold v. Connecticut*, the Court identified a "zone of privacy" in the home arising from "several fundamental constitutional guarantees"—including the Third and Fourth Amendments.[50] In the process, it posed a rhetorical question: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?"[51]

Finally, the home is the center of family life. The Court noted in *Moore v. City of East Cleveland*[52] that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."[53] The Court explained that "[i]t is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."[54] This goal can be realized only in a home.

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41 Frank v. Maryland, 359 U.S. 360, 378–79 (1959) (Douglas, J., dissenting) (quoting William Pitt, Speech on the Excise Bill to the House of Commons (Mar. 1763)).

42 *See, e.g.*, People v. Tomlins, 107 N.E. 496, 497 (N.Y. 1914) ("It is not now and never has been the law that a man assailed in his own dwelling is bound to retreat. If assailed there, he may stand his ground and resist the attack.").

43 526 U.S. 603 (1999).

44 *Id.* at 610.

45 *Id.* (quoting United States v. U.S. Dist. Ct. (*Keith*), 407 U.S. 297, 313 (1972)).

46 *See infra* text accompanying notes 349–65; *see also* Barros, *supra* note 30, at 269–75 (discussing privacy in the home).

47 *See* Dickinson, *supra* note 25, at 1107–17.

48 394 U.S. 557 (1969).

49 *Id.* at 565.

50 381 U.S. 479, 484–86 (1965) (upholding the right to obtain contraceptives).

51 *Id.* at 485.

52 431 U.S. 494 (1977).

53 *Id.* at 503.

54 *Id.* at 503–04.

II. Origins of the Right to Establish a Home

A. *A Traditional Right*

For millennia, people were free to establish homes without governmental interference. William Blackstone posited that the right to a home evolved in a "state of nature":

> As human life . . . grew more and more refined, [an] abundance of conveniences were devised to render it more easy, commodious, and agreeable; as, habitations for shelter and safety, and raiment for warmth and decency. . . . In the case of habitations in particular, it was natural to observe, that even the brute creation, to whom every thing else was in common, maintained a kind of permanent property in their dwellings . . . the birds of the air had nests, and the beasts of the field had caverns . . . . Hence a property was soon established in every man's house and home-stall.[55]

Over three centuries—from the founding of the first European colonies in North America until the widespread adoption of zoning ordinances in the early twentieth century—a white male American was generally[56] free to rent or buy a home wherever he wished.[57] This decision was viewed as a private matter, not a public concern. Indeed, virtually everyone had a home of some sort, however humble.[58] Looking back at this era, the Supreme Court proclaimed in *Meyer v. Nebraska* in 1923 that the right to "establish a home" was one of the rights "long recognized at common law as essential to the orderly pursuit of happiness by free men."[59]

This right evolved from two foundational themes in American law: the right to acquire property and the importance of the home. Under the republican ideology that dominated the founding era, a central purpose of government was to safeguard property rights. As

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55 2 William Blackstone, Commentaries *4.

56 Traditional American property law was pervaded by gender and racial bias. Married women were legally incapable of acquiring property until the widespread adoption of the Married Women's Property Acts in the nineteenth century. John G. Sprankling, Understanding Property Law 154–58 (4th ed. 2017). Black Americans and other minority groups did not hold equal rights to obtain property until *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), clarified the scope of the Civil Rights Act of 1866. All references to the scope of the right to acquire property as a general matter, and the right to establish a home in particular, are subject to these caveats.

57 *See infra* text accompanying notes 85–86, 114, 162.

58 As the 1823 song *Home, Sweet Home* proclaimed: "Be it ever so humble, there's no place like home." John Bartlett, Familiar Quotations 405 (Justin Kaplan ed., 16th ed. 1992).

59 Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

James Madison declared, "[g]overnment is instituted to protect property of every sort."[60] This necessarily required that government safeguard the right to acquire property in the first instance. Yet the special status of the home did not stem simply from its role as a form of property. As discussed above, the home was necessary for survival, provided security against other people and the state, was vital for personal liberty, and served as the center of family life.[61]

B. Colonial America

English law traditionally afforded special protection to the home. For example, a 1615 decision stressed "[t]he pre-eminence and privilege which the law gives to houses which are for men's habitation."[62] As Sir Edward Coke explained in 1644 in his influential *Institutes of the Laws of England*, "a man's house is his castle, & domus sua cuique est tutissimum refugium [and each man's home is his safest refuge]; for where shall a man be safe, if it be not in his house?"[63] Colonial America inherited this tradition.

Perhaps the biggest difference between colonial America and England was the availability of land. In England, real property was the source of economic power, political influence, and social status.[64] But land was usually held in fee tail so that it could be passed down to successive generations in the same family.[65] As a result, most people could not hope to own freehold estates.[66] But when Europeans discovered North America, almost the entire continent was an unowned wilderness.[67] In colonial America, almost any white male could obtain a fee simple estate, and many emigrated to the colonies to obtain land.[68] Thus, as historian James Ely observed, "[a] widely shared desire to

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60 JAMES MADISON, PROPERTY, PAPERS 14:266–68 (Mar. 29, 1792), *reprinted in* 1 THE FOUNDERS' CONSTITUTION 598, 598 (Philip B. Kurland & Ralph Lerner eds., 1987).

61 *See supra* Part I; *infra* Section IV.B.3.

62 Lewis Bowles's Case (1615) 77 Eng. Rep. 1252, 1257; 11 Co. Rep. 79 b, 82 a.

63 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 162 (1644); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES *223 ("[T]he law of England has so particular and tender a regard to the immunity of a man's house, that it styles it his castle and will never suffer it to be violated with impunity . . . .").

64 SPRANKLING, *supra* note 56, at 118.

65 *Id.*

66 JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 11–12 (3d ed. 2008).

67 RODERICK NASH, WILDERNESS AND THE AMERICAN MIND 7 (3d ed. 1982). At least Europeans perceived it in this manner. *Id.*

68 PAUL JOHNSON, A HISTORY OF THE AMERICAN PEOPLE 66 (1997) ("[F]or the first time in human history, cheap, good land was available to the multitude.").

acquire and enjoy property has long been one of the most distinctive features of American society."[69]

During the colonial era, the right to acquire land and establish a home, either by purchase or lease, was unquestioned. John Locke's postulate that ownership of property was a natural right strongly influenced colonial thought. "For the preservation of Property being the end of Government, and that for which Men enter into Society," he wrote, "it necessarily supposes and requires, that the People should *have Property*."[70] Blackstone—who was considered "the preeminent authority on English law" at the time[71]—provided more specific guidance. The "principal aim of society," he reasoned, is to protect the "absolute rights" of individuals that would arise in a state of nature, including the "right of private property" and the "right of personal liberty."[72] The entire second volume of his treatise examined "those rights which a man may acquire in . . . property."[73]

For Blackstone, property was "that 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."[74] This absolutist approach naturally extended to establishing a home. He explained that "personal liberty consists in the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct."[75] He referred to this as "that right of habitation, which every individual might acquire even in a state of nature."[76]

Rather than restrict the right to establish a home, government policy during the colonial era helped to fulfill the right by promoting frontier settlement. Under the headright system used early in the era, unappropriated land was freely granted to anyone willing to "settle upon it, subdue it, and establish a home upon it."[77] Eventually, the Crown began selling land to settlers for a "nominal fee" and granted land freely in return for military service.[78] Finally, squatters who "es-

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69 ELY, *supra* note 66, at xi.

70 JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 138, *reprinted in* TWO TREATISES OF GOVERNMENT (Peter Laslett ed., 1988) (1690).

71 Alden v. Maine, 527 U.S. 706, 715 (1999).

72 1 WILLIAM BLACKSTONE, COMMENTARIES *124, *129.

73 2 BLACKSTONE, *supra* note 55, at *1.

74 *Id.* at *2.

75 1 BLACKSTONE, *supra* note 72, at *134.

76 4 BLACKSTONE, *supra* note 63, at *223.

77 MARSHALL HARRIS, ORIGIN OF THE LAND TENURE SYSTEM IN THE UNITED STATES 401–02 (1953).

78 *See id.* at 399–400.

tablished possessory rights by the construction of houses, barns, fences, and other improvements . . . and by clearing and cultivating it" usually obtained formal ownership "without significant cost."[79]

Colonial law placed virtually no limits on the right to acquire property and establish a home.[80] The vast majority of people lived and worked on farms,[81] where the settler who acquired land typically built his own house and supported his family by raising crops.[82] Thus, for most colonists there was not a sharp distinction between homes and other types of property. The implicit right to acquire property naturally encompassed both. Certainly, piecemeal restrictions affecting homes were occasionally adopted in cities. Official maps might lay out the planned locations for lots.[83] And some cities required that homes be constructed of brick or stone to minimize the risk of fire, or mandated that nuisance-like uses, such as slaughterhouses and distilleries, be restricted to certain areas.[84] But beyond this point, government simply did not regulate land use.

In sum, as the Supreme Court observed in *United States v. Wheeler*,[85] "[i]n all the States from the beginning down to the adoption of the Articles of Confederation the citizens thereof possessed the fundamental right . . . peacefully to dwell within the limits of their respective States."[86] The right to acquire property and the unique status of the home were central themes in the newly independent United States. Reflecting on this era, the Court later explained in the *Slaughter-House Cases*[87] that "the right to acquire . . . property of every

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79 *Id.* at 401.

80 As Morton Horwitz summarized: "In the eighteenth century, the right to property had been the right to absolute dominion over land . . . a static agrarian conception entitling an owner to undisturbed enjoyment . . . ." MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 31 (1977).

81 *See* SONIA A. HIRT, ZONED IN THE USA 113 (2014). As late as 1776, 98% of the population lived outside of cities. *Id.*

82 By 1750, "the vast majority of white adult males in the colonies owned land," which usually included a home. BERNARD H. SIEGAN, PROPERTY RIGHTS: FROM MAGNA CARTA TO THE FOURTEENTH AMENDMENT 54 (2001); *see also* ELY, *supra* note 66, at 27–28 ("Easy availability of land had long characterized colonial society, and by the time of the revolutionary crisis the ownership of land was widespread.").

83 For example, William Penn's 1682 renowned plan for Philadelphia was one of the first examples of American city planning; other notable plans included Savannah, Georgia and Washington, D.C. *See* HIRT, supra note 81, at 112.

84 *See id.* at 111–12.

85 254 U.S. 281 (1920).

86 *Id.* at 293.

87 83 U.S. (16 Wall.) 36 (1872).

kind" was one of the "fundamental principles" that had existed since the nation became "free, independent, and sovereign."[88]

C. *Independence*

The Declaration of Independence indirectly recognized the right to establish a home as a matter of natural law. It proclaimed that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, [and] that among these are Life, Liberty and the pursuit of Happiness."[89] Thomas Jefferson based this phrase on Virginia's draft Declaration of Rights, written by George Mason.[90] The first paragraph of Mason's Declaration provided:

> [A]ll men are born equally free and independant [sic], and have certain inherent natural rights, of which they cannot, by any compact, deprive or divest their posterity; among which are the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.[91]

Historian Pauline Maier explains that Jefferson shortened the final phrase to "life, liberty, & the pursuit of happiness" during the drafting process.[92] She suggests that Jefferson used the words "pursuit of happiness" because "he meant to say more economically and movingly what Mason stated with some awkwardness and at considerably greater length."[93] Maier concludes that "[t]he inherent right to pursue happiness probably also included 'the means of acquiring and possessing property.'"[94] Indeed, Jefferson envisioned an agrarian nation where farmers who owned their own lands—and necessarily their homes—would provide the "virtue and judgment" necessary for republican government.[95]

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88 *Id.* at 76.

89 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

90 *See* PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 125–27 (1998).

91 *Id.* at 126–27.

92 *Id.* at 134.

93 *Id.*

94 *Id.*; *see also* ELY, *supra* note 66, at 29 ("The right to obtain and possess property was at the heart of the pursuit of happiness. Still, Jefferson's formulation was significant because it stressed the importance of acquiring property rather than just the protection of existing property arrangements.").

95 Stanley N. Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J.L. & ECON. 467, 475 (1976). Katz stresses that "the right to property was an unquestioned assumption of the American revolutionaries." *Id.* at 469–70. As Thomas Jefferson explained, "[w]henever there is in any country, uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right." Letter from Thomas

The Supreme Court has suggested that the phrase "pursuit of happiness" includes the right to establish a home. In *Board of Regents of State Colleges v. Roth*, [96] it defined the "liberty" protected by the Due Process Clause to include a list of specific rights—including the "right . . . [to] establish a home . . . and generally . . . those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men."[97] In context, the right to establish a home and the other listed rights are specific examples of the liberties that are essential to the "pursuit of happiness."

Scholars describe the Constitution as home-centric because it extends special protections to homes—particularly as developed in the Court's jurisprudence over the last century.[98] For example, the Third Amendment guarantees that soldiers cannot be quartered in any "house" without the consent of the owner,[99] and the Fourth Amendment protects against unreasonable searches of "houses,"[100] reflecting the importance that the Framers placed on the home. As Professor Akhil Amar notes:

> [N]othing in the written Constitution explicitly demands special protection of "houses" . . . but surely the document invites judges (and other interpreters) to attend to this explicit word . . . in pondering which unenumerated rights are properly claimed by the people. . . .
> . . . [T]he Justices have in fact developed a case law of both enumerated rights and unenumerated rights that recognizes the special significance of houses and what happens inside them.[101]

These amendments indicate that the Framers assumed the existence of an underlying right to establish a home.[102]

In context, the amendments that the states requested were largely the product of history—both the turmoil in seventeenth-century En-

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Jefferson to James Madison (Oct. 28, 1785), *in* 8 THE PAPERS OF THOMAS JEFFERSON 681, 682 (Julian P. Boyd ed., 1953).

96 408 U.S. 564 (1972).

97 *Id.* at 572 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

98 *See* Dickinson, *supra* note 25, at 1109–16.

99 U.S. CONST. amend. III.

100 *Id.* amend. IV.

101 Akhil Reed Amar, *America's Lived Constitution*, 120 YALE L.J. 1734, 1773 (2011).

102 *Cf.* United States v. Guest, 383 U.S. 745, 758 (1966) (holding that the right to travel is a fundamental right even though it does not appear in the text of the Constitution). As one scholar interprets the decision, "[t]he Court explained that the right to travel was absent from the text of the Constitution because as a right so basic, it was simply assumed to exist." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 881 (4th ed. 2011).

gland that led to the 1689 Declaration of Rights and the perceived British abuses of the colonies before independence.[103] Adoption of the Bill of Rights was driven by anti-Federalist anxiety that the new government might engage in similar conduct.[104] But because the Crown had never interfered with the traditional right to establish a home, there was no need to list it as a specific right.

More broadly, James Ely observes that "the right to acquire and own property was undoubtedly a paramount value for the framers of the Constitution."[105] For example, James Madison stated that "[t]he personal right to acquire property, which is a natural right, gives to property, when acquired, a right to protection, as a social right."[106] Indeed, the Takings Clause and the property component of the Due Process Clause in the Fifth Amendment would be meaningless unless there was an underlying right to acquire property.[107]

D. Antebellum Era

American courts firmly endorsed the right to acquire property in the antebellum era.[108] The federal circuit court in *Vanhorne's Lessee v. Dorrance*,[109] for example, held that a state law which terminated the plaintiff's title to a home and farm was unconstitutional.[110] Sitting as a circuit justice, Supreme Court Justice William Paterson observed that "the right of acquiring and possessing property, and having it pro-

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103 *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 966 (1991) (noting that the Cruel and Unusual Punishments Clause of the Eighth Amendment was derived from the Declaration of Rights).

104 As historian Leonard Levy notes, the Bill of Rights "was a bill of restraints on the United States." LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 11–12 (1999).

105 ELY, *supra* note 66, at 43.

106 James Madison, Speech in the Virginia Constitutional Convention (Dec. 2, 1829), *in* THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 402, 402–03 (Marvin Meyers ed., Univ. Press of New Eng. rev. ed. 1981).

107 *See* U.S. CONST. amend. V, cl. 3–4.

108 Leading scholars of the era echoed this view. Melding the approaches taken by Blackstone and Jefferson, James Kent declared that one of the "absolute rights of individuals" was "the right to acquire and enjoy property." 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 1 (1827). He noted that this right had been "justly considered, and frequently declared, by the people of this country, to be natural, inherent, and unalienable." *Id.* In turn, Theodore Sedgwick quoted *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230), to explain that the Privileges and Immunities Clause encompassed "the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety." THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 601–02 (1857) (quoting *Corfield*, 6 F. Cas. at 551–52).

109 2 U.S. (2 Dall.) 304, 28 F. Cas. 1012 (C.C.D. Pa. 1795) (No. 16857).

110 *See id.*

tected, is one of the natural, inherent, and unalienable rights of man."[111]

In turn, Justice Bushrod Washington provided the first influential interpretation of the Privileges and Immunities Clause in *Corfield v. Coryell*[112] by identifying the "fundamental" rights "which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign."[113] Echoing the Declaration of Independence, two of the rights he listed were the "enjoyment of life and liberty, with the right to acquire and possess property of every kind" and "[t]he right . . . to reside in any other state."[114] In combination, the right to acquire property and the right to reside reflected an early recognition of the right to establish a home.

The land policies of the federal government during this period were designed to encourage the settlement of western lands, consistent with Jefferson's vision of a nation populated by independent farmers.[115] As the Supreme Court explained in *Van Ness v. Pacard*,[116] "[t]he country was a wilderness, and the universal policy was to procure its cultivation and improvement."[117]

Rather than restrict the right to establish a home, the government facilitated it. Under the Land Ordinance of 1785,[118] the government began selling public lands at a "sale price [that] was not too high for the settler."[119] Military bounties allowed veterans of the Revolutionary War, the War of 1812, and the Mexican War to obtain land without payment.[120] Squatting was widespread; and under the Preemption Act of 1841, the government eventually allowed the squatter who had "inhabited and improved the land, [and] erected a dwelling on it"[121] to purchase it for a low price.[122] Finally, under the Homestead Act of

111 *Id.* at 310.

112 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

113 *Id.* at 551.

114 *Id.* at 551–52.

115 *See* Katz, *supra* note 95 and accompanying text.

116 27 U.S. (2 Pet.) 137 (1829).

117 *Id.* at 145.

118 28 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 375 (John C. Fitzpatrick ed., 1933).

119 HARRIS, *supra* note 77, at 400.

120 *See* PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 251–54, 262–63, 270–73 (1968).

121 *Id.* at 238.

122 *See* HARRIS, *supra* note 77, at 401; *see also* GATES, *supra* note 120, at 238–39 (discussing preemption).

1862,[123] 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.[124] As the Court observed in *Buchser v. Buchser*,[125] "the policy of the [homestead] statute . . . is to enable the settler and his family to secure a home."[126]

E. Post-Civil War Era

Congress adopted the Fourteenth Amendment in 1866, and it took effect upon ratification in 1868. Section 1 contains its Due Process Clause, which provides, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."[127] Section 1 was motivated in part by concern that southern states would prevent emancipated slaves from obtaining homes and other property—thus interfering with the right to establish a home.

The legislative history of Section 1 is scant.[128] It was primarily intended to constitutionalize the protections set forth in the Civil Rights Act of 1866.[129] Accordingly, the provisions of the Act help to interpret the scope of the Due Process Clause.[130] As Justice Brennan explained in *Goodman v. Lukens Steel Co.*,[131] "[t]he main targets of the [Act] were the 'Black Codes,' enacted in Southern States after the Thirteenth Amendment was passed"—laws that were "poorly disguised substitutes for slavery."[132] Notably, the Act protected the right to "inherit, purchase, lease, sell, hold, and convey real and personal property"—which included the right to establish a home.[133]

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123 Homestead Act of 1862, Pub. L. No. 37-64, § 2, 12 Stat. 392.

124 *Id.* at 392; GATES, *supra* note 120, at 395. Ultimately, over 1,400,000 homesteads were successfully established. HIRT, *supra* note 81, at 116.

125 231 U.S. 157 (1913).

126 *Id.* at 162.

127 U.S. CONST. amend. XIV, § 1, cl. 3. All references hereinafter to the "Due Process Clause" refer to the Due Process Clause of the Fourteenth Amendment.

128 *See* SIEGAN, *supra* note 82, at 237 (noting that debate on Section 1 in the Senate and House of Representatives was "not very extensive").

129 *Id.* at 226 ("While opinion was divergent as to the full meaning of Section 1 of the proposed Fourteenth Amendment, commentators generally agreed that it was intended to authorize passage of and constitutionalize the principles of the Civil Rights Act of 1866 . . . .").

130 *See* Kurt T. Lash, *Enforcing the Rights of Due Process: The Original Relationship Between the Fourteenth Amendment and the 1866 Civil Rights Act*, 106 GEO. L.J. 1389, 1391 (2018) ("Scholars have long looked to the 1866 Civil Rights Act for clues to the original meaning of the Fourteenth Amendment.").

131 482 U.S. 656 (1987).

132 *Id.* at 672 (Brennan, J., concurring in part and dissenting in part).

133 *See* Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1982); *see also* Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal*

The congressional debates preceding adoption of the Act indicate that its property protections encompassed this right. For instance, Congressman William Windom complained that "[t]he State laws of Georgia and South Carolina prohibit any negro from buying or leasing a home."[134] Other legislators noted that similar laws existed in Mississippi[135] and Louisiana.[136] Windom rhetorically asked: "Do you call him a freeman who is denied that most sacred of all possessions, a home?"[137]

In the same vein, Senator Jacob Howard argued that opponents of the bill would permit the former Confederate states to declare that:

> [N]o negro who has once been a slave shall ever . . . have the right or privilege of earning and purchasing property; of having a home under which to shelter him and his family . . . thus leaving it in the power of these interested States to expatriate him at any moment and drive him beyond their limits [and] to deprive him of a home . . . .[138]

Howard asked: "Is a freeman to be deprived of the right of acquiring property, of the right of having a family, a wife, children, home?"[139] In turn, Congressman Martin Thayer challenged the right of southern states to adopt "laws which prevent the enjoyment of the fundamental rights of citizenship; laws which declare, for example, that [former slaves] shall not have the privilege of purchasing a home for themselves and their families."[140]

Senator Lyman Trumbull, who introduced the bill in the Senate, and Congressman James Wilson, who sponsored it in the House of Representatives, both asserted that the rights it guaranteed were already protected by the Constitution.[141] After quoting at length from

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Entitlements, 13 HARV. J.L. & PUB. POL'Y 37, 39 (1990) (suggesting that the Thirteenth Amendment should be viewed as creating a positive "right to sustenance and shelter" for freed slaves).

134 CONG. GLOBE, 39th Cong., 1st Sess. 1160 (1866).

135 Mississippi law prohibited "the holding, leasing, or renting of real estate by freedmen." *Id.*

136 An ordinance in one Louisiana town provided that "[n]o negro or freeman shall be permitted to rent or keep a house within the limits of the town *under any circumstances*" and similar ordinances were adopted by other towns in the state. Report of Carl Schurz, S. EXEC. DOC. NO. 2, 39th Cong., 1st Sess. 23 (1865).

137 CONG. GLOBE, 39th Cong., 1st Sess. 1160 (1866).

138 *Id.* at 504.

139 *Id.*

140 *Id.* at 1151; *see also* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 428 (1968) ("[O]ne of the most comprehensive studies . . . before Congress [when the Civil Rights Act of 1866 was adopted] . . . noted the existence of laws virtually prohibiting Negroes from owning or renting property in certain towns . . . .").

141 *See* CONG. GLOBE, 39th Cong., 1st Sess. 475–76, 1117 (1866).

Justice Washington's decision in *Corfield v. Coryell*, Trumbull described "the right to acquire property" and other rights specified in the bill as "fundamental rights belonging to every man as a free man, and which under the Constitution as it now exists we have a right to protect every man in."[142] Wilson agreed that the object of the bill was "to protect and enforce those [rights] which already belong to every citizen."[143] Quoting James Kent's *Commentaries on American Law*, he stated that the "right to acquire and enjoy property" and other rights in the bill were "natural, inherent, and inalienable."[144]

Ultimately, the rights guaranteed by the Civil Rights Act of 1866 resembled the *Corfield* formulation, including the rights to purchase and lease property.[145] Reflecting on the Act in the *Civil Rights Cases*,[146] the Supreme Court observed that it protected "those fundamental rights which appertain to the essence of citizenship."[147] As historian Eric Foner summarizes, the Act was "the first statutory definition of the rights of American citizenship."[148]

Four years after ratification of the Fourteenth Amendment, the Court recognized that it was intended, in part, to protect the right to obtain a home. In the *Slaughter-House Cases*, it noted that the former Confederate states adopted "laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value."[149] The Court continued: "They were in some States forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it."[150] Thus, emancipated slaves were unable to own the homes where they lived or the farms where they labored. In order to deal with this concern and other problems, the Court explained, legislators "accordingly passed through Congress the proposition for the Fourteenth Amendment."[151]

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142 *Id.* at 475–76.

143 *Id.* at 1117.

144 *Id.* at 1118 (quoting 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 1 (1827)).

145 *See* Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1983).

146 109 U.S. 3 (1883).

147 *Id.* at 22.

148 ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 244 (1988).

149 Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 70 (1872).

150 *Id.*

151 *Id.*

F. Lochner *Era*

The rapid industrialization and urbanization that characterized the late nineteenth century produced a fundamental change in the Supreme Court's attitude toward property.[152] Business enterprises argued that the Due Process Clause insulated them from unreasonable state legislation that interfered with property rights.[153] Over time, the Court developed a series of doctrines that limited the scope of state regulation by broadly protecting economic liberty, initially through reliance on the Contract Clause but eventually by developing the concept of substantive due process.[154] The symbolic triumph of economic liberty was *Lochner v. New York*,[155] where the Court held that a statute limiting the working hours for bakery workers violated the Fourteenth Amendment.[156]

A series of Court decisions from this era endorsed the right to acquire property—usually in the context of shielding business entities from state regulation. For instance, in the 1888 decision of *Powell v. Pennsylvania*,[157] the Court stated that the "privilege . . . of acquiring, holding, and selling property" was protected by the Due Process Clause.[158] Ten years later, in *Holden v. Hardy*,[159] it struck the same theme by observing that the "phrase 'due process of law'" protected that right:

> As the possession of property, of which a person cannot be deprived, doubtless implies that such property may be acquired, it is safe to say that a state law which undertakes to deprive any class of persons of the general power to acquire property would also be obnoxious to the same provision.[160]

The Court also acknowledged the right to reside in a place of one's choice—which indirectly recognized the right to establish a home. Writing for the majority in *Allgeyer v. Louisiana*,[161] Justice Peckham addressed the meaning of "liberty" as used in the Due Pro-

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152 *See* ELY, *supra* note 66, at 8.

153 *See, e.g.*, Powell v. Pennsylvania, 127 U.S. 678, 686 (1888).

154 *See* ELY, *supra* note 66, at 7.

155 198 U.S. 45 (1905).

156 *Id.* at 45.

157 127 U.S. 678 (1888).

158 *Id.* at 684. This holding was foreshadowed by *Barbier v. Connolly*, 113 U.S. 27 (1885), where the Court commented that the Fourteenth Amendment was "undoubtedly intended" to assure "that all persons should be equally entitled to pursue their happiness and acquire and enjoy property." *Id.* at 31.

159 169 U.S. 366 (1898).

160 *Id.* at 390–91.

161 165 U.S. 578 (1897).

cess Clause of the Fourteenth Amendment for the first time, identifying specific rights encompassed by the clause:

> The "liberty" mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, *to live and work where he will*, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned. [162]

During this era, the concept of the home began to evolve, influenced by the same currents that reshaped the Court's property jurisprudence. In preindustrial society, the home was often both a residence and a workplace.[163] But as the century progressed, work increasingly occurred outside the home on premises owned by an employer.[164] In this changing environment, the home took on new meaning as the center of family life, a private retreat from the outside world, and a symbol of autonomy.[165] By the early twentieth century, "[e]stablishment of a separate household by a newly formed family, as well as the maintenance of household headship in the later years of life, were sacred values and markers of autonomy in American society."[166]

At the same time, however, inspired either by the Progressive movement or by racial animus, some cities began to adopt ordinances that restricted land use—and thereby began to imperil the right to establish a home.[167] For example, the 1912 case of *Eubank v. City of Richmond*[168] marked the first time that the Court struck down a land use ordinance—and it involved a home. The Court reasoned that the

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162 *Id.* at 589 (emphasis added); *see also* United States v. Wheeler, 254 U.S. 281, 293 (1920) (affirming that citizens held the "fundamental right . . . peacefully to dwell within the limits of their respective States").

163 *See* FLANDERS, *supra* note 26, at 49 (discussing the impact of industrialization on the nature of the home). For example, "in New York City, in 1800, less than 5 per cent of men had a workplace outside the house . . . and by 1840 it was 70 per cent." *Id.*

164 *See id.*

165 Tamara K. Hareven, *The Home and the Family in Historical Perspective*, 58 SOC. RSCH. 253, 256–60, 274 (1991), *reprinted in* HOME: A PLACE IN THE WORLD 227, 230–34, 248 (Arien Mack ed., 1993).

166 *Id.* at 256.

167 *See infra* text accompanying notes 202–03, 239–40.

168 226 U.S. 137 (1912).

ordinance, which allowed neighbors to establish a building setback line between the street and the houses on a particular block, violated the Due Process Clause.[169] The equities favored the plaintiff, who had obtained a building permit and purchased the needed materials before his neighbors decided to create a setback line; and, even then, the planned home conformed to the line, aside from a minor window protrusion.[170] The decision signaled the Court's concern that land use regulation might go too far.

The Court's 1917 decision in *Buchanan v. Warley*[171] foreshadowed the right to establish a home that it later enunciated in *Meyer v. Nebraska*.[172] The ordinance at issue in *Buchanan* made it "unlawful for any colored person to move into and occupy as a residence . . . any house upon any block upon which a greater number of houses are occupied as residences . . . by white people."[173] In order to test the ordinance, Warley, a Black man, entered into a contract to purchase a residential lot from Buchanan "for the purpose of having erected thereon a house which I propose to make my residence."[174] Warley then refused to perform the contract because the ordinance barred him from living on the property, and Buchanan sued for specific performance.[175] Citing *Holden v. Hardy*, the Court explained: "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. The Constitution protects these essential attributes of property."[176] It relied on the Due Process Clause in striking down the ordinance:

> We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth

169 *See id.* at 140, 143–44.

170 *See id.* at 141–42; *see also* Joseph Gordon Hylton, *Prelude to* Euclid: *The United States Supreme Court and the Constitutionality of Land Use Regulation, 1900–1920*, 3 WASH. U. J.L. & POL'Y 1, 34 (2000) (noting that during this era the Court "routinely upheld the legitimacy of local land use controls" in cases involving commercial properties).

171 245 U.S. 60 (1917). For helpful analysis of *Buchanan*, see James W. Ely, Jr., Buchanan *and the Right to Acquire Property*, 48 CUMB. L. REV. 423 (2018); and James W. Ely, Jr., *Reflections on* Buchanan v. Warley, *Property Rights*, *and Race*, 51 VAND. L. REV. 953 (1998).

172 262 U.S. 390, 399 (1923).

173 *Buchanan*, 245 U.S. at 70–71.

174 *Id.* at 69, 73.

175 This was a collusive lawsuit brought to challenge the constitutionality of the ordinance. *See* Richard A. Epstein, *Lest We Forget:* Buchanan v. Warley *and Constitutional Jurisprudence of the "Progressive Era*," 51 VAND. L. REV. 787, 788 (1998) (noting that the case "was a staged litigation challenge").

176 *Buchanan*, 245 U.S. at 74.

Amendment of the Constitution preventing state interference with property rights except by due process of law.[177]

III. The Constitutional Right to Establish a Home

A. Meyer v. Nebraska

The Supreme Court expressly recognized the right to establish a home in the 1923 decision of *Meyer v. Nebraska*.[178] Yet long before *Meyer*, this right was seen as "essential to the orderly pursuit of happiness by free men,"[179] as discussed in Part II. From the colonial period through the *Lochner* era, the American legal system protected the right through a variety of doctrines, just as federal government policy facilitated fulfillment of the right. As the Court acknowledged two years before it decided *Meyer*, "[h]ouses are a necessary of life."[180]

Meyer is an enigma. Scholars celebrate it as the cornerstone of contemporary substantive due process jurisprudence—"the first modern civil rights case,"[181] "the seminal decision for non-economic substantive due process,"[182] and a "liberal icon[]."[183] Together with *Pierce v. Society of Sisters*,[184] *Meyer* served as the foundation for the Court's expansion of individual rights in areas such as abortion, birth control, family relations, and marriage.[185] Yet the decision was rendered in the middle of the *Lochner* era by a staunchly conservative Court.[186]

Technically, the *Meyer* holding is narrow. The Court merely held that a state law that prohibited teaching a foreign language to students who had not passed the eighth grade violated the Due Process Clause.[187] The decision is notable in part because it represents the Court's first use of substantive due process to protect personal liber-

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177 *Id.* at 82.

178 262 U.S. 390 (1923).

179 *See id.* at 399.

180 Block v. Hirsh, 256 U.S. 135, 161 (1921).

181 Louise Weinberg, *The McReynolds Mystery Solved*, 89 Denv. U. L. Rev. 133, 133 (2011).

182 William G. Ross, *A Judicial Janus:* Meyer v. Nebraska *in Historical Perspective*, 57 U. Cin. L. Rev. 125, 126 (1988).

183 Barbara Bennett Woodhouse, *"Who Owns the Child?":* Meyer *and* Pierce *and the Child as Property*, 33 Wm. & Mary L. Rev. 995, 996 (1992).

184 268 U.S. 510 (1925).

185 *See infra* text accompanying notes 282–91.

186 Exploring the Court's reinterpretation of *Meyer* and *Pierce* over time, Professor Peter Nicolas concludes that these decisions "hold the record for the number of times a decision has been judicially reconstructed." Nicolas, *supra* note 3, at 956.

187 *See* Meyer v. Nebraska, 262 U.S. 390, 400, 402–03 (1923).

ties—in this case the defendant teacher's "right . . . to teach and the right of parents to engage him so to instruct their children."[188]

But the decision is best known for its catalogue of individual rights. Writing for the Court, Justice McReynolds stressed that "the individual has certain fundamental rights which must be respected."[189] He proclaimed in dicta that the "liberty" guaranteed by the clause encompassed a broad range of rights:

> Without doubt, it 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.[190]

He explained that a state could not interfere with these rights by legislation that was "arbitrary or without reasonable relation to some purpose within the competency of the State to effect."[191] Today the *Meyer* list is still the accepted standard for defining the liberty protected by the Due Process Clause.[192]

Although McReynolds cited thirteen prior Court decisions as authority for his catalogue, none of these precedents involved individual liberties. Rather, they all dealt with challenges to laws that burdened economic rights.[193] The *Meyer* catalogue was apparently based on Justice Peckham's pioneering list of mainly economic liberties in *Allgeyer v. Louisiana*, decided twenty-six years earlier.[194] But McReynolds reformulated the list by shifting its focus from economic rights to personal rights—in an echo of the Declaration of Independence.[195]

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188 *Id.* at 400.

189 *Id.* at 401.

190 *Id.* at 399 (emphasis added).

191 *Id.* at 400.

192 *See* CHEMERINSKY, *supra* note 102, at 577–78 (quoting Bd. of Regents v. Roth, 408 U.S. 564, 572 (1972)); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 679 (2d ed. 1988) (quoting *Meyer*). As Tribe notes, *Meyer* has "remained [a] durable and fertile source[] of constitutional doctrine concerning the nature of liberty." *Id.* at 1318.

193 *See, e.g.*, Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Livestock Landing & Slaughter-House Co., 111 U.S. 746 (1884) (right to contract); Truax v. Raich, 239 U.S. 33 (1915) (right to earn a livelihood); Adams v. Tanner, 244 U.S. 590 (1917) (right to engage in lawful business).

194 *See* Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897).

195 *See supra* notes 89–97 and accompanying text.

In context, the *Meyer* formulation was a libertarian response to the Progressive movement. Professor Robert Post posits that McReynolds and his fellow Justices were concerned that the rising tide of Progressive legislation, coupled with the expansion of federal regulatory power during World War I, threatened personal rights that individuals had traditionally enjoyed.[196] He notes that—particularly in *Meyer*—the Court "extended constitutional protections to remarkably diffuse and undifferentiated aspects of ordinary experience, far exceeding merely economic transactions."[197] Its goal, he argues, was to "safeguard that realm from unjustifiable interference" by the state.[198] As such, "*Meyer* can be read as extending 'fundamental rights' to the kinds of cultural practices deemed necessary to sustain the individuality presupposed by democracy."[199]

In a similar vein, Professor Barbara Bennett Woodhouse observes that contemporary commentators "viewed the decision[] . . . as, above all, championing the individual's right to control his own [children]—free from government interference."[200] More ominously, Professor Steven Macias suggests that the motivation for the decision "was not a charitable concern for the preservation of a pluralistic society, but rather an anti-progressive philosophy grounded in social Darwinian ideology."[201]

Neither *Meyer* nor any of the precedents that McReynolds cited involved a home.[202] It is probable the inclusion of the right to establish a home was a reaction to the rapid spread of zoning ordinances, a core theme of the Progressive movement.[203] New York City adopted the

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196 *See* Robert C. Post, *Defending the Lifeworld: Substantive Due Process in the Taft Court Era*, 78 B.U. L. REV. 1489, 1494–95, 1530–31 (1998).

197 *Id.* at 1530.

198 *Id.* at 1532.

199 *Id.* at 1534 (footnote omitted).

200 Woodhouse, *supra* note 183, at 1090. She interprets the recognition of the right "to . . . bring up children" as a reaction to the fact that "the family citadel was crumbling under assaults from common schooling, child welfare, juvenile justice, child labor laws, and a host of government assumptions of paternal prerogatives designed to standardize child-rearing and make it responsive to community values." *Id.* at 1087 n.506, 1090.

201 Steven J. Macias, *The Huck Finn Syndrome in History and Theory: The Origins of Family Privacy*, 12 J.L. & FAM. STUD. 87, 89 (2010). He notes that McReynolds had a "nasty, racist, anti-Semitic temperament." *Id.* at 101.

202 Lofty opening definitions of liberty . . . notwithstanding, there is simply no right to marry, establish a home, or bear children at stake in the *Meyer* case. . . . [T]he problem in *Meyer* is not state interference in the intimacies of home and family . . . .

Susan E. Lawrence, *Substantive Due Process and Parental Rights: From* Meyer v. Nebraska *to* Troxel v. Granville, 8 J.L. & FAM. STUD. 71, 77 (2006).

203 MICHAEL ALLAN WOLF, THE ZONING OF AMERICA: *Euclid v. Ambler* 30 (2008) ("Zon-

first comprehensive ordinance in 1916, and other cities soon followed its example.[204] These early ordinances were modest in scope; each city was divided into geographic zones where different uses were permitted, with limits on the size and location of buildings, including homes.

The widespread adoption of zoning ordinances signaled a shift away from the American tradition that allowed individuals to establish homes as they wished, with minimal governmental interference. As the Supreme Court later explained in *Village of Euclid v. Ambler Realty Co.*,[205] "[r]egulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive."[206]

B. Meaning of "Establish a Home"

The phrase "establish a home" was not a legal term of art when *Meyer* was decided. However, a number of factors indicate that the Court intended the phrase to refer to a person's right to lease or purchase a house, apartment, or other dwelling as a long-term residence and to begin living in that dwelling.[207]

The Court used the phrase as part of a sequence: "to marry, establish a home and bring up children." [208] This suggests a temporal relationship: people marry, then they establish a home, and finally they raise children. [209] In this context, "home" connotes a long-term residence for a family to inhabit, rather than a temporary accommodation such as a room in a hotel or boarding house. Further, the term "establish" indicates the holder of the right will both obtain a home and begin living there.

This interpretation is consistent with dictionary definitions from the era. The leading American dictionary, Webster's Revised Unabridged Dictionary, defined "home" as "[o]ne's own dwelling place; the house in which one lives; esp., the house in which one lives with

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ing as an American legal institution is readily identified with the Progressive Era. . . . In many ways, zoning is a quintessential Progressive concept.").

204 *See id.* at 27.

205 272 U.S. 365 (1926).

206 *Id.* at 387.

207 In a broad sense, of course, a "home" is more than a house or structure—because the term connotes the manner in which people use the property. *See supra* text accompanying notes 26–30. But at a minimum, a "home" connotes a house or other dwelling unit used as a long-term residence, and that is the sense in which the *Meyer* Court used it.

208 Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

209 Later developments make it clear that the right to establish a home is not limited to married couples. *See infra* note 238.

his family; the habitual abode of one's family."[210] In turn, it defined "establish" as "[t]o originate and secure the permanent existence of; to found; . . . to create and regulate."[211] Combined, these terms connote securing and occupying a long-term dwelling.[212]

The phrase occasionally appeared in judicial decisions before *Meyer* was decided, though not as a term of art. One line of cases involved charitable gifts. For instance, in *Peek v. Woman's Home Missionary Society*,[213] the Illinois Supreme Court referred to a bequest that was intended to "establish a home" for orphans.[214] *Board of Commissioners v. Dinwiddie*[215] involved a devise of land "to establish a home for the benefit of worthy persons who have no home."[216] Another example is *Chase v. Stockett*, [217] where the decedent created a trust to "establish a home for 'destitute, aged, and infirm women.'"[218] As used in these decisions, the phrase "establish a home" connoted acquiring a physical dwelling and operating it as a long-term residence.

A second line of cases concerned homestead claims. In the same year that *Meyer* was decided, the Eighth Circuit observed in *United States v. Bennett*[219] that the law required a claimant to "prove that he had a habitable home upon the land and had actually resided upon and cultivated the same for the term of five . . . years";[220] it noted that "there must be good faith on the part of the homesteader to establish a home for himself and family upon the land."[221] Similarly, in *Tustin v. Adams*,[222] the court explained that the homestead laws required the

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210 *Home*, WEBSTER'S REVISED UNABRIDGED DICTIONARY (1913), https://www.websters1913.com/words/Home [https://perma.cc/2ZJE-8BRF]. Earlier editions reflect the same meaning. *See, e.g.*, *Home*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (defining "home" as "[a] dwelling house; the house or place in which one resides").

211 *Establish*, WEBSTER'S REVISED UNABRIDGED DICTIONARY (1913), https://www.websters1913.com/words/Establish [https://perma.cc/7MN3-JSYN].

212 *Homestead*, BLACK'S LAW DICTIONARY (1st ed. 1891) is also helpful. It defines "homestead" as "the home, the house and the adjoining land, where the head of the family dwells; the home farm. The fixed residence of the head of a family, with the land and buildings surrounding the main house." *Id.* (citation omitted).

213 136 N.E. 772 (Ill. 1922).

214 *Id.* at 775.

215 37 N.E. 795 (Ind. 1894).

216 *Id.* at 796.

217 19 A. 761 (Md. 1890).

218 *Id.* at 762.

219 296 F. 409 (8th Cir. 1923).

220 *Id.* at 411.

221 *Id.* at 413.

222 87 F. 377 (D. Wash 1898).

claimant to enter vacant public land and "establish a home thereon, by either erecting a dwelling house, or purchasing from the owner a house suitable for habitation."[223] In both instances, the phrase meant acquiring a house or similar structure and using it as a long-term residence.

Finally, two later Supreme Court uses of the phrase support this interpretation.[224] In *Shelley v. Kraemer*,[225] the Court described a segregation-era zoning ordinance at issue in a prior case; it explained that the law "forbade any Negro to establish a home on any property in a white community."[226] In addition, concurring in *City of Cleburne v. Cleburne Living Center, Inc.*,[227] Justice Marshall observed that for adults with intellectual disabilities, the "right to 'establish a home' . . . means living together in group homes, for . . . group homes have become the primary means by which [they] can enter life in the community."[228] Again, in these cases, "home" connotes a physical structure that is acquired and used as a long-term residence.

In sum, as the First Circuit explained in *González-Fuentes v. Molina*,[229] the "constitutionally protected prerogative to 'establish a home'" encompasses the right "to reside in a dwelling of [one's] own choosing."[230] This right logically covers both leasing and purchasing a home. When *Meyer* was decided, about 45% of Americans owned their homes, while the remainder were renters.[231] It was therefore common for people to "establish" homes in both contexts, and nothing in the opinion suggests that the right was limited to one method of acquisition.

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223 *Id.* at 378.

224 A number of decisions by lower courts have also used the phrase in this manner. *See infra* notes 279–81.

225 334 U.S. 1 (1948).

226 *Id.* at 12.

227 473 U.S. 432 (1985).

228 *Id*. at 461.

229 607 F.3d 864 (1st Cir. 2010).

230 *Id.* at 890 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)) (commenting that while an electronic supervision program confined prisoners to their homes, it allowed them to "live with their loved ones, form relationships with neighbors, lay down roots in their community, and reside in a dwelling of their own choosing . . . rather than in a cell designated by the government" and that what it "afforded the appellees was included in the constitutionally protected prerogative 'to establish a home'").

231 *See Housing 1929–1941*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/education/news-and-education-magazines/housing-1929-1941 [https://perma.cc/5WHS-M3JA] (indicating 45.6% of Americans owned their homes when the 1920 census was taken).

C. *Evolution of the Right after* Meyer

Over 440 federal and state decisions have quoted the *Meyer* phrase "right . . . to . . . establish a home" since the case was decided.[232] More than 120 opinions have quoted this language in the last decade.[233] The right occasionally appears alone[234] but is usually grouped with other *Meyer* rights, sometimes as part of the full list.[235] It is frequently seen in the original cluster "right to 'marry, establish a home and bring up children'"[236] and often combined with the right to raise children.[237] Despite this clustering, it is clear that these are three separate rights.[238]

Three years after *Meyer*, a divided Supreme Court upheld the constitutionality of comprehensive zoning in *Village of Euclid v. Ambler Realty Co.* under the rational basis test.[239] Although the decision shocked observers who assumed that the Court would reject comprehensive land use regulation as an attack on property rights, scholars

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232 Meyer v. Nebraska, 262 U.S. 390, 399 (1923). Cases were identified by searching the "Cases" database in Westlaw on February 21, 2021 using the following search terms: "establish a home" /50 meyer. This search identified 443 federal and state decisions.

233 *Id.* The same search indicated that 127 of these decisions were rendered after February 21, 2011.

234 *See, e.g.*, *González-Fuentes*, 607 F.3d at 890.

235 *See, e.g.*, Bd. of Regents v. Roth, 408 U.S. 564, 572 (1972) (quoting the entire *Meyer* list with approval); Perrier-Bilbo v. United States, 954 F.3d 413, 434 (1st Cir. 2020) (defining the scope of protected "liberty" under the Due Process Clause by quoting from the *Roth* Court's quotation of the *Meyer* list).

236 *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 668 (2015).

237 *See, e.g.*, In re B.F., 976 N.E.2d 65, 67 (Ind. Ct. App. 2012).

238 For example, in *Obergefell*, the Court made it clear that the right to marry is not tied to having children: "[I]t cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate." *Obergefell*, 576 U.S. at 669. Similarly, unmarried individuals have the right to bring up their children. *See* Stanley v. Illinois, 405 U.S. 645, 649 (1972). Finally, in *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), Justice Marshall recognized that the right to establish a home was not tied to marriage or children, but rather could be exercised by single adults; he noted that "[f]or [adults with intellectual disabilities], this right means living together in group homes." *Id.* at 461 (Marshall, J., concurring in the judgment in part and dissenting in part); *see also* Cabrol v. Town of Youngsville, 106 F.3d 101, 107 (5th Cir. 1997) (referring to Due Process Clause protection for "an individual's freedom . . . to establish a home").

239 *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395–97 (1926).

suggest that it was largely motivated by racial and ethnic bias.[240] Notably, the decision did not mention the right to establish a home.[241]

Two factors explain this omission. First, because the plaintiff was attacking Euclid's decision to zone a portion of its land for residential use rather than industrial use, it had no incentive to invoke the right.[242] Second, the ordinance had only a minor impact on the right. For example, it permitted multifamily housing in five of the six use districts,[243] and the minimum lot sizes for single-family homes ranged from 700 to 5,000 square feet—small by modern standards.[244] Significantly, the *Euclid* Court anticipated that future cases might involve ordinances that were more restrictive; it indicated that a higher standard of review could be appropriate "where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way."[245]

In the decades after *Euclid*, the Court generally refused to review cases that challenged zoning ordinances.[246] But it did issue three well-known decisions that touch on the right to establish a home in the zoning context: *Village of Belle Terre v. Boraas* (1974),[247] *Moore v. City of East Cleveland* (1977),[248] and *City of Cleburne v. Cleburne Living Center, Inc.* (1985).[249] In two of these cases, the parties failed to raise the issue, so it was not directly before the Court.

The *Belle Terre* ordinance permitted only one type of residential use, "one-family dwellings"; it defined "family" as "one or more per-

240 *See* WOLF, *supra* note 203, at 138–42; *see also* Richard H. Chused, Euclid*'s Historical Imagery*, 51 CASE W. RSRV. L. REV. 597, 604–15 (2001). For example, duplexes and apartment buildings were barred from the U-1 district, which consisted only of detached single-family houses, resulting in economic segregation. *See, e.g.*, *Euclid*, 272 U.S. at 380. The Court's infamous characterization of an apartment house as "a mere parasite" reflects this animus. *See id.* at 394. As the trial judge remarked: "In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life." Ambler Realty Co. v. Village of Euclid, 297 F. 307, 316 (N.D. Ohio 1924).

241 *Euclid*, 272 U.S. 365. Justice McReynolds dissented, without explaining why. *Id.* at 397.

242 *See id.* at 382 (explaining that part of the Ambler Realty land "falls in class U-2" where the main permitted uses were detached single-family homes and duplexes).

243 *Id.* at 380–81.

244 *Id.* at 381–82.

245 *Id.* at 390.

246 *But see* Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 117, 121, 123 (1928) (citing *Meyer* in a zoning dispute about a proposed "philanthropic home for aged poor," but finding it unnecessary to decide whether "it is within the power of the State or municipality by a general zoning law to exclude the proposed new home from a district").

247 416 U.S. 1 (1974).

248 431 U.S. 494 (1977).

249 473 U.S. 432 (1985).

sons related by blood, adoption, or marriage."[250] The case arose when a couple leased their house to a university student, and five more students later moved in as well.[251] In response to the village's lawsuit, the owners and tenants asserted that the ordinance was unconstitutional.[252] The defendants might have challenged the ordinance as a violation of the right to establish a home because it prohibited the tenants from living together in the village.[253] Instead, they argued that the ordinance violated the Equal Protection Clause based on a variety of arguments, including the right to privacy, the right to travel, and the claim that the tenants' marital status should be irrelevant.[254] The majority characterized the case as a garden-variety zoning dispute that did not involve a fundamental right[255] and upheld the ordinance under the rational basis test.[256] In his dissent, Justice Marshall reasoned that the ordinance violated the Equal Protection Clause by unduly burdening the tenants' rights of association and privacy.[257] He buttressed this argument by citing *Meyer* for the proposition that "[t]he right to 'establish a home' is an essential part of the liberty guaranteed by the Fourteenth Amendment."[258]

Yet three years later, in *Moore v. City of East Cleveland*, the Court held that a parallel ordinance violated the Due Process Clause.[259] The ordinance restricted occupancy of a dwelling to one family, yet defined "family" more narrowly than the *Belle Terre* law.[260] As a result, the homeowner, her son, and one of her grandsons could live in the home, but a second grandson could not.[261] The majority distinguished *Belle Terre* on the basis that it only involved unrelated

250 *Belle Terre*, 416 U.S. at 1–2. The ordinance also classified two unrelated persons as a "family." *Id.*

251 *See id.* at 2–3.

252 *See id.*

253 The brief filed on behalf of the tenants and owners did not raise the right to establish a home. Brief for Appellees, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (No. 73-191), 1974 WL 187429.

254 *Belle Terre*, 416 U.S. at 7.

255 *See id.*

256 *See id.* at 3, 10.

257 *Id.* at 15 (Marshall, J., dissenting). Marshall seemed to view the ordinance as a form of exclusionary zoning. He observed that some lower federal courts had "acted to insure that land-use controls are not used as means of confining minorities and the poor to the ghettos of our central cities." *Id.* at 14. His dissent cited two early articles on exclusionary zoning. *See id.* at 14 n.3.

258 *Id.* at 15.

259 Moore v. City of E. Cleveland,431 U.S. 494, 506 (1977).

260 *See id.* at 531–33.

261 The property at issue was a "frame house" owned by Moore that contained two "dwelling units." Moore and her family occupied one of the units. *Id.* at 533.

individuals, while the *Moore* ordinance "slic[ed] deeply into the family itself" by regulating which relatives could live in a home.[262] The Court explained that "[a] host of cases, tracing their lineage to *Meyer v. Nebraska* and *Pierce v. Society of Sisters* have consistently acknowledged a 'private realm of family life which the state cannot enter.'"[263] Reasoning that the rational basis test was inappropriate "when the government intrudes on choices concerning family living arrangements," the Court used a higher level of scrutiny by examining "the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."[264] Although it noted that the city's justifications for the ordinance—concern for overcrowding, traffic, parking, and school financing—were "legitimate," the Court concluded that the ordinance served them "marginally, at best."[265]

The *Moore* plurality did not expressly rely on the right to establish a home, even though Moore raised the issue.[266] But the opinion was permeated with references to the importance of the family home: the traditions that "uncles, aunts, cousins, and especially grandparents [share] a household along with parents and children";[267] "close relatives . . . draw together and participate in the duties and the satisfactions of a common home";[268] and "the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life."[269]

In sum, *Moore* recognized the right of a family to live together in a home—an amalgam of the *Meyer* rights to establish a home and to raise children. The Court touched on this theme by quoting from a famous dissent by Justice Harlan:

> [H]ere we have not an intrusion into the home so much as on the life which characteristically has its place in the

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262 *Id.* at 498.

263 *Id.* at 499 (citations omitted).

264 *Id.*

265 *Id.* at 499–500.

266 *See* Brief for Appellant at 31, *Moore*, 431 U.S. 494 (No. 75-6289), 1976 WL 178722. Moore's brief relied, in part, on the right to establish a home: "By arbitrarily ruling out certain groupings of blood-related family members, the City of East Cleveland has substantially interfered with the right of the Appellant and her children and grandchildren to, as enunciated in *Meyer v. Nebraska*, 262 U.S. 390 (1923), 'establish a home and bring up children.'" *Id.*

267 *Moore*, 431 U.S. at 504.

268 *Id.* at 505.

269 *Id.* In his dissent, Justice White quoted the *Meyer* list of due process liberties, including the "right . . . [to] establish a home," and noted that "*Meyer* has not been overruled nor its definition of liberty rejected." *Id.* at 545 (White, J., dissenting).

> home. . . . The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right.[270]

Eight years later in *City of Cleburne v. Cleburne Living Center, Inc.*, the Court reviewed the city's denial of an application for a special use permit to operate a group home for people with intellectual disabilities.[271] The applicant might have relied on the right to establish a home but failed to raise this claim.[272] Instead it argued that intellectual disability was a quasi-suspect classification and, accordingly, that the ordinance violated the Equal Protection Clause.[273] The majority rejected the argument that intellectual disability constituted a quasi-suspect classification.[274] However, the Court concluded that the ordinance was invalid as applied under the rational basis test because it would subject residents to "closely supervised and highly regulated conditions."[275] Yet scholars suggest that the Court actually utilized a form of heightened scrutiny.[276]

Concurring with the result, Justice Marshall and two colleagues focused on the right to establish a home. They explained that "the interest . . . in establishing group homes is substantial" because "[t]he right to 'establish a home' has long been cherished as one of the fundamental liberties embraced by the Due Process Clause."[277] As such, they reasoned that heightened scrutiny was appropriate "[w]ith respect to a liberty so valued as the right to establish a home in the community, and so likely to be denied on the basis of irrational fears and outright hostility."[278]

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270 *Id.* at 504 n.12 (quoting Poe v. Ullman, 367 U.S. 497, 551–52 (1961) (Harlan, J., dissenting)).

271 *See* 473 U.S. 432 (1985).

272 The brief filed on behalf of the applicant did not mention the right to establish a home. *See* Brief for Respondents, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) (No. 84-468), 1985 WL 669785. A footnote asserted that shelter was a "basic societal benefit[]," but cited no authority for this proposition. *See id.* at 42 n.17.

273 *See id.* at 25–36.

274 *See Cleburne*, 473 U.S. at 445–46.

275 *See id.* at 450.

276 *See, e.g.*, John M. Payne, *From the Courts: A New Constitutional Look in Zoning Ordinances*, 14 REAL EST. L.J. 260, 263 (1986) (noting that the majority's analysis used "heightened scrutiny in some degree").

277 *Cleburne*, 473 U.S. at 461 (Marshall, J., concurring in the judgment in part and dissenting in part).

278 *Id.* at 473.

Lower courts have also discussed the right to establish a home in contexts related to land use. For example, in *Vasquez v. Foxx*,[279] the Seventh Circuit held that the right was not infringed by a state statute that barred sex offenders from living within 500 feet of a child-related use because they were free to live elsewhere in the state.[280] And the First Circuit relied on the right in *González-Fuentes v. Molina*, in part, to reject a due process challenge to the procedures governing a program by which prisoners were released from custody and allowed to live at home, subject to electronic monitoring—because it protected the "prerogative to 'establish a home.'"[281]

Outside of the land use context, the Court has cited the right to establish a home—along with the rights to marry and to raise children—in a series of major decisions involving family life. The common theme in these decisions is the existence of a "private realm of family life which the state cannot enter."[282] In this setting, the right to establish a home plays a supplemental role, but it helps to demarcate the extent to which the state may intrude into the family, as it did in *Moore*. For example, as Justice Goldberg observed in *Griswold v. Connecticut*, which invalidated laws forbidding the use of contraceptives:

> The Connecticut statutes here involved deal with a particularly important and sensitive area of privacy—that of the marital relation and the marital home. This Court recognized in *Meyer v. Nebraska* . . . that the right "to marry, establish a home and bring up children" was an essential part of the liberty guaranteed by the Fourteenth Amendment.[283]

The right to establish a home was also mentioned in either the Court's opinion or a concurrence in the following cases: *Roe v. Wade*[284] (right

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279 895 F.3d 515 (7th Cir. 2018).

280 *Id.* at 525; *see also* Belt v. State, 127 S.W.3d 277, 284 (Tex. App. 2004) (finding a probation condition requiring a sex offender to reside more than 1,000 feet away from schools and other child-related uses did not violate his right to establish a home).

281 607 F.3d 864, 890 (1st Cir. 2010) (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)). It observed that the program allowed prisoners to "live with their loved ones . . . and reside in a dwelling of their own choosing," which were "included in the constitutionally protected prerogative 'to establish a home.'" *Id.* (quoting *Meyer*, 262 U.S. at 399); *see also* Deraffele v. City of Williamsport, No. 4:14-CV-01849, 2015 WL 5781409, at * 13, *16 (M.D. Pa. Aug. 19, 2015) (finding ordinance requiring that the tenant's family members be listed on the lease did not violate the "fundamental right to establish a home" because it only imposed a "slight burden").

282 *See* Hodgson v. Minnesota, 497 U.S. 417, 447, 452 (1990) (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

283 381 U.S. 479, 495 (1965) (Goldberg, J., concurring) (quoting *Meyer*, 262 U.S. at 399).

284 410 U.S. 113, 214 (1973) (Douglas, J., concurring).

to abortion), *Runyon v. McCrary*[285] (right to education), *Zablocki v. Redhail*[286] (right to marry), *Thornburgh v. American College of Obstetricians & Gynecologists*[287] (right to abortion), *Hodgson v. Minnesota*[288] (right to abortion), and *Troxel v. Granville*[289] (right to raise children).[290] Most recently, in *Obergefell v. Hodges*, the Court characterized the "right to 'marry, establish a home and bring up children'" as "a central part of the liberty protected by the Due Process Clause."[291]

IV. Contours of the Right to Establish a Home

A. A Fundamental Right

As a general rule, a law that infringes a fundamental right will survive a substantive due process challenge only if it satisfies the strict scrutiny test.[292] The Supreme Court has designated a number of liberties as fundamental rights, including the rights to marry, raise children, travel, and vote.[293] This Part demonstrates that the right to establish a home should also be recognized as a fundamental right.

The Supreme Court has never squarely decided whether this right is fundamental.[294] Although *Meyer v. Nebraska* referred to its cata-

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285 427 U.S. 160, 176–79 (1976).

286 434 U.S. 374, 384, 386–87 (1978).

287 476 U.S. 747, 773, 775–76 (1986) (Stevens, J., concurring), *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

288 497 U.S. 417, 435 (1990).

289 530 U.S. 57, 65–67 (2000).

290 Although courts often mention the right to establish a home, scholars have overlooked it. A few articles briefly refer to the right, but none analyzes its history, nature, or scope. *See, e.g.*, Meris Bergquist, *No Exit for Patients Confined at the Vermont State Hospital*, 32 Vt. Bar J. 34, 34 (2006) (two sentences); Martha Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 Harv. C.R.-C.L. L. Rev. 111, 136 (1987) (one sentence); Inez Smith Reid, *Law, Politics and the Homeless*, 89 W. Va. L. Rev. 115, 144 (1986) (two paragraphs).

291 *Obergefell*, 576 U.S. 644, 668 (quoting *Zablocki*, 434 U.S. at 384).

292 *See* Chemerinsky, *supra* note 102, at 814 (presenting a framework for determining whether a fundamental right exists and thus will need to meet strict scrutiny); *see also* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267, 1292–96 (2007) (discussing the Court's "evolving approach" to protecting fundamental rights from government intrusion by applying strict scrutiny); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L. Rev. 793, 862–66 (2006) ("Overall, the strict scrutiny survival rate in fundamental rights cases is 24 percent, with 11 of 46 applications upholding the challenged laws.").

293 *See Obergefell*, 576 U.S. 644 (right to marry); *Troxel*, 530 U.S. 57 (right to raise children); United States v. Guest, 383 U.S. 745 (1966) (right to travel); Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969) (right to vote).

294 In *Lindsey v. Normet*, 405 U.S. 56 (1972), the Court held that the Constitution does not create a *positive* right to housing—that is, the state is not obligated to provide housing to those in

logue of liberties—including the right to establish a home—as "fundamental rights which must be respected,"[295] this usage predates the Court's modern jurisprudence.[296] A number of contemporary federal and state decisions have characterized the right as "fundamental,"[297] but this is an overbroad reading of *Meyer*. However, the Court did recognize an analogous fundamental right in *Moore v. City of East Cleveland*—the right of a family to live together in a home.[298]

The Court's approach to identifying fundamental rights has varied over time.[299] In *Washington v. Glucksberg*, it utilized a rigid two-part framework.[300] More recently, in *Obergefell v. Hodges*, the Court adopted a flexible standard, strongly suggesting that the *Glucksberg* test was no longer appropriate.[301] The analysis below evaluates the right to establish a home under both approaches and then discusses the appropriate standard of review.

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need. *Id.* at 73–74. It rejected claims that the "need for decent shelter" and the "right to retain peaceful possession of one's home" were "fundamental interests," commenting that "the Constitution does not provide judicial remedies for every social and economic ill." *Id.* The right to establish a home, in contrast, is a *negative* right.

295 Meyer v. Nebraska, 262 U.S. 390, 399, 401 (1923).

296 However, Justice Kennedy expressed the view that "[t]he broad formulation of fundamental rights announced in *Meyer* is one of the richest in all of our case law." FRANK J. COLUCCI, JUSTICE KENNEDY'S JURISPRUDENCE 22 (2009) (quoting Anthony M. Kennedy, Unenumerated Rights and the Dictates of Judicial Restraint, Address at the Canadian Institute for Advanced Legal Studies (July 24–Aug. 1, 1986)).

297 *See, e.g.*, Sebesta v. Davis, 878 F.3d 226, 232 (7th Cir. 2017) ("fundamental liberty interest[]"); Henderson v. Adams, 209 F. Supp. 3d 1059, 1077 (S.D. Ind. 2016) (same); *In re* Visitation of A.A.L., 927 N.W.2d 486, 492 (Wis. 2019) ("fundamental liberty"); N.J. Div. of Child Prot. & Permanency v. A.B., 175 A.3d 942, 948 (N.J. 2017) ("fundamental right").

298 In *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997), the Court described the source of its "established method of substantive-due-process analysis" by quoting from *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion). It stated: "[W]e have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" *Glucksberg*, 521 U.S. at 720–21 (quoting *Moore*, 431 U.S. at 503). The implication is that the right recognized in *Moore* is deeply rooted in the nation's history and tradition, and hence a fundamental right. *See also* CHEMERINSKY, *supra* note 102, at 826 (concluding that *Moore* recognized a fundamental right "to keep the family together").

299 *See generally* Robert C. Farrell, *An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, 26 ST. LOUIS U. PUB. L. REV. 203, 216–48 (2007) (discussing different approaches).

300 *Glucksberg*, 521 U.S. at 720–21.

301 *See* Obergefell v. Hodges, 576 U.S. 644, 663–71 (2015).

B. Obergefell *Approach*

1. Overview

Obergefell established the Court's modern standard for identifying fundamental rights.[302] Writing for the majority, Justice Kennedy observed that the process is not governed by "any formula" but rather requires courts to "exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect."[303] He explained:

> That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present.[304]

Kennedy began his analysis by stressing that "the Court has long held the right to marry is protected by the Constitution."[305] He cited a number of Supreme Court precedents for the proposition that "the right to marry is fundamental under the Due Process Clause"[306]—including *Meyer*—though none of those decisions expressly characterize it as a "fundamental right"; rather, they broadly discuss the importance of marriage.

Kennedy then identified "four principles and traditions [that] . . . demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples"[307] as follows: (1) "the right to personal choice regarding marriage is inherent in the concept of individual autonomy";[308] (2) "the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals";[309] (3) "the right to

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302 *See id.* As the Court noted, the *Obergefell* approach is rooted in Justice Harlan's famous dissent in *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting). *Obergefell*, 576 U.S. at 663–64.

303 *Obergefell*, 576 U.S. at 664.

304 *Id.* (citation omitted).

305 *Id.*

306 *Id.* at 664–65. Kennedy included *Meyer* in this list, citing to the page that contains the standard list of due process liberties, including the rights "to marry, establish a home and bring up children." *Id.* (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)). If taken literally, this reference suggests the Court has already found the right to establish a home to be fundamental.

307 *Id.* at 665.

308 *Id.*

309 *Id.* at 666.

marry . . . safeguards children and families";[310] and (4) "marriage is a keystone of our social order."[311] In parallel fashion, the analysis below demonstrates that the right to establish a home is a fundamental right under the *Obergefell* standard.[312]

2. *Constitutional Protection of the Right to Establish a Home*

Like the right to marry, the Court has long held that the right to establish a home is protected by the Constitution.[313] Kennedy's citation to *Meyer* as the temporal foundation of the right to marry applies equally to the right to establish a home because both appear in the *Meyer* catalogue of liberties.

The Court has recognized the importance of the right to establish a home—though less frequently than the right to marry. For example, *Meyer* classified the right as one of the "privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[314] In *City of Cleburne v. Cleburne Living Center, Inc.*, Justice Marshall observed that the right "has long been cherished as one of the fundamental liberties" protected by the Due Process Clause.[315] And in *Obergefell*, the Court quoted *Zablocki v. Redhail* in describing the right—together with the right to marry and the right to bring up children—as a "central part of the liberty protected by the Due Process Clause."[316] Notably, both the right to marry and the right to raise children are already recognized as fundamental rights.[317]

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310 *Id.* at 667.

311 *Id.* at 669.

312 Before *Obergefell*, the Court only recognized negative fundamental rights. As Justice Thomas's dissent commented: "In the American legal tradition, liberty has long been understood as individual freedom *from* governmental action, not as a right *to* a particular governmental entitlement." *Id.* at 726 (Thomas, J., dissenting). But *Obergefell* held that government must recognize marriages of same-sex couples, indicating that the fundamental right to marry was a positive right. *Id.* at 675–76 (majority opinion). An argument could be made that the right to establish a home should be a positive right—obligating the government to provide housing for those in need. But this would require far more affirmative government action than recognition of marriage, and thus it is not clear that the argument would succeed. Accordingly, this Article argues for recognition of the right to establish a home as a negative fundamental right.

313 *See supra* Part III.

314 Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

315 City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 461 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part).

316 *See Obergefell*, 576 U.S. at 668 (quoting Zablocki v. Redhail, 434 U.S. 374, 384 (1978)).

317 *See Obergefell*, 576 U.S. at 675 (right to marry); Troxel v. Granville, 530 U.S. 57, 65–66 (2000) (right to raise children).

3. "Principles and Traditions" Supporting the Right

American law has long recognized the right to establish a home, as discussed in Parts II and III. As Justice Kennedy acknowledged, this history is important in identifying a fundamental right, though not determinative.[318] Using the *Obergefell* framework, the analysis below discusses four principles and traditions that explain why the right to establish a home is fundamental: (1) the home is a necessity for existence; (2) the home provides security against the state and the outside world; (3) the home protects individual liberty; and (4) the home is the center of family life.[319]

a. Home as a Necessity

Shelter is a necessity for human existence—like food or water.[320] Without shelter, a person exposed to the ravages of inclement weather and other hazards cannot survive.[321] Thus, humans have utilized shelter for at least 350,000 years.[322] As Professor Jerry Moore observes, "[w]e have been building homes longer than we have been *Homo sapiens*."[323] Blackstone invoked this ancient history when he posited that even in the state of nature before governments existed, each person enjoyed a "right of habitation."[324]

The Supreme Court has acknowledged the importance of shelter in a number of decisions. For example, in *Shapiro v. Thompson*,[325] it described "the very means to subsist" as "food, shelter, and other necessities of life."[326] In other decisions, the Court has referred to "shel-

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318 *Obergefell*, 576 U.S. at 664.

319 These principles and traditions differ somewhat from those considered in *Obergefell* because the nature of the right is different. The *Obergefell* Court emphasized that the process for identifying fundamental rights "has not been reduced to any formula." *Id.* at 663–64 (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)). Nothing in the decision indicates that the identification of all fundamental rights must be based on the principles and traditions relevant to the right to marry.

320 *See* Fox, *supra* note 26, at 7.

321 The most basic function of a home is "providing shelter from natural elements." Jerry D. Moore, The Prehistory of Home 3 (2012). In particular, the shelter of a home allows humans to minimize the loss of heat, which is crucial for survival in many climates. *See id.* at 45; *see also* Mary Gordon, Home: What It Means and Why It Matters 38 (2010) ("We are, as a species, terrifyingly fragile, ill-equipped for what nature provides in the way of dangers: cold, heat, storm, predatory beasts . . . .").

322 *See* Moore, *supra* note 321, at 93 ("[T]he oldest dwelling currently known is about 450,000–350,000 years old.").

323 *Id.* at 5.

324 4 Blackstone, *supra* note 63, at *223.

325 394 U.S. 618 (1969), *overruled in part by* Edelman v. Jordan, 415 U.S. 651 (1974).

326 *Id.* at 627.

ter, fuel, and other basic necessities"[327] and "housing and the other necessities of life."[328] Given modern health and safety regulations and building codes, the only legally acceptable form of permanent shelter is a house, apartment, or other permanent dwelling—in short, a home.

The plight of the homeless helps to demonstrate the necessity for shelter. One study revealed that unsheltered homeless adults in Boston were almost three times more likely to die than those sleeping in shelters.[329] Although the mortality rate for the unsheltered is certainly affected by factors that contribute to homelessness in the first place,[330] it is also increased by conditions that they experience. As another study explained, certain mortality factors arise from "homelessness itself, such as . . . exposure to communicable diseases, [and] harsh living environments."[331] For example, the rates of hepatitis and tuberculosis for homeless people are far higher than for the general population.[332] Similarly, hypothermia caused by exposure to cold disproportionately affects the homeless, leading to an increased risk of death.[333]

b. Home as a Sanctuary

For centuries, the Anglo-American legal tradition has valued the home as a sanctuary from other people and from the state.[334] Indeed,

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327 Hagans v. Lavine, 415 U.S. 528, 531 n.2 (1974).

328 Lombard v. Louisiana, 373 U.S. 267, 279 (1963) (Douglas, J., concurring).

329 *See* Jill S. Roncarati, Travis P. Baggett, James J. O'Connell, Stephen W. Hwang, E. Francis Cook, Nancy Krieger & Glorian Sorensen, *Mortality Among Unsheltered Homeless Adults in Boston, Massachusetts, 2000–2009*, 178 JAMA INTERNAL MED. 1242 (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6142967/ [https://perma.cc/99WR-FXNC]; *see also* Jonathan R. Hibbs, Lawrence Benner, Lawrence Klugman, Robert Spencer, Irene Macchia, Anne K. Mellinger & Daniel Fife, *Mortality in a Cohort of Homeless Adults in Philadelphia*, 331 NEW ENG. J. MED. 304, 304 (1994) ("The age-adjusted mortality rate among the homeless was 3.5 times that of Philadelphia's general population . . . .").

330 Mental health and substance abuse problems, for example, contribute both to the risk of homelessness and the higher mortality rate. *See* Seena Fazel, John R. Geddes & Margot Kushel, *The Health of Homeless People in High-Income Countries: Descriptive Epidemiology, Health Consequences, and Clinical and Policy Recommendations*, 384 LANCET 1529 (2014).

331 *Id.* at 1532 (footnotes omitted); *see also Housing and Homelessness as a Public Health Issue*, AM. PUB. HEALTH ASS'N (Nov. 7, 2017), https://apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2018/01/18/housing-and-homelessness-as-a-public-health-issue [https://perma.cc/MRH7-2XLC] (discussing public health impacts of homelessness).

332 Fazel et al., *supra* note 330, at 1532–33.

333 *See* Jerzy Romaszko, Iwona Cymes, Ewa Draganska, Robert Kuchta & Katarzyna Glinska-Lewczuk, *Mortality Among the Homeless: Causes and Meteorological Relationships*, PLOS ONE (2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5739436/ [https://perma.cc/535L-HHJV] ("Deaths due to hypothermia were thirteen-fold more frequent among the homeless as compared to the general population.").

334 *See supra* text accompanying notes 39–45; *see also* Barros, *supra* note 30, at 260–69

for millennia cultures around the world have used the home to provide security against outside intrusions.[335]

At the most basic level, a home protects its inhabitants against physical attack. For example, one analysis concluded that homeless women are between two and four times more likely to experience sexual assault and other violent attacks than women in general.[336] It concluded that the "best 'defense' against the risks of victimization that result from being homeless is—to not be homeless!"[337] When a criminal intrusion into the home does occur, the castle doctrine traditionally allows the resident to defend herself with force.[338]

The home also serves as a haven from the outside world in a more general sense. In *Carey v. Brown*,[339] Justice Black acknowledged the importance of this function:

> Preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value. Our decisions reflect no lack of solicitude for the right of an individual "to be let alone" in the privacy of the home, "sometimes the last citadel of the tired, the weary, and the sick."[340]

Anthropologist John Allen similarly views the home as "the place where our minds and bodies recover from the challenges we face in the outside world."[341] He explains that the "human need to feel at home has its roots in our evolutionary biology and is reinforced today

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(discussing security in the home); Dickinson, *supra* note 25, at 1113–16 (discussing Fourth Amendment protection).

335 *See, e.g.*, BILL BRYSON, AT HOME: A SHORT HISTORY OF PRIVATE LIFE 29–30 (2010) (noting that 5,000 years ago the houses in Skara Brae, a small village, "had locking doors").

336 JANA L. JASINSKI, JENNIFER K. WESELY, ELIZABETH MUSTAINE & JAMES D. WRIGHT, THE EXPERIENCE OF VIOLENCE IN THE LIVES OF HOMELESS WOMEN: A RESEARCH REPORT 2 (2005), https://www.ncjrs.gov/pdffiles1/nij/grants/211976.pdf [https://perma.cc/2256-NE4Q]. The most common types of injuries beyond the category of sexual assaults were "bruises, black eyes, and broken bones." *Id.* at 83. The location where homeless women sleep at night plays a major role in their safety. *See id.* at 53; s*ee also* Fazel et al., *supra* note 330, at 1535 ("[S]tudies show that between 27% and 52% of homeless individuals were physically or sexually assaulted in the previous year.").

337 JASINSKI ET AL., *supra* note 336, at 53.

338 *See, e.g.*, People v. Tomlins, 107 N.E. 496, 497 (N.Y. 1914).

339 447 U.S. 455 (1980).

340 *Id.* at 471 (quoting Gregory v. City of Chicago, 394 U.S. 111, 125 (1969) (Black, J., concurring)).

341 ALLEN, *supra* note 26, at 30.

by our cognitive psychology."[342] As such, Allen concludes that a home is "necessary to maintain equilibrium in our lives."[343]

Finally, the home provides security against action by the state. The Fourth Amendment commands that "[t]he right of the people to be secure in their . . . houses . . . shall not be violated."[344] In *Silverman v. United States*,[345] the Supreme Court explained that "[a]t the very core [of the amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."[346] As Justice Kennedy later noted in *Minnesota v. Carter*,[347] "[t]he axiom that a man's home is his castle . . . has acquired over time a power and an independent significance justifying a more general assurance of personal security in one's home, an assurance which has become part of our constitutional tradition."[348]

c. Home as the Locus of Liberty

One of the principles and traditions that Justice Kennedy relied on in *Obergefell* was "the right to personal choice regarding marriage [which] is inherent in the concept of individual autonomy."[349] He stressed the "abiding connection between marriage and liberty."[350] Similarly, our American tradition recognizes that the home is closely linked to liberty.[351]

As the Supreme Court summarized in *City of Ladue v. Gilleo*,[352] "[a] special respect for individual liberty in the home has long been part of our culture and our law."[353] The Court has consistently held that the exercise of constitutional rights inside the privacy of one's home is entitled to greater protection than outside the home.[354] Judicial interpretation of the First, Second, Third, Fourth, and Fifth

342 *Id.* at 9.

343 *Id.* at 30.

344 U.S. CONST. amend. IV, cl. 1.

345 365 U.S. 505 (1961).

346 *Id.* at 511.

347 525 U.S. 83 (1998).

348 *Id.* at 100 (Kennedy, J., concurring).

349 *See* Obergefell v. Hodges, 576 U.S. 644, 665 (2015).

350 *Id.*

351 *See supra* text accompanying notes 46–51; *see also* Barros, *supra* note 30, at 269–75 (discussing privacy in the home); John Fee, *Eminent Domain and the Sanctity of Home*, 81 NOTRE DAME L. REV. 783, 786–87 (2006) (discussing standards in federal constitutional law that center on the privacy of the home).

352 512 U.S. 43 (1994).

353 *Id.* at 58.

354 *See supra* text accompanying notes 47, 98–102.

Amendments has created "home-centric jurisprudence."[355] Thus, having a home is necessary for a person to enjoy the full extent of the liberty guaranteed by the Constitution.

For example, in *Stanley v. Georgia*, the Court invalidated a statute that criminalized the possession of obscene material "in the privacy of a person's own home," stressing the "fundamental" nature of "the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."[356] It commented: "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."[357] In *District of Columbia v. Heller*,[358] it expanded the scope of the Second Amendment to allow possession of firearms in the home; it stressed that "the home [is] where the need for defense of self, family, and property is most acute."[359] Similarly, in *Lawrence v. Texas*,[360] the Court reasoned that the liberty guaranteed by the Due Process Clause allowed adults to engage in "homosexual conduct" in "the confines of their homes."[361] Writing for the Court, Justice Kennedy opined: "In our tradition the State is not omnipresent in the home."[362]

More broadly, in *Carey v. Brown*, the Court explained that "[t]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."[363] And in *United States Department of Defense v. Federal Labor Relations Authority*,[364] it stated that "the privacy of the home . . . is accorded special consideration in our Constitution, laws, and traditions."[365]

d. Home as the Center of Family Life

American law has traditionally viewed the home as the center of family life—a "sacred retreat to which families repair for their privacy

355 *See* Dickinson, *supra* note 25, at 1109–16.

356 Stanley v. Georgia, 394 U.S. 557, 564 (1969).

357 *Id.* at 565.

358 554 U.S. 570 (2008).

359 *See id.* at 628.

360 539 U.S. 558 (2003).

361 *See id.* at 567–68.

362 *Id.* at 562.

363 Carey v. Brown, 447 U.S. 455, 471 (1980).

364 510 U.S. 487 (1994).

365 *Id.* at 501.

and their daily way of living."[366] Indeed, the home has been the center of family life since prehistoric times, long before governments arose.[367]

In *Obergefell,* Justice Kennedy explained that one basis for protecting the right to marry was that it "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education."[368] He observed: "The Court has recognized these connections by describing the varied rights as a unified whole: '[T]he right to "marry, establish a home and bring up children" is a central part of the liberty protected by the Due Process Clause.'"[369] Thus, the right to establish a home is closely linked to the rights to marry and to bring up children. The family life that *Obergefell* celebrates can only occur in a home, as the Court acknowledged by stressing the importance of "loving and nurturing homes" for children.[370]

Obergefell also recognized that "permanency and stability" are important to "children's best interests."[371] The secure family relationships that are "so critical to a child's cognitive, emotional, social, and psychological development"[372] are developed and maintained in a home.[373] Housing insecurity "has devastating effects on children," which can include delayed speech and language development, hyperactivity, and psychiatric, behavioral, and academic problems.[374]

In *Roberts v. United States Jaycees*,[375] the Court addressed another key aspect of the family home: "Family relationships, by their

366 Gregory v. City of Chicago, 394 U.S. 111, 125 (1969) (Black, J., concurring). Sociologists suggest "the link between home and family is so strong that the terms are almost interchangeable." Shelley Mallett, *Understanding Home: A Critical Review of the Literature*, 52 SOCIO. REV. 62, 73 (2004); *see also* Hareven, *supra* note 165, at 228 (noting that "[t]he close identification of home with family" can be "traced to the late eighteenth or early nineteenth century").

367 Anthropologist John Allen observes that although "[f]amilies leave little evidence in the archaeological record . . . [t]he study of family dynamics across species makes clear that the origins of home are likely tied to family." ALLEN, *supra* note 26, at 108. Some scholars argue that the importance of the home for early humans "originates from two biological imperatives: reproductive success and the extended dependency of human offspring." *See* MOORE, *supra* note 321, at 22. Under this view, "it is to the reproductive advantage of both parents to have their offspring in a relatively safe location to which resources are transported." *Id.*

368 Obergefell v. Hodges, 576 U.S. 644, 667 (2015).

369 *Id.* at 668 (quoting Zablocki v. Redhail, 434 U.S. 374, 384 (1978)).

370 *See id.* at 668.

371 *Id.*

372 *See* Joseph S. Jackson & Lauren G. Fasig, *The Parentless Child's Right to a Permanent Family*, 46 WAKE FOREST L. REV. 1, 28 (2011).

373 *See* Lindsay T. Graham, Samuel D. Gosling & Christopher K. Travis, *The Psychology of Home Environments: A Call for Research on Residential Space*, 10 PERSPS. ON PSYCH. SCI. 346, 347–48 (2015) (discussing the role of the home in early social and cognitive development).

374 *See* ALLEN, *supra* note 26, at 191–92.

375 468 U.S. 609 (1984).

nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life."[376] The home is also the place where the ideals and beliefs of children are formed. As the Court noted in *Moore v. City of East Cleveland*, "[i]t is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."[377]

Finally, as the Court summarized in *Hodgson v. Minnesota*: "The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right."[378]

4. Conclusion

In sum, within the *Obergefell* framework, the right to a home is such a "fundamental" interest that "the State must accord . . . [it] . . . respect."[379] It is arguably more fundamental, for example, than the right to marry or the right to travel, which are already recognized as fundamental rights.

C. Glucksberg *Approach*

1. Overview

Before *Obergefell* was decided, the generally accepted test for identifying fundamental rights was the approach developed in *Washington v. Glucksberg*.[380] There the Court employed a two-part inquiry in refusing to find that the right to a physician's assistance in committing suicide was a fundamental right:

> First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of or-

376 *Id.* at 619–20; *see also* Moore v. City of E. Cleveland, 431 U.S. 494, 505 (1977) (noting the tradition that close relatives often "draw together and participate in the duties and the satisfactions of a common home" and "maintain or rebuild a secure home life").

377 *Moore*, 431 U.S. at 503–04; *see also Roberts*, 468 U.S. at 618–19 (observing that "highly personal relationships" such as family ties "foster diversity and act as critical buffers between the individual and the power of the State").

378 Hodgson v. Minnesota, 497 U.S. 417, 448 n.33 (1990) (quoting Poe v. Ullman, 367 U.S. 497, 551–52 (1961) (Harlan, J., dissenting)).

379 *See* Obergefell v. Hodges, 576 U.S. 644, 664 (2015).

380 Washington v. Glucksberg, 521 U.S. 702 (1997), *superseded by Obergefell*, 576 U.S. 644.

> dered liberty," such that "neither liberty nor justice would exist if they were sacrificed." Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest.[381]

In utilizing a different standard, the *Obergefell* Court explained that although the *Glucksberg* approach "may have been appropriate for the asserted right there involved . . . it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy."[382]

The relationship between the *Obergefell* and *Glucksberg* approaches remains unclear, although in context the *Obergefell* Court's seeming dismissal of the *Glucksberg* test suggests that it is obsolete. Dissenting in *Obergefell*, Chief Justice Roberts complained that the majority had "effectively overrule[d]" *Glucksberg*;[383] and scholars, such as Laurence Tribe, express the same view.[384] Yet a number of lower courts continue to follow the *Glucksberg* approach in the post-*Obergefell* era, suggesting that it may survive.[385] Moreover, given changes in the Court's composition since *Obergefell* was decided, it is possible that it might revive the *Glucksberg* standard in a future decision. Accordingly, this Section analyzes the right to establish a home under the *Glucksberg* standard.

2. History, Tradition, and Ordered Liberty

The right to establish a home is deeply rooted in our history and tradition, as discussed in Parts II and III. The comparison with the asserted right of physician-assisted suicide at issue in *Glucksberg* is instructive. There the Court explained in detail how "for over 700 years, the Anglo-American common-law tradition has punished or otherwise disapproved of both suicide and assisting suicide."[386] By contrast, the right to establish a home is a central part of our Anglo-American legal heritage, from Blackstone's ancient "right of habita-

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381 *Id.* at 720–21 (citations omitted) (first quoting *Moore*, 431 U.S. at 503; then quoting Palko v. Connecticut, 302 U.S. 319, 325,•326 (1937); and then quoting Reno v. Flores, 507 U.S. 292, 301–02 (1993)).

382 *See Obergefell*, 576 U.S. at 671.

383 *Id.* at 702 (Roberts, C.J., dissenting).

384 *See* Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 16 (2015).

385 *See* Ronald Turner, *W(h)ither* Glucksberg*?*, 15 DUKE J. CONST. L. & PUB. POL'Y 183, 210–15 (2020) (discussing these decisions).

386 *Glucksberg*, 521 U.S. at 711.

tion" through the repeated recognition of the right in *Obergefell* and other modern Supreme Court decisions.[387]

Two foundational concepts in American law reflect the right to establish a home: the right to acquire property and the importance of the home. The right is implicit in the "pursuit of happiness" provision of the Declaration of Independence and the home-centric Bill of Rights.[388] After ratification of the Constitution, the federal government took practical steps to fulfill the right by adopting land policies that allowed settlers to easily obtain land for homes and farms.[389] And when southern states imperiled the right in the post–Civil War era, Congress adopted both the Civil Rights Act of 1866 and the Fourteenth Amendment, in part, in order to safeguard it.[390] Thus, the Framers of the Fourteenth Amendment intended to protect the right to establish a home and understood it to be fundamental to ordered liberty.[391] Ultimately, in *Meyer* the Court transformed this basic right from one that was assumed to exist—like the right to eat or breathe—into an express right protected by the Constitution.

Moreover, the Court has repeatedly stressed the fundamental nature of the right, describing it as one of the "privileges long recognized at common law as essential to the orderly pursuit of happiness by free men";[392] "an essential part of the liberty guaranteed by the Fourteenth Amendment";[393] and "a central part of the liberty protected by the Due Process Clause."[394]

3. Defining the Right

As defined earlier, the right to establish a home means the right to purchase or lease a house, apartment, or other dwelling as a long-term residence and begin living in that dwelling.[395]

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387 *See* discussion *supra* Part II, Section III.A, Section III.B.

388 *See supra* text accompanying notes 89–104.

389 *See supra* text accompanying notes 115–26.

390 *See supra* text accompanying notes 127–48.

391 This paragraph tracks the historical analysis that the Court in used *McDonald v. City of Chicago*, 561 U.S. 742, 767–78 (2010), to explain why the right to bear arms is a fundamental right under the *Glucksberg* test.

392 Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

393 Griswold v. Connecticut, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring).

394 Obergefell v. Hodges, 576 U.S. 644, 668 (2015) (quoting Zablocki v. Redhail, 434 U.S. 374, 384 (1978)).

395 *See supra* Section III.B.

4. Conclusion

The right to establish a home is a fundamental right under the *Glucksberg* approach. Indeed, the core requirement of that approach—that the right be "deeply rooted in this Nation's history and tradition"—is a quotation from *Moore v. City of East Cleveland*, which recognized the right of a family to live together in a home.[396]

D. Standard of Review

As noted above, the traditional test for determining whether a law that infringes a fundamental right survives substantive due process review is strict scrutiny.[397] Under this test, the state has the burden of establishing that the law serves a compelling governmental interest and is narrowly drawn to attain that objective.[398] Accordingly, courts will probably use strict scrutiny to evaluate infringement of the right to establish a home.

In the alternative, courts might utilize a version of intermediate scrutiny. The use of this test is well established in equal protection jurisprudence, and requires that a law "serve important governmental objectives and . . . be substantially related to achievement of those objectives."[399] In such cases, "[t]he burden of justification is demanding and it rests entirely on the State."[400] Although the Court has never explicitly stated that intermediate scrutiny applies to substantive due process cases involving fundamental rights, it has seemingly used this standard in certain cases.[401]

The most analogous decision is *Moore v. City of East Cleveland*, where Moore argued that the ordinance "substantially interfered" with her right to "establish a home and bring up children."[402] Rather than use strict scrutiny, the Court stated that the appropriate test re-

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396 *See supra* note 298 and accompanying text.

397 *See supra* note 292.

398 *See, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678, 688 (1977) (right to use contraceptives); Roe v. Wade, 410 U.S. 113, 155 (1973) (right to abortion); Dunn v. Blumstein, 405 U.S. 330, 342–43 (1972) (right to travel).

399 *See* Craig v. Boren, 429 U.S. 190, 197 (1976).

400 United States v. Virginia, 518 U.S. 515, 533 (1996).

401 The Court has occasionally used intermediate scrutiny in substantive due process cases involving fundamental rights. *See* Stephen G. Gilles, *Parental (and Grandparental) Rights After* Troxel v. Granville, 9 SUP. CT. ECON. REV. 69, 126 (2001); David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 536–37 (2000); *see also* Cody Stoddard, Benjamin Steiner, Jacqueline Rohrbach, Craig Hemmens & Katherine Bennett, *All the Way Home: Assessing the Constitutionality of Juvenile Curfew Laws*, 42 AM. J. CRIM. L. 177, 196–98 (2015) (discussing use of intermediate scrutiny by lower courts in substantive due process cases).

402 Brief for Appellant, *supra* note 266, at 31; *see also* CHEMERINSKY, *supra* note 102, at 826

quired it to "examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation"—a formulation that echoes the equal protection approach.[403] Similarly, the Court appeared to use a lower standard of review in striking down other laws that infringed on fundamental rights, as in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (right to abortion) and *Troxel v. Granville* (right to bring up children).[404] Although it is difficult to distill a precise standard from these cases, in general they seem to consider both the importance of the government interest and its relationship to the law at issue.

Professor David Meyer attributes the Court's implicit use of intermediate scrutiny in family privacy cases to the fact that protecting this right may produce adverse consequences for both the community and other people, when compared with other fundamental rights whose exercise have no external impacts, such as the right to vote.[405] A similar argument might apply to the right to establish a home because its exercise could have external effects.

V. Enforcing the Right to Establish a Home: Combatting Exclusionary Zoning

A. Exclusionary Zoning in Context

Imagine a city where the zoning ordinance prohibits all residential uses except for traditional, detached, single-family homes on one-acre lots.[406] B, C, and D are all searching for housing. B, who can only afford to live in an apartment, cannot reside there. C, who intends to purchase a detached single-family home, but cannot afford to buy one on such a large lot, is similarly barred. And D, who plans to place a manufactured home on a residential lot, cannot move to the city ei-

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(noting that *Moore* involved "a fundamental right to keep the family together that includes an extended family").

403 Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977); *see also* Meyer, *supra* note 401, at 543 (observing that the *Moore* Court used a standard midway between the strict scrutiny and rational basis tests).

404 *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (finding regulation that imposes an "undue burden" on the right to an abortion unconstitutional); Troxel v. Granville, 530 U.S. 57, 68–73 (2000); *see also* Gilles, *supra* note 401, at 126 ("Intermediate scrutiny is . . . the most convincing interpretation of the plurality's overall approach.").

405 *See* Meyer, *supra* note 401, at 549–51.

406 Belle Terre, New York, is an example of this approach. The entire village is zoned as "A Residence District." Belle Terre, N.Y., Code § 170-2. In this district, the only permitted residential use is a "[o]ne-family dwelling[]" on a lot that is "at least one acre" in size. *Id.* §§ 170-5A(1), 170-7.

ther. These hypothetical situations all present the same question: is exclusionary zoning an unconstitutional infringement of the right to establish a home? This Article demonstrates that it is.

Zoning is exclusionary when an ordinance effectively prevents or substantially impairs the construction of affordable housing for low-income and moderate-income families.[407] Although such zoning can take many forms, three common techniques are: (1) prohibiting multi-family housing such as apartments, condominiums, and townhouses,[408] (2) mandating large lot sizes for detached single-family homes,[409] and (3) barring manufactured homes.[410] Less draconian restrictions may also be exclusionary. For example, a city that zones 95% of its residential land for detached single-family homes has engaged in exclusionary zoning.[411] In practice, exclusionary zoning techniques tend to disproportionately prevent racial and ethnic minorities from moving to a

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407 *See* 3 AM. L. ZONING § 22:1, Westlaw (database updated Nov. 2021); 2 NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, AMERICAN LAND PLANNING LAW § 66:1 (rev. ed. 2003); *see also* Peter H. Schuck, *Judging Remedies: Judicial Approaches to Housing Segregation*, 37 HARV. C.R.-C.L. L. REV. 289, 309 (2002) ("Each type of exclusionary zoning has the effect, and often the purpose, of increasing housing costs, which inevitably reduces the number of affordable units for low-income persons.").

408 *See, e.g.*, BELLE TERRE, N.Y., CODE § 170-5A(1) (only permitted form of housing in village is detached single-family homes). As one study sponsored by the Department of Housing and Urban Development stated: "[L]imiting multifamily housing through exclusionary zoning . . . is one of the most common and most pervasive barriers to affordable housing in America." GERRIT KNAAP, STUART MECK, TERRY MOORE & ROBERT PARKER, AM. PLAN. ASS'N, ZONING AS A BARRIER TO MULTIFAMILY HOUSING DEVELOPMENT, at v (2007), https://www.huduser.gov/portal/Publications/pdf/zoning_MultifmlyDev.pdf [https://perma.cc/P8HD-LYXB]; *see also* Richard F. Babcock & Fred P. Bosselman, *Suburban Zoning and the Apartment Boom*, 111 U. PA. L. REV. 1040, 1059–73 (1963) (discussing suburban hostility to apartment projects).

409 *See, e.g.*, BELLE TERRE, N.Y., CODE § 170-7 (one-acre minimum lot size). One study showed that 14 of the 187 cities and towns in eastern Massachusetts require minimum lot sizes of more than 70,000 square feet or 1.625 acres. EDWARD L. GLAESER, JENNY SCHUETZ & BRYCE WARD, PIONEER INST. FOR PUB. POL'Y RSCH., REGULATION AND THE RISE OF HOUSING PRICES IN GREATER BOSTON: A STUDY BASED ON NEW DATA FROM 187 COMMUNITIES IN EASTERN MASSACHUSETTS, at ii (2006), https://www.hks.harvard.edu/centers/rappaport/research-and-publications/major-reports/regulations-and-the-rise-in-housing-prices-in-greater-boston [https://perma.cc/389J-2AL6]. It concluded that each increase in lot size decreased the percentage of affordable homes. *See id.* at 34; *see also* Paul Boudreaux, *Lotting Large: The Phenomenon of Minimum Lot Size Laws*, 68 ME. L. REV. 1, 9 (2016) (observing that large lot zoning "inflates the cost of housing"); Jeffrey Zabel & Maurice Dalton, *The Impact of Minimum Lot Size Regulations on House Prices in Eastern Massachusetts*, 41 REG'L SCI. & URB. ECON. 571 (2011) (discussing impact of large lot zoning on prices).

410 *See* 3 AM. L. ZONING, *supra* note 407, § 22:2; *see also* Daniel R. Mandelker, *Zoning Barriers to Manufactured Housing*, 48 URB. LAW. 233, 234 (2016) (commenting that "manufactured housing . . . has significant affordability advantages over site-built traditional housing").

411 *See* 3 AM. L. ZONING, *supra* note 407, § 22:2.

city.[412] Moreover, they deprive everyone of the freedom to choose the type of home they wish to live in.

Under the standard *Euclid* framework, the validity of a zoning ordinance is governed by the rational basis test.[413] An ordinance is presumed to be constitutional, and the party challenging its validity must prove that it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[414] In *Village of Belle Terre v. Boraas*, the Court described the standard more succinctly, explaining that such a law will be upheld if it is "reasonable, not arbitrary" and bears "a rational relationship to a [permissible] state objective."[415] Under this deferential test, it is extraordinarily difficult to invalidate a zoning ordinance.[416]

Federal courts and most state courts utilize the rational basis test to evaluate the constitutionality of exclusionary zoning ordinances,[417]

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412 *See* NOAH KAZIS, N.Y.U. FURMAN CTR., ENDING EXCLUSIONARY ZONING IN NEW YORK CITY'S SUBURBS 7 (2020), https://furmancenter.org/files/Ending_Exclusionary_Zoning_in_New_York_Citys_Suburbs.pdf [https://perma.cc/V2M3-9VXB]; *see also* Elliott Anne Rigby, *Understanding Exclusionary Zoning and Its Impact on Concentrated Poverty*, CENTURY FOUND. (June 23, 2016), https://tcf.org/content/facts/understanding-exclusionary-zoning-impact-concentrated-poverty [https://perma.cc/C8YR-AR8V].

413 Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 391 (1926). *Euclid* was premised on the Court's respect for separation of powers; it deferred to the judgment of the village council which "presumably representing a majority of its inhabitants and voicing their will" had adopted the ordinance. *Id.* at 389. In other words, the ballot box is the method to challenge unwise laws. However, an ordinance that bars people from moving into a community also prevents them from voting for candidates committed to repealing such laws. Thus, the logic underlying *Euclid*'s deferential standard of review does not readily apply to exclusionary zoning. *Cf.* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985) ("When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." (citations omitted)).

414 *Euclid*, 272 U.S. at 395.

415 Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974) (alteration in original) (first quoting F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); and then quoting Reed v. Reed, 404 U.S. 71, 76 (1971)).

416 *See, e.g.*, Robert J. Hopperton, *The Presumption of Validity in American Land-Use Law: A Substitute for Analysis, a Source of Significant Confusion*, 23 B.C. ENV'T AFFS. L. REV. 301, 308 (1996).

417 *See, e.g.*, Ybarra v. Town of Los Altos Hills, 503 F.2d 250, 254 (9th Cir. 1974) ("[T]he town need only show that the [one-acre minimum lot size] ordinance bears a rational relationship to a legitimate governmental interest. Here the ordinance is rationally related to preserving the town's rural environment." (citation omitted)); Jaylin Invs., Inc. v. Village of Moreland Hills, 839 N.E.2d 903, 906 (Ohio 2006). As one authority summarizes current law: "Since neither a classification based on wealth nor the necessity of housing triggers 'strict scrutiny' review of exclusionary zoning ordinances, a municipality need only show a minimal rational basis in support of the ordinance." ARDEN H. RATHKOPF, DAREN A. RATHKOPF & EDWARD H. ZIEGLER, JR., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 22.3 (4th ed. 2021).

though a handful of states employ more rigorous standards.[418] As a result, courts have generally upheld such ordinances against substantive due process attack.[419] But the Supreme Court has never decided whether exclusionary zoning violates the Due Process Clause.[420] The fundamental right to establish a home is a powerful tool for challenging such zoning because it invokes a more searching standard of review—either strict scrutiny or intermediate scrutiny.

This Part first examines when exclusionary zoning techniques infringe the right to establish a home. It then evaluates the justifications for using these techniques. To avoid duplication, it discusses intermediate scrutiny before strict scrutiny. The analysis below illustrates how this right can be used to challenge exclusionary zoning as a general matter.

B. Infringement of the Right

Clearly, a city may regulate the right to establish a home to some extent. As the Supreme Court noted in *Zablocki v. Redhail*, "reasonable regulations that do not significantly interfere" with a fundamental right "may legitimately be imposed."[421] It explained that the existence

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418 *See, e.g.*, Surrick v. Zoning Hearing Bd., 382 A.2d 105, 111 (Pa. 1977) ("Where the amount of land zoned as being available for multi-family dwellings is disproportionately small in relation to [various] factors, the ordinance will be held to be exclusionary."); S. Burlington Cnty. NAACP v. Twp. of Mount Laurel, 336 A.2d 713, 724 (N.J. 1975) ("We conclude that every . . . municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing.").

419 Exclusionary zoning can also be challenged under the Fair Housing Act, 42 U.S.C. §§ 3601–3619, where it is proven to have a disparate impact on a racial minority or other group protected by the Act. *See id.* §§ 3604–3606. If such a showing is made, the burden shifts to the defendant city to show that the zoning is "necessary to achieve a valid interest"; and, if so, the plaintiff can still prevail by showing that the interest could be adequately served by different policy with a less discriminatory effect. *See* Tex. Dep't. of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 527, 541 (2015). The approach presented in this Article is a better method for attacking exclusionary zoning because (1) there is no need to prove disparate impact and (2) the standard of review is more rigorous.

420 In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), the Court rejected a claim that the village's failure to rezone land for multifamily housing violated the Equal Protection Clause, even though the decision disproportionately affected African Americans. *See id.* at 269–71. It held that "[p]roof of racially discriminatory intent or purpose is required" to show a violation of the Clause. *Id.* at 265. This decision significantly impeded the use of federal litigation to challenge exclusionary zoning under the Equal Protection Clause. *See* 3 Am. L. Zoning, *supra* note 407, § 22:4.

421 Zablocki v. Redhail, 434 U.S. 374, 386 (1978). Similarly, in *Planned Parenthood v. Casey*, the Court observed that "not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 873 (1992).

of a violation depends on "[t]he directness and substantiality of the interference."[422]

The statute in *Zablocki* mandated that a noncustodial parent obligated to pay child support obtain permission from a court in order to marry; this necessitated proof that the required payments had been made. The Court invalidated the statute because it imposed a serious financial burden on the exercise of the fundamental right to marry. It noted that some parents "will never be able to obtain the necessary court order, because they . . . lack the financial means to meet their support obligations."[423] And even those "able in theory to satisfy the statute's requirements[] will be sufficiently burdened by having to do so that they will in effect be coerced into forgoing their right to marry."[424] Under the *Zablocki* logic, the fundamental right to establish a home is infringed when the law imposes a serious financial burden on the exercise of the right.

The national standard for assessing housing affordability was developed by the Department of Housing and Urban Development. Under this approach, housing is deemed to be affordable if a household spends less than 30% of its income on housing.[425] A household that spends more than this amount is classified as "cost burdened," while one that spends more than 50% is considered to be "severely cost burdened."[426] According to the most recent data, 46.3% of tenants in the United States are cost burdened and 23.9% are severely cost burdened, while 21.2% of homeowners are cost burdened, and 9% are severely cost burdened.[427]

Household incomes and housing costs are affected by a variety of factors. But, at a minimum, where an exclusionary zoning technique

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422 *Zablocki*, 434 U.S. at 387 n.12; *see also* Lyng v. Castillo, 477 U.S. 635, 638 (1986) (the statutory definition of "household" for purposes of food stamp eligibility did not "'directly and substantially' interfere with family living arrangements and thereby burden a fundamental right" because "in the overwhelming majority of cases" it would have no effect on whether close relatives chose to live together (quoting *Zablocki*, 434 U.S. at 387)).

423 *Zablocki*, 434 U.S. at 387.

424 *Id.*

425 J. David Hulchanski, *The Concept of Housing Affordability: Six Contemporary Uses of the Housing Expenditure-to-Income Ratio*, 10 HOUS. STUD. 471, 475–86 (1995) (discussing standard); *see also CHAS: Background*, U.S. DEP'T OF HOUS. & URB. DEV.: OFF. OF POL'Y DEV. & RSCH., https://www.huduser.gov/portal/datasets/cp/CHAS/bg_chas.html [https://perma.cc/M5FV-W29D] (discussing standards used in the Comprehensive Housing Affordability Strategy).

426 HARVARD UNIV. JOINT CTR. FOR HOUS. STUD., THE STATE OF THE NATION'S HOUSING 2020, at 1 (2020), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_The_State_of_the_Nations_Housing_2020_Report_Revised_120720.pdf [https://perma.cc/M6NM-AJMV].

427 *Id.* at 34.

increases the cost of housing to the point where a household is severely cost burdened—paying more than 50% of its income—an infringement of the right to establish a home should be found.

For example, consider a hypothetical family with income of $36,000 per year that wants to live in a city which bars multifamily housing. It could afford to pay up to $1,499 in rent each month without being severely cost burdened; and apartments charging this level of rent could be profitably built in the city. But the minimum cost to rent a detached home in the city—the only type of housing available because of exclusionary zoning—is $2,400 per month; such a rental would consume 80% of the family's annual income. In a situation like this, the excess cost caused by exclusionary zoning severely burdens the right to establish a home.[428] Under the *Zablocki* framework, the added cost is so high that the family is "coerced into forgoing" the right.[429]

More broadly, exclusionary zoning ordinances infringe the right to obtain a home in a different sense—by depriving people of the freedom to live in the type of home they prefer. For instance, consider a city where the only permitted residential use is a conventional detached single-family house on a large lot. In this situation, the city has prohibited almost all the housing alternatives that most cities allow, including apartments, townhouses, condominiums, detached homes on smaller lots, and manufactured homes. An individual, couple, or family who can afford to live in a single-family home on a large lot might strongly prefer to live in a different type of home, such as an apartment or single-family home on a small lot. Under the *Zablocki* standard,[430] ordinances that drastically curtail the range of available housing choices directly and substantially interfere with the right to establish a home.

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428 The same approach applies to the purchase of a home. For example, one study of housing costs in Washington, D.C. showed that a lot occupied by a traditional single-family home could instead accommodate six condominium units. *See* JENNY SCHUETZ, BROOKINGS INST., TO IMPROVE HOUSING AFFORDABILITY, WE NEED BETTER ALIGNMENT OF ZONING, TAXES, AND SUBSIDIES 2–4 (2020), https://www.brookings.edu/wp-content/uploads/2019/12/Schuetz_Policy2020_BigIdea_Improving-Housing-Afforability.pdf [https://perma.cc/KP7N-MDLM]. In order to purchase the traditional home, a buyer would have to pay $1,000,000. *Id.* But a developer could profitably acquire that home, demolish it, build condominium units, and sell each unit for $579,472—which would substantially expand the number of people who could afford to buy a home. *Id.*

429 *See Zablocki*, 434 U.S. at 387.

430 *Id.*

C. Standard of Review: Intermediate Scrutiny

1. Overview

The Supreme Court has not clearly delineated the intermediate scrutiny test sometimes used in substantive due process cases, as discussed above.[431] The analysis below uses the test set forth in *Moore v. City of East Cleveland*—the case that comes closest to applying the fundamental right to establish a home.[432] In *Moore*, the Court held that "when the government intrudes on choices concerning family living arrangements" a court must "examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."[433]

The question is not whether a city may establish zones where the only uses are detached single-family houses on large lots. Such zoning is certainly permissible. A city that zones most of its residential land for such houses but also permits duplexes and other multifamily dwellings, houses on smaller lots, and manufactured homes in at least some areas has not engaged in exclusionary zoning. Rather, the question is whether total or near exclusion of all residential uses other than detached homes on large lots is constitutional.

Under the intermediate scrutiny test, the challenged law is not presumed to be constitutional. For instance, in *Moore* the Court placed the burden of justifying the ordinance on the city.[434] This approach is consistent with the Court's equal protection jurisprudence, which requires that the government bear the "demanding" burden of establishing that the law is constitutional.[435] Thus, a city cannot rely on speculation or surmise, but instead must present proof that the ordinance serves "important" interests.[436]

2. Prohibition of Multifamily Housing

Ordinances banning multifamily housing may be defended on the basis that such housing increases density—and consequently produces traffic, noise, and similar impacts.[437] Although the Supreme Court held in *Village of Euclid v. Ambler Realty Co.* that density concerns provided a rational basis for excluding apartment buildings from sin-

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431 *See supra* Section IV.D.

432 Moore v. City of E. Cleveland, 431 U.S. 494, 499–500 (1977).

433 *Id.* at 499.

434 *See id.* at 499–500.

435 *See* United States v. Virginia, 518 U.S. 515, 533 (1996).

436 *See id.*

437 *See* 3 AM. L. ZONING, *supra* note 407, § 22:13.

gle-family zones, it also acknowledged that "in a different environment [apartments] would be not only entirely unobjectionable but highly desirable."[438] Thus, *Euclid* suggests that entirely excluding multifamily housing from a city would not even meet the rational basis test.

In any event, all forms of development—commercial, industrial, recreational, and otherwise—produce density impacts. A city can hardly have a strong interest in avoiding density impacts if it permits them for other types of uses, especially when compared with the importance of the right to a home. Indeed, the vast majority of zoning ordinances expressly permit duplexes, apartments, and other forms of multifamily housing,[439] indicating that density concerns are not significant.[440]

Even assuming that avoiding density impacts is an important government interest, a ban on all forms of multifamily housing does not closely serve that interest. To paraphrase the Court's analysis in *Moore*, an exclusionary zoning ordinance could allow a family consisting of a "husband, wife, and unmarried children to live together [in a detached single-family home], even if the family contain[ed] a half dozen licensed drivers, each with his or her own car."[441] Yet, as the Court observed, such an ordinance could ban the construction of a duplex shared by an adult brother and sister, each "faithfully us[ing] public transportation."[442] Such an ordinance serves density-related goals "marginally, at best."[443]

Cities sometimes assert fiscal concerns to justify such bans. They argue, incorrectly, that multifamily housing does not generate enough tax revenue to pay for the city services that the inhabitants need.[444] As a Harvard University study concluded: "[R]ather than imposing a

438 Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

439 *See* NAT'L MULTIFAMILY HOUS. COUNCIL, THE HOUSING AFFORDABILITY TOOLKIT 37 (2021) (noting that 15% of the housing stock in the United States is multifamily rental housing).

440 The *Moore* Court noted that limiting density impacts was a "legitimate" goal but did not evaluate its relative importance. *See* Moore v. City of E. Cleveland, 431 U.S. 494, 499–500 (1977).

441 *Id.* at 500.

442 *Id.*

443 *Id.*

444 *See* Pat Dugan, *But What About Multiple Family Housing: Does it Pay for Itself?*, MUN. RSCH. & SERVS. CTR. OF WASH. (Mar. 1, 2012), https://mrsc.org/Home/Stay-Informed/MRSC-Insight/Archives/But-What-About-Multiple-Family-Housing-Does-it-Pay.aspx [https://perma.cc/X8R5-2W3D] ("It is commonly perceived that single family dwellings generate more tax revenue per unit . . . than multiple family developments generate. This is not a very accurate perception."). The *Moore* Court commented that "avoiding an undue financial burden" was a "legitimate" goal but did not assess its relative importance. *Moore*, 431 U.S. at 500.

greater burden on local governments, higher density developments like apartments are actually more fiscally prudent than traditional suburban sprawl."[445] Moreover, a city can readily raise taxes to fund these services if needed.[446] Local governments have financed their operations through taxation for centuries. Most cities across the nation have successfully surmounted any arguable fiscal challenges that these developments might pose. Even assuming that allowing duplexes or other types of multifamily housing might strain local finances, this concern is far less important than the right to a home.

For example, in *Southern Burlington County NAACP v. Township of Mount Laurel*,[447] the New Jersey Supreme Court utilized a heightened standard of review—based on state law—to invalidate an ordinance that prohibited all multifamily housing, despite the township's financial concerns.[448] It explained: "We have no hesitancy in now saying . . . that, considering the basic importance of the opportunity for appropriate housing for all classes of our citizenry, no municipality may exclude or limit categories of housing for that reason or purpose."[449]

Further, a ban on all forms of multifamily housing has only a "tenuous relation" to fiscal concerns.[450] For example, five adult family members could reside in a traditional single-family house, while only two people might live in a duplex, one per unit. Thus, the duplex adds only two people consuming government services, while the house adds five—a 250% increase.

A third potential claim is that multifamily housing will lower property values.[451] However, as scholars have observed, "[l]and values in most existing apartment areas are very high . . . [and] there is little evidence that an apartment per se will detract from the value of sur-

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445 MARK OBRINSKY & DEBRA STEIN, HARVARD UNIV. JOINT CTR. FOR HOUS. STUD., OVERCOMING OPPOSITION TO MULTIFAMILY RENTAL HOUSING 8 (2007), https://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/rr07-14_obrinsky_stein.pdf [https://perma.cc/Z8M9-EZWX]; *see also* Babcock & Bosselman, *supra* note 408, at 1062 ("[I]t is clear that multiple-family housing *per se* does not have any particular effect on municipal finance.").

446 *See* Nat'l Land & Inv. Co. v. Kohn, 215 A.2d 597, 610 (Pa. 1965) ("Zoning provisions may not be used . . . to avoid the . . . economic burdens which time and natural growth invariably bring.").

447 336 A.2d 713 (N.J. 1975).

448 *See id.* at 724–25.

449 *Id.* at 731.

450 *See* Moore v. City of E. Cleveland, 431 U.S. 494, 500 (1977) (noting that the ordinance had only a "tenuous relation" to the city's interests).

451 *See* 3 AM. L. ZONING, *supra* note 407, § 22:14.

rounding land."[452] Of course, in theory any new development might affect the value of nearby properties to some extent. For example, a new shopping center or factory might slightly lower the value of adjacent single-family homes; yet cities routinely approve developments like these, even if they are far more likely to reduce property values than, for example, a duplex. More broadly, property values fluctuate over time for many reasons. Concern that multiunit housing lowers these values is often mere speculation, based on fear rather than facts, and cannot outweigh the importance of the right to a home.

Finally, even if this were a strong state interest, any impact on the value of nearby houses can be mitigated by standard planning techniques, such as creating buffer zones between uses, installing landscaping and other visual screening, and requiring building designs that harmonize with single-family uses.[453] Accordingly, a complete ban on all multifamily dwellings serves this goal only marginally.

3. Large Lot Size Requirements

In *Euclid*, the Court observed that there was "no serious difference of opinion" about the validity of certain aspects of the ordinance—including the lot size requirements for single-family houses.[454] Because the ordinance only mandated minimum lot sizes between 700 and 5,000 square feet, it was reasonable to view them as measures to address density concerns.[455] By contrast, some modern ordinances demand a minimum size of one acre—more than eight times bigger than the largest *Euclid* lot—while others require two acres or more. As one authority concludes, these requirements do not even have a rational relationship to density concerns because they exceed "even the arguable needs of health, safety, and morals."[456] By definition, such density arguments cannot satisfy the more searching intermediate scrutiny test.

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452 Babcock & Bosselman, *supra* note 408, at 1067; *see also* OBRINSKY & STEIN, *supra* note 445, at 12 ("[M]ultifamily housing rental developments do not generally lower property values in surrounding areas.").

453 *See, e.g.*, Appeal of Girsh, 263 A.2d 395, 399 (Pa. 1970) ("Certainly [a city] can protect its attractive character by requiring apartments to be built in accordance with (reasonable) setback, open space, height, and other light-and-air requirements . . . ."); *cf.* Pinecrest Lakes, Inc. v. Shidel, 795 So. 2d 191, 193 (Fla. Dist. Ct. App. 2001) (involving requirement that portions of multifamily housing project use "compatible structure types" on land adjacent to single-family homes).

454 Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

455 *See id.* at 381–82.

456 1 AM. L. ZONING, *supra* note 407, § 7:20.

More commonly, large lot zoning is defended on the rather elusive basis that it preserves the "rural character" of the area. For example, in *Ybarra v. Town of Los Altos Hills*,[457] the Ninth Circuit held that requiring a one-acre lot met the rational basis test because it preserved "the town's rural environment."[458] But using a more demanding standard of review, the Pennsylvania Supreme Court invalidated a similar requirement in *National Land & Investment Co. v. Kohn*.[459] It explained:

> There is no doubt that many of the residents of this area are highly desirous of keeping it the way it is, preferring, quite naturally, to look out upon land in its natural state rather than on other homes. . . . [But] [t]his is purely a matter of private desire which zoning regulations may not be employed to effectuate.
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> . . . .
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> The . . . argument . . . is that the rural character of the area must be preserved. If the township were developed on the basis of this zoning, however, it could not be seriously contended that the land would retain its rural character—it would simply be dotted with larger homes on larger lots.[460]

Similarly, under intermediate scrutiny, the governmental interest in using large lot zoning to maintain rural character is weak at best, particularly when compared with the important interest underlying the right to a home.

Further, large lot zoning has only a tenuous connection with the goal of maintaining the rural character of a region. This goal is better served by allowing cluster zoning, by which housing units are grouped together as condominiums, townhouses, or homes on small lots—thus allowing rural areas to remain devoted to agricultural and other nonresidential uses.

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457 503 F.2d 250 (9th Cir. 1974).

458 *Id.* at 254.

459 215 A.2d 597 (Pa. 1965).

460 *Id.* at 611–12; *see also* C & M Devs., Inc. v. Bedminster Twp. Zoning Hearing Bd., 820 A.2d 143, 158 (Pa. 2002) (ordinance that mandated one-acre minimum lot size in rural area was not "attempting to preserve agriculture, but rather . . . improperly attempting to exclude people"); Hock v. Bd. of Supervisors, 622 A.2d 431, 435 (Pa. Commw. Ct. 1993) ("[M]aintaining the rural character of the township does not constitute a sufficient justification for the minimum lot requirement.").

4. Prohibition of Manufactured Homes

The modern successor to the mobile home is the "manufactured home." Under federal law, a manufactured home is a dwelling unit that is constructed in a factory—including electrical, heating, and plumbing systems—and then transported to a site where it is installed.[461] Congress has recognized that manufactured homes are a "significant resource for affordable homeownership and rental housing accessible to all Americans."[462] However, zoning ordinances in some cities prohibit the use of manufactured homes.[463]

Cities may argue that they have an interest in excluding manufactured homes due to aesthetics. Aesthetic concern is generally recognized as a rational basis for zoning regulation. But today "[w]ell-designed double-wide manufactured homes with conventional siding, roofing materials, and acceptable roof pitch are almost indistinguishable from traditional site-built homes of the same price and quality."[464] Moreover, ordinances often restrict manufactured homes to special zones where only those types of homes are permitted so that they are visually shielded from the public;[465] in this situation, aesthetic issues are irrelevant. Finally, any lingering aesthetic concerns can be addressed by regulating the appearance of these homes.[466]

Another possible claim is that manufactured housing will lower property values.[467] But the analysis above concerning the supposed

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461 *See* 42 U.S.C. § 5402(6) for a more detailed definition.

462 42 U.S.C. § 5401(a)(2). Manufactured housing provides over 6% of the national housing stock. Mandelker, *supra* note 410, at 235.

463 *See* Mandelker, *supra* note 410, at 237; *see also* CASEY J. DAWKINS, C. THEODORE KOEBEL, MARILYN CAVELL, STEVE HULLIBARGER, DAVID B. HATTIS & HOWARD WEISSMAN, CTR. FOR HOUS. RSCH., REGULATORY BARRIERS TO MANUFACTURED HOUSING PLACEMENT IN URBAN COMMUNITIES 19 (2011) (noting that 8% of survey respondents indicated that their jurisdictions excluded manufactured homes). In addition, some cities permit manufactured homes in special zones but bar them from single-family home zones; the analysis in this section applies equally to such ordinances.

464 Mandelker, *supra* note 410, at 239.

465 *See, e.g.*, OCALA, FLA., CODE § 122-287.

466 *See, e.g.*, Ga. Manufactured Hous. Ass'n v. Spalding Cnty., 148 F.3d 1304, 1307 (11th Cir. 1998) (citing Haves v. City of Miami, 52 F.3d 918, 923–24 (11th Cir. 1995)) (upholding zoning regulation requiring manufactured homes to be built with 4:12 roof pitch under rational basis test).

467 For example, in *Texas Manufacturers Housing Ass'n v. City of La Porte*, 974 F. Supp. 602 (S.D. Tex. 1996), the court used the rational basis test to reject a challenge to an ordinance barring manufactured homes from zones for single-family detached houses. *See id.* It noted the defendant's argument that such housing "may lead to a decrease in property values," even though there was no evidence supporting this conclusion. *See id.* at 606. It concluded, "Plaintiff has not satisfied its burden of negating every conceivable rational basis for the Ordinance's exclusion." *Id.* at 607.

impact of multifamily housing on values applies equally here.[468] Research tends to show that manufactured homes do not negatively affect the value of nearby properties.[469] As one scholar concludes "[w]ell-designed and well-maintained manufactured housing built to national standards should not have a negative effect on the value of neighboring property."[470]

Finally, one traditional objection to mobile homes and other early forms of manufactured housing was safety. For example, conventional homes are less likely to be affected by fire or tornadoes.[471] However, federal law has established the safety standards for manufactured homes in recent decades, thereby preempting local ordinances.[472] As a result, a city may not exclude manufactured homes based on safety concerns if they meet federal code requirements.[473]

D. Standard of Review: Strict Scrutiny

1. Overview

Under the strict scrutiny test, the government has the burden to prove that the law serves a compelling state interest and is narrowly tailored to obtain that objective.[474] The Supreme Court has never provided criteria for determining when a compelling state interest exists.[475] Its decisions certainly suggest that there must be a "truly vital interest."[476] For example, the Court has indicated that safeguarding human health,[477] maintaining medical standards,[478] ensuring proper care for children,[479] and winning a war[480] all qualify as compelling state interests. In order to show that the law is narrowly tailored, a city has

468 *See supra* notes 451–52 and accompanying text.

469 *See* Mandelker, *supra* note 410, at 237–38 (summarizing research studies). For instance, in *Anstine v. Zoning Bd. of Adjustment of York Twp.*, 190 A.2d 712, 717 (Pa. 1963), the Pennsylvania Supreme Court noted that the record showed that locating a mobile home in the zone at issue "will *enhance* the value of the surrounding property."

470 Mandelker, *supra* note 410, at 238–39.

471 *See, e.g.*, Torie Bosch, *How to Tornado-Proof Your Mobile Home*, SLATE (Nov. 8, 2005, 3:59 PM), https://slate.com/news-and-politics/2005/11/tornado-proofing-your-mobile-home.html [https://perma.cc/55EQ-ECNU] (discussing the risks of remaining in a manufactured home during a tornado).

472 *See* 42 U.S.C. § 5403(d).

473 *See, e.g.*, Scurlock v. City of Lynn Haven, 858 F.2d 1521, 1525 (11th Cir. 1988).

474 *See supra* text accompanying notes 397–98.

475 *See* Fallon, *supra* note 292, at 1321–22.

476 *See* CHEMERINSKY, *supra* note 102, at 817.

477 *See, e.g.*, Roe v. Wade, 410 U.S. 113, 154 (1973).

478 *Id.*

479 *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 388 (1978).

480 *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 219–20 (1944).

the burden of proving that there is no "alternative, less intrusive" method that could be used to satisfy the government interest.[481]

2. *Prohibition of Multifamily Housing*

The justifications offered for prohibiting multifamily housing—density, finances, and property value—cannot satisfy the intermediate scrutiny test, as discussed above. By definition, they also cannot meet the more demanding strict scrutiny test. Although these are all rational bases for regulation, it cannot be seriously argued that they are compelling state interests such as protecting human health, providing proper care for children, or winning a war.[482]

Moreover, these interests can be satisfied by less intrusive methods. Density concerns, for example, can be addressed by regulating the number of people who may live in each unit, rather than the types of housing units that are allowed.[483] City finance issues can easily be avoided by raising money through taxation. And basic planning techniques such as buffer zones, visual screening, and architectural design measures can ensure that multifamily housing projects do not impact property values.

3. *Large Lot Size Requirements*

Large lot size requirements are invalid under the intermediate scrutiny test, as discussed above, despite arguments based on density[484] and rural character.[485] Again, by definition, these interests are far less compelling than, for example, winning a war, and thus would not meet the strict scrutiny test.

In addition, less intrusive techniques can be used to preserve the rural character of a region. The local government could condemn development rights in the region,[486] rezone the area exclusively for agricultural use, or allow cluster zoning. All three approaches would be more effective than authorizing large homes on large lots.

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481 *See* CHEMERINSKY, *supra* note 102, at 817.

482 *See, e.g.*, Evans v. Romer, 882 P.2d 1335, 1345 (Colo. 1994) (preservation of fiscal resources is not a compelling state interest).

483 *Cf.* Moore v. City of E. Cleveland, 431 U.S. 494, 500–01 (1977) (explaining why ordinance was overbroad, based on number of household residents).

484 *See supra* notes 437–43, 456 and accompanying text.

485 *See supra* notes 457–60 and accompanying text.

486 *See* Nat'l Land & Inv. Co. v. Kohn, 215 A.2d 597, 611 (Pa. 1965) (suggesting condemnation and cluster zoning approaches).

4. Prohibition of Manufactured Homes

Just as the interests advanced to defend bans on manufactured homes do not satisfy the intermediate scrutiny standard, they are also insufficient under the strict scrutiny standard. Concern for aesthetics and property values do not constitute compelling state interests.[487]

Again, these concerns can be adequately addressed through alternative methods. A city can deal with aesthetic concerns by regulating the appearance, location, and landscaping for manufactured homes so that they easily blend in with traditional, single-family homes and other uses. The same techniques will address any possible impact on property values.

E. Summary

In sum, the exclusionary zoning techniques discussed above—prohibition of multifamily housing, large lot size requirements, and prohibition of manufactured homes—probably violate the fundamental right to establish a home.

Although the government interests typically advanced to justify these techniques admittedly meet the deferential rational basis test, they cannot satisfy the intermediate scrutiny test when weighed against the vital importance of the right to establish a home, particularly because the city has the burden of persuasion. Moreover, assuming *arguendo* that such an interest is strong, it is not closely served by the technique.

Nor can any of these techniques satisfy the strict scrutiny standard. Interests such as density, aesthetics, finances, rural character, and property value are simply not compelling state interests. And these techniques are not narrowly tailored to serve such interests.

Conclusion

For almost a century, the Supreme Court has acknowledged that the Due Process Clause encompasses the right to establish a home. But the right has rarely been used and remains underdeveloped, thereby contributing to the shortage of affordable housing. History, tradition, and logic compel the conclusion that the right to establish a home should be recognized as a fundamental right.

It is time to reassess the twentieth-century approach to residential zoning. The broad language of *Village of Euclid v. Ambler Realty Co.*

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487 *See, e.g.*, Neighborhood Enters., Inc. v. City of St. Louis, 644 F.3d 728, 737–38 (8th Cir. 2011) (aesthetic protection is not a compelling state interest).

was pressed into service to legitimize cities where only the wealthy can reside.[488] However, as Justice Stanley Mosk once declared, "total exclusion of people from a community is both immoral and illegal."[489] Exclusionary zoning unduly burdens the fundamental right to establish a home, and accordingly should be declared unconstitutional.

488 *See supra* notes 239–46, 406–12 and accompanying text.

489 Associated Homebuilders of the Greater Eastbay, Inc. v. City of Livermore, 557 P.2d 473, 497 (Cal. 1976) (Mosk, J., dissenting).