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Bring Americans Home: Establishing a Rights-Based Framework at the State Level

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ABSTRACT

Especially since the start of the COVID-19 pandemic, it has become increasingly apparent that the United States is experiencing a long-term crisis of insecure housing and homelessness. This Article argues that the federal programs in place and the patchwork of state laws regarding housing have not, and without significant reform, probably cannot alleviate the crisis. Instead, the United States should approach housing from a rights-centric viewpoint, in which individuals and families are acknowledged as owning the right to adequate housing, and thus they are empowered to enforce that right by law. The Article reviews federal housing policy and canvases state approaches to housing rights, with particular consideration of the international right to adequate housing. It argues that this federal system is unlikely to pivot to a rights-based housing framework, but that states have the power and incentive to implement the international norm of a right to adequate housing directly, including by accessing the available federal support systems.

I. INTRODUCTION

In 2021, the United States experienced an unparalleled rise in housing prices and a corresponding sharp decline in the availability of affordable housing.¹ The Federal Housing Finance Agency (FHFA) reported an 18.7%

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annual price increase in 2021,² marking the highest annual growth rate since 1987.³ Increasing numbers of Americans were priced out of the private residential market.⁴ The COVID-19 pandemic led to a severe global economic recession.⁵ As the economy continues to slow down in 2022, inflation in the United States has peaked at a 40-year high.⁶ Rental prices across the country have soared,⁷ while the supply of affordable rental units has shrunk.⁸ Nevertheless, rent assistance, public housing, and other

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¹ Jared Bernstein, et al., *Alleviating Supply Constraints in the Housing Market*, THE WHITE HOUSE (Sept. 1, 2021), <https://www.whitehouse.gov/cea/written-materials/2021/09/01/alleviating-supply-constraints-in-the-housing-market/> [<https://perma.cc/3H6R-GDY2>].

² Natalie Campisi & Jamie Young, *Housing Market Predictions 2022: Will Prices Drop in The Third Quarter?*, FORBES (June 10, 2022), <https://www.forbes.com/advisor/mortgages/real-estate/housing-market-predictions/> [<https://perma.cc/K93F-XJVV>].

³ Nicole Friedman, *U.S. Home-Price Growth Rose to Record in June*, WALL STREET J. (Aug. 31, 2021), <https://www.wsj.com/articles/u-s-home-price-growth-rose-to-record-in-june-11630414873> [<https://perma.cc/3RJ3-RHTY>].

⁴ Shelby D. Green, *Imagining A Right to Housing, Lying in the Interstices*, 19 GEO. J. ON POVERTY L. & POL'Y 393, 394 (2012) (“[T]he lack of affordable housing has reached worrisome proportions”).

⁵ *COVID-19 to Plunge Global Economy into Worst Recession Since World War II*, THE WORLD BANK (June 8, 2020), <https://www.worldbank.org/en/news/press-release/2020/06/08/covid-19-to-plunge-global-economy-into-worst-recession-since-world-war-ii> [<https://perma.cc/H8XQ-SP6J>].

⁶ Mike Madden & Rachel Siegel, *U.S. Policymakers Misjudged Inflation Threat Until It Was Too Late*, WASH. POST (May 30, 2022), <https://www.washingtonpost.com/us-policy/2022/05/31/inflation-economy-timeline/> [<https://perma.cc/6FRG-YKJX>].

⁷ Caty Borum Chattoo, et al., “*The Rent Is Too Damn High*”: *News Portrayals of Housing Security and Homelessness in the United States*, 24 MASS COMMUN. & SOC. 553, 553-575 (2021); see also Katherine Schaeffer, *Key Facts about Housing Affordability in the U.S.*, PEW RSCH. CTR. (Mar. 23, 2022), <https://www.pewresearch.org/fact-tank/2022/03/23/key-facts-about-housing-affordability-in-the-u-s/> [<https://perma.cc/YG23-LQDF>].

⁸ Maria Massimo, *Housing as a Right in the United States: Mitigating the Affordable Housing Crisis Using an International Human Rights Law Approach*, 62 B.C. L. REV. 273, 274 (2021) (noting that “[i]n recent years, a growing number of renters in this country have spent more than half of their income on rent, and the number of low-rent units has shrunk by approximately four million units, or seventeen percent, since 2011.”).

government support remain insufficient.⁹ Millions of Americans are inadequately housed.¹⁰ In particular, low- and moderate-income households are facing a housing affordability crisis.¹¹

Homelessness has also worsened; even emergency housing providers lack the necessary funding and other resources to meet the growing demand for their services, leaving ever more Americans with no stable shelter at all.¹² The demographic of people experiencing homelessness is no longer comprised mainly of persons with substance use disorders or mental illness.¹³ It also includes survivors of domestic violence, persons with

⁹ Anne Marie Smetak, *Private Funding, Public Housing: The Devil in the Details*, 21 VA. J. SOC. POL'Y & L. 1, 3 (2014); see also Massimo, *supra* note 8, at 274, 289.

¹⁰ William C. Tilburg, *Policy Approaches to Improving Housing and Health*, 45 J.L. MED. & ETHICS 90, 90–91 (2017); see also Jaime Raymond, et al., *Inadequate and Unhealthy Housing, 2007 and 2009*, CDC (Jan. 14, 2011), <https://www.cdc.gov/mmwr/preview/mmwrhtml/su6001a4.htm> [<https://perma.cc/92K6-4EP4>].

¹¹ Green, *supra* note 4, at 394 (noting that “[a]s housing becomes less affordable, it becomes less available. Households with the lowest incomes feel this crisis most acutely”); Katherine Schaeffer, *A Growing Share of Americans Say Affordable Housing is A Major Problem Where They Live*, PEW RSCH. CTR. (Jan. 18, 2022), <https://www.pewresearch.org/fact-tank/2022/01/18/a-growing-share-of-americans-say-affordable-housing-is-a-major-problem-where-they-live/> [<https://perma.cc/APP5-QP9V>] (“[M]ajority of adults living in lower-income households (57%) say availability of affordable housing is a major issue in their community, larger than the shares of those in middle- (47%) or upper-income households (42%) who say it is a major problem”).

¹² Maria Foscarnis, *Advocating for the Human Right to Housing: Notes from the United States*, 30 N.Y.U. REV. L. & SOC. CHANGE 447, 455 (2006) [hereinafter “Notes from the United States”]; KATHERINE LEVINE EINSTEIN & CHARLEY E. WILLISON, MAYORS AND AMERICA’S HOMELESSNESS CRISIS: 2021 MENINO SURVEY OF MAYORS 1, 2 (2021), <https://www.bu.edu/ioc/files/2022/01/2021-MSOM-Homelessness-Report.pdf> [<https://perma.cc/4Z4H-JEPQ>] (“[I]imited funding is a serious obstacle to effectively reducing local homelessness”).

¹³ S. Lynn Martinez, *An American Vision: The Right to Shelter*, 12 IN PUB. INT. 1, 1 (1992) (Homeless population “can no longer be classified as the drunken bum who has ‘chosen’ a life on the streets, and therefore, justifiably ignored by society. They are people fighting to survive.”) (“The homeless population is diverse, varying in age, gender, and color.”); The National Alliance to End Homelessness, *State of Homelessness: 2021 Edition*, <https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness-2021/> [<https://perma.cc/Z828->

disabilities, and other vulnerable individuals and families¹⁴ unable to afford private rental accommodation and without access to public housing.¹⁵

Historically, housing laws and policies in the United States have tended to focus on enabling home ownership,¹⁶ ensuring access to affordable housing, and more recently, eliminating discrimination.¹⁷ The worsening housing crisis, despite decades of such efforts, suggests that a new approach is needed. This Article argues that governments in the United States, especially state legislatures and courts, should recognize a right to housing as appurtenant to citizenship. This would provide a principled basis for courts to compel the engagement of state and federal agencies tasked with housing governance to reduce the incidence of homelessness in the United States.

T4VP] (noting that homeless Americans “lived in every state and territory, and they reflected the diversity of [the] country.”).

¹⁴ Massimo, *supra* note 8, at 288 (“The vulnerable group, such as, women, children, the elderly, and persons with disabilities—reevicted and left homeless”).

¹⁵ Morgan Chandegra, *And It’s Beginning to Snow*, 56 CAL. W. L. REV. 425, 427 (2020); *see also* CARTER FOUST, ET AL., THE HUMAN RIGHTS TO HOUSING AND THE UNITED STATES: SUBMISSION TO THE UN SPECIAL RAPPORTEURS ON THE RIGHT TO ADEQUATE HOUSING AND EXTREME POVERTY AND HUMAN RIGHTS 1, 4 (Nov. 2021), <https://www.ohchr.org/sites/default/files/2022-03/AmericanUniversityWashingtonDC.pdf> [<https://perma.cc/67JB-HA4K>].

¹⁶ Philip Halpern, *Creating Fair and Efficient Subsidies for Home Ownership*, J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 125, 125 (1995) (“Encouraging and facilitating home ownership have been central goals of our national housing policy since the 1930s.”); Jenny Schuetz, *Renting the American Dream: Why Homeownership Shouldn’t be a Prerequisite for Middle-class Financial Security* (Feb. 13, 2019), <https://www.brookings.edu/blog/up-front/2019/02/13/renting-the-american-dream-why-homeownership-shouldnt-be-a-pre-requisite-for-middle-class-financial-security/> [<https://perma.cc/L6Q8-2STL>] (“[H]ousing policy in the U.S. tilts the playing field in favor of homeownership rather than renting.”).

¹⁷ *See, e.g.*, Jennifer C. Johnson, *Race-Based Housing Importunities: The Disparate Impact of Realistic Group Conflict*, 8 LOY. J. PUB. INT. L. 97 (2007) (discussing racial discrimination in housing matters); *see also* *Your Right to Equal Housing*, STATE OF ILL. DEP’T OF HUM. RTS., https://www2.illinois.gov/dhr/FilingCharge/Documents/FH_SexualOrientation_LGBT_June2015.pdf [<https://perma.cc/RQ9P-7L4J>] (last visited Jan. 24, 2022) (Illinois focuses on equality in housing policy).

The Article proceeds in five parts. Part I introduces the housing and homelessness issues in the United States. Part II, under the aegis of international human rights norms, overviews the existing legal framework of federal and state law that governs housing rights in the United States. Part III examines the current approach to housing policy in the United States, finding that while federal efforts have enhanced access to housing, their lack of a rights-based grounding and the inconsistency of state approaches are not likely to resolve the homelessness crisis. Part IV acknowledges the prohibitive obstacles to establishing a federal right to adequate housing. It further proposes that states could address homelessness and improve housing stability through constitutional or legislative enactment, or judicial adoption of international norms, then buttress their policies with available federal support. Part V concludes that the United States should rebase its public housing policies on human rights. Doing so would greatly aid in resolving the country's long-term housing and homelessness crisis because the states are best placed to lead this transition.

II. THE RIGHT TO HOUSING IN THE UNITED STATES

The United States generally acknowledges the need to provide support to those experiencing homelessness or on its verge.¹⁸ Some “federal, state and local laws and programs” contain at least elements of a right to housing.¹⁹ However, federal entitlements to housing do not exist and states are only able to provide limited support to those in need.²⁰

¹⁸ Kristen David Adams, *Do We Need A Right to Housing?*, 9 NEV. L.J. 275, 303 (2009).

¹⁹ ANIL KALHAN & ELISABETH WICKERI, REPORT BY THE INTERNATIONAL HUMAN RIGHTS COMMITTEE OF THE NEW YORK CITY BAR ASSOCIATION—ADVANCING THE RIGHT TO HOUSING IN THE UNITED STATES: USING INTERNATIONAL LAW AS A FOUNDATION 8 (Feb. 2016), <https://www2.nycbar.org/pdf/report/uploads/20072632-AdvancingtheRighttoHousingIHR2122016final.pdf> [<https://perma.cc/8ZGE-WUAZ>]; see also Thomas Byrne & Dennis P. Culhane, *The Right to Housing: An Effective Means for Addressing Homelessness?*, 14 U. PA. J.L. & SOC. CHANGE 379, 386 (2011).

²⁰ Cheryl P. Derricotte, *Poverty and Property in the United States: A Primer on the Economic Impact of Housing Discrimination and the Importance of a U.S. Right to*

A. At the Federal Level

Federal law does not yet recognize a right to housing, in the Constitution or via legislation.²¹ The United States Constitution only protects civil and political rights²² such as freedom of speech²³ and trial by jury.²⁴ It does not recognize social and economic rights, such as food or housing.²⁵ Federal housing legislation grants the government discretion to assist persons in need,²⁶ but it does not go as far as recognizing a general right to housing.²⁷ This leaves federal agencies under no specific obligation to uphold housing rights.²⁸

Housing, 40 HOW. L.J. 689, 695 (1997) (noting that although “there is currently not a U.S. Constitutional Amendment that specifically mandates a right to housing (i.e., entitlement), there is a body of state law and legislative remedies that supports the need for a right to housing in the U.S.”); see also KALHAN & WICKERI, *supra* note 19 at 1.

²¹ Susan Neilson, *Right to Shelter Under the Connecticut Constitution*, 67 CONN. B.J. 441, 471 (1993) (noting that “there is no fundamental right to housing under existing federal law”).

²² *Notes from the United States*, *supra* note 12, at 447; Herman Schwartz, *The Wisdom and Enforceability of Welfare Rights as Constitutional Rights*, 8 HUM. RTS. BRIEF 2 (2001); Daniel J. Rearick, *Reaching Out to the Most Insular Minorities: A Proposal for Improving Latino Access to the American Legal System*, 39 HARV. C.R.-C.L. L. REV. 543, 559–60 (2004) (the U.S. Constitution only protects negative rights that “protect individuals from government interference.”).

²³ U.S. CONST. amend. I.

²⁴ U.S. CONST. amends. VI, VII.

²⁵ Maria Foscarinis, *Homelessness in America: A Human Rights Crisis*, 13 J. L. SOC’Y 515, 519 (2012) [hereinafter “*A Human Rights Crisis*”]; see also Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1, 3 (2006); Maria Foscarinis, *The Growth of A Movement for A Human Right to Housing in the United States*, 20 HARV. HUM. RTS. J. 35, 35–36 (2007) (“American legal framework has traditionally protected ‘negative’ liberties but not ‘positive’ rights.”).

²⁶ KALHAN & WICKERI, *supra* note 19, at 8–9 (“[T]here is no requirement that the assistance be at sufficient levels to meet basic needs such as housing.”).

²⁷ Philip D. Tegeler, *Housing Segregation and Local Discretion*, 3 J.L. & POL’Y 209, 214–15 (1994); Neilson, *supra* note 21, at 471 (“[T]here is no fundamental right to housing under existing federal law.”).

²⁸ Lisa T. Alexander, *Occupying the Constitutional Right to Housing*, 94 NEB. L. REV. 245, 257 (2015).

Federal courts have declined to take a rights-based approach to housing.²⁹ Although it has been argued that a broad reading of the Constitution could support an inherent right to housing,³⁰ the United States Supreme Court (“the Supreme Court”) foreclosed the possibility, declaring that there is no constitutional right to housing.³¹ In *Lindsey v. Normet* (1972),³² the landmark case that denied federal constitutional protection for the right to housing, the Supreme Court held,

We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantees of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement.³³

The Court explicitly denied a judicial role in ensuring a right to adequate housing, deferring to the prerogatives of the states and their legislatures.³⁴

Housing is not the only social or economic right the Supreme Court rejects.³⁵ For example, *San Antonio Independent School District v.*

²⁹ Martinez, *supra* note 13, at 6; see also Byrne & Culhane, *supra* note 19, at 380–81.

³⁰ KALHAN & WICKERI, *supra* note 19, at 8–9 (“[A]rguments have been made that certain language in the Constitution is broad enough to encompass a right to adequate housing.”).

³¹ Massimo, *supra* note 8, at 287 (“The Supreme Court of the United States expressly declared that citizens did not enjoy a constitutional right to housing in 1972 in *Lindsey v. Normet*.”).

³² *Lindsey v. Normet*, 405 U.S. 56, 58–59 (1972).

³³ *Id.*

³⁴ *Id.* at 74 (“Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.” The Supreme Court first clarified that “state legislatures . . . are responsible for assuring adequate housing through state-level legislation.”); see also Massimo, *supra* note 8, at 287.

³⁵ Michele Gilman, *A Court for the One Percent: How the Supreme Court Contributes to Economic Inequality*, UTAH L. REV. 389, 401 (2014) (arguing that “the Supreme Court

Rodriguez (1972)³⁶ refused to recognize a fundamental right to education under the federal Constitution.³⁷ *DeShaney v. Winnebago County Department of Social Services* (1989) denied a child's social security and welfare rights.³⁸ In *Harris v. McRae* (1980),³⁹ the Court also denied the right to medical care by rejecting a claim for medically necessary abortions under the Medicaid program; it held that the government is under no obligation to provide funds for certain medical expenses for the indigent.⁴⁰ Other federal courts are also reluctant to interpret the Constitution and legislation to establish a positive right to housing for all Americans.⁴¹ To date, federal courts have only acted to prohibit housing discrimination against certain protected classes of persons. For example, in *Jones v. Mayer Co.* (1968), the Supreme Court held that federal law prohibits racial discrimination in the sale or rental of property as part of a negative right to freedom from discrimination.⁴²

has contributed to economic inequality by denying social or economic rights for people at the bottom of the income scale.”).

³⁶ *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28–29 (1972); see also Craig J. Tiedemann, *Taking A Closer Look at Massachusetts Public School Expulsions: Proposing an Intermediate Standard of Judicial Review After Doe v. Superintendent of Schools*, 31 NEW ENG. L. REV. 605, 614 (1997).

³⁷ Jenna MacNaughton, *Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune*, 3 U. PA. J. CONST. L. 750, 750 (2001); see also Neilson, *supra* note 21, at 472.

³⁸ *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 189–90 (1989); see also Gilman, *supra* note 35, at 402.

³⁹ *Harris v. McRae*, 448 U.S. 297, 316 (1980) (no constitutional entitlement to government funds to exercise freedom of procreative choice).

⁴⁰ Neilson, *supra* note 21, at 472.

⁴¹ Alexander, *supra* note 28, at 257.

⁴² *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (holding that federal law prohibits racial discrimination in the sale or rental of property); see also Alexander, *supra* note 28, at 257 (federal courts have only protected “a negative right to freedom from discrimination in the attainment of housing on the basis of protected-class status.”).

B. At the State Level

1. Constitutions and Legislation

In contrast to the Supreme Court's reluctance to find a federal right to housing, states have demonstrated a degree of commitment to implementing a rights-based approach.⁴³ In the aggregate, their progress in addressing homelessness and housing stability issues has started to exceed the successes in federal housing programs.⁴⁴ In particular, many states have acknowledged the right to housing as a fundamental right in their constitutions in an explicit or implicit form. The constitutions of New York and Massachusetts contain provisions with express references to housing. Most other states impliedly protect housing rights through broader human rights, such as to social welfare.

The Constitution of New York State imposes an affirmative duty to protect the right to housing.⁴⁵ Article XVIII, adopted in 1938, provides for "low rent housing and nursing home accommodations for persons of low income as defined by law, or for the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas, or for both such purposes, and for recreational and other facilities incidental or appurtenant."⁴⁶ New York is also one of the first few states in the United States to empower its courts to require public authorities to grant access to shelter for homeless persons.⁴⁷

Similarly, the Massachusetts Constitution recognizes the right to shelter at all times, including "during time of war, public exigency, emergency or distress."⁴⁸ Article XLVII establishes "the providing of shelter," along with

⁴³ Derricotte, *supra* note 20; *see also* Massimo, *supra* note 8, at 295.

⁴⁴ KALHAN & WICKER, *supra* note 19, at 13.

⁴⁵ N.Y. CONST. art. XVIII.

⁴⁶ *Id.*

⁴⁷ Bradley R. Haywood, *The Right to Shelter as a Fundamental Interest Under the New York State Constitution*, 34 COLUM. HUM. RTS. L. REV. 157 (2002) (noting that New York has a "judicially enforceable obligation to provide shelter to the homeless.").

⁴⁸ MASS. CONST. art. XLVII.

“[t]he maintenance and distribution [...] of a sufficient supply of food and other common necessities of life,”⁴⁹ as critical “public functions.”⁵⁰ As such, Massachusetts and its cities and towns “may provide [the common necessities of life] for their inhabitants [...]”⁵¹ Chapter 450 of the Acts of 1983⁵² subsequently authorized “the right to shelter” mandate to protect low-income Massachusetts families with children under twenty-one years old.⁵³ This mandate provides eligible families with safe and secure accommodation that is “sufficient for meeting both the physical and psychological needs typically met in home environments;”⁵⁴ however, it does not apply to homeless individuals.⁵⁵

Some states⁵⁶ protect housing rights through broader human rights enshrined in state constitutions.⁵⁷ According to the National Law Center On

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See generally Nancy K. Kaufman, *State Government's Response to Homelessness: The Massachusetts Experience, 1983-1990*, 8 N. ENGL. J. PUB. POL'Y 471, 471–82 (1992).

⁵³ Margaret A. Leonard & Stacy Randell, *Policy Shifts in the Massachusetts Response to Family Homelessness*, 8 N. ENGL. J. PUB. POL'Y 483, 486–87 (1992); see also Laticia Walker-Simpson, *Life Raft or Quicksand?: Emergency Assistance's Role in Greater Boston's Homelessness Crisis*, 64 BOSTON BAR ASS'N BLOG (2020), <https://bostonbar.org/journal/life-raft-or-quicksand-emergency-assistances-role-in-greater-bostons-homelessness-crisis/> [perma.cc/PS5Z-9MV5] (Chapter 450 imposes “strict threshold eligibility requirements for applicants to be eligible for EA Shelter: families must be Massachusetts residents; at least one person must have qualifying immigration status; the family must have a qualifying child under age 21, and the overall household income must be at or below 115% of the federal poverty level.”).

⁵⁴ Chandegra, *supra* note 15, at 452 (quoting Act Promoting Housing and Support Services to Unaccompanied Homeless Youths, 2014 Mass. Legis. Serv. Ch. 450, § 16W(a) (H.B. 4517) (West) (effective Apr. 6, 2015)).

⁵⁵ *Id.* at 451.

⁵⁶ NAT'L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING RIGHTS FOR ALL: PROMOTING AND DEFENDING HOUSING RIGHTS IN THE UNITED STATES 1, 128 (2011), https://homelesslaw.org/wp-content/uploads/2018/10/Human_Right_to_Housing_Manual.pdf (including Alabama, Alaska, California, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Michigan, Mississippi, Missouri, New York, Nevada, North Carolina, New Mexico, Oklahoma, Rhode Island, South Carolina, Texas, West Virginia, and

Homelessness & Poverty (now “National Homelessness Law Center”), at least “twenty-five state constitutions contain provisions that reference and address poverty [...] and public welfare.”⁵⁸ For example, the Constitution of Alabama requires counties to “make adequate provision for the maintenance of the poor.”⁵⁹ The Kansas Constitution mandates counties to “provide [...] for those inhabitants who, by reason of age, infirmity or other misfortune, [claim] upon the aid of society.”⁶⁰ Oklahoma’s Constitution also includes a welfare provision to support persons in need, which is essentially identical to the Kansas provision.⁶¹

Other states alleviate homelessness and housing instability through legislation.⁶² Similar to Massachusetts’ passage of Chapter 450 of the Acts of 1983 and its state-wide “right to shelter” mandate, Illinois amended its Human Rights Act⁶³ to uphold housing rights.⁶⁴ Unlike Massachusetts’ family-centric approach, Illinois’ amendment pays particular attention to equality in housing policy by prohibiting discrimination in the rental or sale of real property.⁶⁵ Other state legislatures have shown less enthusiasm for a rights-based approach. The California Legislature made several attempts to enact a legal right to shelter with the ultimate goal of broadening it to “a

Wyoming. In addition, Montana’s constitution authorizes but does not require aid to the poor.).

⁵⁷ KALHAN & WICKERI, *supra* note 19, at 13 (“States have taken multiple approaches with respect to their recognition of the right to adequate housing.”); *see also* Neilson, *supra* note 21, at 451.

⁵⁸ NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 56; *see also* KALHAN & WICKERI, *supra* note 19, at 13.

⁵⁹ ALA. CONST. art. IV, § 88.

⁶⁰ KAN. CONST. art. 7, § 4. (requiring the state to “participate financially in such aid and supervise and control the administration thereof.”).

⁶¹ OKLA. CONST. Art. XVII, § 3 (“The several counties of the State shall provide, as may be prescribed by law, for those inhabitants who, by reason of age, infirmity, or misfortune, may have claims upon the sympathy and aid of the county.”).

⁶² Massimo, *supra* note 8, at 291.

⁶³ 775 ILSC 5/1-103 (2019).

⁶⁴ Massimo, *supra* note 8, at 291–92.

⁶⁵ STATE OF ILL. DEP’T OF HUM. RTS, *supra* note 17.

more expansive new right to housing.”⁶⁶ The bills failed to pass, most recently in 2020⁶⁷ and 2022.⁶⁸ However, Oregon⁶⁹ and California⁷⁰ enacted state-wide rent control laws in 2019.

Municipal and county regulations can also protect against homelessness. For example, Dane County in Wisconsin recognized housing rights by passing a resolution stressing the county’s fair housing obligations stemming from international norms, such as CERD.⁷¹ Some localities have established rent control laws or regulations to prevent rent spikes.⁷² Takoma Park in Maryland,⁷³ Newark in New Jersey,⁷⁴ and New York City, and others introduced some form of residential rent control regulations.⁷⁵ At the beginning of the COVID-19 pandemic, many states and municipalities also imposed a temporary freeze on residential rent increases and a temporary ban on evictions.⁷⁶

⁶⁶ Gary Blasi, *Legal Right to Shelter*, L.A. LAW. 30, 32 (Dec. 2019), <http://probonoweb.lalawlibrary.org/downloads/Zoom/MCLE%20Panel%20Discussion%20Homelessness%20Legal%20Realities%20and%20Options/Blasi%20Right%20to%20Shelter%20LA%20Lawyer%20Magazine.pdf> [<https://perma.cc/PL25-PJTV>].

⁶⁷ CA AB-2405 Right to Safe, Decent, and Affordable Housing (Cal. 2019–2020); *see also* Massimo, *supra* note 8, at 292.

⁶⁸ CA AB-1372 Right to Temporary Shelter (Cal. 2021–2022).

⁶⁹ ORS Title 10 Chapter 90 – Residential Landlord-Tenant (Or.), https://www.oregonlegislature.gov/bills_laws/ors/ors090.html [<https://perma.cc/K94Y-HTKR>].

⁷⁰ CA AB-1482 The Tenant Protection Act of 2019 (Cal. 2019).

⁷¹ KALHAN & WICKERI, *supra* note 19, at 14.

⁷² *Id.* at 15.

⁷³ Takoma Park’s Rent Stabilization Law, Chapter 6.20 (Md. 1981); *see also* City of Takoma Park, *Rent Stabilization*, <https://takomaparkmd.gov/government/housing-and-community-development/rental-housing-programs/rent-stabilization/> [<https://perma.cc/U9M2-R624>] (last visited Jan. 30, 2022).

⁷⁴ City of Newark, *Rent Control*, CITY OF NEWARK, <https://www.newarknj.gov/departments/rentcontrol> [<https://perma.cc/V7RF-ZP4E>] (last visited Jan. 30, 2022).

⁷⁵ New York State Home and Community Renewal, *Rent Control*, N.Y. STATE, <https://hcr.ny.gov/rent-control> [<https://perma.cc/5V7T-23WU>] (last visited Jan. 30, 2022); *see also* KALHAN & WICKERI, *supra* note 19, at 15 (“In 2011, 47% of New York City’s total rental housing stock was rent-regulated”).

⁷⁶ Massimo, *supra* note 8, at 289.

2. Jurisprudence at the State Level

Some states have judicially recognized a right to housing.⁷⁷ Many others have yet to do so. Large discrepancies exist between state approaches, and criticism has arisen over ineffective implementation.⁷⁸ The New York State Constitution provided a foundation for that state's courts to construct a right to housing that resembles the international norm of adequate housing for all; however, absent a grounding provision such as New York's Article XVIII, state courts outside New York have varied in their willingness to recognize a right to housing. Public interest litigation has predominantly centered on the constitutionality of criminalizing homelessness,⁷⁹ rather than on proactively securing access to housing.

Accordingly, New York courts have demonstrated a strong commitment to strengthening the protection of the right to housing. *Callahan v. Carey* (1979)⁸⁰ was a landmark case affirming a right to shelter in New York.⁸¹ In issuing a preliminary injunction, the court indicated that a shortage of shelters and substandard shelter conditions in New York City⁸² constituted a violation of the housing right enshrined in the state constitution.⁸³ The resultant consent decree ("the Callahan Consent Decree") requires New

⁷⁷ *Id.* at 291 ("To compensate for the absence of a federal right to housing, several cities and states have taken on the challenge of mitigating the affordable housing crisis on the local level by passing legislation and ratifying judicial decisions that promote housing as a right.").

⁷⁸ Neilson, *supra* note 21, at 456.

⁷⁹ Jamie Michael Charles, "America's Lost Cause": *The Unconstitutionality of Criminalizing Our Country's Homeless Population*, 18 B.U. PUB. INT. L.J. 315, 323 (2009).

⁸⁰ *Callahan v. Carey*, N.Y. L.J., at 10 (Dec. 11, 1979) (Sup. Ct. N.Y. County Dec. 5, 1979), aff'd, 118 A.D.2d 1054, 499 N.Y.S.2d 567 (1st Dept. 1986).

⁸¹ John Barlow Weiner, *Institutional Reform Consent Decrees as Conservers of Social Progress*, 27 COLUM. HUM. RTS. L. REV. 355 (1996); *see also* Martinez, *supra* note 13, at 7 (noting that *Callahan v. Carey* was "the first case concerning a right to shelter . . . brought in the New York Supreme Court.").

⁸² Dennis D. Hirsch, *Making Shelter Work: Placing Conditions on an Employable Person's Right to Shelter*, 100 YALE L.J. 491, 494 (1990).

⁸³ Haywood, *supra* note 47, at 165.

York State and New York City to provide shelter meeting minimum standards⁸⁴ for homeless men.⁸⁵ *Eldredge v. Koch* (1983)⁸⁶ followed, affirming a fundamental right to shelter for homeless women on equal protection grounds.⁸⁷ *McCain v. Koch* (1986)⁸⁸ further extended this right to encompass families.⁸⁹ In effect, these judicial interpretations of the state constitution have resulted in the recognition in New York of a universal right to adequate housing in line with international norms.

Application of the principle that adequate housing should be a universal right is more challenging for courts in states that lack an explicit constitutional basis for it. For example, in *L.T. v. New Jersey Dep't of Hum. Servs., Div. of Fam. Dev.* (1993), the Superior Court of New Jersey refused to uphold the right to housing under its state constitution in spite of strong advocacy for reducing homelessness; it ruled that the “[s]tate Constitutional provision which guarantees right to life and liberty, right to acquire and possess property, and right to pursue and obtain safety and happiness does not impose upon state government affirmative obligation to finance housing

⁸⁴ Donna Mascari, *Homeless Families: Do They Have A Right to Integrity?*, 35 UCLA L. REV. 159, 174–75 (1987).

⁸⁵ Massimo, *supra* note 8, at 293.

⁸⁶ *Eldredge v. Koch*, 459 N.Y.S.2d 960, 961 (Sup. Ct. 1983) (“[W]omen were constitutionally entitled to treatment equal to that accorded to men is so obviously meritorious that it scarcely warranted discussion.”).

⁸⁷ Patti E. Phillips, *Adding Insult to Injury: The Lack of Medically-Appropriate Housing for the Homeless HIV-III*, 45 U. MIAMI L. REV. 567, 588 (1991); *see also* Neilson, *supra* note 21, at 455.

⁸⁸ *McCain v. Koch*, 502 N.Y.S.2d 720, 728 (App. Div. 1986).

⁸⁹ Leonard Koerner, *Institutional Reform Litigation*, 53 N.Y.L. SCH. L. REV. 509, 512 (2009) (“[T]he appellate division held that the homeless plaintiffs’ families were entitled to emergency shelter.”); *see also* KALHAN & WICKERI, *supra* note 19, at 14–15; *see also* Neilson, *supra* note 21, at 455 (“[T]he court cited state constitutional text, constitutional history, social conditions and New York precedent to support the proposition that the New York Constitution imposed a ‘positive duty that was not a matter of legislative grace’ to provide shelter for homeless families.”).

for homeless persons.”⁹⁰ Similarly, a Delaware court denied the right to housing under the Delaware Constitution.⁹¹ In *Tilden v. Hayward* (1990),⁹² the Delaware Court of Chancery held that “nothing in [the Delaware] Constitution’s language, its history, or in relevant decisions of the Delaware Supreme Court supports a claim for affirmative government obligations”⁹³ to address homelessness; homelessness services and support were merely “a moral imperative with no legal basis” and “beyond judicial capacity.”⁹⁴ There are exceptions. In *Hodge v. Ginsberg* (1983), the West Virginia Supreme Court of Appeals interpreted WV Code § 9-6, an adult protective services provision, and upheld the right to shelter in West Virginia.⁹⁵ The Court decided that “[t]he lack of shelter [...] poses a substantial and immediate risk of death or serious permanent injury to an incapacitated adult.”⁹⁶ It further ordered the Department of Welfare (now the Department of Health and Human Resources) to provide emergency shelter to indigent homeless individuals in the state.⁹⁷

The relative dearth of state case law testing the existence of a right to housing may reflect limited resources and more urgent client needs on the part of legal advocates for housing rights. In most states, litigation

⁹⁰ *L.T. v. New Jersey Dep’t of Hum. Servs., Div. of Fam. Dev.*, 264 N.J. Super. 334, 624 A.2d 990 (App. Div.), rev’d, 134 N.J. 304, 633 A.2d 964 (1993); *see also* Neilson, *supra* note 21, at 454.

⁹¹ *See* Neilson, *supra* note 21, at 454.

⁹² *Tilden v. Hayward*, No. 11297, 1990 Del. Ch. LEXIS 140, (Del. Ch. 1990).

⁹³ Neilson, *supra* note 21, at 453 (citing *Tilden v. Hayward*, No. 11297, 1990 Del. Ch. LEXIS 140, (Del. Ch. 1990)).

⁹⁴ *Id.*, at 453–54 (citing *Tilden v. Hayward*, No. 11297, 1990 Del. Ch. LEXIS 140, (Del. Ch. 1990)); *see also* Catherine J. Ross, *The Failure of Fragmentation: The Promise of a System of Unified Family Courts*, 32 FAM. L. Q. 3, 3–30 (1998) (“[T]he Chancery Court of Delaware held that homeless plaintiffs had no cause of action in seeking declaratory and injunctive relief.”).

⁹⁵ *Hodge v. Ginsberg*, 172 W.Va. 17, 21–22, 303 S.E.2d 245, 251 (1983).

⁹⁶ *Id.* at 23.

⁹⁷ West Virginia Department of Health and Human Resources, *Social Services Manual - Homeless Services Policy* 7–8 (2016), <https://dhhr.wv.gov/bcf/policy/Documents/Homeless%20Policy.pdf> [<https://perma.cc/8ULG-XJN3>].

pertaining to homelessness focuses on challenging its criminalization.⁹⁸ In this area, state courts tend to afford legislatures considerable leeway. Courts generally uphold laws that criminalize aspects of homelessness,⁹⁹ such as in *Greater Cincinnati Coalition for the Homeless and Charles Gooden v. City of Cincinnati*¹⁰⁰ and *Tobe v. City of Santa Ana*.¹⁰¹ The absence of a constitutional right to housing has left advocates to challenge such laws on other bases, with at least two cases, *Pottinger v. City of Miami (1992)*¹⁰² and *Martin v. City of Boise (2019)*,¹⁰³ finding a violation of “the Eighth Amendment’s prohibition against cruel and unusual punishment”¹⁰⁴ rather than a violation of a right to housing. However, these two cases may show the limited possibilities for defending the rights of homeless persons without first establishing that a basic right to housing exists.¹⁰⁵

C. An International Right to Housing?

International law acknowledges the existence of housing rights.¹⁰⁶ Several international instruments have explicitly recognized a right to adequate housing. For example, the Universal Declaration of Human Rights (UDHR)¹⁰⁷ proclaims, “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family,

⁹⁸ E.g., Ben A. McJunkin, *Homelessness, Indignity, and the Promise of Mandatory Citations for Urban Camping*, 52 ARIZ. ST. L.J. 955, 955 (2020) (noting that “[t]o be homeless in Arizona is to be a criminal”); see also Charles, *supra* note 79, at 323.

⁹⁹ See Charles, *supra* note 79, at 323.

¹⁰⁰ *Greater Cincinnati Coal. for the Homeless and Charles Gooden v. City of Cincinnati*, 56 F.3d 710 (6th Cir. 1995).

¹⁰¹ *Tobe v. City of Santa Ana*, 892 P.2d 1145 (Cal. 1995).

¹⁰² *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992).

¹⁰³ *Martin v. City of Boise*, 920 F.3d 584, 616-18 (9th Cir.), cert. denied sub nom. 140 S. Ct. 674 (2019).

¹⁰⁴ *Id.* at 618.

¹⁰⁵ See McJunkin *supra* note 98, at 977-78.

¹⁰⁶ See *Notes from the United States*, *supra* note 12, at 448; see generally JESSIE HOHMANN, *THE RIGHT TO HOUSING: LAW, CONCEPTS, POSSIBILITIES* 1-286 (2014).

¹⁰⁷ G.A. Res. 217 (III) A, *The Universal Declaration of Human Rights* (Dec. 10, 1948).

including [...] housing.”¹⁰⁸ The Declaration on Social Progress and Development (1969) affirms as a United Nations (UN) aim the universal provision of “adequate housing and community services,” particularly for “low-income groups and large families,”¹⁰⁹ and advocates the adoption of low-cost housing programs to achieve it.¹¹⁰ The International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966),¹¹¹ a foundational UN human rights treaty, mandates states party to “take appropriate steps to ensure the realization of” the right to housing, as a component of an adequate standard of living.¹¹²

Collectively, the UN human rights treaties provide strong protection against discriminatory denial of housing rights. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (1969) requires states party to “prohibit and to eliminate racial discrimination in all its forms,” including with respect to housing.¹¹³ Under the Convention on the Rights of the Child (CRC) (1989), states guarantee an adequate standard of living for children and “within their means” to provide support programs as necessary to enable parents and guardians to fulfil this right “particularly with regard to nutrition, clothing and housing.”¹¹⁴ The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979)¹¹⁵ lists “adequate living conditions, particularly in relation to housing” and other basic

¹⁰⁸ *Id.* at art. 25.1.

¹⁰⁹ Declaration on Social Progress and Development, Dec. 11, 1969, art. 10, GAOR ¶ f, A RES_2542 (XXIV).

¹¹⁰ *Id.* at art. 18, ¶ (d).

¹¹¹ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

¹¹² *Id.* at art. 11, ¶ (1).

¹¹³ G.A. Res. 2106 (XX), article 5(e)(iii), International Convention on the Elimination of All Forms of Racial Discrimination, (Dec. 21, 1965) [hereinafter *ICERD*].

¹¹⁴ United Nations Convention on the Rights of the Child art. 27, Nov. 20, 1989, 1577 U.N.T.S. 3.

¹¹⁵ United Nations Convention on the Elimination of All Forms of Discrimination Against Women art. 12 (2), Dec. 18, 1979, 1249 U.N.T.S. 13.

infrastructure, as among the rights that states must “ensure to” women in rural regions.¹¹⁶ The Convention on the Rights of Persons with Disabilities (CRPD) (2007) recognizes the right to an adequate standard of living, including adequate housing, for persons with disabilities.¹¹⁷

To date, the United States has signed the UDHR, the ICESCR, the ICERD, the CEDAW, the CRC and the CRPD.¹¹⁸ It has ratified the ICERD, consenting to be legally bound by this treaty.¹¹⁹ Signing an international treaty pending ratification still requires the signatory state to refrain from acting against the treaty’s object and purpose.¹²⁰ American courts, state or federal, can read into the United States’ signature of the CEDAW and CRC, and especially the ICESCR, an intention for the United States to at least not act against the treaty’s purpose.¹²¹ By participating in these agreements, the United States has committed to use its best efforts to ensure universal access to adequate housing, and to do so without discrimination and while prioritizing the needs of vulnerable persons. The UDHR, as an unopposed resolution of the General Assembly instigated by the United States, further evidences an American recognition of an international right to housing.

¹¹⁶ *Id.* at art. 14, ¶ (2)(h) (states party must “take all appropriate measures to eliminate discrimination against women in rural areas . . . , and ensure women “enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications”).

¹¹⁷ United Nations Convention on the Rights of Persons with Disabilities art. 28(1), Jan. 24, 2007, 2515 U.N.T.S. 3.

¹¹⁸ United Nations Human Rights Office of the High Commissioner, *Ratification of 18 International Human Rights Treaties*, [https://indicators.ohchr.org/\[https://perma.cc/ZCM4-HXCU\]](https://indicators.ohchr.org/[https://perma.cc/ZCM4-HXCU]) (last visited Feb. 2, 2022).

¹¹⁹ *Id.* (by ratifying a treaty, states assume legal obligations under international law, and they become accountable to their citizens for respecting, protecting, and fulfilling human rights).

¹²⁰ Vienna Convention on the Law of Treaties art. 18(a), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

¹²¹ See generally, Stephen P. Mulligan, *International Law and Agreements: Their Effect upon U.S. Law* (Sept. 19, 2018), <https://sgp.fas.org/crs/misc/RL32528.pdf> [https://perma.cc/B2ZA-PG5Z].

Notwithstanding this recognition, the reality of housing policy in the United States does not accord with a rights-based approach to housing.

III. THE REALITY OF HOUSING RIGHTS IN THE USA: PIECEMEAL AND PATCHWORK

The United States takes a piecemeal approach to homelessness. The Supreme Court and other federal courts have declined to find a constitutional or other right to housing.¹²² Federal spending on housing support is often ad hoc, due to the absence of effective federal laws to prevent homelessness, or tied to housing programs that lack a specific mandate to focus on homelessness.¹²³ The failure of the federal government to undertake a leadership role in combatting homelessness has left states to their own devices.¹²⁴ Some states take a proactive approach to provide shelter and housing assistance to the needy, while others only make a minimal commitment to reduce homelessness. State legislation and judicial decisions across the country are inconsistent and limited in addressing homelessness.¹²⁵

A. Federal Housing Legislation

Instead of stating a right to housing, federal legislation and policy from the New Deal era to the 1960s sought to increase the supply of affordable housing and to enable lower-income Americans to buy homes. It also reflected the policy aims of applying Keynesian stimulus to create wealth

¹²² Massimo, *supra* note 8, at 287; *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (the Supreme Court noted that “state legislatures . . . are responsible for assuring adequate housing through state-level legislation”).

¹²³ John Bartlett, “*Step by Step the Longest March Can Be Won*”: *The Struggle to Define Housing as a Human Right*, 17 PUB. INT. L. REP. 277, 279 (2012); *see also* KALHAN & WICKERI, *supra* note 19, at 25 (“[T]he United States has attempted over time to ensure the welfare of its citizens through ad hoc housing programs and state laws.”).

¹²⁴ KALHAN & WICKERI, *supra* note 19, at 15.

¹²⁵ *Id.* at 25.

and of limiting access to wealth based on race.¹²⁶ The 1934 National Housing Act (NHA), the United States' first legislation to address housing,¹²⁷ focused on making housing more affordable and mortgages more accessible to reduce the foreclosure rate during the Great Depression.¹²⁸ It also established the Federal Housing Administration (FHA) to facilitate home financing and to create jobs in the construction industry.¹²⁹ The NHA was designed to help white and middle-income Americans;¹³⁰ it essentially excluded African Americans from its programs.¹³¹ The Housing Act of 1937¹³² established the nation's first framework for public housing.¹³³ Under this Act, the federal government provided financial assistance to local housing authorities upon request "for the elimination of unsafe and unsanitary housing conditions, for the eradication of slums, for the provision of decent, safe, and sanitary dwellings for families of low income, and for the reduction of unemployment and the stimulation of business activity."¹³⁴ However, the 1937 Act depended for its implementation on a complex supporting

¹²⁶ See generally John F. Cogan et al., *New Keynesian Versus Old Keynesian Government Spending Multipliers*, 34 J. ECON. DYN. & CONTROL 281, 281–95 (2010).

¹²⁷ Kevin Fox Gotham, *Racialization and the State: The Housing Act of 1934 and the Creation of the Federal Housing Administration*, 43 SOCIO. PERSP. 291, 291–317 (2000).

¹²⁸ Peter M. Carrozzo, *A New Deal for the American Mortgage: The Home Owners' Loan Corporation, the National Housing Act and the Birth of the National Mortgage Market*, 17 U. MIA. BUS. L. REV. 1, 24–25 (2008).

¹²⁹ Joshua L. Farrell, *The FHA's Origins: How Its Valuation Method Fostered Racial Segregation and Suburban Sprawl*, J. AFFORDABLE HOUS. & CMTY. DEV. L. 374, 374 (2002).

¹³⁰ KALHAN & WICKERI, *supra* note 19, at 9 (noting that the government measures "provided little assistance to low-income Americans").

¹³¹ Gotham, *supra* note 127, at 291–317.

¹³² The Fair Housing Center of Greater Boston, 1937: *Housing Act (Wagner-Steagall Act)*,

<http://www.bostonfairhousing.org/timeline/1937-Housing-Act.html>
[<https://perma.cc/3SGA-HAQQ>].

¹³³ John F. McDonald, *Public Housing Construction, and the Cities: 1937–1967*, 2011 URB. STUD. RSCH. 1, 1 (2011).

¹³⁴ The Housing Act of 1937, Pub. L. No. 75-412, 50 Stat. 888 (codified as 42 U.S.C.1401 et seq.).

infrastructure that included the passage of state and local laws, as well as the participation of private developers.¹³⁵ Ultimately, design flaws such as relying on fixed rents to meet operating costs limited the Act's impact as a practical housing policy.¹³⁶

Federal efforts to promote home ownership expanded considerably after World War II. The 1944 Servicemen's Readjustment Act initiated the Veterans' Administration (VA) home loans program, which became one of the United States' main mechanisms for subsidizing home ownership.¹³⁷ The Housing Act of 1949¹³⁸ was "the most significant attempt" to address housing issues in the United States.¹³⁹ Although the latter Act did not establish a right to housing,¹⁴⁰ it declared the goal of providing "a decent home and a suitable living environment for every American family."¹⁴¹ Its implementation enabled many Americans to purchase homes¹⁴² and

¹³⁵ Joseph Heathcott, *The Strange Career of Public Housing: Policy, Planning and the American Metropolis in the Twentieth Century*, 78:4 J. AM. PLAN. ASSOC. 360, 363–64 (2012).

¹³⁶ Michael S. FitzPatrick, *A Disaster in Every Generation: An Analysis of Hope VI: HUD's Newest Big Budget Development Plan*, 7 GEO. J. ON POVERTY L. & POL'Y 421, 428–29 (2000).

¹³⁷ CONGRESSIONAL BUDGET OFFICE, THE ROLE OF THE DEPARTMENT OF VETERANS AFFAIRS IN THE SINGLE-FAMILY MORTGAGE MARKET 8 (Sept. 2021), <https://www.cbo.gov/system/files/2021-09/57024-VA.pdf> [https://perma.cc/XM4F-4GQD].

¹³⁸ Massimo, *supra* note 8, at 286–87.

¹³⁹ KALHAN & WICKERI, *supra* note 19, at 9.

¹⁴⁰ Lance Freeman, *America's Affordable Housing Crisis: A Contract Unfulfilled*, 92 AM. J. PUB. HEALTH 709 (2002); *see also* Byrne & Culhane, *supra* note 19, at 387 (noting that the Act is often considered as "the nearest approximation of a right to housing in the United States").

¹⁴¹ United States Housing Act, 42 U.S.C. § 1441 (1949) (calling for "the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family"); *see also* Byrne & Culhane, *supra* note 19, at 387; *see also* *Relocation, Accidental Inequalities, and the Equal Protection Doctrine*, 117 U. PA. L. REV. 579 (1969).

¹⁴² *See generally*, Charles J. Orlebeke, *The Evolution of Low-income Housing Policy, 1949 to 1999*, 11 Housing Policy Debate 489–520 (2000); *see also* Byrne & Culhane, *supra* note 19, at 387.

stimulated the expansion of public housing for the poor.¹⁴³ Nevertheless, this Act drew criticism for failing to define housing goals in a more tangible way.¹⁴⁴ Federal agencies were accused of not providing the necessary resources to ensure the accomplishment of their stated goals.¹⁴⁵ Congress next enacted the Housing Act of 1954 to provide additional financial support to ensure the supply of public housing.¹⁴⁶ This Act had a strong focus on new construction, the demolition of old housing structures, and restoring dilapidated urban homes to habitable condition.¹⁴⁷ In practice however, many low-income families displaced by these renewal efforts were unable or unwilling to relocate to new public housing due to their ineligibility for public housing or racial segregation in some of the new displacement locations, leaving the underlying issue of inadequate access to housing unresolved.¹⁴⁸ Over time, the federal commitment to expand housing availability began to diminish, reflected particularly in reduced funding for affordable housing initiatives.¹⁴⁹

Efforts began in the 1960s to address the biases and imbalances embedded in housing policy in the United States. Congress passed the

¹⁴³ Massimo, *supra* note 8, at 286–87 (noting that the Act “ordered the construction of public housing to raise the standard of living for Americans.”).

¹⁴⁴ KALHAN & WICKERI, *supra* note 19, at 10; *see generally Relocation, Accidental Inequalities, and the Equal Protection Doctrine*, *supra* note 141 (discussing the implementation issues of the Housing Act of 1949).

¹⁴⁵ KALHAN & WICKERI, *supra* note 19, at 10.

¹⁴⁶ B. T. McGraw, *The Housing Act of 1954, and Implications for Minorities*, 16 *PHYLON* (1940–1956) 171, 171 (1955).

¹⁴⁷ KALHAN & WICKERI, *supra* note 19, at 10; Arthur D. Sporn, *Some Contributions of the Income Tax Law to the Growth and Prevalence of Slums*, 59 *COLUM. L. REV.* 1026, 1030 (1959) (noting that “the emphasis in the federal program has shifted . . . to redevelopment heavily complemented by the conservation and improvement of existing neighborhoods and structures.”).

¹⁴⁸ Nick S. Fisfis & Harold Greenberg, *Suburban Renewal in Pennsylvania*, 111 *U. PA. L. REV.* 61, 90–92 (1962).

¹⁴⁹ *Notes from the United States*, *supra* note 12, at 465.

Housing and Urban Development Act of 1965 (HUD Act)¹⁵⁰ and the 1968 Fair Housing Act, instituting a range of major expansions in federal housing programs.¹⁵¹ The HUD Act prioritized low income households' access to affordable housing, with consideration for the needs of particularly vulnerable groups.¹⁵² For example, the Department of Housing and Urban Development (HUD)'s Family Unification Program provides special vouchers to families whose children are taken away because of lack of shelter.¹⁵³

The Fair Housing Act addressed housing discrimination for the first time in United States history.¹⁵⁴ It provided an overarching framework of non-discrimination in housing markets to complement existing federal housing programs, aligned and updated to reflect classes of persons protected against discrimination in federal law generally.¹⁵⁵ From the standpoint of rights, this broad prohibition of discrimination is the centerpiece of federal housing law in the United States. The 1968 HUD Act sought to encourage the Federal Housing Administration to ease lending and reduce redlining by "loosen[ing] credit requirements for borrowers and viability criteria for neighborhoods."¹⁵⁶ Despite these legislative efforts, however, racial

¹⁵⁰ Housing and Urban Development Act of 1965 § 101(a), 79 Stat. 451, 12 U.S.C. § 17015(a) (Supp. I, 1965); for more discussion about HUD Act, see Robert Ellickson, *Government Housing Assistance to the Poor*, 76 YALE L.J. 508 (1967).

¹⁵¹ KALHAN & WICKERI, *supra* note 19, at 10.

¹⁵² *Id.*

¹⁵³ *Id.* at 8.

¹⁵⁴ U.S. Dep't of Housing & Urban Development, *History of Fair Housing*, https://www.hud.gov/program_offices/fair_housing_equal_opp/abouttheo/history [<https://perma.cc/F9V3-CQBF>] (last visited July 13, 2022) (noting that the Act "prohibited discrimination concerning the sale, rental, and financing of housing based on race, religion, national origin, sex, (and as amended) handicap and family status.").

¹⁵⁵ *Id.*

¹⁵⁶ Alexander von Hoffman, *History Lessons for Today's Housing Policy: The Political Processes of Making Low-Income Housing Policy*, JOINT CTR. FOR HOUS. STUD., HARV. WI-5 34 (2012), https://www.jchs.harvard.edu/sites/default/files/w12-5_von_hoffman.pdf [<https://perma.cc/YCC6-B2WA>].

segregation persists.¹⁵⁷ Governmental and private actions have served to perpetuate racially discriminatory housing practices nationwide.¹⁵⁸

After focusing on promoting home ownership and, via the HUD Act, aiding specific disadvantaged groups, federal housing policy evolved toward a general system of subsidies for those unable to afford housing. In 1974, Congress approved the landmark Housing Choice Voucher Program, which authorized the federal government to provide rental subsidies to eligible families and individuals.¹⁵⁹ Updated several times, this program is still in effect.¹⁶⁰ Those eligible only need to pay thirty percent of their adjusted income in rent, with federally funded vouchers covering the rest (up to a maximum allowable amount).¹⁶¹ The implementation of this program has supported “very low-income” households and individuals to rent privately owned properties.¹⁶² The Housing and Community Development Act of 1980¹⁶³ was enacted to consolidate and update housing and community development laws, and to alleviate the national rental

¹⁵⁷ Lawrence M. Friedman & James E. Krier, *A New Lease on Life: Section 23 Housing and the Poor*, 116 U. PA. L. REV. 611, 617–18 (1968) (After the enactment of the two Acts in the 1960s, many public housing projects in big cities, such as Washington D.C., Baltimore, and Chicago, were designed for non-whites only).

¹⁵⁸ Genevieve Pagan & Isabela Lyrio, *U.S. Supreme Court Rules on Upholding Housing Discrimination Law*, WILSON CTR. (July 15, 2015), <https://www.wilsoncenter.org/article/us-supreme-court-rules-upholding-housing-discrimination-law> [https://perma.cc/Q8EC-A6U4]

¹⁵⁹ Bruce Zucker & Kiren Dosanjh Zucker, *Section 8 Choice Voucher Program: The Benefits and Pitfalls of Renting to Residential Tenants Receiving Federally Subsidized Housing*, 43 REAL EST. L.J. 38 (2014); see also U.S. Dep’t of Hous. & Urb. Dev., *Section 8 Program Background Information*, https://www.hud.gov/program_offices/housing/mfh/rfp/s8bkinfo [https://perma.cc/C2KB-2WYQ] (last visited July 13, 2022).

¹⁶⁰ U.S. Dep’t of Hous. & Urb. Dev., *Section 8 Rental Certificate Program*, <https://www.hud.gov/programdescription/cert8> [https://perma.cc/6XE7-46JT] (last visited July 13, 2022).

¹⁶¹ *Id.*

¹⁶² Zucker & Zucker, *supra* note 159, at 39.

¹⁶³ Housing and Community Development Act of 1980, Pub. L. No. 96-399, 94 Stat. 1614.

crisis.¹⁶⁴ The Act authorized a series of financial assistance programs with a primary focus on reducing housing shortages and supporting both individuals and families unable to afford adequate housing, and more broadly, disadvantaged communities.¹⁶⁵ Federal housing voucher programs expanded in the 1980s, and in 1987 Congress enacted a permanent program that enabled eligible recipients to use vouchers generally rather than only for particular rehabilitated properties.¹⁶⁶ Nevertheless, due to inadequate funding, there are “long waiting lists for assistance”; families often wait years for the vouchers to be approved and issued.¹⁶⁷ Furthermore, it remains challenging to find property owners who are willing to accept the vouchers, as discrimination against voucher holders remains common across the country.¹⁶⁸

Federal efforts to ensure housing for disadvantaged persons slowed significantly at the start of the 21st century, then accelerated in the wake of the 2008 financial crisis. The 1999 Faircloth Amendment sought to limit “the construction of new public housing units,”¹⁶⁹ essentially ending federal

¹⁶⁴ Lisa A. Steinhardt, *Unit Owners' Ability to Cancel Contracts Under the Condominium Act West 14th Street Commercial Corporation v. 5 West 14th Owners Corporation*, 54 BROOK. L. REV. 589, 589 (1988).

¹⁶⁵ *Id.* at 594.

¹⁶⁶ Von Hoffman, *supra* note 156, at 52.

¹⁶⁷ Zucker & Zucker, *supra* note 159, at 39–40 (citing Thomas Byrne & Dennis P. Culhane, *The Right to Housing: An Effective Means for Addressing Homelessness?*, 14 U. PA. J.L. & SOC. CHANGE 379, 389 (2011)); *see also* Sonya Acosta & Erik Gartland, *Families Wait Years for Housing Vouchers Due to Inadequate Funding*, CTR. ON BUDGET & POL’Y PRIORITIES (July 22, 2021), <https://www.cbpp.org/research/housing/families-wait-years-for-housing-vouchers-due-to-inadequate-funding> [https://perma.cc/SW5E-86ZY].

¹⁶⁸ *See generally* Tamica H. Daniel, *Bringing Real Choice to the Housing Choice Voucher Program*:

Addressing Voucher Discrimination under the Federal Fair Housing Act, 98 GEO. L.J. 769 (2010); *see also* Alison Bell, et al., *Prohibiting Discrimination Against Renters Using Housing Vouchers Improves Results*, CTR. ON BUDGET & POL’Y PRIORITIES (Dec. 20, 2018), <https://www.cbpp.org/research/housing/prohibiting-discrimination-against-renters-using-housing-vouchers-improves-results> [https://perma.cc/3LUK-8LD9].

¹⁶⁹ U.S. DEP’T OF HOUS. & URB. DEV., GUIDANCE ON COMPLYING WITH THE MAXIMUM NUMBER OF UNITS ELIGIBLE FOR OPERATING SUBSIDY PURSUANT TO SECTION

funding for this purpose and thus further stressing a system that had already failed to meet demand for housing to avert homelessness.¹⁷⁰ In 2009, Congress passed the Homeless Emergency Assistance and Rapid Transition to Housing Act (the HEARTH Act).¹⁷¹ The HEARTH Act provided “the largest source of funding” for emergency shelters and transitional housing,¹⁷² and supported many homeless Americans to move into permanent housing.¹⁷³ It also sought to streamline federal housing administration¹⁷⁴ and established a coordinated entry system to standardize the assessment process for housing applications, prioritizing the needs of the most vulnerable populations.¹⁷⁵ The Act’s Continuum of Care program appears to have been effective in reducing homelessness,¹⁷⁶ although it

9(G)(3)(A) OF THE HOUSING ACT OF 1937 (AKA THE FAIRCLOTH LIMIT), <https://www.hud.gov/sites/documents/FRCLTH-LMT.PDF> [https://perma.cc/4PGX-LTSC]; see also Gianpaolo Baiocchi, et al., *The Case for a Social Housing Development Authority*, URB. DEMOCRACY LAB N.Y.U. (Nov. 2020), <https://urbanemos.nyu.edu/wp-content/uploads/2020/11/SHDA-whitepaper-Nov2020.pdf> [https://perma.cc/3743-YHUD].

¹⁷⁰ Kevin Leacock, *A Brief History of Housing Policy in the U.S.*, NAT’L NURSE-LED CARE CONSORTIUM (Oct. 29, 2019), <https://nurseledcare.phmc.org/advocacy/policy-blog/item/641-a-brief-history-of-housing-policy-in-the-u-s.html> [https://perma.cc/DG4C-T44X].

¹⁷¹ Homeless Emergency Assistance and Rapid Transition to Housing Act of 2009, Pub. L. No. 111-22, Div. B, § 1002, 123 Stat. 1664 (2009).

¹⁷² Courtney Veneri, *Welcome Home? An Analysis of Federal Housing Programs and Their Efficacy in Reducing Homelessness Among Domestic Violence Survivors*, 14 DEPAUL J. FOR SOC. JUST. 1, 21 (2021).

¹⁷³ NATIONAL ALLIANCE TO END HOMELESSNESS, SUMMARY OF HEARTH ACT 9 (2009), www.endhomelessness.org/files/2098_file_HEARTH_Act_Summary_FINAL_6_8_09.pdf [https://perma.cc/GBW2-4TUG]; see also Byrne & Culhane, *supra* note 19, at 389.

¹⁷⁴ Veneri, *supra* note 172, at 21 (noting that the HEARTH Act “consolidated and changed the way federal homeless programs operated”).

¹⁷⁵ Josh Leopold, *Five Ways the HEARTH Act Changed Homelessness Assistance*, URB. WIRE (May 9, 2019), <https://www.urban.org/urban-wire/five-ways-hearth-act-changed-homelessness-assistance> [https://perma.cc/2469-M6MG].

¹⁷⁶ Alfred M. Clark III, *Homelessness and the Crisis of Affordable Housing: The Abandonment of a Federal Affordable Housing Policy*, 25 J. AFFORDABLE HOUS. & CMTY. DEV. L. 85, 88 (2016) (reporting an 11% decline in the homeless population in the USA from 2010 to 2015).

leaves some gaps such as support for short term emergency housing.¹⁷⁷ Its Emergency Solutions Grants and Rural Housing Stability Assistance programs arguably have been less successful, due in part to overly broad grant criteria for the former,¹⁷⁸ and, for the latter, to a lack of provision for emergency shelter or case management, both critically important to vulnerable homeless persons such as domestic violence survivors.¹⁷⁹

The response to the impact of the COVID-19 pandemic on homelessness has highlighted both the capabilities and the limitations of the federal housing regime. The availability of a legal framework and administrative infrastructure allowed HUD in 2021 to announce \$2.7 billion for “homeless services organizations across the country for supportive services and housing programs for people experiencing homelessness.”¹⁸⁰ However, the temporary national eviction moratorium issued by the federal government and the Centers for Disease Control and Prevention (CDC) in September 2020 were nullified by the Supreme Court a year later,¹⁸¹ consistent with the judicial policy of leaving housing rights to the states. In sum, the United States has established a federal framework to address the housing needs of

¹⁷⁷ Veneri, *supra* note 172, at 33.

¹⁷⁸ *Id.* at 29.

¹⁷⁹ *Id.* at 34–35.

¹⁸⁰ HUD Announces \$2.7 Billion Funding Opportunity to Help People Experiencing Homelessness, U.S. DEP’T OF HOUS. & URB. DEV. (Aug. 18, 2021), https://www.hud.gov/press/press_releases_media_advisories/HUD_No_21_124 [<https://perma.cc/QLF2-VNHD>].

¹⁸¹ *Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19*, 85 FED. REG. 55, 292 (2020) (noting that it was initially announced by the Trump Administration and the CDC); *see also* Adam Liptak & Glenn Thrush, *Supreme Court Ends Biden’s Eviction Moratorium*, N.Y. TIMES (Aug. 26, 2021), <https://www.nytimes.com/2021/08/26/us/eviction-moratorium-ends.html> [<https://perma.cc/QK24-WJKG>] (Biden Administration extended the Federal Eviction Moratorium but the Supreme Court overturned the program in August 2021).

Americans,¹⁸² but it only provides limited support, and has yet to resolve the worsening housing crisis.¹⁸³

B. The Incoherence of Housing Rights in the United States

Current housing policy in the United States does not offer a sustainable solution to homelessness.¹⁸⁴ It is “too fractured” to respond to “the immense challenges residents face in accessing adequate housing.”¹⁸⁵ Although homelessness results from a complex interplay of causes including social, financial and health related factors,¹⁸⁶ and merits examination in its every aspect, this Article only focuses on the legal perspective and endeavors to suggest legal approaches to lessen the worsening homelessness and housing stability crisis in the United States.

Some criticize the United States for its substandard performance in housing rights protection nationwide.¹⁸⁷ Raquel Rolnik, the former United Nations Special Rapporteur on adequate housing, raised concerns of affordability, accessibility,¹⁸⁸ discrimination, and lack of public

¹⁸² Adams, *supra* note 18, at 302–03 (suggesting that “although the United States does not currently recognize a right to housing as a general proposition, some housing entitlements already exist”).

¹⁸³ See generally Massimo, *supra* note 8.

¹⁸⁴ KALHAN & WICKERI, *supra* note 19, at 25.

¹⁸⁵ *Id.*

¹⁸⁶ Kaufman, *supra* note 52, at 473–74 (discussing the causes of homelessness); see also Jonathan J. Sheffield, *Homeless Bills of Rights: Moving United States Policy Toward a Human Right to Housing*, 22 GEO. J. ON POVERTY L. & POL’Y 321, 324 (2015) (other factors include, for example, “affordable housing shortages, growing rent and income disparities, and eroding housing-subsidy programs”).

¹⁸⁷ Eric Tars et al., *Challenging Domestic Injustice Through International Human Rights Advocacy: Addressing Homelessness in the United States*, 42 CARDOZO L. REV. 913, 929 (2021) (noting that “[t]he United States has represented itself as a champion of international human rights law abroad, but, domestically, it has struggled to fully adopt many of the rights and treaties that it helped develop”).

¹⁸⁸ Human Rights Council, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to An Adequate Standard of Living, and on the Right to Non-discrimination in This Context, Raquel Rolnik - Mission to the United States of America*, ¶ 79, A/HRC/13/20/Add.4 (Feb. 12, 2010) [hereinafter *Rolnik 2010*] (Rolnik expressed

participation in decision-making for housing policies.¹⁸⁹ She stated that housing issues are “long faced by the poorest people and today affecting a greater proportion of society”¹⁹⁰ in the United States, and suggested “the engagement of the present administration to progress the implementation of the right to adequate housing as a policy goal for all.”¹⁹¹ Professors Anil Kalhan and Elisabeth Wickeri also attributed the “continued race- and gender-based discrimination in housing” to “the failure ... to comprehensively codify the right to adequate housing.”¹⁹²

States that explicitly uphold the right to housing also face criticism for ineffective implementation.¹⁹³ For example, opinions regarding the New York approach are mixed. Some scholars, such as Bradley R. Haywood, applauded New York for imposing a judicially enforceable obligation on governments to provide emergency shelters to those in need.¹⁹⁴ Eric Tars, Tamar Ezer, and others also suggested that the recognition of this right had mitigated homelessness in New York by in effect providing a safety net between possibly precarious private housing and a complete lack of shelter.¹⁹⁵ Other observers disagreed, and raised questions about the enforceability of this right. Susan Neilson argued that, despite judicial recognition, New York State still lacks an effective enforcement mechanism to implement this right.¹⁹⁶ Thomas Byrne and Dennis P.

“deep concern” about the millions of Americans “who face serious challenges in accessing affordable and adequate housing”).

¹⁸⁹ KALHAN & WICKERI, *supra* note 19, at 16; *Id.*

¹⁹⁰ Rolnik 2010, *supra* note 188, at ¶ 79.

¹⁹¹ *Id.* at ¶ 3.

¹⁹² KALHAN & WICKERI, *supra* note 19, at 16.

¹⁹³ Neilson, *supra* note 21, at 456.

¹⁹⁴ Haywood, *supra* note 47, at 157 (one of the two hallmarks of the New York legal landscape is that it is “one of the only states in America with a judicially enforceable obligation to provide shelter to the homeless,” although Haywood also discussed the issues associated with the implementation of housing rights in New York).

¹⁹⁵ Tars et al., *supra* note 187, at 968.

¹⁹⁶ *Id.* at 456 (arguing that “despite judicial recognition of the plight of the homeless and the importance of housing, no state has established a judicially enforceable right to

Culhane observed that New York's "right to shelter" mandate "only led to the creation of the largest and most expensive emergency shelter system in the United States,"¹⁹⁷ and failed to deliver the stability necessary to the homeless.¹⁹⁸ Donna Mascari also found that many shelters in New York provided substandard fire and health safety and sanitation, or were understaffed or not secure due to poor management.¹⁹⁹

The existing system has two pitfalls. First, the piecemeal approach to housing indicates that the United States has not fully complied with and effectively implemented the obligations stated by international instruments.²⁰⁰ To improve Americans' access to adequate housing, it is imperative for the United States to realign domestic legislation and policies with international human rights standards. Second, state legislation on homelessness lacks uniformity and contingency; its interpretation also varies.²⁰¹ It should however be possible to foster a legally grounded and coordinated national approach. For example, the development of model legislation or restatements of law that states could consider while adopting a rights-based approach to housing. Although exact standards and implementation may differ between states, a rights-based approach ultimately helps increase state accountability for fulfilling the right to housing; it also empowers people to know and claim their rights in the event of violations.²⁰²

shelter"); Neilson, *supra* note 21, at 443 (noting that "later New York decisions have raised serious questions about whether this right is judicially enforceable").

¹⁹⁷ Byrne & Culhane, *supra* note 19, at 386.

¹⁹⁸ *Id.*

¹⁹⁹ Mascari, *supra* note 84, at 166.

²⁰⁰ Marc-Olivier Herman, *Fighting Homelessness: Can International Human Rights Law Make a Difference*, 2 GEO. J. ON FIGHTING POVERTY 59, 60 (1994) (noting that "the American legal system consistently resists the influence of international human rights law"); KALHAN & WICKERI, *supra* note 19, at 8.

²⁰¹ *Id.* at 15 (noting that the absence of clear federal guidelines has left states and municipalities to "fend for themselves in protecting and ensuring housing rights").

²⁰² See generally Herman, *supra* note 200, at 59–74 (advocating for a rights-based approach to housing).

IV. RECONCILING THE RIGHT WITH THE REALITY

To build an effective housing policy framework, the United States could usefully begin by realigning its laws and programs with international human rights standards,²⁰³ particularly through constitutional amendments at the state level, state legislation, and state judicial actions.²⁰⁴

A. Federal Recognition of the Right to Housing

1. Constitutional Amendment and Legislative Reform at the Federal Level

Constitutional amendment to establish a right to housing would provide a foundation for structural changes within the legal system and for governments to improve outcomes in social housing and homelessness. Legislators and scholars have advocated for a constitutional right to housing for decades. For example, in 2003, Representative Julia Carson introduced the Bringing America Home Act,²⁰⁵ calling for the recognition of housing as “a basic human right” in the United States.²⁰⁶ In 2011, Representative Jesse L. Jackson Jr. proposed to amend the Constitution to establish a right to housing.²⁰⁷ In 2021, Representative Alma S. Adams also put forward a proposal to amend the Constitution to “recogniz[e] and secur[e] the

²⁰³ Tars et al., *supra* note 187, at 980 (“[t]he international human rights framework provides a rich source of norms, levers for shaping standards and exerting political pressure, and opportunities for building advocacy coalitions and relations with officials”).

²⁰⁴ Manal Totry-Jubran, *Transitional Justice in Housing Injustice: The Case of Housing Rights Violations Within Settler Democracies*, 52 VAND. J. TRANSNAT’L L. 795 (2019) (the experiences of other countries could provide guidance as to how to do this, or even provide precedents for the United States or its constituent states to follow. For example, the United Nations Human Settlement Program found that by 2016 constitutions or legislation enacted in seventy-five percent of the world’s countries incorporated housing rights at least to some degree).

²⁰⁵ H.R.2897 – Bringing America Home Act 108th Congress (2003–2004).

²⁰⁶ *Id.*

²⁰⁷ H.J.Res.32 – Proposing an Amendment to The Constitution of The United States Respecting The Right to Decent, Safe, Sanitary, and Affordable Housing, 112th Congress (2011–2012).

fundamental right to . . . housing.”²⁰⁸ These efforts went in vain.²⁰⁹ Scholars have also linked the “worsening affordable housing crisis” to the non-recognition of a “human or constitutional right” to housing,²¹⁰ and argued that the New Deal era programs effectively established “a second American ‘bill of rights’ that recognizes a right to housing and other social and economic rights.”²¹¹ Clearly, those arguments are not endorsed by Congress or the Supreme Court; otherwise, the United States would have upheld the right to housing, along with other social and economic rights. Furthermore, it is unlikely that the United States will amend its constitution to recognize these rights in the near future.²¹²

In lieu of constitutional reform, Congress could legislate a right to housing.²¹³ A federal right would automatically make housing a key policy priority,²¹⁴ help ensure that national programs deliver adequate housing to

²⁰⁸ H.J.Res.20 – Proposing an Amendment to the Constitution of the United States Recognizing and Securing the Fundamental Right to Life, Liberty, and Property, Which Includes Housing, Health Care, Education, and Nutrition, 117th Congress (2021–2022).

²⁰⁹ H.R.2897 – Bringing America Home Act 108th Congress (2003–2004); H.J.Res.32 – Proposing an Amendment to The Constitution of The United States Respecting The Right to Decent, Safe, Sanitary, and Affordable Housing, 112th Congress (2011–2012).

²¹⁰ Massimo, *supra* note 8, at 273.

²¹¹ Alexander, *supra* note 28, at 257; see NAT’L LAW CTR. ON HOMELESSNESS AND POVERTY, RIGHT TO HOUSING FACT SHEET IN THE UNITED STATES, [https://nhlp.org/files/\(2\)%20Right%20to%20Housing%20-%20in%20the%20U.S.pdf](https://nhlp.org/files/(2)%20Right%20to%20Housing%20-%20in%20the%20U.S.pdf) [<https://perma.cc/FH43-3MSD>]; see also William E. Forbath, *Civil Rights and Economic Citizenship: Notes on the Past and Future of the Civil Rights and Labor Movements*, 2 U. PA. J. LAB. & EMP. L. 697, 701 (2000); see also James J. Varellas, *The Constitutional Political Economy of Free Trade: Reexamining Nafta-Style Congressional-Executive Agreements*, 49 SANTA CLARA L. REV. 717, 786 (2009).

²¹² Alexander, *supra* note 28, at 257 (“It is unlikely that the U.S. will pass a constitutional amendment to adopt a right to housing in the near future”).

²¹³ *Id.*; see generally JOSH CHAFETZ, CONGRESS’S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 1–448 (2017).

²¹⁴ Totry-Jubran, *supra* note 204, at 808 (noting that countries that have incorporated housing rights within their national legal system “have raised housing to a position of primary importance”).

those in need across the country,²¹⁵ and promote consistency and efficiency in the administration and implementation of housing policies across states.²¹⁶ However, a legislatively created federal housing right may not be feasible. First, the United States simply does not have the necessary legal frameworks in place to implement a national right to housing.²¹⁷ Second, pivoting to legislative recognition of a socioeconomic right such as housing would be incongruous with Congress's historical tendency to allocate resources to mitigate social ills, rather than recognizing new rights.²¹⁸ The United States has traditionally declined to adopt this approach, opting instead to focus on increasing the available supply of housing and enforcing anti-discrimination laws.²¹⁹

2. The Limited Scope for Federal Courts to Apply International Rights to Housing

The Supreme Court can provide a normative content for the right to housing, including how to uphold this right in practice. For example, the Supreme Court can order federal agencies to establish monitoring and accountability mechanisms to detect and remedy breaches of housing rights, or give directives for implementing new policies and programs to ensure people's access to adequate housing.²²⁰ To comply with the United States' international obligations, the Supreme Court could consider giving

²¹⁵ *Id.* (noting that “[t]his protection obligates authorities to set housing policies and allows individuals and groups to demand that the state act to protect their right to housing and allocate needed resources to fulfill that right”).

²¹⁶ KALHAN & WICKERI, *supra* note 19, at 15.

²¹⁷ Miles Walser, *Putting the Brakes on Rent Increases: How the United States Could Implement German Anti-Gentrification Laws Without Running Afoul of the Takings Clause*, 36 WIS. INT’L L.J. 186, 200 (2018).

²¹⁸ Massimo, *supra* note 8, at 308.

²¹⁹ Halpern, *supra* note 16; Schuetz, *supra* note 16; Johnson, *supra* note 17.

²²⁰ See generally, James F. Spriggs, II, *The Supreme Court and Federal Administrative Agencies: A Resource-Based Theory and Analysis of Judicial Impact*, 40 AM. J. POL. SCI. 1122, 1122–1151 (1996).

international human rights treaties, such as the ICESCR, domestic effect.²²¹ However, there are two obstacles: the uncertain binding effect of international human rights law and the likely unwillingness of the Supreme Court or lower federal courts to establish such a precedent.

Generally, courts are not well placed to import international law into United States jurisprudence. Most international treaties are not legally binding.²²² Even if they are, the enforcement mechanisms are not suited to the protection of human rights at the domestic level.²²³ There is a significant gap between the standards set in international treaties and global human rights realities,²²⁴ with “enforcement of international human rights laws” widely considered “the weak link in the international legal system.”²²⁵ Alongside the legal and cultural impediments to enforcing international law domestically within the United States, the uncertain applicability of international law itself has presented significant challenges to housing rights efforts in the United States.²²⁶ To date, the United States is only a signatory to the ICESCR and most other treaties that affirm housing rights.²²⁷ Signing demonstrates the United States’ intent and willingness to give these treaties enforceability in domestic courts,²²⁸ but it does not

²²¹ See, e.g., Curtis A. Bradley, *The Supreme Court as a Filter Between International Law and American Constitutionalism*, 104 CALIF. L. REV. 1576, 1576–1578 (2016).

²²² See, e.g., David Sloss, *Legislating Human Rights: The Case for Federal Legislation to Facilitate Domestic Judicial Application of International Human Rights Treaties*, 35 FORDHAM INT’L L.J. 445, 449 (2012) (discussing the United States’ noncompliance with international human rights treaties); see also Massimo, *supra* note 8, at 282 (noting that the UDHR is not binding on member states).

²²³ See generally Julie Cassidy, *Watchdog or Paper Tiger: The Enforcement of Human Rights in International Forums*, 10 NOTRE DAME L. REV. 37, 37 (2008).

²²⁴ See, e.g., Alexander, *supra* note 28, at 255 (“There remains a disturbingly large gap between the standards set in article 11 (1) of the [ICESCR] and the situation prevailing in many parts of the world”).

²²⁵ Cassidy, *supra* note 223, at 37.

²²⁶ Massimo, *supra* note 8, at 314.

²²⁷ See Sloss, *supra* note 222, at 449–450.

²²⁸ U.N.T.S., *Glossary of Terms Relating to Treaty Actions*, https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml [<https://perma.cc/9D7M-FKDE>] (last visited July 13, 2022).

establish a binding legal obligation.²²⁹ Even binding treaties are not much different when it comes to domestic implementation.²³⁰ Most treaties, including the ICERD, are not self-executing and thus cannot be enforced by United States federal courts until implemented in legislation.²³¹

The Supreme Court has shown some acceptance of international law in domestic judicial interpretation since the 2000s.²³² For example, it acknowledged its respect for the “opinion” of the world in *Roper v. Simmons* (2005).²³³ In *Lawrence v. Texas* (2003),²³⁴ *Roper v. Simmons* (2005),²³⁵ and *Graham v. Florida* (2010),²³⁶ it also called on international law (as persuasive authority only) to help interpret a few constitutional provisions, such as due process and prohibition of cruel and unusual punishment.²³⁷ However, the Supreme Court has remained silent about the application of international law to housing rights.²³⁸ Lower federal courts

²²⁹ Paul L. Hoffmann, *Enforcing International Human Rights Law in the United States Human Rights: An Agenda for the Next Century: Part II - Implementing and Enforcing Human Rights: Chapter 17*, 26 STUD. TRANSNAT'L LEGAL POL'Y 477, 477–511 (1994); NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 211.

²³⁰ Tars et al., *supra* note 187, at 933; see Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 629–30 (2008).

²³¹ Tars et al., *supra* note 187, at 933 (noting that most treaties “are not self-executing or actionable in United States courts without subsequent implementing legislation”); see Vázquez, *supra* note 230, at 629–30.

²³² *Notes from the United States*, *supra* note 12, at 454 (“recent Supreme Court decisions as well as statements by individual Justices suggest a growing acceptance of a role for international law and practice as part of U.S. law in human rights contexts”).

²³³ *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (acknowledging that the “opinion” of the world should be respected).

²³⁴ *Lawrence v. Texas*, 539 U.S. 558, 2481–84 (2003).

²³⁵ *Roper*, 543 U.S. at 1198.

²³⁶ *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010).

²³⁷ Rex D. Glensy, *The Use of International Law in U.S. Constitutional Adjudication*, 25 EMORY INT'L L. REV. 197, 198 (2011).

²³⁸ KALHAN & WICKER, *supra* note 19, at 8–9; Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 717 (1983); Massimo, *supra* note 8, at 287 (The Supreme Court deferred the responsibility to states, which are “better equipped” to address homelessness and housing stability issues).

also at times discuss international instruments in their judgments.²³⁹ For example, the ICERD has arisen in federal courts regarding employment discrimination in *Tomoko Funayama v. City of Philadelphia, et al.* (2013),²⁴⁰ racial discrimination in *Karlu Khan Mayweathers v. R.Q. Hickman, et al.* (2008),²⁴¹ and racial discrimination in relation to housing rights in *Boris Nickolaevich Skudnov v. U.S. Dep't of HUD et al.* (2015).²⁴² However, as Tars and others observe, federal courts have so far shied away from actually applying the ICERD.²⁴³ This may reflect a general reluctance of federal courts to give direct effect to legally binding treaties the United States is party to²⁴⁴ or simply the availability of more easily applicable federal anti-discrimination statutes. Furthermore, considering the previous discussion pertaining to federal courts' consistent resistance to upholding housing rights, it is unlikely that federal courts will take the lead in reducing homelessness and improving Americans' housing rights.

3. Leaving the Responsibility to the States

The federal system has failed to recognize a right to housing, but the increasing urgency of homelessness issues demands systemic changes.²⁴⁵

²³⁹ Tars et al., *supra* note 187, at 968 ("The UDHR has persuasive value in the United States and has been cited in several federal court cases"); see, e.g., *Perkovic v. I.N.S.*, 33 F.3d 615, 622 (6th Cir. 1994); *Wong v. Ilchert*, 998 F.2d 661, 663 (9th Cir. 1993).

²⁴⁰ *Funayama v. City of Philadelphia*, 13-CV-2667, 2013 WL 6159279 (E.D. Pa. Nov. 25, 2013) (employment discrimination).

²⁴¹ *Mayweathers v. R.Q. Hickman*, 5CV0713WQH CAB, 2008 WL 4690521 (S.D. Cal. Oct. 21, 2008), *aff'd sub nom. Mayweathers v. Woodford*, 393 Fed. Appx. 425 (9th Cir. 2010) (racial discrimination).

²⁴² *Skudnov, v. U.S. Dep't of Hous. & Urb. Dev.*, 3:15-CV-100-JHM, 2015 WL 3892422 (W.D. Ky. June 24, 2015).

²⁴³ Tars et al., *supra* note 187, at 931 ("United States has tended to shy away from treaties that protect social and economic rights").

²⁴⁴ E.g., John F. Coyle, *The Case for Writing International Law into the U.S. Code*, 56 B.C. L. REV. 433, 434 (2015) ("[T]he federal courts of appeal have exhibited a marked reluctance to give direct effect to customary international law or treaties to which the United States has long been a party").

²⁴⁵ See generally DEBORAH PADGETT, ET AL., HOUSING FIRST: ENDING HOMELESSNESS, TRANSFORMING SYSTEMS, AND CHANGING LIVES 1–248 (2015).

By its participation in UN declarations and treaties, the United States has shown its approval of the emergent international norm that every person has a right to an adequate standard of living, which includes housing. The concern of the federal government is evident in its programs to provide a supply of housing for those with lower incomes and in its stance against discrimination in housing markets. In practice, however, federal reforms to restructure housing policy based on rights would face significant political challenges and may not be feasible.²⁴⁶ Instead, state courts and legislatures may be best placed to lead the United States to establish its own rights-based approach to housing.

B. State Approaches to Housing Rights

State constitutions and legislation can provide a legal foundation for the progressive realization of the right to housing.²⁴⁷ This opens the way for the protection of housing rights without requiring federal intervention by either Congress or courts.²⁴⁸ In the absence of applicable federal laws,²⁴⁹ states can play a key role in assuring housing rights, which could provide a path for the United States to move piecewise toward upholding in practice the international norm of a right to adequate housing.²⁵⁰ The Supreme Court's decision in *Lindsey v. Normet* (1972) invited states to lead the fight against homelessness in the United States.²⁵¹ States are "better equipped" than federal authorities to address homelessness and housing stability issues.²⁵² To reduce and ultimately end homelessness, states could implement a

²⁴⁶ Walser, *supra* note 217, at 200 (The United States "lacks much of the framework for implementing [the right to housing] on a national level").

²⁴⁷ See, e.g., Neilson, *supra* note 21, at 451 (noting that "state constitutions may provide a sounder basis for fundamental rights to subsistence benefits").

²⁴⁸ Neilson, *supra* note 21, at 441.

²⁴⁹ Walser, *supra* note 217, at 200 (noting that the federal system has failed to recognize a right to housing).

²⁵⁰ Sheffield, *supra* note 186, at 350.

²⁵¹ *Lindsey v. Normet*, 405 U.S. 56, 58–59 (1972).

²⁵² Pollock, *supra* note 238, at 717; Massimo, *supra* note 8, at 287.

rights-based approach to housing through amendments to state constitutions, state legislation, and judicial interpretation.

1. Constitutions

To reduce homelessness and mitigate persistent housing issues in the United States, it is imperative that state constitutions recognize housing as a human right.²⁵³ There are several advantages of expressing this as a constitutional right at the state level.²⁵⁴ State constitutions help to close gaps left by the federal system.²⁵⁵ Compared to the federal Constitution, state constitutions generally provide broader protections of fundamental rights, including social and economic rights that are absent from the federal Constitution.²⁵⁶ State constitutions are also easier to amend than the federal Constitution,²⁵⁷ with states like New York and Massachusetts having already directed amendments specifically at housing rights.²⁵⁸ A state constitutional right to housing can serve as a critical driver for a state-wide shift towards a more effective legal and institutional framework to reduce homelessness.²⁵⁹

²⁵³ Maria Foscarinis, et al., *The Human Right to Housing: Making the Case in U.S. Advocacy*, 38 CLEARINGHOUSE REV. 97 (2004); see also Massimo, *supra* note 8, at 314 (arguing that housing, as a human right, “must be included in state constitutions”).

²⁵⁴ Adams, *supra* note 18, at 300 (noting that “[d]eeming housing a “human right” may have significant advantages as compared with declaring it to be an “ordinary” right”).

²⁵⁵ Massimo, *supra* note 8, at 303.

²⁵⁶ *Id.*, at 309; see, e.g., Adam H. Morse, *Second-Class Citizenship: The Tension Between the Supremacy of the People and Minority Rights*, 43 J. MARSHALL L. REV. 963 (2010) (“[A]mend[ing] state constitutions to prevent minority groups from gaining legal rights, such as the ability of gay and lesbian couples to enter into legally recognized marriages, pose difficult problems in constitutional law.” However, “state constitutions can be amended” to protect minority groups’ legal rights).

²⁵⁷ Massimo, *supra* note 8, at 309.

²⁵⁸ *Id.* at 314.

²⁵⁹ *Id.* at 308–09 (“A strategy more plausible and practical than federal legislation is adoption and enforcement of housing as a right by individual states through amendments to state constitutions”).

A constitutional right to housing establishes legal obligations that state authorities are bound to respect.²⁶⁰ This does not mean governments must build free housing for everyone,²⁶¹ but it mandates relevant authorities to devote critical resources to reduce homelessness and improve people's access to adequate housing.²⁶²

States must then take effective measures, such as adopting new laws or implementing reforms, to ensure the full enjoyment of housing rights. In the event of violations, individuals and groups have standing to require authorities to provide additional resources to fulfill this right.²⁶³ From an economic perspective, the constitutional protection of housing rights justifies continuing budget appropriations to support housing programs;²⁶⁴ it ensures the supply and allocation of critical resources to those in need.²⁶⁵ From a social perspective, it improves access to safe, affordable and adequate housing, helping to build a safer and healthier community.²⁶⁶ Furthermore, declaring housing a constitutional right raises public awareness and understanding about housing rights, and encourages people to call on state authorities to account for their actions in response to homelessness and housing issues. Experience suggests that creating an explicit constitutional right to housing has contributed to the reduction of

²⁶⁰ KALHAN & WICKERI, *supra* note 19, at 5 (noting that a constitutional right to housing imposes an affirmative duty on states to create and sustain “the legal, social and economic conditions necessary for the exercise [of this right]”).

²⁶¹ *A Human Rights Crisis*, *supra* note 25, at 520.

²⁶² Molly Solomon, *What Would ‘Housing as a Human Right’ Look Like in California?*, KQED (Feb. 12, 2020), <https://www.kqed.org/news/11801176/what-would-housing-as-a-human-right-look-like-in-california> [<https://perma.cc/GEH9-84F9>].

²⁶³ Totry-Jubran, *supra* note 204, at 808.

²⁶⁴ Norma Rotunno, Note, *State Constitutional Social Welfare Provisions and the Right to Housing*, 1 HOFSTRA L. & POL’Y SYMP. 111, 111 (1996); Adams, *supra* note 18, at 300.

²⁶⁵ See, e.g., Adams, *supra* note 18, at 300 (noting that it would “motivate increased construction of affordable housing”).

²⁶⁶ Sara-Laure Faraji, et al., *Effect of Emergency Winter Homeless Shelters on Property Crime*, 14 J. EXPERIMENTAL CRIMINOL. 129, 129–40 (2018) (noting that “homeless individuals may commit acquisitive crimes due to a lack of basic necessities”).

homelessness, a success the United States could potentially replicate nationwide. For example, in New York, the incidence of sleeping rough has been significantly reduced due to the implementation of the state's right to shelter mandate originally deriving from the constitutional right to housing.²⁶⁷

2. State Legislation

Legislation can be a powerful tool to support the progressive realization of a right to housing at the state level; it helps develop a rights-based framework for housing, safeguarding the effective and responsible implementation of a constitutional right.²⁶⁸ Alternatively, a legislatively enacted right to housing improves accountability by requiring state authorities to take all necessary actions to prevent homelessness and improve access to housing support and services. To date, many states have taken steps towards recognizing and promoting social and economic rights in general;²⁶⁹ however, only a few have adopted legislation that details the implementation of housing rights, and most existing state laws carry limitations. For example, Massachusetts' Chapter 450 established the right to shelter, but only for low-income families with children under twenty-one years old,²⁷⁰ which essentially denies the right to housing for the majority of

²⁶⁷ Anna Scott, *What Can LA Learn from New York's 'Right to Shelter' Law?*, KCRW (June 16, 2021), <https://www.kcrw.com/news/shows/greater-la/homeless-theater-art/new-york-right-to-shelter-law-lessons> [<https://perma.cc/2HCH-K7ZE>]; see Sarena Goodman, et al., *Homelessness Prevention in New York City: On Average, It Works*, 31 J. HOUS. ECON. 14, 14–34 (2016); see also Byrne & Culhane, *supra* note 19, at 386 (arguing that this approach is unfeasible and has instead “led to the creation of the largest and most expensive emergency shelter system in the United States”).

²⁶⁸ Ellen Wiles, *Aspirational Principles or Enforceable Rights—The Future for Socio-Economic Rights in National Law*, 22 AM. U. INT'L L. REV. 35, 53 (2006) (“Enacting legislation to give concrete effect to constitutional rights is a vital way to provide greater clarification on their meaning and content”).

²⁶⁹ Massimo, *supra* note 8, at 303; see Risa E. Kaufman, *Localizing Human Rights in the United States Through the 2030 Sustainable Development Agenda*, 49 COLUM. HUM. RTS. L. REV. 99, 113–14 (2017).

²⁷⁰ Walker-Simpson, *supra* note 53.

the homeless population—individuals—by preventing them from seeking housing assistance.²⁷¹

There is ample precedent for legislatures to implement internationally accepted human rights standards via state law. To apply this to housing, legislatures may draw support from the right to adequate housing contained in treaties and other international human rights instruments.²⁷² Several states have incorporated international norms into laws and policies to protect human rights within their territories, which suggests this model could succeed in the domain of housing rights.²⁷³ For example, as Maria Foscarinis notes, the California Legislature has adopted the interpretation of “racial discrimination” contained in the ICERD;²⁷⁴ and when developing its administrative regulations on the treatment of prisoners, Connecticut also incorporated international minimum standards.²⁷⁵ The United States has progressively incorporated other international norms into domestic law.²⁷⁶ In the domain of housing rights, state legislatures can follow the same approach. Although the standards adopted by different states might vary, the core principle remains the same: no one deserves to be homeless.

Another advantage of states’ legislating a rights-based approach could be simple administrative efficiency.²⁷⁷ Eligibility requirements for housing in the United States are often complex, and sometimes, they can be exclusive and discriminatory. For example, state authorities often assess housing assistance applications against a number of criteria: income; whether the

²⁷¹ Chandegra, *supra* note 15, at 451.

²⁷² See, e.g., *Notes from the United States*, *supra* note 12, at 477 (noting that “[i]nternational law and standards can also serve as models for domestic legislation, or be adopted wholesale into U.S. law or policy.”).

²⁷³ Massimo, *supra* note 8, at 314.

²⁷⁴ *Notes from the United States*, *supra* note 12, at 477.

²⁷⁵ *Id.* (Connecticut adopted “the international standard minimum rules for the treatment of prisoners as part of its administrative directive.”).

²⁷⁶ Massimo, *supra* note 8, at 314.

²⁷⁷ See, e.g., Mascari, *supra* note 84, at 166 (discussing poor management of shelters in New York).

applicant is qualified as elderly, a person with a disability, or as a family; or whether the applicant has an eligible immigration status.²⁷⁸ The complexity prevents many people from seeking housing assistance.²⁷⁹ As a result, ineligible individuals often end up homeless or at risk of being homeless.²⁸⁰ In this respect, Scotland may provide a useful reference.²⁸¹ Exercising devolved powers, Scotland adopted its own law to address homelessness issues within its territory. The Homelessness etc. (Scotland) Act 2003 abolished the priority need test for accommodation,²⁸² mandating instead a general right to immediate housing for any homeless persons “in permanent housing with supportive services.”²⁸³ As a result of this reform, the homelessness rate has been “substantially lower” in Scotland than in the United Kingdom generally.²⁸⁴ Scotland’s success might not be wholly replicable in the United States for various reasons, such as budget constraints. State legislatures could, nonetheless, consider adjusting eligibility criteria to simply reflect a general right to affordable housing, and make housing more accessible to those in need.

²⁷⁸ See, e.g., *HUD’s Public Housing Program*, U.S. DEP’T OF HOUS. & URB. DEV., https://www.hud.gov/topics/rental_assistance/phprog#:~:text=WHO%20IS%20ELIGIBLE%3F,citizenship%20or%20eligible%20immigration%20status [https://perma.cc/U9Y4-LMFN] (last visited July 13, 2022).

²⁷⁹ Chandegra, *supra* note 15, at 451 (Massachusetts’ Chapter 450 established the right to shelter, but only for low-income Massachusetts families with children under twenty-one years old, essentially excluding the majority of the homeless population—homeless individuals).

²⁸⁰ *Id.*

²⁸¹ Sheffield, *supra* note 186, at 322; see Eric S. Tars & Caitlin Egleson, *Great Scot!: The Scottish Plan to End Homelessness and Lessons for the Housing Rights Movement in the United States*, 16 GEO. J. ON POVERTY L. & POL’Y 187, 195 (2009) (noting that Scotland proves that the implementation of the right to adequate housing is “more than an ideal”).

²⁸² Homelessness etc. (Scotland) Act 2003, Section 2, <https://www.legislation.gov.uk/asp/2003/10/section/2> [https://perma.cc/WAQ8-H7UV].

²⁸³ Sheffield, *supra* note 186, at 340.

²⁸⁴ B. Watts, et al., *The Homelessness Monitor: Scotland 2021* (Sept. 29, 2021), <https://www.crisis.org.uk/ending-homelessness/homelessness-knowledge-hub/homelessness-monitor/scotland/the-homelessness-monitor-scotland-2021> [https://perma.cc/F7K6-R433] (“Rates of core homelessness are substantially lower in Scotland (0.57% of households) than in England (0.94%) and Wales (0.66%).”).

C. Recognition of an International Right to Housing by State Courts

Even without the enactment of housing rights in state constitutions or legislation, state courts can still use other jurisprudential tools to support the realization of housing rights,²⁸⁵ although this would only be a temporary and partial solution to persistent homelessness and housing problems. Susan Neilson's research indicates that state courts have used "different constitutional text, history, values, structural concerns, and notions of judicial capacity at the state level"²⁸⁶ to protect people from discrimination when they seek housing assistance and to further protect housing rights. Stewart G. Pollock argues that state courts are the appropriate forum to resolve housing rights disputes because they are "better equipped" with local knowledge to decide on the best practice for their states.²⁸⁷ Interpretation and application of state laws is also one of the most direct and effective ways to address housing rights violations. Judicial review of administrative decisions is "the application of the rule of law,"²⁸⁸ and "human rights are more effectively realized when supported by the rule of law."²⁸⁹ Through upholding administrative justice in housing, state courts protect and promote equitable access to safe and secure housing. In the event of housing rights violations, state courts can require government authorities to provide remedies and reparation.²⁹⁰

²⁸⁵ KALHAN & WICKERI, *supra* note 19, at 5 (noting that "judges are being increasingly called upon to play a role in the implementation of housing rights, and the growing body of housing rights case law is evidence of this important development.").

²⁸⁶ Neilson, *supra* note 21, at 442.

²⁸⁷ Pollock, *supra* note 238, at 717.

²⁸⁸ Murray Gleeson, *Courts and The Rule of Law* (Nov. 7, 2001), https://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleeson/cj_ruleoflaw.htm [<https://perma.cc/83ZU-2VCV>].

²⁸⁹ Massimo, *supra* note 8, at 312.

²⁹⁰ See, e.g., Totry-Jubran, *supra* note 204, at 797 (noting that some countries in the world "have not enacted any legislation in recognition of housing rights, but they provide judicial remedies for violations of rights.").

State courts may consider applying relevant international human rights law to create judicial rights to housing.²⁹¹ Under the ICERD, the United States must “guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of [. . .] the right to housing.”²⁹² The ICERD, buttressed by federal anti-discrimination statutes, provides ample legal basis for state courts to resolve housing disputes that relate to discrimination. In addition to turning to federal anti-discrimination law, state courts can also apply the ICERD directly to resolve discrimination-related housing disputes. Other international human rights treaties have persuasive value only,²⁹³ but still provide useful guidance²⁹⁴ for state courts to consider in order to redress domestic housing injustice.²⁹⁵ Nevertheless, state application of international human rights treaties faces two major obstacles. First, state courts may not be willing to apply international standards to resolve domestic disputes, since most international treaties are not binding on domestic courts.²⁹⁶ Particularly, the United States Supreme Court’s unfavorable treatment of international law may further deter state courts from applying international human rights standards.²⁹⁷ Second, state courts may not be equipped with sufficient knowledge and skills to enforce international human rights law in the domestic context.²⁹⁸

Federal laws only provide a limited scope of response to nationwide homelessness and housing issues.²⁹⁹ Existing support programs are

²⁹¹ Tars et al., *supra* note 187, at 932.

²⁹² ICERD, *supra* note 113, at art. 5(e)(iii).

²⁹³ Tars et al., *supra* note 187, at 930 (noting that, for example, “[t]he UDHR has persuasive value in the United States and has been cited in several federal court cases.”).

²⁹⁴ KALHAN & WICKERI, *supra* note 19, at 16 (such as “a structure and clearly defined standards” that domestic courts could refer to).

²⁹⁵ Meetal Jain, *Bringing Human Rights Home: The DC Right to Housing Campaign*, 17 HUM. RTS. BRIEF 10, 10–12 (2010).

²⁹⁶ Hoffmann, *supra* note 229.

²⁹⁷ *Id.*; see also Massimo, *supra* note 8, at 313.

²⁹⁸ KALHAN & WICKERI, *supra* note 19, at 25.

²⁹⁹ *Id.* at 9.

criticized for being unfocused. For example, Kristen David Adams contends that federal housing programs have predominantly centered on “creat[ing] jobs and respond[ing] to the needs of [. . .] the submerged middle class,”³⁰⁰ but failed to address the housing needs of the homeless population.³⁰¹ Despite the lack of a federal right to housing for the foreseeable future, federal authorities should still prioritize equitable access to federal housing services and programs.³⁰² Federal authorities can also pursue a range of strategies to support states in their efforts to promote and protect housing rights for everyone, for example, through establishing programs to incentivize private developers to incorporate affordable housing in their projects,³⁰³ or even to “create micro-homes villages for the homeless.”³⁰⁴ The federal system can contribute to states’ successful implementation of rights-based approaches to housing.

In sum, in the absence of federal recognition of housing rights, states must take responsibility for the progressive realization of the right to housing.³⁰⁵ This need not amount to a universal right to free, government-supplied housing,³⁰⁶ but it would require state authorities to establish an effective legal and institutional framework that ensures people’s access to

³⁰⁰ Adams, *supra* note 18, at 286.

³⁰¹ *Id.*

³⁰² See generally PAUL F. WENDT, THE ROLE OF THE FEDERAL GOVERNMENT IN HOUSING (1956), <https://www.huduser.gov/portal/sites/default/files/pdf/Federal-Government-in-Housing.pdf> [<https://perma.cc/VG5Q-VC2L>].

³⁰³ *A Human Rights Crisis*, *supra* note 25, at 520.

³⁰⁴ Alexander, *supra* note 28, at 249–50.

³⁰⁵ See, e.g., Stuart Wilson, Chapter 10: *The Right to Adequate Housing*, in RESEARCH HANDBOOK ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS AS HUMAN RIGHTS (JACKIE DUGARD ET AL., EDS.) 180–201 (2020) (discussing the importance of the progressive realization of the right to housing); see also U.N. Special Rapporteur on the Right to Adequate Housing, *The Right to Adequate Housing*, <https://www.ohchr.org/Documents/Issues/Housing/SRHousingIntroductionFlyer.pdf> [<https://perma.cc/2YTE-YWGM>].

³⁰⁶ *A Human Rights Crisis*, *supra* note 25, at 520.

housing adequate for their health, wellbeing, safety, and security.³⁰⁷ State legislatures and courts play a key role in developing a rights-based approach to ensure adequate housing for everyone.³⁰⁸ Nevertheless, housing issues are complex,³⁰⁹ expensive,³¹⁰ and often rely on the availability of resources.³¹¹ If federal authorities are willing to support state housing initiatives, particularly in areas that fall under federal jurisdiction, states' progress in reducing homelessness and other housing issues can be accelerated.

V. CONCLUSION

Although the housing crisis has been worsening in the United States,³¹² the establishment of a right to housing remains controversial.³¹³ The United States only views housing as a public good in the general sense, as the Supreme Court has consistently declined to recognize housing as an

³⁰⁷ *Id.* (noting that “government’s obligation is to put policies in place to ensure housing for all”).

³⁰⁸ JULES L. COLEMAN, *MARKETS, MORALS AND THE LAW* 28 (1988); Adams, *supra* note 18, at 286–87 (noting that “[w]hen the market fails to allocate resources correctly, entitlements must be allocated directly”).

³⁰⁹ Hannah Kieschnick, *A Cruel and Unusual Way to Regulate the Homeless: Extending the Status Crimes Doctrine to Anti-Homeless Ordinances*, 70 STAN. L. REV. 1569, 1619 (2018).

³¹⁰ Dara Smith, *Home Is Where the Heart Is: Sexual Orientation Discrimination and the Right to Adequate Housing in International Law*, 40 GEO. WASH. INT’L L. REV. 1343, 1352 (2009) (arguing that “states are incapable of providing housing to all of their citizens”).

³¹¹ Byrne & Culhane, *supra* note 19, at 385.

³¹² Samuel Stein, *The Housing Crisis and the Rise of the Real Estate State*, 28 NEW LAB. FORUM 52, 52–60 (2019); *see also* Neilson, *supra* note 21, at 442–43; Abha Bhattarai & Rachel Siegel, *Inflation is Making Homelessness Worse* (July 3, 2022), THE WASHINGTON POST, <https://www.washingtonpost.com/business/2022/07/03/inflation-homeless-rent-housing/> [<https://perma.cc/7MZL-96PB>].

³¹³ *See generally*, Maria Foscarinis, *Homelessness and Human Rights: Towards an Integrated Strategy*, 19 ST. LOUIS U. PUB. L. REV. 327, 327–55 (2000); *see also* Herman, *supra* note 200, at 60; Adams, *supra* note 18, at 280.

individual right.³¹⁴ The absence of a federal entitlement stymies vulnerable Americans' access to critical housing resources.³¹⁵ Meanwhile, state approaches are also piecemeal; their support for public housing is limited in scope.³¹⁶ The existing approach to housing has demonstrably failed to resolve the housing crisis.³¹⁷ It is crucial that the United States look for alternative solutions.³¹⁸

A pivot to a rights-based approach to housing is becoming ever more timely,³¹⁹ as the founder and former executive director of the National Homelessness Law Center, Maria Foscarinis, argued.³²⁰ Housing is one of the fundamental necessities for human survival and development.³²¹ It offers physical shelter, protecting people from environmental and other external threats;³²² it also provides a sense of security and dignity.³²³ From a human rights perspective, housing is inseparable from the idea of adequate living standards.³²⁴ Inadequate access to housing can severely impede opportunities to fulfill other fundamental needs,³²⁵ thus inadvertently undermining further human rights.³²⁶ As compared to political agendas or

³¹⁴ Neilson, *supra* note 21, at 442–43 (noting that the United States Supreme Court declined to recognize housing rights at the federal level and refused to impose an affirmative obligation on governments to provide housing support for the needy).

³¹⁵ *Notes from the United States*, *supra* note 12, at 465.

³¹⁶ KALHAN & WICKERI, *supra* note 19, at 25.

³¹⁷ Massimo, *supra* note 8, at 273.

³¹⁸ *Id.*

³¹⁹ *Notes from the United States*, *supra* note 12, at 449–50.

³²⁰ National Homelessness Law Center, *About the Law Center*, <https://homelesslaw.org/history-mission/> [<https://perma.cc/MP6F-MD2S>].

³²¹ Totry-Jubran, *supra* note 204, at 802.

³²² *Id.* at 796; JESSIE M. HOHMANN, *THE RIGHT TO HOUSING: LAW, CONCEPTS, POSSIBILITIES* 4–5 (2013).

³²³ Totry-Jubran, *supra* note 204, at 796; Adams, *supra* note 18, at 305–07.

³²⁴ Tawfiq S. Rangwala, *Inadequate Housing, Israel, and the Bedouin of the Negev*, 42 OSGOOD HALL L.J. 415, 418 (2004).

³²⁵ Alexander, *supra* note 28, at 254.

³²⁶ *Id.*; see Chris Sidoti, *Housing as a Human Right: National Conference on Homelessness Council to Homeless Persons Address by Chris Sidoti, Human Rights Commissioner* (Sept. 4, 1996), https://humanrights.gov.au/sites/default/files/content/pdf/human_rights/housing.pdf

government policies, human rights is a more powerful tool to address the ongoing housing crisis,³²⁷ as it can drive a fundamental shift towards a paradigm that prioritizes housing and views it as a universal right.³²⁸ The United States is more likely to achieve housing security if it recasts housing as an individual right. As such, in the absence of housing rights at the federal level, states bear the responsibility for making this shift. Constitutional amendments at the state level, state legislation, and state judicial actions in recognition of housing rights are all important steps toward the progressive realization of a legally enforceable right to housing that reflects international standards.

[<https://perma.cc/5A3Z-KXT9>] (“[a]dequate housing is essential for human survival with dignity. Without a right to housing, many other basic human rights will be compromised”).

³²⁷ Adams, *supra* note 18, at 299; see also Kyra Olds, *The Role of Courts in Making the Right to Housing A Reality Throughout Europe: Lessons from France and the Netherlands*, 28 WIS. INT’L L.J. 170, 176 (2010) (discussing the importance of recognizing the right to housing).

³²⁸ *A Human Rights Crisis*, *supra* note 25, at 527.