

“YOU CAN’T BE HERE”: THE HOMELESS AND THE RIGHT TO REMAIN IN PUBLIC SPACE

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ABSTRACT

In cities throughout the country, homeless individuals are continuously relocated from place to place and faced with the quandary that by engaging in basic life activities they are breaking the law. Many of these individuals and their legal advocates have argued that laws prohibiting the homeless from sleeping or sitting down in public make it effectively impossible for them to exist, violating the Eighth Amendment ban on cruel and unusual punishments and the right to travel derived from the Fourteenth Amendment. However, the vast majority of courts have rejected these arguments because they do not readily fit into existing doctrines.

This article argues that the Supreme Court’s decision in *Obergefell v. Hodges* provides a mold for homeless individuals and their advocates to recast challenges to anti-homeless ordinances and regularly-issued move-along orders into a more compelling form. In *Obergefell*, the Supreme Court recognized the right to same-sex marriage by looking at the confluence of several different lines of case law and allowing concerns for equality to guide its substantive due process analysis. This article follows the mode of substantive due process analysis that *Obergefell* endorsed and focuses on the connections between the right to movement, the Eighth Amendment, Fourth Amendment privacy concerns, the attention to inequality motivating applications of the right to travel, and the Court’s vagueness cases as they relate to vagrancy and public spaces. This article then looks at how a right to remain in public space can be applied to shield homeless individuals from mistreatment while maintaining law enforcement’s ability to regulate public spaces.

I. INTRODUCTION	310
II. PREVAILING CHALLENGES TO ANTI-HOMELESS ORDINANCES	312
A. The Eighth Amendment	312
B. The Right to Travel	316
C. Substantive Due Process Before <i>Obergefell</i>	320
III. THE STATE OF SUBSTANTIVE DUE PROCESS AFTER <i>OBERGEFELL</i>	321
IV. CHALLENGES RECAST AS A COMPREHENSIVE RIGHT	326

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A. A Basic Intuition	328
B. The Right to Freedom of Movement	329
C. The Eighth Amendment	333
D. The Imperatives of the Fourth Amendment	336
E. The Equality in the Right to Travel	338
F. Vagueness and the Beginnings of a Substantive Right	340
V. THE SHAPE OF THE RIGHT AND CRITIQUES.....	343
A. A Right to Space or a Right to Remain.....	343
B. The Right to Remain and Effective Policing	344
C. A Proposed Standard of Review	347
VI. CONCLUSION.....	349

I.

INTRODUCTION

In *Obergefell v. Hodges*,¹ the Supreme Court recognized the right to same-sex marriage by looking at the confluence of several different “principles and traditions”² and allowing concerns for equality to guide its substantive due process analysis.³ The opinion appears to sound the death knell for the rival and, until *Obergefell*, seemingly predominant mode of substantive due process analysis endorsed in *Washington v. Glucksberg*.⁴ In *Glucksberg*, the Court required that any right be “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty,” as well as a “‘careful description’ of the asserted fundamental liberty interest.”⁵ In *Obergefell*, by framing fundamental rights at a higher level of generality, Justice Kennedy drew on patterns in constitutional reasoning and connections among various rights that had been obscured under *Glucksberg*.⁶ Further, by reaffirming the close tie between the Due Process and Equal Protection Clauses, the Court signaled its openness to upholding the rights of marginalized groups through substantive due process.⁷

This breakthrough in gay rights and the accompanying overhaul of substantive due process analysis could have significant implications for the civil rights of a seemingly disparate group—the homeless. Faced with a declining supply of low-income housing and increasing numbers of laws criminalizing

1. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

2. See Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 164 (2015) (quoting *Obergefell*, 135 S. Ct. at 2598).

3. See *id.* at 174.

4. *Washington v. Glucksberg*, 521 U.S. 702 (1997); see Yoshino, *supra* note 2, at 162.

5. *Glucksberg*, 521 U.S. at 721 (first quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); then quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937); and then quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

6. See Yoshino, *supra* note 2, at 163–64, 166.

7. See *id.* at 174.

homelessness,⁸ homeless individuals and their legal advocates have brought a number of constitutional challenges to strike down ordinances criminalizing behavior in which homeless people must engage to survive. Advocates have argued that laws prohibiting homeless individuals from sleeping or sitting down in public make it effectively impossible for them to exist, violating the Eighth Amendment ban on cruel and unusual punishments and the right to travel derived from the Fourteenth Amendment. While the arguments have periodically found success, the vast majority of courts have rejected these claims.⁹ The arguments falter in part because they would require judges to accept novel applications of constitutional rights and invalidate decisions made through the democratic process, particularly by local communities. This article is not intended to detract from the force of these arguments, but rather, in light of their limitations and the opening that *Obergefell* has provided to develop substantive due process rights, to harness and recast them in a more direct, powerful, and persuasive form.

The *Obergefell* decision presents an opportunity for homeless advocates to push the courts to recognize a right that more directly protects against the trauma that homeless individuals endure on a daily basis at the hands of law enforcement—the right to remain in public space. Through the substantive due process analysis followed in *Obergefell*, advocates can vindicate the rights of the homeless in the face of measures to exclude them from public space that would be unthinkable if applied to the rest of the population. In doing so, courts can fulfill their duty to uphold equal protection, while avoiding the difficulties involved in recognizing additional classifications for strict scrutiny.¹⁰ The right to remain in public space is both a universal right that all Americans value dearly and a bulwark against deprivations that have starkly affected homeless people throughout history and, to a particularly dire extent, today.

Alone, none of the constitutional doctrines that homeless advocates have brought before the courts have been consistently extended to apply protection to homeless individuals. Yet together, modeled after the reasoning in *Obergefell*, the different clusters of liberties support a fundamental right to remain in public space that addresses the indignity continuously inflicted on homeless people. Part II reviews the claims that homeless advocates most frequently present and how courts have viewed these arguments. Part III analyzes the Supreme Court's substantive due process jurisprudence and the state of the law after *Obergefell*. Part IV sets out the bases for a right to remain in public space modeled after the

8. See NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 7–9 (2014), https://www.nlchp.org/documents/No_Safe_Place [<https://perma.cc/P8AM-RL4P>] [hereinafter NO SAFE PLACE] (reporting increases in laws banning camping in public by 60%, bans on loitering, loafing, and vagrancy by 35%, and bans on sleeping in vehicles by 119% since 2011, alongside a 12.8% loss of low-income housing since 2001).

9. See *infra* Parts II.A, II.B.

10. See Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 752, 758–59 (2011) (discussing the Court's trepidation about according new classifications heightened scrutiny in an increasingly diverse society).

Court's reasoning in *Obergefell*. Part V looks at the shape the right would take and explores two potential critiques.

II.

PREVAILING CHALLENGES TO ANTI-HOMELESS ORDINANCES

A. *The Eighth Amendment*

Homeless advocates have achieved some success arguing that criminalizing homelessness violates the Cruel and Unusual Punishments Clause of the Eighth Amendment.¹¹ In most courts, however, the argument that the Eighth Amendment prohibits anti-homeless ordinances has foundered on several obstacles. First, courts have largely hewed to the plurality holding affirming the defendant's conviction for public intoxication in *Powell v. Texas*—the Supreme Court's last word on the meaning of the Cruel and Unusual Punishments Clause as it applies to criminalizing involuntary actions—and read Justice White's opinion casting the fifth and deciding vote unduly narrowly.¹² Second, several circuits have sidestepped the question entirely by holding that the Eighth Amendment does not attach before conviction. Third, even the most favorable rulings have limited the application of the Eighth Amendment to circumstances where no shelter is available, risking leaving homeless people no option where shelters are inaccessible or dangerous.

The Supreme Court first applied the Cruel and Unusual Punishments Clause to what states may criminalize in 1962 in *Robinson v. California*, when it invalidated a state statute that criminalized not only the possession or use of narcotics, but also addiction.¹³ The Court held that making the "status" of narcotics addiction a criminal offense, such that someone could be continuously guilty without having engaged in any discrete act within the state, inflicts a cruel and unusual punishment in violation of the Eighth Amendment.¹⁴ The Court noted that narcotics addiction is an illness that may be contracted innocently or involuntarily, and it compared the State's actions to imprisoning someone for having a common cold.¹⁵

In *Powell*, the Court fractured over the appropriate application of *Robinson* to a chronic alcoholic's challenge of his conviction for public drunkenness.¹⁶ The four Justices in the plurality read *Robinson* as holding that the Cruel and Unusual Punishments Clause requires that an individual commit an act before he is convicted of a crime.¹⁷ For the plurality, the relevant distinction was between

11. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

12. See *Powell v. Texas*, 392 U.S. 514 (1968).

13. *Robinson v. California*, 370 U.S. 660, 665 (1962).

14. See *id.* at 666–67.

15. *Id.* at 667.

16. See *Powell*, 392 U.S. 514.

17. *Id.* at 553.

conduct and status, not voluntary and involuntary conduct.¹⁸ The defendant had gone outside in a state of intoxication and could therefore be convicted.¹⁹ The *Robinson* Court had mandated the existence of an actus reus, the *Powell* plurality argued, not any particular constitutional doctrine of mens rea.²⁰ In contrast, the four Justices in dissent concluded that *Robinson* stood for the proposition that criminal penalties may not be imposed on involuntary conduct.²¹ *Powell* was powerless to avoid drinking and, once intoxicated, he could not keep himself from appearing in public.²²

Justice White cast the deciding fifth vote in *Powell* in favor of upholding the conviction. His concurrence rested on the narrowest understanding of the law, making it the only controlling precedent among the opinions in *Powell*.²³ Justice White stated that there is no meaningful distinction between criminalizing an irresistible compulsion to use narcotics and criminalizing yielding to that compulsion.²⁴ He voted to uphold the conviction, however, because *Powell* had failed to show that he was incapable of avoiding drinking in public.²⁵ Justice White held out the possibility that a chronic alcoholic who is homeless could show that he was unable to avoid public places while intoxicated and therefore could not be punished for the involuntary act of bowing to his addiction and drinking.²⁶

Several courts since have held that criminalizing conduct inseparable from homelessness violates the Cruel and Unusual Punishments Clause.²⁷ In *Jones v. City of Los Angeles*, the leading case decided in favor of this view, the Ninth Circuit determined that five Justices on the *Powell* court—Justice *Powell* in his concurrence and four Justices in dissent—“understood *Robinson* to stand for the proposition that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one’s status or being.”²⁸ The Ninth Circuit found that the homeless “are in a chronic state that

18. *Id.*

19. *Id.* at 533–34.

20. *Id.* at 533, 535.

21. *Id.* at 533; *id.* at 567 (Fortas, J., dissenting).

22. *Id.* at 569–70 (Fortas, J., dissenting).

23. *Id.* at 548–54 (White, J., concurring in the judgment); *Marks v. United States*, 430 U.S. 188, 193 (1977) (where no single opinion is supported by a majority of the Court, the holding of the Court may be viewed as the position supporting the judgment on the narrowest grounds). The precedential value of the *Powell* plurality opinion is limited to its precise facts.

24. *Powell*, 392 U.S. at 548–49 (White, J., concurring in the judgment).

25. *Id.* at 552–53.

26. *Id.* at 551.

27. *See, e.g.*, *Jones v. City of Los Angeles*, 444 F.3d 1118, 1136 (9th Cir. 2006), *appeal dismissed and vacated as moot*, 505 F.3d 1006, 1006 (9th Cir. 2007) (dismissing and vacating because parties reached settlement); *Anderson v. City of Portland*, No. 08-1447-AA, 2009 WL 2386056, at *7 (D. Or. July 31, 2009) (denying motion to dismiss Eighth Amendment claim, but adding a factor—“the nature of the act and the reasons for its prohibition”—to the tests used in *Jones* and *Pottinger v. City of Miami*); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1565 (S.D. Fla. 1992).

28. *Jones*, 444 F.3d at 1135.

may have been acquired “innocently or involuntarily” and that with no access to private spaces, sitting, lying, and sleeping are “universal and unavoidable consequences of being human” that “can only be done in public.”²⁹ Thus, “by criminalizing sitting, lying, and sleeping, the City is in fact criminalizing Appellants’ status as homeless individuals.”³⁰ The fact that City officials admitted to a severe shortage of shelter beds was critical to the court’s determination that homeless individuals were compelled to sleep on the street.³¹ While *Jones* can be cited as persuasive authority, it is not binding in the Ninth Circuit because the court vacated the opinion as a condition of the subsequent settlement.³²

Despite homeless advocates’ sporadic success, most courts have declined to invalidate anti-homeless ordinances under the Eighth Amendment.³³ In *Tobe v. City of Santa Ana*, the Supreme Court of California held that *Robinson* and *Powell* hinged on the distinction between status and conduct and did not deal with the line between voluntary and involuntary conduct.³⁴ The court found that an ordinance banning camping and storage of personal property in public areas did not violate the Eighth Amendment because the ordinance proscribed conduct, not status.³⁵ The court also expressed doubt that homelessness can be considered an involuntary status rather than a condition subject to an individual’s control.³⁶ Similarly, a California district court in *Joyce v. City & County of San Francisco* found that homelessness is not a status and that *Robinson* and *Powell* turned on conduct, not voluntariness.³⁷ The court feared that declaring homelessness a status

29. *Id.* at 1136 (citing *Robinson v. California*, 370 U.S. 660, 667 (1962)).

30. *Id.* at 1137.

31. *Id.* at 1138 (“[S]o long as there is a greater number of homeless individuals in Los Angeles than the number of available beds, the City may not enforce section 41.18(d) at all times and places throughout the City against homeless individuals for involuntarily sitting, lying, and sleeping in public.”); see also *Pottinger*, 810 F. Supp. at 1565 (relying on the absence of “a single place where [the homeless] can lawfully be”). However, the *Pottinger* court suggested that even where shelter space is available, it may not be a viable alternative to public spaces “if, as is likely, the shelter is dangerous, drug infested, crime-ridden, or especially unsanitary Giving one the option of sleeping in a space where one’s health and possessions are seriously endangered provides no more choice than does the option of arrest and prosecution.” *Pottinger*, 810 F. Supp. at 1580 n.34 (quoting Paul Ades, *The Unconstitutionality of “Antihomeless” Laws: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel*, 77 CALIF. L. REV. 595, 620 n.183 (1989)).

32. See *Jones*, 505 F.3d 1006.

33. See, e.g., *Lehr v. City of Sacramento*, 624 F. Supp. 2d 1218, 1231 (E.D. Cal. 2009) (“[D]espite any similarities between *Jones* and the instant case, this Court is not now bound by the majority’s rationale and cannot today accept its logic. Rather, this Court finds the *Jones* dissent to be the more persuasive and well-reasoned opinion. Accordingly, the Court will now incorporate that opinion into its own analysis of the current dispute.”).

34. *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1166 (Cal. 1995).

35. *Id.*

36. *Id.* at 1166–67.

37. *Joyce v. City of San Francisco*, 846 F. Supp. 843, 858 (N.D. Cal. 1994) (upholding San Francisco’s Matrix program of stringently enforcing a set of ordinances against homeless individuals). The court dismissed the plaintiff’s argument that language in Justice White’s concurrence indicated that five members of the Court would have overturned the conviction in *Powell* had the defendant been homeless as “sheer speculation.” *Id.* at 857. It also stated that “it

would “significantly limit the States in their efforts to deal with a widespread and important social problem and would do so by announcing a revolutionary doctrine of constitutional law that would also tightly restrict state power to deal with a wide variety of other harmful conduct.”³⁸

Even where courts suggest that they might be open to the analysis in *Jones*, claims fail without a showing of insufficient shelter capacity. In *Joel v. City of Orlando*,³⁹ the Eleventh Circuit held that the availability of shelter space gave Joel the opportunity to comply with an ordinance criminalizing camping, and it distinguished *Jones* and *Pottinger v. City of Miami*⁴⁰—a case preceding *Jones* that was decided similarly to *Jones*—on that basis. While *Pottinger* suggested that shelters must meet minimum standards of sanitation and safety to defeat an Eighth Amendment claim, other courts have not made similar provisos.⁴¹

Finally, some courts will not even consider an Eighth Amendment challenge due to a division over whether the Eighth Amendment is applicable before a conviction. This disagreement stems from divergent understandings of *Ingraham v. Wright*.⁴² In *Ingraham*, the Supreme Court held that the Eighth Amendment does not regulate state action “outside the criminal process.”⁴³ It determined that because the context of disciplining schoolchildren is different from that of punishing criminals, disciplinary corporal punishment is not subject to Eighth Amendment scrutiny.⁴⁴ As a result, both the Second and Fifth Circuits have held that the Eighth Amendment does not attach before conviction.⁴⁵ In *Davison v. City of Tucson*, a district court in Arizona dismissed the homeless plaintiffs’ Eighth Amendment claim since none of them were convicted under the trespass statute under consideration.⁴⁶ Other courts disagree with this reading of the Eighth Amendment.⁴⁷

would be an untoward excursion by this Court into matters of social policy to accord to homelessness the protection of status.” *Id.* at 858.

38. *Id.* at 858 (quoting *Powell v. Texas*, 392 U.S. 514, 537 (1968) (Black, J., concurring)).

39. *Joel v. City of Orlando*, 232 F.3d 1353, 1362 (11th Cir. 2000).

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

41. *See id.* at 1580 n.34.

42. *See Ingraham v. Wright*, 430 U.S. 651 (1977).

43. *Id.* at 667–68.

44. *Id.* at 671.

45. *See Weyant v. Okst*, 101 F.3d 845, 856 (2d Cir. 1996); *Johnson v. City of Dallas*, 61 F.3d 442, 443–45 (5th Cir. 1995); *see also Betancourt v. Giuliani*, No. 97CIV6748 JSM, 2000 WL 1877071, at *5 (S.D.N.Y. Dec. 26, 2000) (granting summary judgment on plaintiff’s claim that his arrest was a violation of the Eighth Amendment on the grounds that an Eighth Amendment violation can only occur where a convicted person is involved).

46. *Davison v. City of Tucson*, 924 F. Supp. 989, 992–93 (D. Ariz. 1996).

47. *See, e.g., Jones v. City of Los Angeles*, 444 F.3d 1118, 1128 (9th Cir. 2006) (holding that *Ingraham* depended on the distinction between criminal and noncriminal punishment, not criminal conviction and pre-conviction law enforcement measures). *Ingraham* itself specified that the Cruel and Unusual Punishments Clause “imposes substantive limits on what can be made criminal and punished as such.” *Id.* at 1127 (quoting *Ingraham*, 430 U.S. at 667).

Advocates continue to push courts to accept the application of the Eighth Amendment in the context of homelessness. Notably, the Department of Justice Civil Rights Division submitted a Statement of Interest in *Bell v. City of Boise*⁴⁸ in light of the conflicting lower-court case law to argue that *Jones* is the appropriate legal framework for analyzing the plaintiffs' Eighth Amendment claims.⁴⁹ However, the government filed similar amici briefs in the 1990s in *Tobe* and *Joyce*, yet the same debate continues today. If anything, the brief reflects the split between a growing consensus on the national level that criminalizing homelessness is counter-productive and inhumane, and the proliferation of anti-homeless ordinances among municipalities.⁵⁰

B. The Right to Travel

Unlike homeless individuals' Eighth Amendment claim, which revolves around the disputed holding of a single case, homeless people's invocation of the right to travel requires tracing centuries of case law. While it does not appear expressly in the Constitution, the right to travel freely throughout the United States is an indisputable fundamental right that has at various times been attributed to the Article IV Privileges and Immunities Clause, the Commerce Clause, a corollary of national citizenship, the Equal Protection Clause, and the Due Process Clause.⁵¹ The uncertain origins of the right to travel and the Supreme Court's silence on whether the right applies within state lines have led to ambiguity about the nature and scope of the right, including its relation to a more general right to movement. Advocates have continued to press courts to recognize that the right to travel precludes municipalities from passing laws that effectively exclude homeless people from living in a jurisdiction, but courts have for the most part declined to accept this more expansive reading of Supreme Court precedent.

The Supreme Court has found violations of the right to travel when laws discriminate against new residents from out of state. In *Shapiro v. Thompson*, the Supreme Court struck down as violative of the Equal Protection Clause a statute that imposed a minimum durational residency requirement in order to qualify for welfare benefits.⁵² The Court found that, by discriminating against residents who had lived in the state for less than a year, the statute infringed on the fundamental right to travel. Subsequently, the Court invalidated state laws that mandated a

48. *Bell v. City of Boise*, No. 1:09-cv-00540-REB, 2014 WL 3547224 (D. Idaho July 16, 2014).

49. Statement of Interest of the United States at 4, *Bell v. City of Boise*, No. 1:09-cv-00540-REB (D. Idaho Aug. 6, 2015).

50. Compare U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, SEARCHING OUT SOLUTIONS: CONSTRUCTIVE ALTERNATIVES TO THE CRIMINALIZATION OF HOMELESSNESS (2012), https://www.usich.gov/resources/uploads/asset_library/Searching_Out_Solutions_2012.pdf [<https://perma.cc/A4V3-A7V7>] with NO SAFE PLACE, *supra* note 8.

51. See *Lutz v. City of York*, 899 F.2d 255, 260–61 (3d Cir. 1990) (“Various Justices at various times have suggested no fewer than seven different sources [of the right to travel].”).

52. See *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969).

minimum duration of residency for eligibility to vote⁵³ and a one-year stay in the state in order to receive free medical care.⁵⁴ Each of these cases has recognized the right to travel as fundamental and subject to strict scrutiny, with the *Shapiro* Court even stating that the right is so important that it is “a virtually unconditional personal right.”⁵⁵ The Court has expressly refrained from reaching the question of whether the right includes intrastate travel.⁵⁶

While the aforementioned cases decided on right-to-travel grounds reveal a clear pattern of invalidating laws that directly discriminate against newcomers to a state, in dicta in cases involving the First Amendment and the void-for-vagueness doctrine, the Court has suggested that the right to travel may reach additional kinds of movement. In *Kent v. Dulles*, while declining to find authority for the Secretary of State to deny passports to Communist sympathizers, Justice Douglas wrote:

Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values.⁵⁷

This articulation of the right to travel was dicta because the Court decided the case based on statutory construction.⁵⁸ Nonetheless, the broad reference to movement “inside frontiers” implies that freedom of movement is not limited to crossing state lines. Then, in the course of striking down an anti-loitering statute on vagueness grounds in *Kolender v. Lawson*, the Court found that the statute “implicates consideration of the constitutional right to freedom of movement.”⁵⁹ Unlike the laws in the *Shapiro* line of cases, the law in *Kolender* applied to everyone within the state of California without imposing any classifications based on length of residency.⁶⁰

53. See *Dunn v. Blumstein*, 405 U.S. 330, 332–33 (1972).

54. See *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250, 269 (1974).

55. *Shapiro*, 394 U.S. at 643. Recent cases have called into question whether the right to travel should be evaluated under strict scrutiny. In *Zobel v. Williams*, the Court struck down minimum durational residency requirements under rational basis review without addressing “whether any enhanced scrutiny is called for,” 457 U.S. 55, 60–61 (1982), and in *Attorney General of New York v. Soto-Lopez*, the fifth and sixth votes for striking down a statute relied on rational basis review, while the plurality applied strict scrutiny, 476 U.S. 898, 913, 916 (1986).

56. *Mem'l Hosp.*, 415 U.S. at 255–56 (“Even were we to draw a distinction between interstate and intrastate travel, a question we do not now consider”); *but see* *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 277 (1993) (disagreeing with plaintiffs’ contention that defendants’ demonstrations infringed upon the interstate travel rights of women seeking abortions because the actions of the defendants only inhibited intrastate travel).

57. *Kent v. Dulles*, 357 U.S. 116, 126 (1958).

58. The Court later qualified its discussion of the right to travel in *Kent* by noting that First Amendment concerns “controlled” the *Kent* decision. See *Regan v. Wald*, 468 U.S. 222, 241–42 (1984).

59. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

60. *Id.* at 352.

In the absence of a definitive answer from the Supreme Court on the applicability of the right to travel to intrastate travel, circuit courts have split on the issue. In *King v. New Rochelle Municipal Housing Authority*, the Second Circuit found the city's residency requirement unconstitutional as applied to individuals seeking public housing.⁶¹ The court determined that "[i]t would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state."⁶² Both the Third and Sixth Circuits have recognized "the right to travel locally through public spaces and roadways"⁶³ after canvassing right-to-travel cases and finding that the right was "implicit in the concept of ordered liberty"⁶⁴ and "deeply rooted in the Nation's history."⁶⁵ In contrast, in *Wright v. City of Jackson*, the Fifth Circuit held that a fundamental right to intrastate travel does not exist, and it accordingly upheld a city ordinance requiring its employees to live within city limits under rational basis review.⁶⁶

In order to invalidate anti-homeless laws under the right to travel, advocates for the homeless build upon decisions that have found a right to intrastate travel and argue that laws that leave homeless persons nowhere to go within a city burden their right to travel. This argument reached its high-water mark in *Pottinger v. City of Miami*, where a district court in Florida held that "the City's practice of arresting homeless individuals for performing essential, life-sustaining acts in public when they have absolutely no place to go effectively infringes on their fundamental right to travel in violation of the equal protection clause."⁶⁷ In support of this proposition, the *Pottinger* court cited the Supreme Court in *Memorial Hospital v. Maricopa County*, where the Court determined that laws penalize travel if they deny a person a "necessity of life"⁶⁸—such as free medical care—based on the duration of a person's residence in a jurisdiction. The *Pottinger* court found that "forcing homeless individuals from sheltered areas or from public parks or streets affects a number of 'necessities of life'—for example, it deprives them of a place to sleep, of minimal safety and of cover from the elements."⁶⁹ The court observed that the manner in which the city enforced ordinances against homeless

61. *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 647–48 (2d Cir. 1971).

62. *Id.* at 648.

63. *Johnson v. City of Cincinnati*, 310 F.3d 484, 495 (6th Cir. 2002) (applying strict scrutiny to an ordinance that banned individuals arrested for certain drug offenses from entering particular neighborhoods for up to ninety days); *Lutz v. City of York*, 899 F.2d 255, 268 (3d Cir. 1990) (upholding cruising ordinance as a reasonable time, place, and manner restriction on the right of localized intrastate travel); *see also* *Cole v. City of Memphis*, 839 F.3d 530, 537 (6th Cir. 2016) (subjecting to intermediate scrutiny the Memphis police's narrower routine practice of sweeping and closing down a popular two-block area for two hours on weekend nights).

64. *Lutz*, 899 F.2d at 268 (citing *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

65. *Id.* (citing *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)).

66. *Wright v. City of Jackson*, 506 F.2d 900, 901 (5th Cir. 1975).

67. *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1554 (S.D. Fla. 1992).

68. *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250, 259 (1974).

69. *Pottinger*, 810 F. Supp. at 1580.

individuals had the effect of preventing homeless people from coming into Miami and expelling those present.⁷⁰

However, subsequent courts have made clear that *Pottinger* is an outlier.⁷¹ Under a drastically different reading of *Memorial Hospital* and the Supreme Court's right-to-travel jurisprudence, in *Tobe v. City of Santa Ana*, the Supreme Court of California found that only a law that directly burdens the fundamental right of interstate travel is constitutionally infirm.⁷² The court explained that an ordinance imposes a direct burden when it creates "classifications which, by imposing burdens or restrictions on newer residents which do not apply to all residents, deter or penalize migration of persons who exercise their right to travel to the state."⁷³ In contrast, the court stated, an incidental impact on travel of a law having a purpose other than restricting migration to the state does not violate the right to travel.⁷⁴ It also noted that states are not obligated to facilitate access to constitutional rights.⁷⁵ The City of Santa Ana thus had no constitutional obligations to allow homeless individuals to stay on public property to enable their exercise of the right to travel.⁷⁶

Other courts have issued decisions similar to that of the Supreme Court of California. In *Joyce v. County of San Francisco*, a district court in California found that, even assuming that there was an intrastate right to travel, police actions that adversely affect homeless people do not trigger strict scrutiny under the right to travel because they are facially neutral with respect to residence.⁷⁷ In *Davison v. City of Tucson*, an Arizona district court determined that "[t]he Defendants' action does not impede the travel of any of the named plaintiffs because they do not seek to travel anywhere; they seek only to remain."⁷⁸ Even the Second Circuit, which has recognized the right to intrastate travel, scarcely paused to consider a homeless plaintiff's right-to-travel claim in *Betancourt v. Bloomberg*.⁷⁹ In a challenge to an ordinance prohibiting erecting a structure in a public place, the court held that the

70. *Id.* at 1581.

71. *But see* *Streetwatch v. Nat'l R.R. Passenger Corp.*, 875 F. Supp. 1055, 1064 (S.D.N.Y. 1995) (holding that Amtrak's rules of conduct, which were applied in a manner that consistently removed homeless individuals from Penn Station, "implicate the constitutional freedom of movement"). Following the lead of the Third Circuit and *Kolender* and *Papachristou*, the court described a "constitutionally protected freedom to move about in the public areas of one's locale." *Id.* It highlighted testimony that "individuals were arrested or ejected solely because Amtrak police officers perceived that they were homeless or associating with the homeless." *Id.*

72. *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1162–63 (Cal. 1995).

73. *Id.* at 1162.

74. *Id.* at 1163.

75. *Id.* at 1165.

76. *Id.*

77. *Joyce v. City of San Francisco*, 846 F. Supp. 843, 860 (N.D. Cal. 1994).

78. *Davison v. City of Tucson*, 924 F. Supp. 989, 993 (D. Ariz. 1996).

79. *Betancourt v. Bloomberg*, 448 F.3d 547 (2d Cir. 2006).

statute does not impinge on the right to travel because it does not restrict interstate or intrastate freedom of movement.⁸⁰

Attempts to extend the right to travel to the homeless thus suffer from doctrinal and policy limitations similar to those that undermine Eighth Amendment claims. The interstate travel doctrine does not naturally reach longtime homeless residents of a city or laws that do not affect the right to travel on their face. The more general freedom of movement language scattered throughout the case law does not reveal a clear pattern or rationale that judges can faithfully apply. Ironically, the *Pottinger* court's remark that the Supreme Court has "long recognized the right to travel" inadvertently underscores the confused nature of the right.⁸¹ The length of the history of the right has served as a makeweight for conceptual clarity. Without an understanding of the core activity that the right to travel protects or any guidance from the Supreme Court, lower courts have difficulty extending the right.⁸² Moreover, judges fear the consequences of advancing a novel interpretation of the law that will hamstring law enforcement. The inexact fit between the legal doctrine and the plight of homeless persons offers judges an easy out.

C. Substantive Due Process Before Obergefell

Homeless advocates have pursued two courses in arguing that cities have violated homeless individuals' right to travel. In the approach taken in *Pottinger*, the plaintiffs prevailed on the court to adopt a large-scale outlook that the city's enforcement of its laws had the cumulative effect of rendering it impossible for homeless individuals to live in Miami legally.⁸³ The second approach, also pursued in *Pottinger*, has been to attempt to constitutionalize the life-sustaining activities that homeless people are compelled to perform in public.⁸⁴ The *Pottinger* court found that the plaintiffs offered no legal support for their contention that the court should recognize a fundamental right to undertake life-sustaining activities, particularly when the "Supreme Court has long recognized the right to travel as a fundamental constitutional right."⁸⁵ Other courts have also declined to recognize rights to engage in specific life-sustaining activities.⁸⁶ Yet,

80. *Id.* at 553. In dissent, Judge Calabresi wrote that the ordinance seemed to threaten either the "right to travel by burdening the so-called 'right to remain'" as outlined in the plurality opinion in *Morales* or the "Eighth Amendment's bar against punishing status rather than conduct" as elucidated in *Jones*. *Id.* at 555 n.**. He did not elaborate further, however, because he found that the statute was void for vagueness even under the standard that the majority applied. *Id.*

81. *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1578 (S.D. Fla. 1992).

82. *See Lutz v. City of York*, 899 F.2d 255, 261–67 (3d Cir. 1990) (considering the various constitutional provisions that could be the source of a localized right to intrastate travel).

83. *See Pottinger*, 810 F. Supp. at 1565.

84. *Id.* at 1578.

85. *Id.*

86. *See, e.g., Joel v. City of Orlando*, 232 F.3d 1353, 1357 (11th Cir. 2000) (finding no right to sleep outside); *Davison v. City of Tucson*, 924 F. Supp. 989, 992 (D. Ariz. 1996) (rejecting plaintiffs' argument for "a right to occupy public lands in contravention of the governmental body

with the ascendance of the mode of substantive due process analysis endorsed in *Obergefell*, substantive due process is now a promising avenue to curtail the criminalization of homelessness.

III.

THE STATE OF SUBSTANTIVE DUE PROCESS AFTER *OBERGEFELL*

Substantive due process has long been a contested field of constitutional interpretation.⁸⁷ In the first half of the twentieth century, the Supreme Court interpreted the term “liberty” in the Due Process Clause of the Fourteenth Amendment to contain rights including the right to make decisions about the education of one’s children⁸⁸ and the right to procreate.⁸⁹ At the same time, it found economic rights in the terms “property” and “liberty,” most infamously in its decision to strike down wage and hour laws under the right of contract in *Lochner v. New York*.⁹⁰ When the Court’s intervention to protect the freedom of contract led to a clash with President Roosevelt’s New Deal agenda and a near constitutional crisis, the Court recanted its economic liberty jurisprudence, retreating to a forgiving rational basis standard in *West Coast Hotel Co. v. Parrish*.⁹¹

Starting with the Warren Court era, the doctrine of substantive due process experienced a second life through the Court’s recognition of privacy rights. Initially, the Court developed a theory of a penumbra of interrelated rights, whereby the concepts at the periphery of rights—the First, Third, and Fourth Amendments—together supported a right to privacy.⁹² In subsequent cases, the underpinnings for unenumerated rights migrated to the word “liberty” in the Due Process Clause.⁹³ Additionally, the Equal Protection Clause and the Due Process Clause appeared together in judicial treatment of unenumerated rights, buttressing each other, even as the Court recognized rights principally upon the foundation of one clause or the other.⁹⁴ Justice Harlan provided the classic explication of this mode of constitutional interpretation in a dissent in *Poe v. Ullman* (which was eventually adopted by a majority of the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*),⁹⁵ where he wrote that liberty “cannot be

owning said lands”); *Joyce v. City of San Francisco*, 846 F. Supp. 843, 859 (N.D. Cal. 1994) (declining to be the first court to recognize a fundamental “right to sleep”).

87. See U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law”); see also Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1897 n.14 (2004).

88. *Meyer v. Nebraska*, 262 U.S. 390, 400–01 (1923); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925).

89. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

90. *Lochner v. New York*, 198 U.S. 45, 64 (1905).

91. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 397–98 (1937).

92. *See Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

93. *See Roe v. Wade*, 410 U.S. 113, 153 (1973).

94. *See Tribe, supra* note 87, at 1898.

95. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 848–49 (1992).

determined by reference to any code” nor is it “a series of isolated points pricked out,” but that it “is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.”⁹⁶ Justice Harlan envisioned that judges would supply “content to [that] Constitutional concept” through the rational outcome of the “judicial process” based on “grounds which follow closely on well-accepted principles and criteria.”⁹⁷ In the following years, in cases brought under the Fourteenth Amendment involving the right to use contraception,⁹⁸ the right to sexual intimacy,⁹⁹ and the right to abortion,¹⁰⁰ the Court built upon the notion of a private space for autonomous decisions.

Beginning with a footnote in a dissent in *Michael H. v. Gerald D.*¹⁰¹ and culminating in the majority opinion in *Washington v. Glucksberg*,¹⁰² the conservative side of the Court developed an alternative method for interpreting substantive due process.¹⁰³ In *Glucksberg*, the Court arrived at the conclusion that there was no right to physician-assisted suicide by formulating the interest at stake at a “careful” or “precise” level and examining history to see whether there was a tradition of protecting or denying protection to the asserted right.¹⁰⁴ It resisted the plaintiffs’ argument to uphold a right to control one’s own body in favor of the more specific right to physician aid in ending one’s own life.¹⁰⁵ In looking to history, it found laws condemning physician-assisted suicide, rather than an accepted historical practice.¹⁰⁶

The tension between the common-law approach to interpreting substantive due process exemplified by Justice Harlan’s dissent in *Poe* and the formulaic methodology set forth in *Glucksberg* remained unresolved in subsequent cases.¹⁰⁷ The decision in *Lawrence v. Texas*¹⁰⁸ upholding a fundamental right to sexual intimacy used the more expansive reading of the Due Process Clause associated with the progressive side of the Court, but Justice Kennedy did not once reference

96. *Poe v. Ullman*, 367 U.S. 497, 542–43 (1961) (Harlan, J., dissenting).

97. *Id.* at 542, 544–45.

98. *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

99. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

100. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. at 845–46; *Roe v. Wade*, 410 U.S. 113, 153 (1973).

101. *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (plurality opinion).

102. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

103. See Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1087–99 (1990).

104. *Glucksberg*, 521 U.S. at 722–23, 728.

105. *Id.* at 723.

106. *Id.* at 728.

107. See Yoshino, *supra* note 2, at 149.

108. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

Glucksberg, leaving the extent to which the opinion heralded the predominance of the *Poe* methodology unclear.¹⁰⁹

The Supreme Court's decision in *Obergefell v. Hodges* limited the applicability of the *Glucksberg* methodology and embraced the more open-ended common-law approach to substantive due process associated with Justice Harlan's dissent in *Poe*.¹¹⁰ While reiterating the same themes of progress and evolving conceptions of liberty that he had propounded in *Lawrence*, Justice Kennedy this time cited Justice Harlan's *Poe* dissent and, while he did not expressly overrule *Glucksberg*, he dealt it a major blow:

Glucksberg did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy.¹¹¹

Justice Kennedy went beyond disavowing the *Glucksberg* approach with regard to "marriage and intimacy." By referring to "marriage and intimacy" as only one of multiple rights that the Court has deemed fundamental, he left room for future argument that *Glucksberg* is ill-suited for other areas of law.¹¹² Under one interpretation, *Lawrence* and *Obergefell* can be distinguished from *Glucksberg* on the grounds that same-sex sodomy and same-sex marriage are applications of the more general rights of intimacy¹¹³ and marriage,¹¹⁴ respectively, whereas the asserted right to physician-assisted suicide in *Glucksberg* does not stem from an obvious higher-level right.¹¹⁵ If this distinction becomes salient in future cases, it may support the recognition of the right to remain in public space, which originates in a long-recognized and recurrent right to movement. A second interpretation leads to an even farther-reaching conclusion: that the language "may have been appropriate" seemed to hint that *Glucksberg* was wrong when it was decided.¹¹⁶

The *Obergefell* Court arrived at the right of same-sex couples to marry by situating its analysis in the Court's broader understanding of the term "liberty" in the Fourteenth Amendment.¹¹⁷ By beginning with the meaning of liberty, the Court was able to engage in an interpretive exercise similar to the analysis of the

109. See Yoshino, *supra* note 2, at 162 (noting that *Glucksberg* appeared in the briefs in *Obergefell* as controlling authority).

110. *Id.*

111. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015).

112. Yoshino, *supra* note 2, at 166.

113. *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

114. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

115. See Yoshino, *supra* note 2, at 165.

116. *Id.* (emphasis added) (quoting *Obergefell*, 135 S. Ct. at 2602).

117. *Obergefell*, 135 S. Ct. at 2597–98.

language of other provisions of the Constitution, rather than using the formulaic method specially designed for unenumerated rights set forth in *Michael H.*¹¹⁸ The *Glucksberg* Court had purported to “rein in the subjective elements”¹¹⁹ in due process review through a mechanical definition of the right and assessment of any relevant tradition of the exercise of that right.¹²⁰ In contrast, the *Poe* dissent approach is “guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements.”¹²¹

Before laying out the foundations for the right to marry and the imperative to extend it to all citizens, including same-sex couples, Justice Kennedy emphasized several fundamental precepts of constitutional interpretation that are of particular importance when applied to the Fourteenth Amendment and his understanding of the Due Process Clause:

[t]he generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.¹²²

Liberty is an expansive value that the Framers left open to develop through the progressive understanding of successive generations. Over the previous decades, the term had become imbued with the promise of protecting people’s ability “to define and express their identity.”¹²³

Justice Kennedy employed a common-law approach by drawing upon four bases for affirming a right to same-sex marriage, rather than limiting the inquiry to tracing a specific tradition. First, he relied on the premise that “the right to personal choice regarding marriage is inherent in the concept of individual autonomy.”¹²⁴ Second, he wrote of the principle that “the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.”¹²⁵ Third, he expanded upon the basis that marriage “safeguards children and families and thus draws meaning from

118. See Douglas S. Broyles, *Have Justices Stevens and Kennedy Forged a New Doctrine of Substantive Due Process? An Examination of McDonald v. City of Chicago and United States v. Windsor*, 1 TEX. A&M L. REV. 129, 150 (2013); Frank I. Michelman, *Unenumerated Rights Under Popular Constitutionalism*, 9 U. PA. J. CONST. L. 121, 153 (2006); *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (plurality opinion).

119. *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997).

120. See Tribe & Dorf, *supra* note 103, at 1059 (“Far from providing judges with a value-neutral means for characterizing rights, it provides instead a method for disguising the importation of values.”).

121. *Obergefell*, 135 S. Ct. at 2598.

122. *Id.*

123. *Id.* at 2593.

124. *Id.* at 2599.

125. *Id.*

related rights of childrearing, procreation, and education.”¹²⁶ Fourth, he explained, “this Court’s cases and the Nation’s traditions make clear that marriage is a keystone of our social order.”¹²⁷ This mode of analysis is significant because it looks to a “confluence of various traditions” rather than a specific tradition of a narrowly-defined right.¹²⁸ Kennedy brought together diverse bases that span from historical to existential in order to arrive at his conclusion.

The reasoning demonstrated in *Obergefell* is potentially momentous not only for its analysis of liberty, but also for the manner in which it interweaves liberty and equal protection.¹²⁹ A division in the Court between viewing the Equal Protection Clause and the Due Process Clause as distinct or as intertwined mirrors the Court’s split between adherents of the liberty analysis in *Glucksberg* and the *Poe* dissent. In his dissent in *Obergefell*, Chief Justice Roberts criticized the majority for lacking “anything resembling our usual framework for deciding equal protection cases” and failing to analyze marriage laws using rational basis review.¹³⁰ While the majority stated that the marriage laws are unequal and that “this denial to same-sex couples of the right to marry . . . serves to disrespect and subordinate them,”¹³¹ it did not make a finding that the law is not rationally related to a legitimate state interest.¹³² However, far from being anomalous, the majority’s eschewal of a separate equal protection analysis is precisely what is required under its view of the two clauses.¹³³

In his comment on *Obergefell*, Kenji Yoshino argues that *Obergefell* fortified the approach endorsed in *Lawrence* of what he refers to as “antissubordination liberty.”¹³⁴ In both cases, the Court could have struck down the statutes solely on equal protection grounds. However, states could have worked around an equal protection ruling by prohibiting sodomy for both same-sex and opposite-sex participants following such a ruling in *Lawrence* or refusing to grant marriage licenses to any couples following a similar decision in *Obergefell*.¹³⁵ By ruling on due process grounds, the Court opted for a more effective and durable means of furthering equality interests. As the Court explained in *Obergefell*, “[i]n any particular case one Clause may be thought to capture the right in a more accurate and comprehensive way, even as the two Clauses may converge on the identification and definition of the right.”¹³⁶ Thus, rather than existing

126. *Id.* at 2600.

127. *Id.* at 2601.

128. Yoshino, *supra* note 2, at 164.

129. *Id.* at 148.

130. *Obergefell*, 135 S. Ct. at 2623 (Roberts, C.J., dissenting).

131. *Id.* at 2604 (majority opinion).

132. *Id.* at 2623 (Roberts, C.J., dissenting).

133. Yoshino, *supra* note 2, at 172 (“Yet in fairness to Justice Kennedy’s analysis, the synergy that he discussed meant that equal protection analysis could inform substantive due process in such a way that would perforce change the ‘usual framework’ of analysis.”).

134. *Id.* at 174.

135. *Id.* at 173.

136. *Obergefell*, 135 S. Ct. at 2603.

independently from the due process analysis as Justice Roberts would require, the equality analysis motivated the recognition of the liberty and influenced the shape it would take.¹³⁷

The “synergy”¹³⁸ that the Court describes between liberty and equality may suggest a path forward for civil rights movements beyond gay rights.¹³⁹ The Court has not afforded a new group heightened scrutiny for equal protection purposes since 1977,¹⁴⁰ and it is unlikely to do so today in light of its concern about proliferating candidates for new classifications in our increasingly multicultural society.¹⁴¹ By working under the rubric of liberty, the Court can further the ends of equality without the broad implications of recognizing a suspect class. Rather than watching society splinter into varied classes, the Court can help bridge divides through the language of universal rights.¹⁴² Equality concerns, meanwhile, can also provide a meaningful guide for the Court because they not only militate in favor of expanding liberties to protect a marginalized group, but constrain the expansion of rights where equality will not be furthered.¹⁴³ In supporting his description of the Equal Protection Clause and the Due Process Clause as interconnected, Justice Kennedy cited a line of cases that either rested on both grounds or were decided on only one basis but in which the threat to one right accentuated the violence done to the other.¹⁴⁴ *Obergefell* builds upon this history and makes clear “that in the common law adjudication of new liberties, the effect on those subordinated groups should matter.”¹⁴⁵

IV.

CHALLENGES RECAST AS A COMPREHENSIVE RIGHT

Like the right to same-sex marriage, the right to remain in public space would be a right cast in universal terms and shaped by the deprivations faced by a specific group. Before *Obergefell*, advocates had to argue for the right to remain out of the history of the right to travel. While they were able to make a compelling case, it fell short in part because it was a poor fit with the right to interstate travel and did not directly address the affront to those whose rights were purportedly being

137. *Id.* (“Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other.”).

138. *Id.*

139. See Yoshino, *supra* note 10, at 802–03.

140. See *id.* at 757 (citing *Trimble v. Gordon*, 430 U.S. 762, 769 (1977) (subjecting section of Illinois Probate Act, which prevented children born out of wedlock from inheriting from their intestate fathers, to heightened scrutiny)); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (acknowledging that the Court has applied an intermediate level of scrutiny to discriminatory classifications based on illegitimacy such as was done in *Trimble*).

141. Yoshino, *supra* note 10, at 758.

142. See *id.* at 793–94.

143. *Id.* at 800–02.

144. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015).

145. Yoshino, *supra* note 2, at 175.

abridged. The police's continual displacement of homeless people could also have been framed as discrimination on the basis of housing status, for only people perceived as or known to be homeless are told to move, while other people are left free to engage in activities or simply rest idly.¹⁴⁶ Advocates scarcely so much as raised this equal protection claim because of the courts' antipathy to the argument that poverty is a suspect class¹⁴⁷ or that housing is relevant to either equal protection or fundamental rights.¹⁴⁸

Following suit from *Obergefell*, the right to remain can draw upon multiple bases. While each strand alone might not qualify as a carefully-defined right rooted in tradition that fits the *Glucksberg* framework, together multiple strands demonstrate the protection that the Constitution affords individuals to remain in public space. First, the Supreme Court's invocation of a right to free movement throughout United States history indicates the importance of freedom of motion and its converse, the right to remain. While the uncertain relation of a freedom of movement to the right to travel previously limited the significance of the more general and unmoored right, under the *Obergefell* model, references to a right to free movement underscore an important component of liberty woven into multiple opinions. Second, the Eighth Amendment preserves the ability to exist free from state punishment, even as the present doctrine poses technical hurdles to realizing this underlying norm. Third, the Fourth Amendment's emphasis on privacy and the failure of the Fourth Amendment to protect homeless individuals indicates the need to apply its values through a different means. Fourth, the concern for equality built into the Court's right-to-travel jurisprudence lends credence to the existence of a right that ensures equal access to public space. *Obergefell* suggests that courts

146. See, e.g., N.Y.C., N.Y., ADMIN. CODE § 14-151 (2017) ("Community Safety Act") (prohibiting bias-based profiling defined as an act of a law enforcement officer that relies on one of a set of classifications, including housing status, as "the determinative factor in initiating law enforcement action against an individual, rather than an individual's behavior or other information or circumstances that links [the person(s)] to suspected unlawful activity"). In 2016, the New York Civil Liberties Union ("NYCLU"), on behalf of the organization Picture the Homeless, filed the first complaint under the Community Safety Act's ban on discrimination on the basis of housing status. The complaint asks the New York City Commission on Human Rights to investigate the New York Police Department's alleged practice of asking people to "move along" based not on any violation of a law but on their perceived or known housing status. Press Release, N.Y. Civil Liberties Union, Complaint: NYPD Unlawfully Orders Homeless People to Leave Public Spaces (May 26, 2016), www.nyclu.org/news/complaint-nypd-unlawfully-orders-homeless-people-leave-public-spaces [https://perma.cc/8JBR-EQ9P]. As a student advocate with the New York Civil Liberties Clinic, the author represented several members of Picture the Homeless in a suit for damages against the City of New York for lost property and drafted an early version of the complaint that NYCLU subsequently filed with the NYC Human Rights Commission.

147. See Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, & Dialogic Default*, 35 *FORDHAM URB. L.J.* 629, 645 (2008) (noting that the Supreme Court has never squarely addressed whether poor people are a suspect class).

148. E.g., *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) ("We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement.").

should analyze liberty and equality concerns in tandem.¹⁴⁹ Even where a law may not formally violate equal protection, principles of equality should shape how a court analyzes the liberty interest at stake. Finally, beyond the four substantive bases for a right to remain, the Court has signaled its concern with broad state control of behavior in public that affects marginal groups by striking down laws on vagueness grounds.

A. A Basic Intuition

A simple thought exercise illustrates that most people already enjoy a right to remain without being forced to consider the importance and fragility of the right. A housed person leaves her home and enters public space with the understanding that she is entitled to do so. The sidewalks, streets, and plazas are housed individuals' collective space. A person with a home can sit on a bench, wander through a neighborhood, or stand and gaze across the street. Or, if she is tired, she can lean against a building as long as she is out of the way of people walking down the sidewalk or passing through doorways. If a police officer came up to her and ordered her to move, she would be startled and would either protest this unjustified infringement on her autonomous decision-making and existence, or comply, thinking that moving comes at no cost because there are an infinite number of other spaces to go.¹⁵⁰ However, if this occurred repeatedly, the deprivation of this person's capacity to freely inhabit public spaces would reduce her ability to engage in daily activities. Both the limitations on her actions and the assault on her autonomy itself would have a dramatic effect on her life and self-image.

In his dissent in *City of Chicago v. Morales*, Justice Scalia lambasted Justice Stevens's description of loitering as a constitutional right.¹⁵¹ "Of course every activity," Justice Scalia wrote, "even scratching one's head, can be called a 'constitutional right' if one means by that term nothing more than the fact that the activity is covered (as all are) by the Equal Protection Clause, so that those who engage in it cannot be singled out without 'rational basis.'"¹⁵² Justice Scalia likely chose scratching one's head as an example to illustrate the ludicrousness, in his view, of elevating loitering to the status of a constitutional right because head scratching is a trivial activity that is not protected by the Constitution.¹⁵³ Yet the example of head scratching in fact reinforces Justice Stevens's defense of unenumerated rights; it is unimaginable that a legislature could deprive citizens of

149. See Yoshino, *supra* note 2, at 174.

150. Stops, searches, and frisks on the basis of race are similarly demeaning. Certainly racialized policing is at play among the homeless population itself, which is 40.6% Black. OFFICE OF CMTY. PLANNING & URBAN DEV., U.S. DEP'T OF HOUS. & URBAN DEV., THE 2017 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS, PART 1: POINT-IN-TIME ESTIMATES OF HOMELESSNESS 9 (2017) (finding that 40.6% of the homeless population is Black).

151. *City of Chicago v. Morales*, 527 U.S. 41, 84 (1999) (Scalia, J., dissenting).

152. *Id.*

153. And perhaps as a gibe at what he saw as Justice Stevens's head-scratching view of constitutional rights.

so basic and constitutive a human behavior. Even so, on a daily basis, homeless individuals are faced with a deprivation that is far more severe, yet similarly confounding. In cities across the country, homeless individuals are denied the ability to be in the only area available to them—the public.

Applied across the general population, the pervasive control of access to public space currently imposed on homeless individuals would cause an uproar. Blanket restrictions on movement strike at the core of people’s liberty to carry out their lives in the outside world and associate freely. Yet such measures would not disrupt the average person’s entire life, for a housed citizen is still free to do as she pleases inside the privacy of her home. For a subset of the population, however, there is nowhere to retreat from anti-homeless ordinances and ad hoc police directives to move along. For homeless people, the street is both the public and the private. Thus, the way these regulations of public access are applied presents a paradox. The very people who most need to remain in public space are those whose ability to do so is most under attack.¹⁵⁴

B. The Right to Freedom of Movement

In *City of Chicago v. Morales*, the last time the Supreme Court considered the existence of a right to remain in public space, three members of the Court recognized a “constitutionally protected liberty” in loitering.¹⁵⁵ In their dissents, Justices Scalia and Thomas understood Justice Stevens, the author of the plurality, to be arguing for recognition of a fundamental right, and they forcefully dismissed the suggestion that such a right exists. In response to Justice Stevens’s interpretation of a line of right-to-travel cases, Justice Thomas wrote, “[T]he plurality’s approach distorts the principle articulated in those cases, stretching it to a level of generality that permits the Court to disregard the relevant historical evidence that should guide the analysis.”¹⁵⁶ Yet, following *Obergefell*, a majority of the Court now appears to favor precisely the approach that Justice Thomas disparaged in his *Morales* dissent.¹⁵⁷ A reexamination of Supreme Court precedent involving a right to free movement, using the analytical approach applied in *Obergefell*, reveals common reasoning across the cases and demonstrates the Court’s longstanding commitment to safeguarding freedom of movement. Under *Obergefell*, the right to freedom of movement can, in turn, form a building block of a fundamental right to remain in public space.

154. See Jeremy Waldron, *Essays: Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 302 (1991) (“[A] person who is not free to be in any place is not free to do anything; [he] is comprehensively unfree.”).

155. *Morales*, 527 U.S. at 53–55 (Stevens, J., plurality opinion).

156. *Id.* at 105 n.5 (Thomas, J., dissenting) (citing *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (Scalia, J., plurality opinion)).

157. See *supra* Part III; *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) (“If rights were defined by who exercised them in the past, then received practices could serve as their own continued justifications and new groups could not invoke rights once denied.”).

The Court has only found violations of the right to travel when laws make classifications that penalize movement between state lines, yet, in dicta, the Court has gestured toward a broader freedom of movement. In *Kent v. Dulles*, the Court, following the canon of constitutional avoidance, found that the Secretary of State had exceeded his statutory authority by withholding passports from Communists.¹⁵⁸ While the holding of *Kent* rested on statutory interpretation, Justice Douglas emphasized the centrality of the right to travel to the American way of life.¹⁵⁹ Sourcing the right to travel in the liberty of the Fifth Amendment, Justice Douglas extolled freedom of movement as “part of our heritage” and described it as socially indispensable.¹⁶⁰

Then, in *Papachristou v. City of Jacksonville*, the Court defended the more general right to freedom of movement independently of the formally-recognized interstate right discussed in earlier cases.¹⁶¹ Writing for a unanimous court, Justice Douglas invalidated an archaic vagrancy law on the grounds that it was unconstitutionally vague.¹⁶² The Court held that the ordinance failed to give individuals fair notice that their conduct was prohibited and encouraged arbitrary and discriminatory enforcement by allowing the police “unfettered discretion.”¹⁶³ Describing the activities, such as “wandering or strolling,” that the ordinance proscribed, Justice Douglas, in an oft-quoted passage, wrote:

The difficulty is that these activities are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the

158. *Kent v. Dulles*, 357 U.S. 116, 129 (1958).

159. *Id.*

160. *Id.* at 125–26. The Court eventually struck down the same provision in *Aptheker v. Secretary of State* for violating the right to travel. 378 U.S. 500, 505 (1964). While the *Aptheker* Court cited the right-to-movement language from *Kent* in the course of tracing the history of judicial review of the statute, *id.* at 505–06, it invalidated the statute without going beyond establishing that interstate travel encompassed foreign travel, *id.* at 507–08.

161. See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972).

162. *Id.* at 171. The ordinance read:

Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses.

Id. at 156–57 n.1. Justice Douglas noted that since the time of the arrest the City had eliminated “juggling” from the list of criminal activities. *Id.* at 157 n.1.

163. *Id.* at 168.

feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence.¹⁶⁴

Justice Douglas did not invoke the right to travel in *Papachristou* the way he had in *Kent*, where it was directly implicated. Rather, he focused on the state's imposition of a lifestyle on populations positioned outside the mainstream of society.¹⁶⁵ For Justice Douglas, the values animating the indisputably fundamental right to travel applied with equal force to the threat to free movement in Jacksonville. His analysis of the right to free movement stands on its own, indicating that it has a life distinct from the more particular right to travel.

In *Kolender v. Lawson*, the Supreme Court again referred to a right to free movement, not simply in crossing state lines, but also in inhabiting public space.¹⁶⁶ The Court invalidated a statute that required people who loiter or wander on the streets to provide a “credible and reliable” identification and account for their presence when stopped by a police officer who has reasonable suspicion under *Terry v. Ohio*.¹⁶⁷ Writing for the majority, Justice O'Connor concluded that the statute was vague because it failed to clarify what was meant by “credible and reliable” identification.¹⁶⁸ To sustain a facial challenge to a law, a court must find that the law “reaches a substantial amount of constitutionally protected conduct” or is “vague in all of its applications.”¹⁶⁹ In *Kolender*, Justice O'Connor based her finding of vagueness on the risk that the ordinance posed of curtailing First Amendment liberties and further noted, “Section 647(e) implicates consideration of the constitutional right to freedom of movement.”¹⁷⁰ Justice O'Connor's remark on the threat to the right to freedom of movement is noteworthy because the ordinance at issue did not involve interstate travel or discrimination on the basis of residency, as required in the *Shapiro* line of cases.¹⁷¹ While Justice O'Connor cited *Kent* and *Aptheker*, she did not draw a distinction between the right to travel as it appeared in the two passport cases and the right to freedom of movement implicated in *Kolender*.

164. *Id.* at 164.

165. *See id.* at 170 (“Those generally implicated by the imprecise terms of the ordinance—poor people, nonconformists, dissenters, idlers—may be required to comport themselves according to the lifestyle deemed appropriate by the Jacksonville police and the courts.”).

166. *See Kolender v. Lawson*, 461 U.S. 352, 353 (1983).

167. *Id.* In *Terry*, the Court held that officers may stop, question, and frisk individuals whom they suspect of possessing arms, or of committing or preparing to commit a crime, without probable cause for an arrest. The officer must be able to point to “specific and articulable facts” that warrant the intrusion. *Terry v. Ohio*, 392 U.S. 1, 20–21 (1968).

168. *Kolender*, 461 U.S. at 353–54.

169. *Vill. of Hoffman Estates v. Flipside*, 455 U.S. 489, 494–95 (1982).

170. *Kolender*, 461 U.S. at 358 (citing *Aptheker v. Sec'y of State*, 378 U.S. 500, 505–06 (1964); *Kent v. Dulles*, 357 U.S. 116, 126 (1958)).

171. *See supra* Part II.B.

Most recently, in the plurality opinion in *City of Chicago v. Morales*, Justice Stevens argued that there is a right to loiter by connecting the *Papachristou* opinion with the preceding right to travel cases.¹⁷² In the part of his opinion joined by a majority of the Court, Justice Stevens struck down on vagueness grounds a Chicago ordinance prohibiting “criminal street gang members from loitering with one another or with other persons in any public place.”¹⁷³ The Court concluded that the ordinance failed to give ordinary citizens fair notice to conform their conduct to the law¹⁷⁴ and failed to give officers minimal guidance.¹⁷⁵ Then, in a section of his opinion joined only by Justices Souter and Ginsburg, Justice Stevens wrote:

[A]s the United States recognizes, the freedom to loiter for innocent purposes is part of the “liberty” protected by the Due Process Clause of the Fourteenth Amendment. We have expressly identified this “right to remove from one place to another according to inclination” as “an attribute of personal liberty” protected by the Constitution. *William v. Fears*, 179 U.S. 270, 274 (1900); see also *Papachristou v. Jacksonville*, 405 U.S. 156, 164 (1972). Indeed, it is apparent that an individual’s decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is “a part of our heritage” *Kent v. Dulles*, 357 U.S. 116, 126 (1958), or the right to move “to whatsoever place one’s own inclination may direct” identified in Blackstone’s Commentaries. 1 W. Blackstone, Commentaries on the Laws of England 130 (1765).¹⁷⁶

Justice Stevens put the right to remain on equal footing with the freedom of movement discussed in dicta in *Kent*. In *Kent*, Justice Douglas made no distinction between freedom of movement within frontiers and the fundamental right to travel. This invites the inference that in *Morales*, Justice Stevens intended to stretch this continuum even further by identifying a fundamental right not only to move within borders, but to remain in a place of one’s choosing.¹⁷⁷ This logic

172. See *City of Chicago v. Morales*, 527 U.S. 41, 53–54 (1999) (Stevens, J., plurality opinion).

173. *Id.* at 45–46. The ordinance defined loitering as “remain[ing] in any one place with no apparent purpose.” *Id.* at 47.

174. *Id.* at 58 (citing *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)).

175. *Id.* at 60 (citing *Kolender*, 461 U.S. at 358).

176. *Id.* at 53–54.

177. A comparison between Justice Stevens’s plurality opinion in *Morales* and his majority opinion in *Saenz v. Roe*, 526 U.S. 489 (1999)—decided less than a month earlier—shows that while the freedom of movement appears in dicta in many of the same cases as the right to travel, they are distinct formulations. In *Saenz*, Justice Stevens identified “at least three different components” of the right to travel in the Supreme Court’s history:

the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.

would be in line with that of the First Amendment, where the Court has found that the right to freedom of expression must include a corollary right to refrain from speech.¹⁷⁸

Justice Stevens left the import of the right to loiter uncertain. Responding to criticism from Justices Scalia and Thomas that he was inventing a fundamental right, Justice Stevens wrote that the dissenting Justices “incorrectly assume . . . that identification of an obvious liberty interest that is impacted by a statute is equivalent to finding a violation of substantive due process.”¹⁷⁹ Justice Stevens declined to elaborate on the level of scrutiny that the liberty interest warrants or whether it was violated in *Morales*, since he determined that the law was impermissibly vague regardless.¹⁸⁰

While the ambiguous scope of the right to free movement and a concomitant right to remain would reduce the rights’ significance under the *Glucksberg* analysis, their importance becomes clear when they are analyzed under Justice Kennedy’s approach in *Obergefell*. Justice Kennedy followed the mode of reasoning from Justice Harlan’s dissent in *Poe v. Ullman*, in which Justice Harlan proposed that we situate rights on a “rational continuum.”¹⁸¹ Justice Harlan believed that rational constitutional decision-making must involve judges abstracting rights from the particular settings in which the rights were pronounced so that they can see the connections between them.¹⁸² Although the right to freedom of movement did not feature in the holdings of cases like *Kent*, *Kolender*, *Papachristou*, and *Morales*—which were instead decided on the basis of statutory construction, the First Amendment, or vagueness—the right shaped the Court’s reasoning. When studied side by side, these cases demonstrate the centrality of a right to movement. While the freedom of movement does not alone protect the right to remain in public space, it is a principle that should guide courts’ reasoning in the areas upon which it touches.

C. The Eighth Amendment

The Eighth Amendment speaks most directly to the oppression that the homeless face. In *Robinson*, the Supreme Court determined that “[e]ven one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a

Id. at 500. The fact that Justice Stevens listed the first two “components” even though only the third was at issue in *Saenz* suggests that the lack of any mention of a right to intrastate travel is telling. At the same time, his careful inclusion of “at least three different components” leaves the right open-ended. *Id.* (emphasis added).

178. See *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (holding that the State of New Hampshire could not require drivers to display the state motto “Live Free or Die” on their license plates).

179. *Morales*, 527 U.S. at 53 n.19 (Stevens, J., plurality opinion).

180. *Id.* at 55.

181. *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

182. Tribe & Dorf, *supra* note 103, at 1071.

common cold.”¹⁸³ Yet in *Powell*, four Justices in the plurality balked at what they feared would be prohibiting punishment for acts compelled by a condition that a defendant is powerless to change and thereby adopting a “constitutional doctrine of criminal responsibility.”¹⁸⁴ Although advocates have argued that the State’s exertion of its coercive power to penalize the condition of homelessness is cruel and unusual,¹⁸⁵ following the fractured decision in *Powell*, lower courts have expressed their discomfort with adopting a view of the Eighth Amendment that would thrust courts into the role of regulating substantive criminal law by declaring certain conditions a “status.”¹⁸⁶ While the Supreme Court’s Eighth Amendment jurisprudence in this area has stalled, through the Fourteenth Amendment, the Court has preserved an autonomous sphere for the individual outside of state control with an eye toward marginalized groups. The mode of reasoning employed in *Obergefell* contains the promise that the values underlying the Court’s interpretation of the Eighth Amendment can inform the evolution of substantive due process.

Justice White’s concurrence in *Powell* has special meaning in the context of homelessness. Justice White concurred in the judgment because he concluded that *Powell* had failed to show that he could not have avoided ending up in public after drinking.¹⁸⁷ Justice White held out the possibility, however, that chronic alcoholics who are homeless could have Eighth Amendment claims if they can show that it is impossible for them to avoid public places while they are intoxicated.¹⁸⁸ Public intoxication would be an unavoidable consequence of these individuals’ alcohol addiction, and they could not be punished without violating the Eighth Amendment.¹⁸⁹ In *Joyce*, the lawsuit seeking an injunction against San Francisco’s concerted effort to enforce a set of ordinances against homeless individuals, the plaintiffs argued that Justice White had already applied the Eighth Amendment to the homeless.¹⁹⁰ The *Joyce* Court dismissed the plaintiffs’

183. *Robinson v. California*, 370 U.S. 660, 667 (1962).

184. *Powell v. Texas*, 392 U.S. 514, 533 (1968).

185. See *infra* Part II.A. Although he was relying on the infringement of basic freedom rather than the Eighth Amendment, Jeremy Waldron captures the severity of the violation of homeless individuals’ rights:

What is emerging . . . is a state of affairs in which a million or more citizens have no place to perform elementary human activities like urinating, washing, sleeping, cooking, eating, and standing around. . . . If I am right about this, it is one of the most callous and tyrannical exercises of power in modern times by a (comparatively) rich and complacent majority against a minority of their less fortunate fellow human beings.

Waldron, *supra* note 154, at 301–02.

186. See, e.g., *Lehr v. City of Sacramento*, 624 F. Supp. 2d 1218, 1234 (E.D. Cal. 2009); *Joyce v. City of San Francisco*, 846 F. Supp. 843, 858 (N.D. Cal. 1994).

187. *Powell*, 392 U.S. at 552–53 (White, J., concurring in the judgment).

188. *Id.* at 551.

189. *Id.*

190. *Joyce*, 846 F. Supp. at 855.

argument as “sheer speculation” based on dicta.¹⁹¹ While Justice White’s anticipation of future cases involving homeless persons may not determine a court’s Eighth Amendment analysis, it accentuates the lack of existing constitutional protection for homeless people and underscores the urgency of recognizing a sanctuary for homeless people in substantive due process, where the various strands of constitutional analysis converge.

Courts have also refused to accept Eighth Amendment claims on doctrinal grounds that would not apply if the values of the Eighth Amendment were instead employed to inform a Fourteenth Amendment liberty. Certain circuits have interpreted *Ingraham* to preclude the Eighth Amendment’s application to state actions preceding conviction,¹⁹² but substantive due process would enable courts to consider the Eighth Amendment interest at stake without the same constraint. Other courts have required Eighth Amendment claimants to prove that homeless people truly have no choice but to engage in certain conduct in public by demonstrating a shortage of shelter space.¹⁹³ Although this requirement makes sense in the abstract, it fails to account for the dangerous and unsanitary conditions in many shelters¹⁹⁴ that lead large numbers of homeless people to instead choose to sleep on the streets.¹⁹⁵ A right to remain in public space would place the decision with the homeless people who must endure hazardous shelters, rather than a court that lacks the information or competence to gauge a shelter’s habitability or monitor its compliance with basic standards of safety.¹⁹⁶

The holistic mode of analysis employed in *Obergefell* reveals an overlap between the Eighth and Fourteenth Amendments. While the Eighth Amendment

191. *Id.* at 857. Further, the *Joyce* court worried that considering homelessness a “status” comparable to drug addiction in *Robinson* would take the Court into matters of social policy and have severe consequences for law enforcement. While “status” is a different construct in the context of the Eighth Amendment than the Equal Protection Clause, the Court’s hesitancy about the potentially broad effects of designating homelessness a status echoes comparable concerns about recognizing poverty as a suspect class.

192. *See supra* Part II.A.

193. *Id.*

194. Winnie Hu, *Review of New York Shelter System Finds Hundreds of Violations*, N.Y. TIMES (Mar. 12, 2015), <http://www.nytimes.com/2015/03/13/nyregion/new-york-homeless-shelter-system-violations-report.html> [<https://nyti.ms/2lgwB7b>].

195. *See, e.g.*, Kirk Mitchell, *As Denver Shelters Prepare for a Dangerous Storm, Many Homeless Would Rather Stay on the Streets*, DENVER POST (Dec. 19, 2017), <https://www.denverpost.com/2017/12/19/severe-winter-weather-coming-denver-homeless/> [<https://perma.cc/CE6U-PQV3>].

196. New York courts have upheld the state right to shelter in dozens of court orders dating back to *Callahan v. Carey*, N.Y. L.J., Dec. 11, 1979, at 10 (N.Y. Sup. Ct. Dec. 5, 1979). Ian Frazier, *Hidden City*, NEW YORKER (Oct. 28, 2013), <https://www.newyorker.com/magazine/2013/10/28/hidden-city> [<https://perma.cc/3XDA-NDPG>]. While New York courts have held the City of New York to the minimal standards of adequacy contained in New York’s own regulations, *see McCain v. Koch*, 511 N.E.2d 62, 66 (N.Y. 1987), they have not been able to prevent shelters from descending into dangerous conditions. MARK G. PETERS, N.Y.C. DEP’T OF INVESTIGATION, PROBE OF DEPARTMENT OF HOMELESS SERVICES’ SHELTERS FOR FAMILIES WITH CHILDREN FINDS SERIOUS DEFICIENCIES (2015), <http://www1.nyc.gov/assets/doi/reports/pdf/2015/2015-03-12-Pr08dhs.pdf> [<https://perma.cc/44D3-GTQP>].

prevents the State from using the criminal code to coerce an individual to change a condition that is beyond her control, the Fourteenth Amendment preserves an individual's space to make personal decisions. The prohibition on inhumane compulsion and the preservation of basic choice are the obverse of one another. Just as the Fourth Amendment informed the development of a right to privacy, the Eighth Amendment supports a basic right to remain in public space that extends to all citizens, including those without homes.

D. The Imperatives of the Fourth Amendment

The Fourth Amendment is a vital safeguard of individuals' rights to live free from government coercion outside of a reasonable and justified infringement.¹⁹⁷ While homeless individuals have successfully asserted their Fourth Amendment rights when law enforcement has seized and destroyed their property,¹⁹⁸ courts have not extended the Fourth Amendment to protect homeless individuals' presence in public areas. This was not the only possible reading of the Supreme Court's interpretation of the Fourth Amendment. In *Katz v. United States*, the Court determined that the government's recording of the defendant's conversations in a telephone booth violated the defendant's reasonable expectation of privacy in the words he uttered in the booth and therefore constituted a search and seizure under the Fourth Amendment.¹⁹⁹ Writing for the majority, Justice Stewart explained that the parties':

effort to decide whether or not a given "area," viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.²⁰⁰

Katz's focus on people not only serves an important function in updating the Fourth Amendment to accommodate technology and the challenge that it poses to a facile alignment of physical space and privacy, but also points to a connection between the Fourth Amendment and the Due Process Clause.

197. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

198. *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1033 (9th Cir. 2012) (upholding district court's dismissal of the City's motion for summary judgment because the City "failed utterly to provide any meaningful opportunity to be heard before or after it seized and destroyed property belonging to Skid Row's homeless population").

199. *Katz v. United States*, 389 U.S. 347, 353 (1967).

200. *Id.* at 351–52 (internal footnote and citation omitted).

The Fourth Amendment seeks to preserve a space for the individual beyond arbitrary governmental intrusion, but it fails to accomplish this purpose for the homeless because of the way that *Katz* has been applied over the past several decades.²⁰¹ The Court has adopted the framework that Justice Harlan set forth in his concurrence in *Katz* as a more concrete formulation of the principles articulated in the majority opinion: “there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”²⁰² Courts have disposed of homeless individuals’ claims to Fourth Amendment protection in public places where they have stored their belongings by finding that legal violations, such as trespassing, defeat the second, objective prong.²⁰³ Although courts have applied *Katz* in ways that defeat homeless individuals’ Fourth Amendment claims, the Court’s concern for individuals’ ability to maintain an inner sanctum free from official oversight resonates in other areas of constitutional law. Just as the Fourth Amendment’s failure to reach homeless individuals recalls the limitations of the right to freedom of movement and the Eighth Amendment, the role of individual autonomy in Fourth Amendment jurisprudence also parallels the values animating those other constitutional protections.

The Fourth Amendment has been interpreted to exclude not only homeless individuals’ privacy interests, but also their ability to move around in public spaces. The Fourth Amendment only covers police interactions with civilians where there is a seizure. However, an interaction is not considered a seizure when a reasonable individual would feel free to terminate the encounter.²⁰⁴ Without a property interest to anchor a homeless individual to a particular location, a police officer’s directive to move along from a public place does not trigger any Fourth Amendment interest, since complying with the order will end the interaction and

201. See Nicholas May, *Fourth Amendment Challenges to “Camping Ordinances”: A Legal Strategy to Force Legislative Solutions to Homelessness*, RICH. J.L. & PUB. INT., Summer 2008, at 15; Justin Stec, *Why the Homeless Are Denied Personhood Under the Law: Toward Contextualizing the Reasonableness Standard in Search and Seizure Jurisprudence*, 3 RUTGERS J.L. & URB. POL’Y 321 (2006).

202. *Katz*, 389 U.S. at 361 (Harlan, J., concurring); *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (quoting Justice Harlan’s concurrence in *Katz*).

203. See, e.g., *Amezquita v. Hernandez-Colon*, 518 F.2d 8, 12 (1st Cir. 1975) (holding that squatters did not have a reasonable expectation of privacy); *United States v. Ruckman*, 806 F.2d 1471, 1472 (10th Cir. 1986) (holding that the defendant did not have a reasonable expectation of privacy in the cave where he lived since he was a trespasser on public lands); *People v. Thomas*, 45 Cal. Rptr. 2d 610, 613 (Ct. App. 1995) (finding that a Los Angeles criminal law demonstrated that society did not consider there to be a fundamental right of privacy for homeless persons while trespassing on public or private property). *But see United States v. Sandoval*, 200 F.3d 659, 661 (9th Cir. 2000) (finding that whether an individual had a reasonable expectation of privacy in his tent on public land did not turn on whether he had permission to camp).

204. See *Florida v. Bostick*, 501 U.S. 429, 439 (1991).

not deprive the homeless individual of any property.²⁰⁵ The values contained in the Fourth Amendment and the void left by its incomplete coverage underscore the importance of recognizing a right to remain within the Due Process Clause.

E. The Equality in the Right to Travel

The Supreme Court has struck down classifications that penalize people who have recently moved to the state.²⁰⁶ In finding restrictions on the right to travel to be impermissible, the Court has accounted for the effect of poverty and inequality. In *Edwards v. California, Memorial Hospital*, and *Shapiro*, the Court described the manner in which the classification would acutely impact indigent migrants to the state.²⁰⁷ Thus, while the Court will not impose an affirmative obligation on the state to protect social and economic rights,²⁰⁸ and it is unlikely to recognize poverty as a suspect class,²⁰⁹ it can look to its precedent considering poverty in determining permissible limitations on the right to travel.

At the same time, courts have rejected claims for the right to travel because they do not believe that the government has an obligation to recognize a maximally protective and encompassing right even when it has concerns about the rights and liberties of the poor. Poverty thus sits uncomfortably with the professed universal scope of fundamental rights. The Court has dealt with this tension in part by relying on the state action doctrine, holding that the state is not responsible for remedying or dealing with inequalities outside of its immediate responsibility.²¹⁰ The right to remain fits within this sensitive area because it does not impose affirmative obligations on the state, yet it allows for inequality to enter the Court's consideration. Recognition of this fundamental right will permit all individuals to

205. See Stephen E. Henderson, "Move On" Orders as Fourth Amendment Seizures, 2008 BYU L. REV. 1, 18 (2008).

206. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 642 (1969) (holding that statutory prohibition of welfare benefits to residents of less than a year violated the Equal Protection Clause); *Dunn v. Blumstein*, 405 U.S. 330, 360 (1972) (invalidating state laws that required citizens to have resided in a state for a year and three months in a county in order to vote); *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250, 269 (1974) ("The Arizona durational resident requirement for eligibility for nonemergency free medical care creates an 'invidious classification' that impinges on the right of interstate travel by denying newcomers 'basic necessities of life.'").

207. See, e.g., *Edwards v. California*, 314 U.S. 160, 174-75 (1941) (holding unconstitutional a California statute making it a misdemeanor to bring or assist in bringing into the state any indigent nonresident); *Shapiro*, 394 U.S. at 627 ("On the basis of this sole difference the first class is granted and the second class is denied welfare aid upon which may depend the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life."); *Mem'l Hosp.*, 415 U.S. at 261 ("The denial of medical care is all the more cruel in this context, falling as it does on indigents who are often without the means to obtain alternative treatment.").

208. See *Lindsey v. Normet*, 405 U.S. 56, 74 (1972).

209. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (upholding Texas's school financing system and declining to recognize wealth as a suspect class).

210. See *Maher v. Roe*, 432 U.S. 464, 471-74 (1977); *Harris v. McRae*, 448 U.S. 297, 317-18 (1980).

preserve the barest degree of the liberty that the Court has defined, a self-definitional autonomy.²¹¹

The right to remain in public space could help restore the promises of the Constitution to a group of Americans that has been effectively excised from the Supreme Court's deliberations. Coupled with their political powerlessness, poor people's lack of traction in the courts has led them to fall into what Julie Nice calls a "dialogic default."²¹² Other scholars studying the evolution of constitutional law have argued that constitutional interpretation evolves with society.²¹³ While recognition by the courts could fuel political mobilization, and social movements could push the courts to include poor people in applications of constitutional rights, the silence on both fronts has stymied progress.²¹⁴ Nice argues that the courtroom doors have closed on the poor since *Dandridge v. Williams*, when the Supreme Court announced that it would apply the most deferential form of rationality review to governmental actions dealing with economics and social welfare.²¹⁵ She finds it especially problematic that, although the Supreme Court has never squarely considered whether poverty is a suspect classification, in cases following *Dandridge* the Court has assumed that it is not and thus deprived poor people of a full airing of their case for heightened scrutiny.²¹⁶ Poor people have also had trouble mobilizing because they lack resources and political sway and are a diffuse group.²¹⁷

The *Obergefell* Court's consideration of the Due Process and Equal Protection Clauses together presents a model for how poverty and homelessness can shape the case for a right to remain even though indigence has never received formal heightened scrutiny. Alongside the four bases for recognizing the fundamental right to same-sex marriage, the Court looked at the harm that the denial of marriage inflicted on same-sex couples. Inequality inflected the Court's analysis even though gays have not been afforded heightened scrutiny. Similarly, indigence should inform courts' consideration of the right to remain in public

211. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.").

212. Nice, *supra* note 147, at 633–34.

213. See, e.g., JACOBUS TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* 183–91 (1951); David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1468–69 (2001); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323, 1323 (2006).

214. See Nice, *supra* note 147, at 633–34.

215. *Id.* at 638 (citing *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) (finding that Maryland's cap on welfare without regard to a family's need or size did not violate the Equal Protection Clause or the Social Security Act)).

216. *Id.* at 645.

217. See Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 724 (1985); Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1306 (1993) (challenging the deferential judicial review in poverty cases because of poor people's lack of political influence).

space. Anti-camping ordinances, anti-loitering laws, and police orders to move along systematically work to the disadvantage of a specific group—the homeless. Cities have targeted homeless people through ordinances of various forms, from the vagrancy ordinance in *Papachristou* to anti-camping ordinances today. Vilification in newspapers and hate crimes persist.²¹⁸ As courts weigh the persuasiveness of the preceding bases for a fundamental right, they should consider the extent to which these laws and police practices subordinate a particular group.

F. Vagueness and the Beginnings of a Substantive Right

Substantive due process cases have tended to revolve around intimate associations, privacy, and the home. While freedom of movement, the Fourth Amendment, the Eighth Amendment, and the strain of equality in the right to travel can together form four bases that parallel those supporting the right to same-sex marriage in *Obergefell*, the right to remain would nonetheless be a sharp turn in the development of substantive due process over the past several decades since *Griswold v. Connecticut* and *Roe v. Wade*. Applications of unenumerated rights, from the use of contraceptives to same-sex intimate relations, have all looked inward to the home rather than outward to the street. However, the lack of a public-facing substantive due process does not mean that the Court has declined to protect against infringements on “liberty” that neither violate enumerated rights nor implicate the home or intimate relationships. Instead, the Court has maintained a presence in this sphere through procedural rather than substantive means. Vagueness doctrine—the means by which the Court struck down suspect laws in *Papachristou*,²¹⁹ *Kolender*,²²⁰ and *Morales*²²¹—could more accurately be described not as a procedural doctrine, but as a veiled judgment.

In his classic law school note, Anthony Amsterdam argued that courts use vagueness to further substantive commitments.²²² Amsterdam explained that vagueness is less concerned with indefinite language than with “the creation of an insulating buffer zone of added protection at the peripheries of several of the Bill of Rights freedoms.”²²³ Robert Post built upon Amsterdam’s conception of vagueness by arguing that the Supreme Court employs vagueness doctrine not only to force legislatures to revise laws to be clearer or more precise, but also to

218. See, e.g., NAT’L COAL. FOR THE HOMELESS, NO SAFE STREET: A SURVEY OF HATE CRIMES AND VIOLENCE COMMITTED AGAINST HOMELESS PEOPLE IN 2014 & 2015, 1 (2016), nationalhomeless.org/wp-content/uploads/2016/07/HCR-2014-15.pdf [https://perma.cc/9QL5-SSAB] (documenting 199 attacks against homeless persons in 2014 and 2015).

219. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

220. *Kolender v. Lawson*, 461 U.S. 352, 361 (1983).

221. *City of Chicago v. Morales*, 527 U.S. 41, 64 (1999).

222. Anthony G. Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 74–75 (1960).

223. *Id.* at 75.

limit what social orders governments can impose on citizens.²²⁴ Post argued that it was in fact apparent who would be subject to the strictures of the Jacksonville ordinance in *Papachristou*. The Court noted that “poor people, nonconformists, dissenters, [and] idlers[] may be required to comport themselves according to the lifestyle deemed appropriate by Jacksonville police and the courts.”²²⁵ While vagueness supposes that individuals cannot discern a standard by which they can make judgments about what behavior is illegal, in *Papachristou* the Court identified a standard of bourgeois values and deemed it an impermissible basis for the law.²²⁶ While vagueness has nothing intrinsically to say about individuals’ conduct in public spaces, it served as a vehicle by which the Court not only policed language, but also checked the type of laws that states can impose on public behavior.²²⁷

The close connection between vagueness and substantive due process can be seen through the development of two seminal cases in each category: *Papachristou v. City of Jacksonville* and *Roe v. Wade*.²²⁸ Early drafts of *Papachristou* were based not on vagueness, but on substantive due process.²²⁹ Justice Douglas’s draft opinion recognized the activities criminalized in the Jacksonville ordinance, including wandering or strolling, as fundamental rights.²³⁰ By the time of his final version, Justice Douglas had deleted all reference to the Ninth Amendment or the Bill of Rights, and, while his affirmation of alternative lifestyles remained, his opinion now rested on vagueness.²³¹ Meanwhile, Justice Blackmun’s early draft opinion in *Roe* relied on void-for-vagueness doctrine.²³² Justice Brennan and Justice Douglas pressed Justice Blackmun to reach “the core issue” of privacy in *Roe* rather than rely on vagueness.²³³

After reading Justice Douglas’s draft *Papachristou* opinion, Justice Brennan wrote to him,

224. Robert C. Post, *Reconceptualizing Vagueness: Legal Rules and Social Orders*, 82 CALIF. L. REV. 491, 491–92 (1994).

225. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972).

226. Post, *supra* note 224, at 498.

227. *Id.* at 506–07.

228. Risa L. Goluboff, *Dispatch from the Supreme Court Archives: Vagrancy, Abortion, and What the Links Between Them Reveal About the History of Fundamental Rights*, 62 STAN. L. REV. 1361, 1385 (2010).

229. *Id.* at 1367 (citing Draft Opinion, *Papachristou v. City of Jacksonville*, No. 70-5030 (Dec. 28, 1971) (Douglas Papers, Box 1558)).

230. *Id.*

231. *Id.* at 1373.

232. *Id.* at 1379 (citing Justice Harry A. Blackmun, First Draft, *Roe v. Wade*, No. 70-18, at 13–14 (May 18, 1972) (Blackmun Papers, Box 151)).

233. *Id.* at 1379 (citing Memorandum from Justice William J. Brennan to Justice Harry A. Blackmun, Re: *Roe v. Wade*, No. 70-18 (May 18, 1972) (Brennan Papers, Box I-285); Memorandum from Justice William O. Douglas to Justice Harry A. Blackmun, Re: *Roe v. Wade*, No. 70-18 (May 19, 1972) (Douglas Papers, Box 1589)).

As I recall[,] vagueness was the consensus ground at conference. Will the 'fundamental rights' approach scare away votes? It keys in so perfectly with my views in the abortion cases that I fervently hope not. Does the possible risk argue for holding up circulation until Harry's Texas case comes around[?]²³⁴

Justice Brennan worried that other, more conservative Justices would perceive the commonalities between the two opinions and reconsider joining *Roe* in order not to recognize a doctrine that encompassed Justice Douglas's *Papachristou* opinion too.²³⁵ Justice Stewart would not sign on to *Papachristou* until Justice Douglas removed the broader, rights-based argument and specifically required that Justice Douglas delete a reference to the Bill of Rights in the last sentence of the opinion.²³⁶ The other Justices did not express their views in preserved memoranda.²³⁷

Part of the appeal of the vagueness doctrine, that it is a value-free mechanism for protecting individuals from unchecked governmental control, is also the reason that it is not a fully satisfying home for the intuition that we have a right to be in public spaces. It checks the form of legislation, but it does not regulate the substance. For instance, the *Morales* Court struck down the Chicago ordinance prohibiting people from loitering with known members of a gang in a public place on the basis that it was unconstitutionally vague.²³⁸ This holding served the interest of free activity in public because it forced the government to craft a narrower statute that did not cover as wide a population or range of conduct. However, the City of Chicago subsequently passed an ordinance that more clearly defined loitering.²³⁹ Vagueness is thus no protection from specific laws like anti-camping ordinances or move-along orders based on laws that are sufficiently clear.

The substantive component of vagueness does not directly support the conclusion that there should be a fundamental right to remain. Rather, it answers the concern that reviewing local laws that regulate activity in public space and inhibit the freedom of unpopular groups is not within the purview of the judiciary. Outside of the dicta mentioning potential implications for a right to free movement, the holdings in the vagueness cases do not amount to precedent supporting the recognition of a particular right. Instead, they show that the

234. *Id.* at 1378 (citing Memorandum from Justice William J. Brennan, Jr. to Justice William O. Douglas, Re: *Papachristou v. City of Jacksonville*, No. 70-5030 (Dec. 30, 1971) (Brennan Papers, Box I-274)).

235. *Id.*

236. *Id.* at 1382 (citing Memorandum from Justice Potter Stewart to Justice William O. Douglas, Re: *Papachristou v. City of Jacksonville*, No. 70-5030 (Jan. 28, 1972) (Douglas Papers, Box 1558)).

237. *Id.* at 1383.

238. *City of Chicago v. Morales*, 527 U.S. 41, 64 (1999).

239. See CHI., ILL., MUN. CODE § 8-4-015(a) (2000). Part of the new ordinance was lifted directly from language that Justice O'Connor proposed in her concurrence. Kim Strosnider, *Anti-Gang Ordinances After City of Chicago v. Morales: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, 39 AM. CRIM. L. REV. 101, 136 (2002).

judiciary has previously operated in this area and that a more transparent form of reasoning may be desirable.

V.

THE SHAPE OF THE RIGHT AND CRITIQUES

A. *A Right to Space or a Right to Remain*

The right to remain speaks directly to the injustice perpetrated against homeless individuals and the importance of the basic liberty to remain in a place of one's choosing without being roused from a familiar area or herded from place to place. However, one might think that such a right still falls shy of capturing the essence of the universal right being recognized, which is not so much a right to remain as a right to space. Homeless people have a right to a place where they can exist. With no private space of their own to complement the public, they face being driven out of an area entirely.²⁴⁰ Further, they have the same right to be in public spaces that the rest of the population enjoys. Additionally, after *Obergefell*, it can be argued that positive rights are possible.²⁴¹

However, a right to space has an Achilles heel that the right to remain does not have. While a right to remain preserves an individual's autonomous choice to decide where to be, there is no restriction on where the space must be in the positive formulation of the right. Robert Ellickson's proposed scheme for balancing the needs of homeless and non-homeless urban dwellers shows the need to embed personal choice in the right and not reduce it to space alone.²⁴² Ellickson discusses a hypothetical municipality that zones land as green, yellow, and red.²⁴³ In green zones, which make up five percent of the city, no panhandling or "bench squatting" would be permitted.²⁴⁴ This would serve as a retreat for individuals who are unusually sensitive to what Ellickson considers disruptive behaviors.²⁴⁵ Yellow zones, comprising ninety percent of the city, would have more lenient codes than green zones, but ban "chronic panhandling and bench squatting."²⁴⁶

240. See Waldron, *supra* note 154, at 304 ("Now one question we face as a society—a broad question of justice and social policy—is whether we are willing to tolerate an economic system in which large numbers of people are homeless. Since the answer is evidently, 'Yes,' the question that remains is whether we are willing to allow those who are in this predicament to act as free agents, looking after their own needs, in public places—the only space available to them. It is a deeply frightening fact about the modern United States that those who *have* homes and jobs are willing to answer 'Yes' to the first question and 'No' to the second.").

241. Yoshino, *supra* note 2, at 167.

242. See generally Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165 (1996).

243. *Id.* at 1220.

244. *Id.* at 1221–22.

245. *Id.*

246. *Id.* at 1221.

Finally, panhandling and squatting would be permitted in five percent of the city, called red zones.²⁴⁷

The dangers of Ellickson's proposal illustrate the necessity of recognizing a right to remain in public space. Concentrating homeless individuals in one corner of the city would expose them to the same threats that render many shelters unlivable. When they have the liberty to choose an area in a city to spend their time, homeless people are able to get to know a group of peers and surround themselves with people they trust. Grouping a mass of homeless people in one crowded area exposes them to violence and intimidation.²⁴⁸ Homeless women would be particularly vulnerable to abuse.²⁴⁹ In addition, the people who live or work in the areas designated as red zones would face a concentration of destitution outside their doors and in the places they frequent that is unjustified and likely the result of a lack of wealth and resulting influence with city officials.²⁵⁰ Finally, segregating the city permits people with homes to go about their lives unaware of the misery cordoned off several blocks away from them, which otherwise would be obvious.²⁵¹ While the state may not be under an affirmative legal obligation to provide homeless people with housing,²⁵² removing homeless people from view decreases their chance of support through the democratic process.²⁵³

B. *The Right to Remain and Effective Policing*

Courts have been reluctant to recognize constitutional rights that would protect the homeless for fear of tying the hands of law enforcement. In *Joyce*, the court warned that declaring homelessness a status under the Eighth Amendment would have a "devastating impact on state and local law enforcement efforts."²⁵⁴ While it behooves courts to consider the real-world implications of their rulings, it is nonetheless courts' duty "to judge the *constitutionality* of police behavior, *not* its effectiveness as a law enforcement tool."²⁵⁵ Anything less would be an abdication of the role of the third branch to enforce constitutional rights and defend

247. *Id.*

248. See Stephen R. Munzer, *Ellickson on "Chronic Misconduct" in Urban Spaces: Of Panhandlers, Bench Squatters, and Day Laborers*, 32 HARV. C.R.-C.L.L. REV. 1, 28 (1997).

249. *Id.*

250. *Id.* at 28–29.

251. See *Loper v. N.Y.C. Police Dep't*, 999 F.2d 699, 704 (2d Cir. 1993) ("Begging frequently is accompanied by speech indicating the need for food, shelter, clothing, medical care or transportation. Even without particularized speech, however, the presence of an unkempt and disheveled person holding out his or her hand or a cup to receive a donation itself conveys a message of need for support and assistance.")

252. See *Lindsey v. Normet*, 405 U.S. 56, 74 (1972). *But see Callahan v. Carey*, N.Y. L.J., Dec. 11, 1979, at 10 (N.Y. Sup. Ct. Dec. 5, 1979).

253. See Helen Hershkoff & Adam S. Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104 HARV. L. REV. 896, 901 (1991).

254. *Joyce v. City of San Francisco*, 846 F. Supp. 843, 858 (N.D. Cal. 1994).

255. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 556 (S.D.N.Y. 2013) (holding that the New York Police Department violated the Fourth Amendment by systematically conducting stops and frisks in a racially discriminatory fashion).

individuals from government excesses. While commentators defend the need for police discretion and quality-of-life laws,²⁵⁶ it is far from clear that liberty and safety are incompatible.²⁵⁷

For one, little indicates that recognizing a right that extends protections to homeless individuals in their interactions with the police would limit law enforcement's ability to preserve public safety. A debate about such a right under the Fourteenth Amendment would instead counterbalance the lack of judicial consideration of police decisions under the Fourth Amendment. The Supreme Court has found no reasonable expectation of privacy in many situations, recognized many police-citizen encounters as consensual, upheld consent searches without requiring that police officers alert civilians of their right to say no, and applied the deferential standard of "reasonable suspicion" to police actions such as "stop and frisk."²⁵⁸ Police have ordinances at their disposal, such as prohibitions on disorderly conduct or harassment, on which they can rely when appropriate.²⁵⁹ The Fourth Amendment also does not reach police encounters such as directions for people to move along.²⁶⁰

Homelessness elicits strong reactions among housed citizens because of concerns about decorum and safety. Under the theory of broken windows policing, the incidence of "quality-of-life" offenses, such as loitering, littering, unreasonable noise, or public drunkenness, contributes to a feeling that law is not taken seriously in a community, which in turn leads residents to commit more serious crimes.²⁶¹ While the adoption of quality-of-life policing coincided with a sharp decline in crime rates,²⁶² the correlation between the two has not been established.²⁶³ Other cities across the nation that did not institute the broken

256. See, e.g., Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 562 (1997); Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1184 (1998).

257. *Floyd*, 959 F. Supp. 2d at 556 ("The goals of liberty and safety may be in tension, but they can coexist—indeed the Constitution mandates it.").

258. See David Cole, *Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1071–72 (1999).

259. See, e.g., N.Y. PENAL LAW § 240.20 (McKinney 2015) (disorderly conduct) ("A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof: (1) He engages in fighting or in violent, tumultuous or threatening behavior; or (2) He makes unreasonable noise; or (3) In a public place, he uses abusive or obscene language, or makes an obscene gesture; or (4) Without lawful authority, he disturbs any lawful assembly or meeting of persons; or (5) He obstructs vehicular or pedestrian traffic; or (6) He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or (7) He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose. Disorderly conduct is a violation.").

260. See *supra* Part IV.D.

261. See James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 32.

262. See Cole, *supra* note 258, at 1064.

263. See Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 271 (2006).

windows theory experienced similar drops in crime, cities including New York employed other strategies such as tracking crime through CompStat and increasing police presence in certain areas, and developments like a decline in the use of crack cocaine contributed to dramatically safer cities.²⁶⁴ Nonetheless, newspapers like the *New York Post* have dehumanized homeless people and cast them as symbols heralding a return to the disorder of the 1980s and 1990s.²⁶⁵

Although the benefits of quality-of-life policing and criminalizing homelessness are unclear, the harms are apparent. Even meeting the philosophy of broken windows policing on its own turf and considering the community's sense of law enforcement, broken windows may backfire. Overly broad police discretion encourages discriminatory policing that impedes law enforcement by undermining the law's legitimacy among those who are targeted, including minorities and poor people.²⁶⁶ Members of those groups that feel alienated are less likely to provide leads to the police, testify as witnesses for the prosecution, serve on juries when called, and convict defendants when they do serve.²⁶⁷ Those who distrust the fairness of the legal system are discouraged from playing by the rules, thus compounding the risk of crime in neighborhoods that already suffer from socioeconomic disadvantage.²⁶⁸

Enforcing laws against homeless people is also counter-productive. Most homeless people are unable to afford fines for violating routine quality-of-life offenses and are subsequently sent to jail.²⁶⁹ Their criminal records may then cost them eligibility for housing and public assistance benefits, cripple their efforts to find jobs, and impair their credit.²⁷⁰ The extensive harm to homeless individuals takes on an absurd air when one compares the cost of warehousing homeless people in prison compared to providing them with supportive housing.²⁷¹

264. See FRANKLIN E. ZIMRING, *THE CITY THAT BECAME SAFE: NEW YORK'S LESSONS FOR URBAN CRIME AND ITS CONTROL* (2011).

265. See, e.g., Tom Wilson, *20 Years of Cleaning up NYC Pissed Away*, N.Y. POST (July 10, 2015), <http://nypost.com/2015/07/10/apparently-its-now-ok-to-pee-on-the-streets-of-new-york-city/> [https://perma.cc/636J-4C5U]; Andrea Peyser, *Bums Are Running Amok in New York City and It Needs to Stop*, N.Y. POST (July 19, 2015), <http://nypost.com/2015/07/19/bums-are-running-amok-in-new-york-city-and-it-needs-to-stop/> [https://perma.cc/7DL2-P7PM].

266. See Cole, *supra* note 258, at 1091–92.

267. *Id.* at 1091.

268. *Id.*

269. See Donald Saelinger, *Nowhere to Go: The Impacts of City Ordinances Criminalizing Homelessness*, 13 GEO. J. ON POVERTY L. & POL'Y 545, 559 (2006).

270. *Id.* at 560.

271. Marc Santora, *City's Annual Cost Per Inmate Is \$168,000, Study Finds*, N.Y. TIMES (Aug. 23, 2013), <http://www.nytimes.com/2013/08/24/nyregion/citys-annual-cost-per-inmate-is-nearly-168000-study-says.html> [https://nyti.ms/2kqzVJ9]; Matthew Yglesias, *Giving Housing to the Homeless Is Three Times Cheaper than Leaving Them on the Streets*, VOX (Feb. 4, 2015), <http://www.vox.com/2014/5/30/5764096/its-three-times-cheaper-to-give-housing-to-the-homeless-than-to-keep> [https://perma.cc/3DWP-FRUB].

C. A Proposed Standard of Review

A right is only meaningful to the extent that it is upheld against laws or activities that threaten it. Courts determine the constitutionality of most statutes or regulations by assessing whether they are rationally related to a legitimate government purpose.²⁷² Under this standard it is nearly a foregone conclusion that courts will defer to legislative decision-making.²⁷³ However, where a law implicates a fundamental right, courts will assess whether the law is necessary or narrowly tailored to promote a compelling governmental interest.²⁷⁴ It would be impractical to subject laws that affect the right to remain in public space to strict scrutiny because of the need to regulate public spaces. Traffic lights or parade grounds are routine regulations of public space that need not endure the rigors of strict judicial scrutiny. Compared to the right to interstate travel, for instance, the frequency with which the right to localized travel is controlled and the multiplicity of conflicting interests in public space would render a rigid regime untenable.

Courts and commentators have considered two alternative standards for a right to intrastate travel in lieu of strict scrutiny: intermediate scrutiny borrowed from time, place, and manner restrictions on speech²⁷⁵ and the undue burden test used for restrictions on access to abortion.²⁷⁶ In *Lutz v. City of York*, the Third Circuit borrowed from free-speech doctrine, which applies intermediate scrutiny to time, place, and manner restrictions on speech.²⁷⁷ The court considered intrastate travel and free speech analogous in the sense that “unlimited access to public fora or roadways would result not in maximizing individuals’ opportunity to engage in protected activity, but chaos.”²⁷⁸ It upheld an ordinance prohibiting cruising under intermediate scrutiny, finding that it was “narrowly tailored to meet significant city objectives.”²⁷⁹

272. See, e.g., *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 397–98 (1937) (overruling *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923), and upholding the constitutionality of minimum wage legislation); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955) (“[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”).

273. Except for rational basis with bite cases. See *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 538 (1973); *Romer v. Evans*, 517 U.S. 620, 635 (1996).

274. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (“[I]n moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional.”).

275. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

276. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (joint opinion of O’Connor, Kennedy & Souter, JJ.).

277. *Lutz v. City of York*, 899 F.2d 255, 269 (3d Cir. 1990).

278. *Id.*

279. *Id.* at 270.

By failing to distinguish between incidental and direct burdens on the right to travel on public fora, the *Lutz* approach may be both over- and under-protective.²⁸⁰ In free speech law, statutes that impermissibly target types of speech are subjected to strict scrutiny as content-based restrictions. Intermediate scrutiny then only applies to content-neutral speech.²⁸¹ Without this sorting mechanism in right-to-intrastate-travel cases, intermediate scrutiny applies to curfews and traffic signs alike.²⁸² Further, the crux of the time, place, and manner test—that there is an available alternative channel of communication²⁸³—undermines the protections afforded by a right to remain in public space. Courts may instead fall into the segregated scheme laid out by Ellickson.²⁸⁴ Thus, access to space may not be interchangeable in the way that modes of communication can be.²⁸⁵

Instead, the undue burden standard from *Planned Parenthood v. Casey* may be a more suitable test.²⁸⁶ In *Planned Parenthood v. Casey*, the Court held that a statute or regulation constitutes an undue burden where it “has the purpose or effect of placing a substantial obstacle in the path” of the exercise of the right.²⁸⁷ The Court has applied a comparable standard informally in the right to marry, the right to vote, and the right to travel.²⁸⁸ The undue burden standard could aid courts in distinguishing between laws that are needed for public order and do not pose notable threats to people’s exercise of the right to remain in public space and laws that substantially interfere with the exercise of their rights.

The way such a standard would function can be seen through application to laws and police activity common in municipalities across the United States: obstruction ordinances, anti-camping ordinances, and move-along orders. First, an obstruction ordinance is not directly targeted at homeless individuals, but applies across a wide range of people and activities who may interfere with people moving down city streets or parks. The purpose is the daily functioning of a city, and while its enforcement might affect homeless people whose belongings block public passages, streets are wide enough that it is unlikely to prevent them from being outside in a significant way.

280. See Benjamin C. Sasse, *Curfew Laws, Freedom of Movement, and the Rights of Juveniles*, 50 CASE W. RES. L. REV. 681, 706–11 (2000).

281. See Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 52 (1987).

282. See Sasse, *supra* note 280, at 708.

283. See Frederick Schauer, *Cuban Cigars, Cuban Books, and the Problem of Incidental Restrictions on Communications*, 26 WM. & MARY L. REV. 779, 791 (1985).

284. See *supra* Part V.A.

285. See *Kovacs v. Cooper*, 336 U.S. 77, 82–83, 89 (1949) (upholding a prohibition on sound trucks in residential neighborhoods in part because speakers can reach their audience through other methods).

286. See Sasse, *supra* note 280, at 709.

287. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (joint opinion of O’Connor, Kennedy & Souter, JJ.).

288. See generally Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 908–30 (1994).

Second, an anti-camping or anti-sleeping ordinance raises immediate red flags because the only population affected is the homeless. For example, in Dallas, Texas, it is unlawful to sleep or “doze” in a public place.²⁸⁹ A city can raise legitimate concerns such as public safety, sanitation, and aesthetics, but the evident purpose of displacing homeless people and the substantial effect that the ordinance has on the ability of homeless people to remain in public space should subject the statute to strict scrutiny. The city’s concerns would not outweigh the fundamental right to remain in public space when there are other means for furthering these objectives, such as scheduling intermittent cleaning or increasing police presence.

Finally, move-along orders can be challenged when, as in *Pottinger*, there is a showing of a policy of repeatedly directing people to move.²⁹⁰ Unless such a directive implicates a fundamental right, it is difficult to challenge because of the deference that courts allow police judgment.²⁹¹ For instance, according to a survey of homeless individuals conducted by the Coalition on Homelessness in San Francisco, seventy percent of the respondents had been forced to move from a public space in the last year.²⁹² With nowhere else to turn but public space, seventy percent of the respondents who reported being asked to move said that they moved down the street or around the corner, stayed in the same spot, or walked around and returned once the police left.²⁹³ The recognition of the right to remain would put law enforcement to the task of articulating a justification for their actions or finding an alternative. A court faced with proof of a pattern of move-along orders should conclude that the practice is an undue burden on a homeless individual’s right to remain in public space and determine whether the city has offered a compelling justification for its actions. If the city does not meet its burden, the court should issue an injunction.

VI. CONCLUSION

Obergefell presents an opportunity to recast challenges to anti-homeless ordinances and regularly-issued move-along orders in a more robust form that directly addresses the indignities that these government actions inflict on homeless individuals. Most courts have concluded that the Eighth Amendment and the right to travel do not protect homeless people from such treatment. The right to remain in public space does not readily fit into an existing doctrine, but rather sits at the intersection of several constitutional provisions. The mode of substantive due

289. DALL., TEX., CODE ch. 31, art. I, § 31-13 (2017).

290. See *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1554 (S.D. Fla. 1992).

291. See Henderson, *supra* note 205, at 39.

292. COAL. ON HOMELESSNESS, PUNISHING THE POOREST: HOW THE CRIMINALIZATION OF HOMELESSNESS PERPETUATES POVERTY IN SAN FRANCISCO 1 (2015), <http://www.cohsf.org/Punishing.pdf> [<https://perma.cc/8964-TE9X>].

293. *Id.*

process analysis that *Obergefell* endorsed encourages courts to perceive the connections between the right to movement, the Eighth Amendment, the Fourth Amendment privacy concerns, and the inequality motivating applications of the right to travel. Further, a close look at the Supreme Court's vagueness cases as they relate to vagrancy and public spaces reveals that the development of substantive due process primarily in the private realm was not a historical inevitability. Rather, vagueness contains substantive components that can be excavated and applied in the context of homelessness today. As a state where the public meets the private, homelessness is a uniquely suitable and circumscribed place for this development.

In *The New Equal Protection*, Kenji Yoshino writes that while the turn to substantive due process in *Lawrence v. Texas* was born of necessity, substantive due process offers advantages over equal protection.²⁹⁴ Although "pluralism anxiety" has curbed the Court's recognition of new suspect classifications, the Court has advanced the same goals of legal equality through recognition of individual rights.²⁹⁵ Rather than highlighting differences among groups in order to justify heightened scrutiny, fundamental rights underscore our commonalities.²⁹⁶ Just as pluralism anxiety has shaped the Court's response to discrimination against gay people, the Court's reluctance to wade into economic issues through socioeconomic rights or equal protection has curtailed its and lower courts' treatment of the criminalization of homelessness. Upholding a right to remain in public space steers clear of imposing positive obligations on government and establishing poverty as a suspect class. It would bring homeless people relief from treatment as criminals and remove an obstacle to efforts to provide housing and support services. At the same time, the right to remain in public space strikes a universal chord that can restore some agency to homeless individuals and emphasize the civic obligation of those who have private property rights on which to fall back.

294. See Yoshino, *supra* note 10, at 792–97.

295. *Id.* at 787.

296. *Id.* at 795.