

THE UNTENABLE CASE FOR AN UNCONDITIONAL RIGHT TO SHELTER

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As homelessness has become a prominent domestic issue, numerous advocates have called for constitutional recognition of an individual's unconditional right to enjoy a minimum level of shelter. I argue here that these advocates have failed to deal with the fundamental fact that a society must maintain incentives to work. Both theory and data indicate that an unconditional shelter right, presumably coupled with ironclad rights to enjoy other material benefits, would be counterproductive, even for the poor. My stance is grounded on policy considerations, not on a preference for constitutional minimalism. Indeed, after criticizing the proposed right to shelter, I will identify and praise two momentous, but little-heralded, original endowments that our current constitutional scheme guarantees to each citizen.

My remarks will touch on three overarching issues in the design of a constitution's bill of rights. First, should a bill of rights protect only "negative liberties," that is, rights against government intrusions, or should it also affirm specified "positive liberties," such as entitlements to a minimum level of material welfare? Second, should a constitution's bill of rights be complemented with a "bill of duties" that specifies each citizen's civic responsibilities? Finally, what rights in a federal system are appropriately placed only in a state constitution's bill of rights?

I. THE ADVOCATES OF SHELTER RIGHTS

Recent discussions of a constitutional right to shelter revive, in a particular context, a longstanding controversy over whether entitlements to sustenance can be found in the United States Constitution. Most writers on this subject are unabashed proponents of welfare rights. Of these "advocates," I concen-

* Walter E. Meyer Professor of Property and Urban Law, Yale Law School. I thank Michael Granston for able research assistance, and Akhil Amar, Curtis Berger, Michael Schill, and Robert Solomon for helpful comments. In this instance it is actually imperative to insert the cliché that the commentators do not necessarily agree with what the author has written.

trate on three: Frank Michelman, Akhil Amar, and Curtis Berger.

Professor Michelman has long contended that the Equal Protection Clause can be construed to require the federal government to provide each individual with a minimum of wherewithal.¹ In refining his position, Professor Michelman has associated himself with John Ely's view that the Constitution is properly construed to be "representation reinforcing."² The essence of the argument is that a citizen who lacks a minimum endowment of tangible wealth may not be able to participate effectively in political life.³ For example, granting a person the right to vote may not be meaningful when the recipient is too impecunious to exercise such a right independently.

Akhil Amar has also embraced the position that the Constitution guarantees each citizen a grubstake. In a sparkling essay that echoes Professor Michelman's general themes but departs from them on many particulars, Professor Amar construes the Thirteenth Amendment⁴ to require the federal government to provide all individuals with a minimum level of sustenance and

1. See Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659 [hereinafter Michelman, *Welfare Rights*].

2. See Michelman, *Welfare Rights*, *supra* note 1, at 666-79; JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 77-104 (1980).

3. Rather than calling for constitutional recognition of an omnibus right to a minimal level of welfare, Professor Michelman envisions a series of particulars—"constitutional rights to provision for certain basic ingredients of individual welfare, such as food, shelter, health care, and education." Michelman, *Welfare Rights*, *supra* note 1, at 659. If welfare rights are created by law, however, there are major advantages in articulating the entitlements broadly rather than narrowly. Government agencies can administer one general entitlement program more cheaply than a battery of specific ones; they need determine eligibility only once, mail only one check, and so on. A general cash allotment also allows each household to decide for itself how to allocate its stipend among shelter, food, entertainment, or other items. A state that distributes an array of in-kind benefits reveals its distrust of its citizens' competence. The advantages of preserving consumer sovereignty may not be decisive, of course, when, say, the welfare of children is at stake. In my view, government should paternalistically provide in-kind benefits only in particular cases where there has been demonstrated incompetence on the part of the parent to whom a welfare check would be sent. Whether or not they agree, Professor Michelman and the other advocates of a right to shelter should at least explain why they are so eager to channel material aid into one particular segment of the household budget. More defensible is the broad and conditional stance in Thomas C. Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877, 897 (1976) (advocating "a right in each person to have his basic material needs met by his society to the extent he is unable to meet them by his own efforts").

4. U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitude . . . shall exist within the United States . . . Congress shall have power to enforce this article by appropriate legislation.").

shelter.⁵ The title of his essay, *Forty Acres and a Mule*, recalls Thaddeus Stevens's proposal during the Reconstruction Era for a bare-bones governmental transfer to each freedman.⁶ Professor Amar's invocation of Congressman Stevens's idea implies that Professor Amar might sympathize with a governmental policy that endowed each person with a form of inalienable seed capital, rather than with a basket of consumption goods.⁷ If this is indeed Professor Amar's view, he is honoring a central—and, I will argue, commendable—feature of our current constitutional scheme.

Both Professors Michelman and Amar are prone to overly inventive constitutional interpretation. Currently, the federal and state constitutions explicitly bestow certain original entitlements upon each person, but, as I will explain, the structure of these entitlements militates against judicial implication of unconditional welfare rights. I need spend little space on textual arguments because a number of commentators, most notably Robert Bork, have previously expressed their doubts about whether, say, the language and history of the Equal Protection Clause support Professor Michelman's interpretation of it.⁸ Furthermore, a solid majority of the Supreme Court has implicitly rejected Professor Michelman's position.⁹

Unlike Professors Michelman and Amar, Curtis Berger does not view the current constitutional text and case law as sup-

5. See Akhil R. Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL'Y 37, 39 (1990). *But see id.* at 42 (attacking unconditional "doles" of the sort seemingly endorsed a few pages earlier).

6. See MICHAEL K. CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 85 (1986).

7. See Amar, *supra* note 5, at 42. An intriguing question is what sorts of in-kind transfers Professor Amar would favor under current circumstances when forty acres and a mule would have little or no use value to most recipients. Should Washington distribute pick-up trucks? Home computers? Fixer-upper housing? In commenting on a draft of this essay, Professor Amar identified education and job-training programs as the basic entitlements. He would also honor immigrants' claims to adult education.

8. See, e.g., Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695. Professor Michelman concisely summarizes the positions of his various critics in *Welfare Rights*, *supra* note 1, at 659-60.

9. In its early years, the Burger Court declined to construe the Equal Protection Clause as creating constitutionally protected interests in schooling, shelter, and welfare benefits. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Lindsey v. Normet*, 405 U.S. 56 (1972); *Dandridge v. Williams*, 397 U.S. 471 (1970); see also *Williams v. Barry*, 708 F.2d 789, 793 (D.C. Cir. 1983) ("No one has plausibly maintained that there is a constitutional . . . right to city-provided shelter.") (Bork, J., concurring).

porting a right to shelter.¹⁰ Instead, Professor Berger urges Congress to establish this right through a variety of statutory measures.¹¹ His suggestions should be welcomed by homeless advocates who have placed Congressional recognition of a "right to shelter" near the top of their political agenda. Although such a statutory guarantee is easy to draft,¹² even Congressional Democrats have declined repeatedly to include express recognition of a right to shelter in housing and homelessness acts.¹³ It is also notable that Professors Amar, Berger, and Michelman are all ambivalent about the prospect of judicial enforcement of a right to shelter.¹⁴ They doubtless foresee that judges might become overly entangled in the details of housing and welfare policy.

II. THREE APPROACHES TO WELFARE RIGHTS

Forsaking the important issues of constitutional interpretation and judicial role, I now turn to a discussion of whether establishing an unconditional right to shelter would be a wise social policy. In this section, I will argue that recognition—whether constitutional or statutory—of an unconditional right to shelter would represent a fundamental departure from this nation's traditional welfare strategy.

The basic conundrum of welfare policy is to provide aid to the less fortunate without undermining incentives to work. Richard Epstein and Ralph Winter have sounded this concern

10. See Curtis Berger, *Beyond Homelessness: An Entitlement to Housing*, 45 U. MIAMI L.REV. 315 (1990-91).

11. See *id.* at 324-26. For an overview of the statutory arguments that are currently available to shelter advocates, see Florence Wagman Roisman, *Establishing a Right to Housing: A General Guide*, 25 CLEARINGHOUSE REV. 203 (1991).

12. See, e.g., S. 2608, 99th Cong., 2d Sess. § 101(a)(1986) (Senator Gore's proposed Homeless Persons' Survival Act of 1986). Section 101(a) stated in part: "Declaration of Entitlement.—Every homeless individual is entitled as a matter of right to decent overnight shelter. . . . [B]oth State and Federal courts shall have jurisdiction to enforce this right in private actions brought by or on behalf of homeless individuals."

13. In 1986 and 1987, Congress declined to act favorably on bills proposing a "Homeless Persons' Survival Act." See Lucie White, *Representing The Real Deal*, 45 U. MIAMI L. REV. 271, 294 n.86 (1990-91); see also The Stewart B. McKinney Homeless Assistance Act, Pub. L. No. 100-77, 101 Stat. 482 (1987) (failing to include a right-to-shelter provision).

14. See Amar, *supra* note 5, at 42; Berger, *supra* note 10, at 325; Michelman, *Welfare Rights*, *supra* note 1, at 684-85; see also Grey, *supra* note 3, at 900-01. The right-to-shelter advocates must be asking lawmakers to do more than issue a hortatory statement about the desirability of improved housing conditions, because Congress did just that as long ago as 1949. See Housing Act of 1949, ch. 338, § 2, 63 Stat. 413, codified at 42 U.S.C. § 1441 (1988) (endorsing the goal of "a decent home in a suitable living environment for every American family").

in their critiques of the welfare-rights advocates.¹⁵ Like most commentators, Professor Epstein and Judge Winter assume that no human group can socialize its members to eliminate innate propensities toward material self-interest.¹⁶ Although individuals assuredly pursue nonmaterial ends as well, man cannot live without bread. Indeed, the advocates of shelter rights themselves espouse a cause that emphasizes the material side of life.

If individuals are in fact partly motivated by material ends, the recognition of unconditional welfare rights might diminish society's aggregate wealth in several ways. First, a person who is guaranteed sustenance has less reason to work. Second, if income taxes or other taxes on labor are used to fund welfare guarantees, welfare programs diminish the marginal material rewards of wage-earners, thereby decreasing their labor incentives. Third, a welfare state invariably gives rise to administrative costs and wasteful rent-seeking efforts. Finally, as more and more individuals and households in an area receive government assistance, neighborhood residents may no longer be able to sustain the traditional informal norm that an employable person has a duty to be in the workforce.¹⁷ Although there is no consensus on the magnitude of the various costs of maintaining a welfare state, even left-liberal social scientists and politicians are concerned about these issues.¹⁸

15. See Richard A. Epstein, *The Uncertain Quest for Welfare Rights*, 1985 B.Y.U. L. REV. 201, 215-21; Ralph K. Winter, Jr., *Changing Concepts of Equality: From Equality Before the Law to the Welfare State*, 1979 WASH. U. L.Q. 741, 743, 752-55. Judge Winter also contended that the expansion of the welfare state has contributed to social instability and threatened democratic processes.

16. When pollsters asked "Do you think that people work better if their pay is directly tied to the quantity and quality of their work?", 90% of Soviet and 86% of American respondents answered in the affirmative. See Robert J. Shiller et al., *Popular Attitudes Toward Free Markets: The Soviet Union and the United States Compared*, 81 AM. ECON. REV. 385, 391 (1991). On the other hand, some 60% of respondents in both nations did not think that "if government were to make sure that everyone had the same income, we would all be poor." *Id.* at 392. A respondent who regarded material rewards as just one of a number of powerful incentives might have voted with the majority on both questions.

17. This possibility, which is often couched as the "dependency" or "underclass" issue, is deeply contested. See Isabel V. Sawhill, *Poverty in the U.S.: Why Is It So Persistent?*, 26 J. ECON. LITERATURE 1073, 1097-1109 (1988).

18. See, e.g., David T. Ellwood & Lawrence R. Summers, *Poverty in America: Is Welfare the Answer or the Problem?*, in FIGHTING POVERTY: WHAT WORKS AND WHAT DOESN'T 78, 103 (Sheldon H. Danziger & Daniel H. Weinberg eds., 1986) ("For youth, the reduced work that would apparently accompany an extension of benefits to that group makes us extremely wary of expansion of welfare in that direction."); Steven Kelman, *Sweden Sour?*, THE NEW REPUBLIC, July 29, 1991, at 22 (stating that Sweden's Social Democrats "have also finally come to accept that marginal tax rates were too high"). *But cf.* MARK

To simplify the analysis drastically, assume that a society may adopt one or another of three possible strategies to resolve the inherent tension between providing welfare and encouraging work. The three, which I now briefly outline, are (1) the no-welfare approach, (2) the conditional-welfare approach, and (3) the unconditional-welfare approach.

In a market economy such as the United States, each individual essentially owns his own labor.¹⁹ This endowment of rights to labor creates direct material incentives to participate either in self-employment, household production, or labor markets. In a market economy, each worker serves as the primary monitor against his own shirking. However, some workers will inevitably be mentally or physically incapable of performing marketable tasks, or will simply be unqualified to perform the jobs available in the market. A government that adopts a *no-welfare approach* does little or nothing to relieve an individual of the consequences of being unemployable or unemployed.

Many voters apparently regard the laissez-faire system just described as unacceptably cruel to those who either cannot work or are jobless for reasons largely beyond their control. As a result, over the last century the democratic nations with market economies have all instituted welfare-state programs to supplement (and, perhaps unintentionally, to supplant) more traditional systems of social insurance such as the extended family, the voluntary association, and organized religion.

Policymakers in the United States have generally opted for the second strategy, a *conditional-welfare approach*. Few U.S. programs render all applicants eligible for long-term welfare benefits. Eligibility for benefits is instead typically restricted to limited categories of persons, notably those who either cannot work (because of age or disability), or should not be in the workforce (because they are caretakers of small children).²⁰ Persons who fall outside these categories are expected to make their way without significant governmental assistance. This approach to welfare is conditional in the sense that applicants for

KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 155-57 (1987) (appraising skeptically the assertion that income taxes create disincentives to work).

19. See *infra* text accompanying notes 52-53.

20. See Ellwood & Summers, *supra* note 18; SAR A. LEVITAN, PROGRAMS IN AID OF THE POOR (6th ed. 1990). In the United States, aid to able-bodied non-caretakers tends to be offered in small amounts, for short terms, or only as long as various workfare requirements are met.

benefits must prove that they should be excused from the presumptive duty to be self-supporting. The welfare benefits that are made more broadly available, such as food stamps and general assistance, typically are conditional in another sense: A beneficiary's entitlement depends on continuing compliance with specified "workfare" obligations. The lawmakers who create these conditional-welfare programs intend to soften the harsh consequences of the laissez-faire system, while at the same time minimizing harm to work incentives.

A society that pursues the third strategy, the *unconditional-welfare approach*, promises all of its members certain minimal material comforts with no questions asked. Most advocates of a right to shelter appear to contemplate an entitlement of this variety. If a society were able to deliver on this set of promises, it would free its members from much of the stress of being personally responsible for providing for themselves. The unconditional-welfare approach inherently places in the hands of central authorities the task of distributing most social largesse. In practice, these same central authorities must also assume great responsibility for policing against shirking—a responsibility that a market economy largely decentralizes to each individual. Because the managers of an unconditional-welfare state have little discretion in distributing material benefits (at least in theory), they are likely to institute elaborate nonmaterial incentives to induce people to work.

Unconditional-welfare systems appear to be most viable within small, closely-knit societies that are capable of administering informal sanctions. For example, a kibbutz that assures housing to each of its members may be able to correlate social status positively with industriousness and to ostracize or even expel able-bodied shirkers. By contrast, experience abroad suggests that a nation-state is too large and too loosely-knit to generate informal social forces that successfully support norms of work.²¹ In practice, a state that adopts the unconditional-welfare approach therefore tends to resort to heavy-handed coercion to enforce legal duties to work.²² Even though the unconditional-welfare approach may eliminate certain stresses that individuals bear when they must be self-sufficient, this ap-

21. Parasitism—that is, shirking from work obligations—has been a serious problem in Communist nations. See Kennedy, *infra* note 26.

22. See *infra* note 26 and accompanying text.

proach introduces the new stresses that arise when an individual is monitored by a powerful centralized bureaucracy.

Communist states, of course, provide the crispest examples of the unconditional-welfare approach. Communist bills of rights contain an array of positive rights including, typically, an express right to shelter.²³ These constitutions also set out what might be called "bills of duties,"²⁴ which invariably include an express duty to work.²⁵ Although the authorities who have managed Communist regimes have tried exhortation and other noncoercive techniques, they have also resorted to criminal prosecutions to enforce duties to work.²⁶

III. DO SHELTER RIGHTS LEAD TO IMPROVED HOUSING CONDITIONS?

It is theoretically possible that the guarantee of a right to shelter (and related welfare benefits) would, by weakening work incentives, shrink the aggregate social welfare pie so much that everyone, including the poor, would end up materially worse off. This prospect may seem utterly fanciful on its face. In this section, I introduce some evidence that it is not.

23. See, e.g., CUBA CONST. art. 8c, translated in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., Pamela S. Falk trans., Oceana Publications, Inc., Mar. 1979) [hereinafter CUBA CONST.] ("The socialist state . . . works so that no family be left without a comfortable place to live."); G.D.R. CONST. art. 47, translated in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., Gisbert H. Flanz & Ralph P. Hummel trans., Oceana Publications, Inc., Feb. 1973) ("Every citizen . . . has the right to dwelling space for himself and his family in accordance with economic possibilities and local limitations."); U.S.S.R. CONST. art. 44, translated in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., John N. Hazard trans., Oceana Publications, Inc., Oct. 1990) [hereinafter U.S.S.R. CONST.] ("Citizens of the USSR have the right to housing.")

24. See, e.g., P.R.C. CONST. arts. 42, 49-56, translated in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., Tao-Tai Hsia et al. trans., Oceana Publications, Inc., April 1983) [hereinafter P.R.C. CONST.] (describing various duties to family, state, and nation). On whether a bill of duties should be added to the United States Constitution, see *Forum: Who Owes What to Whom?*, HARPER'S MAG., Feb. 1991, at 43.

25. See, e.g., CUBA CONST., *supra* note 23, art. 44 (Feb. 1976) ("Work in a socialist society is a right and duty and a source of pride for every citizen"); P.R.C. CONST., *supra* note 24, art. 42 (Dec. 7, 1982) ("Citizens of the People's Republic of China have the right as well as the duty to work"); U.S.S.R. CONST., *supra* note 23, art. 60 (Oct. 7, 1977) ("It is the duty of, and a matter of honour for, every able-bodied citizen of the USSR to work conscientiously").

26. See Ian M. Kennedy, *Cuba's Ley Contra La Vagancia—The Law on Loafing*, 20 UCLA L. REV. 1177 (1973). Because the United States offers welfare only on a conditional basis, it can dispense with criminal prosecutions for failure to work. See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 156-57 (1972) (voiding vagrancy ordinance for vagueness and for encouraging arbitrary arrests).

Poor persons in the United States, who lack a constitutional right to shelter, tend to live in more spacious and better-maintained housing than do poor persons in nations that recognize a right to shelter. Moreover, the housing conditions of poor households in the United States have been steadily improving with time. Although these facts hardly prove that the United States would injure the poor by embracing an unconditional right to shelter, they do demonstrate that our conditional-welfare system has proven to be much more successful than its detractors would have us believe. In general, the United States deserves high commendation for the housing its people enjoy. American housing is much larger, better-equipped, and cheaper than that in Japan, for example.²⁷

A. *Housing in Jurisdictions that Recognize a Right to Shelter*

Comparative housing data are of poor quality. In addition, an analyst cannot readily control for the many factors, other than the presence or absence of a right to shelter, that might determine a nation's housing success. Despite these difficulties, a brief look at housing conditions in different nations is instructive.

International evidence shows that proclaiming a right to shelter does not magically lead to better housing conditions. It is hardly news that the Communist states that have long espoused a right to housing have done a dreadful job of delivering on that promise.²⁸ The median household in the Soviet Union lives in two rooms²⁹ and has about 130 square feet per capita;³⁰ the median U.S. household occupies five rooms and

27. The average dwelling in Japan is about half as spacious as its counterpart in the United States. Ninety percent of Japanese homes lack central heating, and fifty-five percent lack a flush toilet. See T. R. Reid, *Premier Vows to Make Japan "Lifestyle Superpower,"* WASH. POST, Nov. 9, 1991, at A22.

28. "The single greatest source of dissatisfaction among young men [according to a Soviet sociologist] is housing. A chronic shortage of housing . . . forces many young men to live with their parents or in huge, drab workers' dormitories built on the outskirts of Moscow and other large Soviet employment centers." Felicity Barringer, *Generation in Trouble: Spanish & Russians Find Their Youth Alienated*, N.Y. TIMES, Feb. 16, 1987, at 6; see also JEFFREY P. TELGARSKY & RAYMOND J. STRUYK, TOWARD A MARKET-ORIENTED HOUSING SECTOR IN EASTERN EUROPE 41-53 (1991) (documenting housing shortages in Eastern Europe); David K. Shipler, *The Politics of Neighborhood*, NEW YORKER, June 3, 1991, at 45 (discussing housing grievances in Moscow).

29. See MICHAEL ALEXEEV, FACTORS INFLUENCING THE DISTRIBUTION OF HOUSING IN THE USSR 10 (Berkeley-Duke Occasional Papers on the Second Economy in the Soviet Union, Paper No. 8, Dec. 1986).

30. See INTERNATIONAL MONETARY FUND ET AL., 3 A STUDY OF THE SOVIET ECONOMY

has nearly 600 square feet per capita.³¹ Only 2% of United States households, compared to 76% of Soviet households, live in two rooms or less.³² To put it bluntly: Americans below the poverty line typically live far more spaciouly than do middle-class Soviets.

More pertinent to debates over housing in western democracies are the housing patterns in Sweden and the Netherlands, two nations that Professor Berger praises for having embraced a constitutional right to housing.³³ The scant evidence available suggests that poor households in these nations live in worse housing than do their counterparts in the United States. In the early 1980s, for example, 5% of Swedish housing units and 4.1% of Dutch housing units lacked full plumbing facilities,³⁴ whereas only 2.7% of U.S. housing units did.³⁵ At the same time, it is perhaps relevant that 64.4% of United States dwelling units were occupied by homeowners, while only 41.4% of Swedish and 42.7% of Dutch dwelling units were.³⁶ Despite the legal promises of their nations, observers in Sweden and Holland report shortages of low-rent housing units.³⁷ Because housing-production costs in Sweden are more than double what they are in the United States, housing affordability is a much more serious problem there.³⁸

Because advocates of shelter rights aspire to change current law, they are likely to stress nonlegal theories of American housing triumphs, such as unusually plentiful endowments of land and other resources, or the good fortune of having avoided wartime destruction. These particular hypotheses are weak; Sweden, for example, has a lower population density

322 (1991). In Eastern-European nations, the median floor area per capita ranges from about 200 to 350 square feet. In West Germany, it is closer to 500 square feet. See TELGARSKY & STRUYK, *supra* note 28, at 43-48.

31. See BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 45, 720 (1990).

32. See *id.* at 720; ALEXEEV, *supra* note 29, at 10.

33. See Berger, *supra* note 10, at 334.

34. See *Human Settlements Situation in the ECE Region Around 1980: Survey*, U.N. Economic Commission for Europe, at 35, U.N. Doc. ECE/HPB/60 (1986) [hereinafter *Human Settlements*].

35. See BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 710 (1987).

36. See *Human Settlements*, *supra* note 34, at 34.

37. See Elizabeth Huttman, *Housing Segregation in Western Europe: An Introduction*, in *URBAN HOUSING SEGREGATION OF MINORITIES IN WESTERN EUROPE AND THE UNITED STATES* 21, 29-30 (Elizabeth Huttman et al. eds., 1991).

38. See Thomas Miller, *Sweden's Social Equity Approach to Housing: The Pluses and the Minuses*, *URB. LAND*, Sept. 1991, at 21.

than does the United States and did not suffer war damage. More credible is the hypothesis that federal income tax incentives have led to greater—some economists would say excessive—investment in U.S. housing.

This tax hypothesis, however, underscores the potential effects of basic legal choices on economic performance. Observers who believe that natural resources and deep-rooted cultural traditions are paramount should heed the divergent trajectories of the economies of East and West Germany, and of North and South Korea. Should not the advocates of unconditional shelter rights be wary of importing the general welfare strategy of nations with inferior housing records?

B. *Trends in Housing Conditions in the United States*

Contrary to the commentators' perceptions of a housing "crisis,"³⁹ during this century most poor American households—despite their lack of a right to shelter—have benefited from steadily improving housing conditions. For example, the percentage of black households lacking complete plumbing plunged from 79.6% in 1940 to 6.1% in 1980, and the percentage living with more than one person per room dropped from 28.3% in 1960 to 9.1% in 1980.⁴⁰ Contrary to what some advocates might have predicted for the Reagan decade, the available data indicate that these auspicious trends have continued since 1980.⁴¹ The residential situation of the institutionalized poor has also improved as prisons, mental hospitals, and similar accommodations have become much more livable.

The nation's progress in housing is often overlooked because panhandlers and other impoverished people have become increasingly visible in conspicuous downtown locations during the past decade. Although advocates for the homeless

39. Many of the contributions to the Symposium, *Law and the Homeless*, 45 U. MIAMI L. REV. 261 (1990-91), typify the reformers' tendency to depict the current housing situation as dire. See, e.g., Berger, *supra* note 10, at 317-24; White, *supra* note 13, at 272; Stephen Wizner, *Homelessness: Advocacy and Social Policy*, 45 U. MIAMI L. REV. 387, 389 (1990-91). I myself would use "crisis" only when describing a housing situation like the one in New York City, which has wounded itself with rent controls and numerous other misguided programs.

40. See John C. Weicher, *Private Production: Has the Rising Tide Lifted All Boats?*, in HOUSING AMERICA'S POOR 45, 50 (Peter D. Salins ed., 1987).

41. See JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIV., THE STATE OF THE NATION'S HOUSING 23 (1990) (citing the fact that the number of poor households renting physically "inadequate" housing fell from 1.75 million in 1980 to 1.43 million in 1987).

tend to link this "homelessness" problem with changes in housing markets, I have argued elsewhere that it is more plausibly attributed to the deinstitutionalization of the mentally ill, the drug epidemic, the loosening of police supervision of street behavior, and the deepening of underclass subcultures.⁴² Observers should be cautious about inferring a "housing crisis" from a rise in panhandling. The fragmentary evidence on the subject suggests that many panhandlers dwell permanently in conventional housing.⁴³

Curtis Berger, who is well aware that physical housing conditions have been improving, has asserted that the primary housing problem is now affordability.⁴⁴ Professor Berger relies in part on an advocacy organization's study alleging that in 1985 almost half of poor renters spent at least 70% of their household incomes on shelter.⁴⁵ Because housing expenditures in excess of 30% of household income are conventionally considered excessive, this statistic, if reliable, would be truly dismaying.

It has long been known, however, that these rent-to-income ratios, derived from the Census Bureau's American Housing Survey (AHS) data, are highly misleading.⁴⁶ For starters, many AHS statistics are facially implausible, especially the entries that report that many poor households spend *all* of their income on rent.⁴⁷ Why would an impoverished household allocate all of its desperately scarce resources to housing, to the detriment of spending for food, clothing, medical care, and

42. See Robert C. Ellickson, *The Homelessness Muddle*, PUB. INTEREST, Spring 1990, at 45. For a somewhat different view, see PETER H. ROSSI, *DOWN AND OUT IN AMERICA: THE ORIGINS OF HOMELESSNESS* 181-94 (1989).

43. See Brandt Goldstein, *An Empirical Study of the Panhandlers of York and Broadway Streets in New Haven, Connecticut* 19-21 (1991) (unpublished manuscript, on file with author) (noting that at least 8 of 12 panhandlers interviewed had customary and regular access to a conventional dwelling); INTERAGENCY COUNCIL ON THE HOMELESS, 1990 ANNUAL REPORT 25 (1991).

44. See Berger, *supra* note 10, at 317-24. Those who cite declines in the number of low-rent units are stating a variant of the affordability argument. These declines are distressing only if poor households cannot afford to pay more.

45. See *id.* at 317 (citing CENTER FOR BUDGET & POLICY PRIORITIES, *A PLACE TO CALL HOME* 1 (1989)).

46. See, e.g., Peter D. Salins, *Toward a Permanent Housing Problem*, PUB. INTEREST, Fall 1986, at 22. Sources on rent-to-income ratios are usefully assembled in Michael H. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 CORNELL L. REV. 878, 890 n.37 (1990).

47. See, e.g., BUREAU OF THE CENSUS, *AMERICAN HOUSING SURVEY FOR THE NEW YORK-NASSAU-SUFFOLK METROPOLITAN AREA IN 1987*, at 90 (1990) (reporting that 139,600 households in this Area had rent burdens equal to or greater than their entire incomes for 1987).

other essentials? Why would not two such households combine, enabling both to free up funds for other purposes? If the figures are accurate, why has there been no obvious deterioration in the diets, clothing, or health of the poor, as would be expected if housing burdens have been siphoning away so many scarce dollars?

Both the numerator and the denominator that the AHS uses to compute rent-to-income ratios are tilted in a direction that exaggerates the affordability problem.⁴⁸ Small distortions may arise in the ratio because the contract rent that is included in the numerator overstates actual rent burdens to the extent that a tenant can avoid paying rent for a period of time, say, by prolonging eviction. The potential inaccuracies in the denominator are much more momentous. The AHS, like most Census Bureau publications, greatly understates the incomes of poor households. First, the AHS asks respondents only to report cash income, thus ignoring all in-kind welfare-state benefits such as food stamps, Medicaid, and Section 8 housing assistance.⁴⁹ Between 1968 and 1987, in-kind transfers rose from 53% to 73% of anti-poverty expenditures in the United States, and in-kind expenditures more than tripled from \$1,100 to \$3,700 per poor person in inflation-adjusted dollars.⁵⁰ In short, over the past twenty years, Census reports have *increasingly* understated the incomes of poor households. Moreover, there is growing evidence that many, perhaps most, poor households obtain significant cash income from jobs, family, and friends that they do not reveal to the Census, perhaps to avoid risking termination of means-tested government benefits. To correct for these two major omissions, the findings in the much-discussed Jencks & Edin study imply that the nominally reported incomes of poor households should be approximately tripled.⁵¹ Universal recalculations along these lines would reduce a rent-to-income ratio previously reported at a shocking 70% to a mundane 23.3%. Given the scarcity of reliable data on the incomes of poor households, I hardly advocate a whole-

48. The standard AHS definitions of relevant terms appear in *id.* app. at 15-16, 19.

49. See United States Housing Act of 1937 § 8, 42 U.S.C. § 1437f (Supp. 1991) (providing for housing allowances to help recipient low-income households rent privately-owned dwelling units).

50. See LEVITAN, *supra* note 20, at 79 (fig. 13).

51. See Christopher Jencks & Kathryn Edin, *The Real Welfare Problem*, AM. PROSPECT, Spring 1990, at 31, 32-37.

sale readjustment along these lines. Nor do I doubt that a poor household living in a high-rent area and lacking housing assistance may be severely burdened by housing costs. However, I do advise those who emphasize the housing affordability problem to attend to the severe shortcomings in their statistical sources.

IV. IN PRAISE OF TWO (UNSUNG) CONSTITUTIONAL ENTITLEMENTS THAT BROADLY DISTRIBUTE WEALTH

Overlooked in the debate over implicit welfare rights is the important fact that our current federal and state constitutions explicitly guarantee that government will bestow on each individual two forms of seed capital: a general right to self-ownership of one's own labor and a right to receive schooling. One might assume that the existence of these starting endowments would strengthen the case for the recognition of additional ones, such as an unconditional right to shelter. Not so. The extant constitutional provisions honor a fundamental principle that unconditional welfare rights would violate.

A. *The Thirteenth Amendment's Conferral of Self-Ownership of Labor*

Upon conclusion of the Civil War, the victors placed in the Constitution one of the basic principles for which they had fought: "Neither slavery nor involuntary servitude . . . shall exist within the United States . . ." ⁵² This sentence undeniably ensures that every United States resident possesses a fundamental endowment of property: his own human capital. Many observers erroneously think that most wealth is held in the form of land, equipment, stocks, bank accounts, and the like. In the United States in recent years, however, approximately 75% of national income has been in the form of compensation of workers and income of sole proprietors. ⁵³ By establishing a worker's presumptive right to reap these returns personally, the Thirteenth Amendment assured the distribution of the great bulk of the nation's capital assets. This statement is some-

52. U.S. CONST. amend. XIII, § 1.

53. See BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 439 (1990) (reporting that in 1988, compensation of employees constituted 73.2% of national income, and the incomes of proprietors of all types constituted an additional 8.3%).

what exaggerated, of course; our legal system permits governments to capture a share of human capital by imposing income taxes and compelling public service such as jury duty. Nevertheless, the underlying assertion stands: All the acres and mules, and their modern equivalents, are trifles in comparison to the wealth the Thirteenth Amendment has distributed.

B. *The State Constitutional Right to Receive Schooling*

Particularly in a technologically advanced economy, formal education can greatly augment the value of a person's human capital. A society dedicated to providing equality of opportunity might thus want to assure, as a matter of constitutional law, the provision of schooling to all children. Constitutional law scholars seldom note that our legal system currently does assure schooling. On the question of a child's constitutional right to an education, what law professors and law students know best is that the Supreme Court held, in *San Antonio Independent School District v. Rodriguez*,⁵⁴ that the Equal Protection Clause of the Constitution⁵⁵ does not confer a fundamental right to receive schooling. Less widely known is the fact that *all state* constitutions contain provisions that direct each state to provide an education to each resident child.⁵⁶ In contrast to Article I, Section Eight of the United States Constitution, which merely declares that Congress "shall have power" to regulate commerce, open post offices, and so forth,⁵⁷ virtually all of these state constitutional provisions require the state legislature to provide free common schools.⁵⁸ If a child were to invoke rights under one of these clauses, even a strict constructionist would

54. 411 U.S. 1, 35 (1973).

55. U.S. CONST. amend. XIV, § 1.

56. See Julie K. Underwood & William E. Sparkman, *School Finance Litigation: A New Wave of Reform*, 14 HARV. J.L. & PUB. POL'Y 517, 533 n.54 (1991).

57. See also U.S. CONST. amend XIII, § 2 ("Congress shall have power to enforce [the abolition of slavery] by appropriate legislation"). Despite this discretionary locution, Akhil Amar has asserted that this clause requires Congress to use its legislative powers to establish fundamental birthrights. See Amar, *supra* note 5, at 42-43.

58. The exact language varies. See, e.g., CAL. CONST. art. IX, § 5 ("The Legislature shall provide for a system of common schools . . ."); N.Y. CONST. art. XI, § 1 ("The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."); TEX. CONST. art. VII, § 1 ("[I]t shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."). An unusually ambiguous provision is N.H. CONST. art. LXXXIII ("[I]t shall be the duty of the legislators . . . to cherish the interest of literature and the sciences."). Citations to all fifty state constitutional provisions are assembled in Underwood & Sparkman, *supra* note 56 at 533, n.54.

construe the clause as explicitly conferring a schooling entitlement.⁵⁹

The state constitutional guarantees of schooling are pertinent to two of the overarching issues in the design of bills of rights. First, these provisions illustrate that Americans are not in principle averse to explicit constitutional recognition of a positive liberty. Second, it is noteworthy that the fundamental entitlement to schooling is embedded in state constitutions and not in the federal document. Not all business of constitutional magnitude is necessarily best accomplished at the national level.⁶⁰ Legal innovation is abetted when fifty "laboratories" can experiment with different educational programs.⁶¹ When law varies among the states, individuals and households with varying tastes can choose among them by "voting with their feet." Concededly, federalism has its pitfalls in some instances: The risk of migration across state lines may induce states to engage in a race to the bottom in the provision of certain social services. Although I will not here attempt to develop a theory of the proper role of state bills of rights, I do urge scholars of constitutional law to attend to this neglected issue.

V. CONCLUSION: THE GRAND CONSTITUTIONAL DESIGN

Why has our political system balked at expressly recognizing "a right to shelter," "a right to a minimum income," and other similar rights, when for more than a century it has guaranteed self-ownership of labor and a right to schooling? The essential reason is both simple and manifest: The proposed entitlements tend to discourage work, while the existing entitlements tend to encourage it.

59. See, e.g., *Orozco by Arroyo v. Sobol*, 674 F. Supp. 125, 128 (S.D.N.Y. 1987) (holding that N.Y. CONST. art. XI, § 1 entitles a resident homeless child to free public education). These state-constitutional guarantees pose familiar problems of justiciability and interpretation in particular contexts. For example, must a high school offer Latin? See also *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989) (holding that the state's school financing system is not "efficient").

60. Potential advantages and drawbacks of federalism are concisely reviewed in Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1492-1511 (1987).

61. See *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting) (advocating "social experiments that an important part of the community desires, in the insulated chambers afforded by the several States"); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

The current constitutional provisions reject the unconditional-welfare approach. To secure the value of the rights that our constitutions presently confer, a recipient must complement the conferrals with personal labor. Owning one's own labor is valuable only to the extent that one is willing to work. The value of receiving an education depends significantly on one's willingness to apply oneself in school. By increasing the rewards of work, the present constitutional guarantees help induce individuals to contribute to the nation.

Events in several American cities illustrate the drawbacks of establishing unconditional rights to material aid. During the early 1980s, New York City, Philadelphia, and Washington, D.C. each guaranteed their citizens unqualified rights to receive emergency shelter.⁶² These open-door shelter policies attracted unexpected numbers of able-bodied entrants, and the shelters apparently fostered dependency.⁶³ In Philadelphia, housing advocates eventually agreed to allow the city to deny shelter to employable persons who had refused to comply with job-hunting requirements.⁶⁴ When the D.C. City Council backtracked from that jurisdiction's right to shelter, D.C. voters declined to reverse that retreat.⁶⁵ Many New York City shelter administrators came to favor imposing some sort of workfare obligation on able-bodied members of the shelter population, but encountered resistance from lawyers who represented the homeless.⁶⁶

Remarkably, despite these events and the magnitude of the issue involved, most of the advocates of unconditional shelter rights either ignore the tension between welfare and work, or

62. See Dennis D. Hirsch, Note, *Making Shelter Work: Placing Conditions on an Employable Person's Right to Shelter*, 100 YALE L.J. 491, 494, 498 (1990) (describing litigation settlements in New York City and Philadelphia); sources cited *infra* note 65 (describing 1984 referendum in Washington, D.C.).

63. See Hirsch, *supra* note 62, at 495-99; *Benefits of System Luring More Families to Shelters*, N.Y. TIMES, Sept. 4, 1991, at A1; *N.Y. Shelter Houses Rage, Fear, Crack*, L.A. TIMES, May 5, 1991, at A1.

64. See Hirsch, *supra* note 62, at 498-99.

65. In 1984, 72% of District of Columbia ballots were cast in favor of a referendum that established a right to shelter in that jurisdiction. In 1990, the D.C. City Council greatly qualified the shelter right and imposed time limits and job-counseling requirements on shelter users. See H.R. REP. NO. 1023, 101st Cong., 2d Sess. 70 (1991). On November 6, 1990, a referendum that would have re-established a right to shelter in the District failed by a 49-to-51 % margin. Sharon Pratt Dixon, the victorious candidate for mayor, and the Washington Post led the opposition to the 1990 ballot proposition. See *D.C. Right to Shelter Overtaken*, SAFETY NETWORK (National Coalition for the Homeless, Washington, D.C.), Nov. 1990, at 1.

66. See Hirsch, *supra* note 62, at 497-98, 500-01.

dismiss its importance.⁶⁷ Those who have drafted our constitutions and conditional welfare programs have served us better. They have been attuned to the desirability of having a decentralized system for monitoring against shirking. They have been aware of the inherent tension between positive and negative liberties, and aware that a bill of rights that delivers on promises of unconditional welfare rights would be hard-pressed to deliver on promises to shield the individual from an intrusive state. Moreover, international evidence does not support the proposition that recognition of an unconditional right to shelter actually results in better housing for the poor. Shifting jobs from carpenters to lawyers is not the way to improve housing conditions.

67. See, e.g., Berger, *supra* note 10 (neglecting to discuss effects of guaranteed housing on incentives to work); White, *supra* note 13, at 298 (disapproving of inquiry into whether someone has caused his own homelessness because "victim-focused policies shift the blame for unfair housing allocation from market failure to personal fault"); Wizner, *supra* note 39, at 396 (rejecting arguments that welfare programs may induce enrollments and lead to dependency). But consider the following excerpt from a letter from Curtis Berger:

I believe that you have created a strawman in your assertion that those of us who espouse an entitlement to shelter believe in an unconditional right. Most entitlements, viz., the right to vote, the right to an education, the right to develop one's land, are conditional, viz., the duty not to commit a felony, the duty to attend classes, the duty not to commit a nuisance. In fact, I am hard-pressed to think of any constitutional or statutory entitlements that are not coupled to related duties. In the present context, I have no quarrel with an entitlement to shelter linked to an obligation to work, for those who can work and for whom jobs are available. I would even argue that persons have an entitlement to receive gainful employment, which implies that government has a duty to give work to those whom the private sector is unable to employ.

Letter from Curtis Berger, Professor of Law, Columbia University, to the author (Aug. 29, 1991) (on file with author).