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"Officer, Where's My Stuff?"1

The Constitutional Implications of a De Facto Property Disability for Homeless People

KEVIN BUNDY*

Introduction

Property can have no more dangerous, even if unwitting, enemy than one who would make its possession a pretext for unequal or exclusive civil rights.2

Although estimates vary widely,3 homeless people constitute a substantial component of the country’s population. As large numbers of homeless people continue to congregate in the public parks and on the thoroughfares of the nation’s cities, politicians and social service providers are engaged in a sometimes caustic debate over how to “solve” the problem of homelessness.4 Many cities and

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3. A “one-night head count” of overnight shelters conducted by the U.S. Census Bureau on March 27, 2000 yielded a figure of 170,706. ANNETTA C. SMITH AND DENISE I. SMITH, U.S. CENSUS BUREAU, EMERGENCY AND TRANSITIONAL SHELTER POPULATION: 2000, Census Special Reports Series CENSR/01-2 at 5 (2001). Additional surveys taken at soup kitchens, on the street, and in other locations over the next two nights expanded the count to 280,527. Estimates of the total homeless population are significantly higher. See, e.g., Juanita E. Miller, Poverty Among the Homeless, Ohio State University Extension Fact Sheet HYG-5711-98 (1998), (citing estimates ranging from 200,000 to as high as 600,000) at http://ohioline.osu.edu/hyg-fact/5000/5711.html (last visited Mar. 16, 2003).

4. Recent developments in San Francisco exemplify the nature of these debates. See, e.g., Rone Tempest, San Francisco Rethinks Cash Aid to Homeless, L.A. TIMES, Aug. 26, 2002, California Metro Section, at 1 (noting protests against business-backed cash assistance reduction measure authored by Supervisor Gavin Newsom that “thwarted several of Newsom’s public appearances, forcing the supervisor to leave under police escort.”); Ilene Lelchuk, Lawsuit Over Prop. N Voter Guide; Homeless Advocates Say It’s Misleading,
courts have responded to homelessness by thoroughly criminalizing homeless people’s basic life activities and arbitrarily depriving them of their personal belongings. Homeless people lack the basic liberty to be anywhere legally, and their right to own even a few personal belongings is at best insecure and at worst unrecognized. Caught between hostile municipalities and unsympathetic courts, homeless people increasingly are being deprived of their ability to own property. In American political theory, ownership of property has long served as one of the foundations of citizenship. This article contends that our ostensibly liberal and republican society should find the de facto property disability visited upon homeless people constitutionally troubling.

Over the past two decades, municipal leaders in a number of American cities have responded to business and tourism concerns by aggressively enforcing criminal laws against sleeping in public, loitering, camping, and other activities. Enforcement of these “quality of life” crimes tends to proscribe most of the essential life activities—eating, sleeping, and other basic functions usually carried out in private homes—that homeless people must involuntarily perform in public.6 Advocates for the civil rights of the homeless have condemned many such policies for displacing homeless people to other cities and violating their constitutional rights while doing little to alleviate their problems.7 Despite their varying levels of success and questionable constitutionality, simplistically punitive approaches seem to be winning out over the more complex affordable housing, drug and mental health treatment, outreach, and job training programs proposed by homeless advocates.8 City
officials worry that such social services will attract homeless migrants from other, less “tolerant” municipalities. Responding to these fears, many cities have opted to cut services and increase police activity, often making life for the homeless so difficult that they are forced to seek refuge elsewhere. The cumulative effect of these policies is to criminalize most aspects of homeless existence.

"Property sweeps," the often arbitrary seizure and frequent destruction of homeless people’s personal property, are a key element of many such policies. Belongings are seized while homeless people are asleep, momentarily away from their possessions, or under arrest. As Harry Simon points out, "property sweeps have disastrous consequences for the homeless." Loss of bedding, identification, medicine, and personal mementos "deprive[s] the homeless of the means to survive and rob[s] them of basic human dignity."

Property sweeps also raise constitutional questions under the Fourth, Fifth, and Fourteenth Amendments. Courts’ responses to these constitutional challenges illuminate the striking and complex interactions between property, legal personhood, and social class in America. In a society that has always viewed protection of private property as one of the primary functions of government, many courts nonetheless have proven unwilling to recognize that problem. Wright, supra note 5, at 174-75.

9. See, e.g., Patrick Hoge, Answers Exist, Experts Say, but Take Commitment and Money, S.F. CHRON., Nov. 4, 2001, at A20 (quoting George Smith, head of the Mayor’s Office on Homelessness, who “thinks new homeless people are constantly arriving from counties that are less generous or tolerant than San Francisco”).


12. See, e.g., Whistle, supra note 1, at 1.


15. Simon, supra note 5, at 672.

16. Id. One homeless resident of San Francisco described his horror and frustration at losing all of his belongings to a Department of Public Works crew while he slept. (“All of my things—my just-cleaned blankets . . ., my little radio and my new batteries, but most terrifying of all, my BACKPACK with my meds—were gone! [W]orse than anything else was the loss of my meds. “) Whistle, supra note 1, at 1.

17. Simon, supra note 5, at 670.

homeless people exercise any kind of property interest whatsoever in their belongings. Municipal policies depriving homeless people of their scant belongings, combined with courts’ unwillingness to provide any remedy, leave homeless people doubly dispossessed. Indeed, the law enforcement, public works, and judicial forces converging on homeless people and their personal belongings have created a de facto “property disability,” a situation in which many homeless people seem to exercise no property rights at all.

This comment argues that the imposition of a property disability on the homeless raises serious constitutional questions, which in turn suggest a range of remedies. Part I discusses several recent decisions involving legal challenges to the confiscation and destruction of homeless people’s property. These decisions reveal a wide range of judicial preconceptions about whether homeless people have any legally recognizable property interest in their personal possessions, and confirm the extent to which homeless people are not fully recognized at law. Taken together, municipal enforcement and judicial construction have imposed a de facto property disability on the homeless. Part II considers whether imposition of such a property disability contravenes constitutional guarantees. Answering this question requires a reexamination of the history and philosophical underpinnings of the Reconstruction Amendments, most notably the Privileges or Immunities Clause of the Fourteenth Amendment, all of which suggest that contemporary courts should find this property disability constitutionally suspect. Part III explores various potential remedies, including constitutionally based arguments for a fundamental property right, compensation under the Takings Clause, and considering homelessness a suspect classification for Equal Protection purposes. Because none of these remedies alone addresses the structure of property law that contributes to the dispossession of the homeless, the conclusion suggests that the homeless have a right to safe, supportive, and permanent shelter. Shelter is a precondition to both exercising property interests and participating in civic life as envisioned by the Constitution and the egalitarian underpinnings of the American political tradition.

I. A Property Disability in Fact and Law

Courts analyzing constitutional challenges to property sweeps routinely must decide whether homeless people have any recognizable property interests. Although these decisions draw on different constitutional doctrines, they show both a substantive and a rhetorical disregard for the property claims of homeless individuals. First, as a matter of doctrine, courts tend to analyze
homeless people's property interests spatially, in terms of where homeless people are or are not allowed to be. These decisions generally turn on either the Fourth Amendment question of whether homeless people have any reasonable expectation of privacy in their belongings, or on whether homeless people trespassing on public or private land may retain their property. Second, as a rhetorical matter, many courts seem to have difficulty distinguishing between homeless people's property and garbage. Municipal policies grounded in aesthetics guide some of this reasoning, although some courts have moved well beyond mere aesthetics into a powerful rhetoric of filth and contagion that justifies their construction of a reduced or nonexistent property interest for homeless people. Finally, a comparison of takings decisions brought under the Fifth Amendment by homeless people and by real estate developers reveals courts' radically different conceptions of what kinds of property interests can and should be recognized and protected at law. These cases confirm that the law, in many instances, does not recognize that homeless people have any property rights worth protecting.

A. Judicial Treatment of Homeless People's Personal Property

1. No Place To Be: The Regulation of Space, Liberty, and Property

Jeremy Waldron observes that one of the primary effects of property law is to divide a jurisdiction into "spatially defined regions" and "give us a way of determining, in the case of each place, who is allowed to be in that place and who is not."19 In the United States, many of our most basic life functions—such as eating, sleeping, excreting, and engaging in sexual activity—are thought of as private activities. Accordingly, these activities are usually performed, as the saying goes, "in the privacy of one's home." Homeless people by definition, however, lack just such a secure, defensible space in which they have an unquestioned right to be. Or, as Waldron puts it, "there is no place governed by a private property rule where [a homeless person] is allowed to be whenever he chooses, no place governed by a private property rule from which he may not at any time be excluded as a result of someone's say-so."20 As a result, homeless people can perform many private life activities only at the whim of private property owners (and public officials) who exercise the power to exclude others from various kinds of property: "the homeless person is utterly and at all

19. Waldron, supra note 6, at 296.
20. Id. at 299.
times at the mercy of others.”

Waldron suggests that the “libertarian fantasy” of a world in which all places are governed by private property rules would be “catastrophic for the homeless,” and that our society avoids this catastrophe only because there are some spaces still “held as collective property and made available for common use.” These common spaces, however, are increasingly regulated, often precisely in response to concerns about homelessness. The prospects for homeless people in this increasingly regulated public environment are grim:

What is emerging—and it is not just a matter of fantasy—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. Legislators voted for by people who own private places in which they can do all these things are increasingly deciding to make public places available only for activities other than these primal human tasks.

21. Id.
22. Id. at 300.
23. The climate of exasperation and persecution surrounding homelessness in American cities has grown increasingly harsh in recent years:

Cities that once pitied the homeless . . . now see them as threats to safety and public order. Tampa has ordered that they not be served food in public parks. Tucson is considering privatizing sidewalks so adjacent businesses can shoo them away. The National Law Center on Homelessness and Poverty says that of 50 cities it surveyed, 48 percent have initiated police sweeps of the homeless over the last two years.


24. MIKE DAVIS, CITY OF QUARTZ: EXCAVATING THE FUTURE IN LOS ANGELES, at 232-34 (1990). Davis describes how the City of Los Angeles has attempted to improve the “liveability” of corporate sections of Downtown by creating “an opulent complex of squares, fountains, world-class public art, exotic shrubbery, and avant-garde street furniture” along pedestrian corridors. This transformation of urban common space has been accompanied by “a merciless struggle to make public facilities and spaces as ‘unliveable’ as possible for the homeless and the poor.” For example, the city has decided against providing public toilets in areas frequented by homeless people. Davis observes that the Community Redevelopment Association prefers “the solution of ‘quasi-public restrooms’—meaning toilets in restaurants, art galleries and office buildings—which can be made available to tourists and office workers while being denied to vagrants and other unsuitables.” This strategy also denies homeless people access to water for drinking and washing, forcing many to use the dangerously polluted Los Angeles River. Davis also confirms that police routinely sweep the streets, confiscating homeless people’s makeshift shelters and belongings.

25. Waldron, supra note 6, at 301. Davis articulates this “privatization” of public space explicitly in class terms, arguing that the “destruction of accessible public space” in Los Angeles signals the death of the “Olmsteadian vision” of “public landscapes and parks as social safety-valves, mixing classes and ethnicities in common (bourgeois) recreations and enjoyments.” DAVIS, supra note 24 at 226-27 (emphasis in original). In place of this vision, Davis sees what he calls “Fortress L.A.”: a wasteland of gated
Waldron views this transformation of public, common space into space only suitable for activities that complement rather than replace those usually exercised "in private" as "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." The simultaneous regulation of life-sustaining activities in both public and private space leaves homeless people with literally "no place to be"—that is, fundamentally unfree.

Waldron distinguishes the basic kind of liberty that homeless people lack from the more specific freedoms guaranteed by the Bill of Rights. At least one court, however, has taken note of the constitutional implications of policies aimed at proscribing homeless existence through regulation of public space and seizure of personal belongings. In *Pottinger v. City of Miami,* homeless residents and civil rights activists challenged a City of Miami policy designed, in their view, "to harass the homeless and remove them from sight." City police had, on several occasions, seized and destroyed the personal belongings of homeless people who were sleeping in city parks. The court characterized the litigation as "an inevitable conflict between the need of homeless individuals to perform essential, life-sustaining acts in public and the responsibility of the government to maintain orderly, aesthetically pleasing public parks." The court also observed that "[e]xcept for a fortunate few, most homeless individuals have no alternative to living in public areas," and found that "there is no public place where they can perform basic, essential acts such as sleeping without the possibility of being arrested."

In this situation, homeless residents’ personal property was never secure. Plaintiff Peter Carter testified that he and a number of other homeless people were arrested one night for sleeping in a park. When they returned to the park after being released by the police, all of their belongings were gone. This was just one

communities, constant surveillance and security, and architecture designed around exclusion of racial and underclass 'others.' See generally id. at 223-60.

26. Waldron, supra note 6, at 301-02.
27. Id. at 302.
28. Id. at 319.
30. Id. at 1555. One plaintiff testified that the assistant city manager told her that "the City did not want unsightly homeless people in the developing downtown area."
31. Id. at 1555-56, 1560.
32. Id. at 1554.
33. Id. at 1558, 1560.
34. Id. at 1560.
instance, according to plaintiffs, of the City's "pattern and practice of seizing and destroying [homeless people's] personal property or forcing them to abandon it at arrest sites." The court found that this pattern and practice violated the Fourth Amendment, holding that society was disposed to recognize plaintiffs' reasonable expectation of privacy in their personal belongings and that "the City's interest in having clean parks [was] outweighed by the more immediate interest of the plaintiffs in not having their personal belongings destroyed." For the Pottinger court, because homeless individuals lacked any private space in which they legally could be, their last shreds of privacy had to be located in their personal belongings, thus entitling these belongings to Fourth Amendment protection. The Pottinger decision elucidates that access to private, residential space is closely related to the exercise of a property interest in personal belongings. A life lived entirely in public is, in many respects, a life in which few basic freedoms and activities can be performed securely. One such freedom is the ability to possess and control personal belongings without undue and arbitrary interference by police and other public officials. Fourth Amendment rights, essential to the conception of property that is shielded against government oppression, turn out to be contingent on possession of private space—a troubling anomaly given the Supreme Court's oft-quoted admonishment that the Fourth Amendment "protects people, not places."

Other courts have been unwilling to recognize that homeless people exercised property interests at all, especially where they had no right to be in the places from which police sought to remove them. A pair of Eleventh Circuit cases decided within one year of each other, D'Aguanno v. Gallagher and Church v. City of Huntsville, ominously indicate that there is no place—public or private—in which homeless people may be secure in their personal belongings and effects. In D'Aguanno, four homeless individuals had camped on an undeveloped piece of private property for periods ranging

35. Id. at 1570.
36. Id. at 1572-73.
37. As the court explained, "the interior of the bedrolls and bags or boxes of personal effects belonging to homeless individuals in this case is perhaps the last trace of privacy they have. In addition, the property of homeless individuals is often located in the parks or under the overpasses that they consider their homes. . . . [U]nder the circumstances of this case, it appears that society is prepared to recognize plaintiffs' expectation of privacy in their personal property as reasonable." Id. at 1572.
40. Church v. City of Huntsville, 30 F.3d 1332 (11th Cir. 1994).
from four months to six years.\textsuperscript{41} In December 1991, four sheriff’s deputies “visited the campsite and destroyed [plaintiffs’] shelters and personal property, including food items and furniture.”\textsuperscript{42} The plaintiffs brought several state and federal constitutional claims, all of which the District Court rejected on qualified immunity grounds, holding that there was no controlling case law that would have alerted the officers to the plaintiffs’ “clearly established” constitutional rights.

After holding that plaintiffs had no reasonable expectation of privacy because they were trespassing on private land,\textsuperscript{43} the court went on to deny their due process claims by distinguishing an Eleventh Circuit case in which the plaintiff was deprived of a federal loan, “the terms of which specifically created a property interest and a right to due process protection.”\textsuperscript{44} To the court, the precedent involving the loan did not “give defendants notice that plaintiffs had a right to due process given the facts of this case.”\textsuperscript{45} On this basis, the court refused to recognize that plaintiffs had any property interest in their personal belongings. Indeed, the court appears to have assumed without analysis that because the plaintiffs were homeless and trespassing on private land, they lost all legal claim to the personal property that they brought with them.

The Eleventh Circuit substantially ratified this view in affirming the District Court’s disposition of this part of the case. In the circuit court’s view, Supreme Court authority supporting “the general proposition that the Fifth Amendment requires notice and an opportunity to be heard before the government deprives a person of his property” was “insufficient to overcome a qualified immunity defense” because the rights asserted were too “abstract”:

[If the test of “clearly established law” were to be applied at this level of generality . . . [p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging [a] violation of extremely abstract rights . . . . Plaintiffs have cited no authority that clearly states the circumstances in which homeless persons retain a property

\textsuperscript{41} D’Aguanono, 827 F. Supp. at 1560. By way of comparison, the statutory period for an adverse possession claim in Florida is seven years. Fla. Stats. Ann. §§ 95.12, 95.18 (Matthew Bender 2002).
\textsuperscript{42} D’Aguanono, 827 F. Supp. at 1560.
\textsuperscript{43} D’Aguanono, 827 F. Supp. at 1562. It seems that the owner of the property did not know that the plaintiffs were camping on her land until after the incident occurred, and that the police undertook to destroy the plaintiffs’ belongings on their own initiative. See Affidavit of Rhoda Bouzek, Paragraph 5, 50 F.3d at 883 (“I am unaware of ever having met or communicated with [the plaintiffs]. To the extent that these persons were on my property . . . it was without my consent, permission or knowledge.”).
\textsuperscript{44} Id.
\textsuperscript{45} Id. at 1563.
interest in the shelters they erect or whether homeless persons retain a property interest in shelters erected and property stored, without permission, on private property.\textsuperscript{46}

In the absence of such clear legal authority, the court elected to hold that homeless trespassers forfeit their interest in their personal property, and thus have no recourse when the police punitively destroy everything they own without notice, a hearing, or compensation. Apparently the right not to be deprived summarily of one's earthly possessions—indeed, the right to have any earthly possessions at all—becomes extremely abstract when one is homeless.\textsuperscript{47}

At least in the Eleventh Circuit, this right may be as tenuous on public property as it is on private land. In \textit{Church v. City of Huntsville}, a group of homeless plaintiffs challenged several constitutional violations arising from an alleged municipal policy "to drive them out of the city."\textsuperscript{48} Conflicts arose when the City suggested to the State Highway Department that it evict homeless people living on state property under highway bridges and overpasses. The Court distinguished between the City and the State, finding that the highway department "was responsible for removing the personal property and makeshift structures of the homeless from under the bridges [and] for storing any personal items taken from under the bridges."\textsuperscript{49} According to the court, the City's only role in the eviction operation was to provide police, who kept peace at the eviction site but also "participated in the process of determining which property should be destroyed as unsanitary, and which property should be kept by the State to be reclaimed by the bridge people."\textsuperscript{50} This distinction, combined with evidence of disagreement on the city council over proposals affecting the homeless,\textsuperscript{51} led the Court to find that the "bridge people" had not proven the existence of an official policy necessary for liability under Section 1983 of the Civil Rights Act.\textsuperscript{52}

In reaching this conclusion, the Court signaled that because the plaintiffs had no right to be where they were, a municipal policy to violate their rights could not logically exist:

\textsuperscript{46} D'Aguanno v. Gallagher, 50 F.3d 877, 880, 881 (11th Cir. 1995) (internal citations omitted).

\textsuperscript{47} On other courts' willingness to recognize abstract property interests in other contexts, specifically where such interests are held by large real estate developers, \textit{See} Part I.C., \textit{infra}.

\textsuperscript{48} Church v. City of Huntsville, 30 F.3d at 1332, 1335 (11th Cir. 1994).

\textsuperscript{49} \textit{id.} at 1344.

\textsuperscript{50} \textit{id.} at 1344-45 and n.6.

\textsuperscript{51} \textit{id.} at 1343 n.4.

\textsuperscript{52} \textit{See} Monell v. Dept. of Social Svcs., 436 U.S. 658 (1978) (municipal liability arises only where challenged actions are shown to be "official policy" of municipality.).
Even if we were to impute to the City full responsibility for the removal of the homeless and their property, we would still be unable to agree that such action is indicative of a City policy to violate the rights of the homeless. The Constitution does not confer the right to trespass on public lands. Nor is there any constitutional right to store one's personal belongings on public lands. In this case, the property owner, the State of Alabama, authorized the removal of the homeless and their belongings from under the bridges and overpasses.53

This is a strange conclusion for a number of reasons, one of which is the backward logic of the court's hypothetical. Assuming that municipal liability could be shown, the court says it would still decline to find the existence of an official policy. An official policy, however, itself is the predicate for municipal liability under Section 1983.4 The court's real focus, as indicated in the quoted excerpt, was on dictating that the homeless "bridge people" had no right at all to be where they were, and thus no property interest in the belongings seized by the City. Under this analysis, the State of Alabama had as much right as any private landowner to exclude homeless people from using state property and to have their belongings seized and destroyed.

At least in the Eleventh Circuit, these decisions leave no place, private or public, where homeless people can securely possess their personal belongings. The logical result of this situation is that homeless people, often possessing nothing but what they can carry with them, are effectively denied the ability to exercise a legally recognized property interest at all. The regulation of public and private space defeats this basic ability, long considered a fundamental civil right,55 and adds property ownership to the other basic life activities that homeless people are fundamentally unfree to perform. Homeless people, by virtue of the property relations that define their existence, are thus entirely at the mercy of the state, and unable to access the very provisions of the Bill of Rights that were enacted to protect all citizens against abuses of state power.

Cases like Pottinger, D'Aguanno and Church demonstrate that legally recognized ownership of personal property is all but impossible without concomitant possession of some private space in which to store and safeguard it. Furthermore, while there is still some disagreement, most courts seem to find this constraint constitutionally unproblematic despite its seemingly obvious interference with basic notions of property, liberty, and constitutional rights. In Jeremy Waldron's terms, homeless people

53. Id. at 1345.
54. Monell, 436 U.S. at 694.
55. See Part II, infra.
are fundamentally “unfree” not only to perform basic life activities necessary for survival, but also to avail themselves of individual civil rights and liberties, like privacy itself, that are guaranteed by the Constitution. Judicial ratification of municipal anti-homeless policy represents the dystopian vision of the Founders come true: without security in private property, the citizen stands unprotected against abuses of state power.

2. **Personal Property and Other Garbage**

Judicial preconceptions and rhetorical conventions concerning the nature of homeless people’s property may also blind courts to the constitutional implications of its seizure and destruction. If municipal policy and judicial decision-making combine to deprive homeless people of their ability to exercise property interests, their putative belongings must logically assume a status below the rest of the things in the world that are commonly thought of as property. Indeed, in the pages of newspapers and judicial decisions alike, homeless people’s belongings often are represented as particularly virulent forms of garbage, the existence of which threatens the communities in which homeless people live.

Many city policies on homelessness are motivated by concern for its aesthetic impact on local businesses, tourism, shopping, and other economic activity. Accordingly, homeless people are rousted and moved away from areas where they might mix with tourists and professionals. Likewise, homeless people’s belongings often are treated as items that do not merit the respect generally

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57. According to Harry Simon, judges and other officials often use “aesthetics” as a code word for protecting citizens of one class from contact with another. Simon, supra note 5, at 631, 659.

58. A recent article in the San Francisco Chronicle stated this concern very clearly: “By the city’s last count, there were some 2,000 people living on the streets... acting out, sleeping, eating, doing drugs, begging, performing all bodily functions, often in the paths of those who would shop, do business, dine or be entertained in San Francisco.” Patrick Hoge, *Squalor in the Streets: S.F. Spends More Than $200 Million a Year on Homelessness, But Why Does the Problem Persist?*, S.F. CHRON., Nov. 4, 2001, at A1. The article begins by describing an encounter between “horrified passers-by” and “a one-legged drug addict, lying in his own vomit [and] naked from the waist down” who “[a]wakened,... cursed bystanders, ate from a trash can, then urinated and gushed diarrhea into the street. Then the 31-year-old, on probation for stealing a woman’s purse, rolled his wheelchair to a nearby intersection and begg[ed] money from aghast motorists caught in traffic.” The implication created by subsequent statistics—2,000 homeless on the street, 70 percent of whom are “mentally ill or substance abusers or both”—is that these are typical morning activities for a homeless person in San Francisco. *Id.*

59. See *Church v. City of Huntsville*, 30 F.3d 1332, 1346 (11th Cir. 1994).
shown for personal property. For example, the City of San Francisco has spent large sums of money over the past several years to recover shopping carts—often full of personal belongings—from homeless people.60 These belongings are often described by journalists in the same terms used for homeless people themselves: dirty, inappropriate, and aesthetically unpleasant. “Each month, the city removes about 1,000 carts from the streets. . . . [C]ity workers pick through the often overflowing carts, removing hazardous materials such as used syringes, crack pipes, bottles of urine and clothing covered with bodily secretions.”61 Such descriptions illustrate the difficulty many people have in distinguishing homeless people’s property from abandoned, hazardous garbage.

Courts also struggle with this distinction. In the Pottinger decision, the court rejected assertions by the City of Miami that distinguishing property from garbage was impossible:

[H]omeless individuals often arrange their property in a manner that suggests ownership, for example, by placing their belongings against a tree or other object or by covering them with a pillow or blanket. Such characteristics make the property of homeless persons reasonably distinguishable from truly abandoned property, such as paper refuse or other items scattered throughout areas where plaintiffs reside.62

The court also rebuffed the City’s argument that inventorying and storing homeless people’s property posed undue logistical burdens, using terms that highlight the role of the owner’s social status in characterizations of property: “a homeless person’s bedroll should be no more difficult to handle than a picnic basket; possessions that are contained in a plastic bag, box, or cloth bundle should be no more burdensome to store or inventory than possessions contained in a suitcase or a briefcase.”63 These striking comparisons between items often possessed by homeless people

60. The City estimates the cost of collecting, cleaning and storing the carts at $650,000. Patrick Hoge, Carted Away: Removing Shopping Baskets from Streets Costs S.F. Hundreds of Thousands—Plus Payments to Homeless, S.F. CHRON., Oct. 21, 2001, at A1. Lester Tobin planned to file a small claims action against the city for the loss and destruction of personal property including two Persian rugs, a laptop computer, and silverware; another homeless person was awarded a $1,000 settlement after a mountain bike and several items of clothing were destroyed in a garbage compactor. Hoge, supra note 60, at A1 and A20.

61. Id. This lurid characterization of the carts’ contents is belied by a full-color photo accompanying the article, in which a large blanket and carefully folded sleeping bag are shown amid a group of carts covered with blue tarps, apparently placed there by homeless residents attempting to keep their possessions dry or signal a desire for privacy usually associated with expressions of ownership.


63. Id. at 1573.
(bedrolls and bundles) and items usually associated with more bourgeois uses of urban public space (picnic baskets and briefcases) clearly illustrate that class has tainted the ways in which city officials treat different kinds of property.

Again, however, Pottinger seems to be unique in this regard. Other courts explicitly conflate homeless people’s belongings with garbage. In Love v. City of Chicago, homeless residents challenged the constitutionality of city actions that violated “Temporary Procedures” for off-street cleanings in downtown Chicago’s Lower Wacker Drive area. These procedures required city sanitation workers to notify homeless residents at least twice before cleaning the area—once at least twelve hours, and again twenty minutes, prior to cleaning—and allow them to move their belongings to a safe area around the corner or across the street. A prior ruling in the same litigation held that these procedures were reasonable and protective of homeless people’s interests. The parties found themselves back in court following a December 1, 1997, cleaning in which a large quantity of possessions were gathered up and destroyed despite having been moved by their owners to a designated safe zone.

Before turning to the issues surrounding the December 1 cleaning, the court engaged in a lengthy and illustrative discussion of the relationships between homeless people, their belongings, and unsanitary conditions. The court noted the city’s “right and obligation to maintain its public ways in a clean, safe, obstruction-free manner. . . . Unsanitary conditions can rapidly develop from insects, human waste, and the presence of items that are not systematically removed.” Here, homeless people’s items are seen as a source of pestilence equivalent to insects and human waste. The court also observed that “plaintiffs’ property is often stored and maintained in unsanitary and unsafe conditions. Vermin, other pests, and human waste are frequently found in the materials stored by the homeless in the Lower Wacker Drive area.” For the court, this situation was not the involuntary result of homeless people having no secure place to store personal belongings, but rather was the fault of the homeless themselves, most of whom were

64. See, e.g., Bonner v. City of Santa Ana, 45 Cal. App. 4th 1465, 1468 (1996) (implying that city workers’ removal and destruction of several garbage bags full of homeless people’s belongings might have been “simple negligence” rather than city policy).
66. Id. at 1-2.
67. Id. at 5-6.
68. Id.
69. Id. at 4.
70. Id. at 6.
"voluntarily choosing to live in the Lower Wacker Drive area."\(^{71}\)

The December 1, 1997, cleaning occurred after the city issued a construction permit for renovation of a building adjacent to Lower Wacker Drive. As the court noted, "[t]he construction required the sidewalks adjacent to this building on Lower Wacker Drive to be boarded up. Consequently, the homeless living at this location were required to relocate."\(^{72}\) Anticipating difficulties in evicting the residents from the area, authorities ordered "an extra police presence."\(^{73}\) After removing items from sidewalk and median areas outside the designated safe zone, city workers consulted with police regarding belongings that had been moved to the safe zone, part of a median strip in the "fork area," and "decided to discard items stored in the safe areas at the fork even if the items were claimed or attended. As a result, most Lower Wacker Drive residents lost all of their possessions. A few residents lost items of special value such as family photographs and Bibles."\(^{74}\) The court approved of this seizure and destruction of property despite the Temporary Procedures, as officials "reasonably believed that the health and safety hazards posed by the unprecedented accumulation of belongings presented an imminent danger requiring immediate abatement."\(^{75}\)

The court also refused to require city workers to sort through the property seized in order to locate items of value. Because of the "unsanitary and unsafe conditions" in which the property was stored, and the "vermin, human waste, and other pests" that were "frequently found in the materials," the court held that "[p]laintiffs have the burden to separate out and move items they find valuable and wish to retain."\(^{76}\) The court apparently failed to notice the irony in this comment; the belongings at issue had been separated out and moved, in accordance with the Temporary Procedures, indicating that the plaintiffs did wish to retain them. More significant is the degree to which unmistakably valuable personal property like photographs and Bibles took on the taint of filth that the court associated with the homeless residents and the Lower Wacker Drive area.

Indeed, the court ultimately concluded that the dispossession of homeless people in the area led to a general reduction in their numbers, and was therefore a positive development overall. According to the court, "[t]he events of that day resulted in a much

\(^{71}\) Id. at 4.
\(^{72}\) Id. at 5.
\(^{73}\) Id.
\(^{74}\) Id. at 6.
\(^{75}\) Id.
\(^{76}\) Id.
cleaner, safer Lower Wacker Drive and also precipitated an immediate reduction from about fifty to about twenty homeless people living there." The court went on to note that “[t]hose plaintiffs dispossessed on December 1, 1997, have been offered—and many have accepted—food, lodging, and job training from the City at its expense. Frankly, the lives of some of the plaintiffs have, by their own testimony, been upgraded.”

While it may be true that some of the plaintiffs’ property was stored in unsanitary conditions, this was most likely the result of their being homeless and having no secure, private place in which to keep their possessions safe and clean. Yet the court sees dispossession as both effective in removing homeless people from the streets and therapeutic in terms of their lives, thus providing a convenient rationalization for similar municipal policies. Basic property rights often taken as given must be subordinated to both the city’s interest in clean, aesthetically pleasing environments and the best interests of the homeless themselves, even if the property interest is destroyed in the process.

B. Takings and Seizures: The Class Status of Property and the Fifth Amendment

The seizure and destruction of homeless people’s personal belongings arguably implicate both the due process and just compensation clauses of the Fifth Amendment, although courts are far from settled on how to approach such claims. Conversely,

77. Id. at 13.
78. Id. at 14.

79. Although this section focuses primarily on the operation of the Takings Clause, homeless people have also claimed less tangible property interests sufficient to implicate due process concerns. For example, residents of municipal shelters in the District of Columbia brought a series of due process challenges to proposed shelter closings. Despite an early decision holding that shelter residents had a property interest in their shelter space sufficient to implicate due process concerns, Williams v. Barry, 490 F. Supp. 941 (D.D.C. 1980), that case was reversed on appeal. Williams v. Barry, 708 F.2d 789 (D.C. Cir. 1983). Subsequent decisions have continued to deny a property interest. See Johnson v. Dixon, 786 F. Supp. 1 (D.D.C. 1991) (holding that amendment to the District’s municipal shelter legislation explicitly disclaimed creation of an entitlement to shelter); Washington Legal Clinic for the Homeless v. Barry, 107 F.3d 32 (D.C. Cir. 1997) (rejecting argument that District’s non-entitlement disclaimer was dispositive, yet holding that discretion in the shelter space allocation process precluded creation of entitlement).

80. Compare, e.g., Pottinger v. City of Miami, 810 F. Supp. 1551, 1570 n.30 (S.D. Fla. 1992) (finding that taking and destruction of personal property violates the fifth amendment) with Love v. City of Chicago, No. 96 C 0396, 1998 WL 60804, at *13 (N.D. Ill. Feb. 6, 1998) (restricting compensation to items “required to live on the sidewalk”); see also D’Aguanno v. Gallagher, 50 F.3d 877, 881 (11th Cir. 1995) (denying Fifth Amendment due process challenge because homeless plaintiffs had not shown that they retained a property interest in personal belongings stored without permission on private
although the doctrine is notoriously complex, courts have developed far more predictable ways of recognizing and compensating government interference with landowners', investors', and developers' interests in land.\textsuperscript{81} A comparison of the different standards against which these various takings claims are measured further illustrates the ways in which property is imbued with notions of social class and status, and provides a framework in which to understand the constitutional implications of homeless property sweeps.

The difficulties some courts have had in recognizing seizure of homeless people's property as a government taking might surprise a lay observer. The seizure of personal belongings by the state would seem to present an obvious and simple instance of a taking, in contrast to the complex situations involving real property that have contributed to the doctrine's notorious convolutions. Indeed, it is hard to imagine a more clear physical invasion\textsuperscript{82} than the confiscation and destruction of all of one's worldly possessions by authorities acting under color of law.

Perhaps reflecting such an intuitive insight, the court in \textit{Pottinger} assumed without much comment that the plaintiffs' property had been "taken."\textsuperscript{83} Turning to the "public use" and "just compensation" requirements of the Takings Clause, the court noted that "public use" has been defined quite broadly: "the proper test is whether 'exercise of the eminent domain power is rationally related to a conceivable public purpose... it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use clause."\textsuperscript{84} Under this analysis, "the fact that the city does not actually use or possess the property taken from the homeless does not mean that there is no 'public use,' and therefore no taking under property).


\textsuperscript{82. 'A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." Loretto, 458 U.S. at 426 (quoting Penn Central, 438 U.S. at 124).

\textsuperscript{83. Pottinger, 810 F. Supp. at 1570 n.30. One might object that the court's discussion of the Takings Clause was only dicta, given that it appears in a footnote and was not essential to the holding, which rested primarily on Fourth and Eighth Amendment claims. \textit{Pottinger}'s discussion of takings issues is nonetheless indicative of how a sympathetic court might analyze a Fifth Amendment claim.

\textsuperscript{84. Pottinger, 810 F. Supp. at 1570 n.30 (quoting Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 241, 244 (1984)).}
Although the court’s discussion does not elaborate on the “conceivable public purpose” for which the homeless people’s belongings were taken, it is clear from the rest of the decision that the city’s interest in “orderly, aesthetically pleasing parks and streets” fills this role. In other words, the possessions of Miami’s homeless were taken for the public use of keeping the streets and parks clean of unsightly people and their belongings.

Other courts, however, have approached the question quite differently. The District Court’s decision in Love v. City of Chicago does not mention “public use” at all, instead focusing on whether the plaintiffs had a recognized property interest at the time of government action. Although the court dismissed plaintiffs’ claim as unripe because they had not sought compensation through city or state procedures before filing suit, it did acknowledge that “plaintiffs who place personal items in the safe areas during the cleanings are entitled to compensation if the city takes those items.” The court’s view of the nature of the property interest in these belongings, however, was closely connected to its assumptions about the homelessness of their owners.

The decision expresses consternation at the “unprecedented amount of possessions” accumulated by homeless residents in the area following charity donations during the Thanksgiving holiday, including “many items besides those necessary for life on Lower Wacker Drive.” The degree to which the homeless residents’ possessions were mixed in with “vermin, other pests and human waste” also deeply disturbed the court. Accordingly, the court dramatically qualified its finding that the city “should reimburse plaintiffs for the loss of items taken by the city from the safe areas” by holding that “the right to compensation is not absolute.” First, the court held that “the City should not be compelled to reimburse plaintiffs for possessions that were mingled with filthy or improper items that posed a hazard to pedestrians or vehicles, such as furniture, cardboard boxes, or extra mattresses.” Carrying this notion of “improper items” one step further, the court concluded

85. Id.
86. Id. at 1554.
87. At the other extreme from Pottinger, the D’Aguanno decisions questioned whether the homeless people retain any property interest in their belongings whatsoever because of their status as trespassers; compensation for their lost possessions thus never became an issue. See D’Aguanno v. Gallagher, 827 F. Supp. at 1562-63; D’Aguanno v. Gallagher, 50 F.3d at 881.
89. Id.
90. Id at 5.
91. Id. at 11.
92. Id.
that plaintiffs could only be compensated for “the basic items, such as a sleeping bag and several blankets, required to live on the sidewalk.” Finally, the court noted that although clothing, bedding, and other such possessions “can be readily valued or replaced . . . a few plaintiffs lost irreplaceable items, such as photographs or Bibles, that cannot be easily valued. Plaintiffs, however, assumed a risk of loss by choosing to leave the items in the Lower Wacker Drive area instead of with friends or relatives for safekeeping.”

In a remarkable series of steps, nearly all of which cited no precedential authority, the court so narrowly circumscribed the property interests of the homeless plaintiffs that it left them with almost nothing to own. The loss of personal items mixed in with sleeping bags [or] blankets would not be compensated because city workers could not be expected to sort through the possessions seized. On the other hand, the taking of all other personal belongings besides sleeping bags and blankets would not be compensated because these items were deemed unnecessary for life on the sidewalk. Most remarkably, irreplaceable personal items would not merit compensation because plaintiffs had “assumed the risk of loss” by failing to leave these items in a secure, private space. The court does not examine its assumption that all homeless people have friends or relatives with whom they can safely leave their most precious possessions while “choosing” to live out their lives in places like Lower Wacker Drive. By identifying the nature of the plaintiffs’ property interest as the relevant inquiry, then qualifying that interest so severely that almost nothing remained, the court not only limited the city’s liability to sleeping bags and blankets but also straitjacketed homeless people’s basic freedom to own and control personal property.

93. Id. at 13.
94. Id. at 12 (emphasis supplied).
95. The court cited nothing in support of its determinations that neither personal items mixed in with other items nor items unnecessary for life on the sidewalks deserved compensation. In support of its creative application of the “assumption of the risk” doctrine, the court cites McKenzie v. City of Chicago, 118 F.3d 552 (7th Cir. 1997). McKenzie says nothing about “assumption of the risk,” but rather concerns a court’s refusal to enjoin demolition of a building based on emotional harm to the owners where monetary compensation was available. Id. at 556. The Love opinion, on the other hand, denies compensation altogether for the items to which the homeless plaintiffs felt the greatest emotional attachment. In this respect, the McKenzie opinion actually would support an argument for monetary compensation.
The ease with which courts abrogate homeless people's property interests seems especially stark in comparison to the ways in which courts often go out of their way to defer to even the most abstract interests of real property owners. Indeed, if courts were to apply the standards often used in real property cases to claims brought by the disposessed homeless, the results might be surprising. One notable recent takings case—in which homelessness played an ironically important role—illustrates this dichotomy.

In *Seawall Associates v. City of New York*, a group of property owners brought a facial challenge to an ordinance that restricted the demolition, conversion, and alteration of single-room occupancy ("SRO") hotels. The ordinance imposed a five-year renewable moratorium on "conversion, alteration and demolition of SRO multiple dwellings," required owners to "rent-up" or "rehabilitate and make available every SRO unit in their buildings, and lease every unit to a 'bona fide' tenant at controlled rents," and imposed substantial fines for violating either of these requirements. The ordinance also contained a provision allowing owners to purchase an exemption from the moratorium by either paying for or creating "an equal number of replacement units" and a "hardship exemption" for owners whose property returned less than eight and one-half percent of assessed value annually. The city's stated aim in passing the ordinance was to address withdrawal of SRO units from the rental market that, according to the city council, "contributed to the increasing homeless population."

The Court of Appeals, siding with the SRO owners, found that the ordinance on its face constituted both a physical and a regulatory taking of their property. In framing the issue, the Court chose to focus on "whether the uncompensated obligations and restrictions imposed by the governmental action force individual property owners to bear more than a just share of obligations which are rightfully those of society at large." The Court determined that the ordinance, by preventing owners from converting the SROs and requiring them to keep the buildings fully rented, "impose[d] on the property owners more than their just share of such societal

99. Id. at 1061.
100. Id. at 1061-62.
101. See id. at 1073 (Bellacosa, J., dissenting), quoting Local Laws, 1985, No. 59 of City of New York § 1 and Local Laws, 1986, No. 22 of City of New York § 1. This approach represented a shift in New York's previous policy of encouraging the demolition and conversion of SROs, brought on by the city's realization that its policy had a "staggering impact on the homeless population." Seawall, 542 N.E.2d at 1073 (Bellacosa, J., dissenting).
102. Id. at 1062.
obligations."\(^{103}\)

One remarkable aspect of the Seawall case is its extension of the "physical invasion" doctrine from actual real property itself to the abstract "bundle" of classical property rights.\(^{104}\)

Whether the mandatory 'rent-up' obligations of the antiwarehousing provision effect a physical taking depends upon the nature and extent of their interference with certain essential property rights. . . . Where, as here, owners are forced to accept the occupation of their properties by persons not already in residence, the resulting deprivation of rights in those properties is sufficient to constitute a physical taking for which compensation is required.\(^{105}\)

For the Court, the ordinance itself—by requiring property owners to maintain, renovate, and rent out their rooms to tenants for at least five years—invaded the owners' interest in exclusion, if not their actual property. "Although the Supreme Court has not passed upon the specific issue of whether the loss of possessory interests, including the right to exclude, resulting from tenancies coerced by the government would constitute a physical taking, we believe that it would. Indeed, it is difficult to see how such forced occupancy of one's property could not do so."\(^{106}\) This deference to a prospective real estate developer's largely theoretical property interest stands in marked contrast to other courts' findings that homeless people's immediate and tangible property interests are too abstract for recognition (D'Aguanno) or in need of radical circumscription (Love).

The Court of Appeals applied a similar analysis in finding that the ordinance worked a regulatory taking. Observing that the government may regulate the use of private property under its

\(^{103}\) Id.

\(^{104}\) "Under the traditional conception of property, the most important of the various rights of an owner is the right of possession which includes the right to exclude others from occupying or using the space. . . . This right to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." Id. at 1063 (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982)).

\(^{105}\) Seawall, 542 N.E.2d at 1062-63 (emphasis added).

\(^{106}\) Id. at 1064. The Court analogized to cases where a state agency's requirement of a dedicated easement as a condition for a building permit, Nollan v. Cal. Coastal Comm., 483 U.S. 825 (1987), and the federal government's imposition of a navigational servitude allowing public access to a privately owned marina, Kaiser Aetna v. United States, 444 U.S. 164 (1979), were found to authorize physical invasions by third parties. Seawall, 542 N.E.2d at 1063. The decision also distinguished cases in which rent control ordinances and other landlord-tenant regulations were upheld against taking challenges, finding that such regulations "merely involved restrictions imposed on existing tenancies where the landlords had voluntarily put their properties to use for residential housing . . . . [T]hose regulations did not force the owners, in the first instance, to subject their properties to a use which they neither planned nor desired." Id. at 1064-65.
police power, the Court noted that such regulations will nonetheless require compensation when they force certain people to bear burdens that should more fairly be borne by the public as a whole. According to the Court, the test for whether such a regulation constitutes a taking is twofold: “such a burden-shifting regulation of the use of private property will, without more, constitute a taking: (1) if it denies an owner economically viable use of his property, or (2) if it does not substantially advance legitimate state interests.”

With respect to the first prong of this test, the Court found that the “mandatory rental provisions—together with the prohibition against demolition, alteration and conversion of the properties to other uses, and the requirement that uninhabitable units be refurbished—deny owners of SRO buildings any right to use their properties as they see fit.” The Court also decided that the ordinance impaired the ability of owners to sell their properties “for any sums approaching their investments” and therefore “must also negatively affect the owners’ right to dispose of their properties.” The Court went on to conclude that abrogation of these “valuable components of the ‘bundle of rights’ making up their fee interests” deprived the owners of economically viable use of their property.

The ordinance also failed the second prong of the Court’s regulatory takings test. Although “the end sought to be furthered by [the ordinance] is of the greatest importance—alleviating the critical problems of homelessness,” the Court found that the ordinance would not substantially advance this aim. In a somewhat Kafkaesque twist, the court noted that “the SRO units are not earmarked for the homeless or for potentially homeless low-income families, and there is simply no assurance that the units will be rented to members of either group.” This observation allowed the Court to conclude that:

[The] nexus between the obligations placed on SRO property owners and the alleviation of the highly complex social problem of homelessness is indirect at best and conjectural. Such a tenuous connection between means and ends cannot justify singling out this group of property owners to bear the costs required by the law toward the cure of the homeless problem.

108. Id. (emphasis in original).
109. Id. at 1066 (emphasis in original).
110. Id.
111. Id.
112. Id. at 1068.
113. Id. Of course, an ordinance forcing the owners not only to rent their units, but to rent them to members of a particular group of citizens, would certainly flunk the Court’s “physical invasion” test.
114. Id. at 1069.
Seawall certainly represents an extreme application of the Takings Clause in its abstract, formalist analysis of property interests. This formalist approach, however, combined with the ways in which the case is implicated in municipal efforts to address homelessness, presents an interesting thought experiment: What if a court were to apply Seawall's logic in a case where homeless residents challenged a city policy allowing the seizure of their personal belongings? First, there could be no doubt that the policy would work a physical invasion of the plaintiffs' property; seizure and destruction of property present nearly the paradigmatic case of such invasion. Under Seawall's formalist analysis, however, the rights to possess, exclude others from possessing, dispose of and use whatever the plaintiffs owned could not be abrogated. This might mean that the decision in Love, instead of determining that homeless people could not be compensated for the non-necessary items they had lost, would instead have enjoined the city from removing and destroying any of the sofas, computers, or extra mattresses without compensation. The D'Aguanno court, had it brought such analysis to bear on the case of the homeless trespassers, would have had far less trouble locating a property interest in the makeshift shelters and personal possessions that the plaintiffs in that case kept with them; in other words, the abstractness of the property interest would not have bothered the court.

Second, to the extent that a municipal policy is similar enough to an ordinance to face a facial challenge, the city's policy would nonetheless fail Seawall's two-prong test for a regulatory taking. Dispossession certainly limits the economically viable use of the owner's property, along with all other uses. Furthermore, because the link between seizure of homeless people's belongings and the city's interest in clean parks and streets is at least as indirect, conjectural, and tenuous as the relationship between SRO conversion and increased homelessness, the city would have a difficult time showing that the policy substantially advanced legitimate state interests.

Finally, the policy certainly would require a specific class of

115. The dissent in Seawall compared the majority's opinion to Lochner in its elevation of a single property theory to constitutional significance. Id. at 1072. At least one commentator has agreed with this comparison. See John A. Saurenman, Keystone, Nollan and First English Three Years Later: How Fare the States?, 3 EMERGING ISSUES ST. CONST. L. 115, 137 (1990). Seawall does have its fans, however, at least one of whom has attempted to federalize its reasoning. A 1993 decision from the Northern District of California lifted whole paragraphs from the Seawall opinion, often without citation, in finding that a similar ordinance adopted by the City and County of San Francisco constituted both a physical and a regulatory taking of SRO owners' property. Golden Gate Hotel Ass'n v. City and County of San Francisco, 864 F. Supp. 917 (N.D. Cal. 1993), rev'd and vacated on other grounds, 18 F.3d 1482 (9th Cir. 1994).
individual property owners to bear more than their fair share of "obligations which are rightfully those of society at large." As the decisions in Love, Pottinger, and Church pointed out, seizure and destruction of a homeless person's property commonly results in loss of everything that the person owns. Complete dispossession is of much greater and more immediate significance than, for instance, interference with reasonable investment backed expectations or infringement on certain economically viable uses of property. Forcing the homeless to bear the burden of the city's interest in clean streets and parks is doubly unfair because they themselves are viewed by many cities as the very blight that dispossession policies aim to abate. In other words, they must bear the burden of dispossession in order to advance the municipality's interest in their ultimate removal.

Although such an experiment may seem frivolous on its surface, it does shed special light on the ways in which courts treat different classes of property—and different classes of owners—very differently when a government taking is involved. When an owner is weak and impoverished with respect to society as a whole, courts seem to view her ability to own property as equally weak and attenuated and therefore to tolerate invasions of her property interests to a very significant degree. Where she controls real estate investments, on the other hand, some courts appear willing to acknowledge not only tangible but also highly abstract property interests, and to view government interference with those interests with far greater scrutiny.

This thought experiment demonstrates not only how different types of property and classes of owners receive different legal treatment, but also how the categories of real property and personal belongings do not easily lend themselves to the same kind of takings analysis. Real property is subject to official regulation in ways that personal property is not. From county zoning ordinances to the federal Endangered Species Act, legislation at all levels defines the boundaries of property rights, and takings doctrine has responded accordingly. Such legislation, however, is often adopted through political processes to which landowners have (often privileged) access, and can also be challenged through the kinds of facial constitutional claims advanced by the SRO owners in Seawall.

Municipal policies targeting the possessions of the homeless, on the other hand, rarely if ever take the form of official legislation, and

117. The many dangers of Seawall's exceedingly formal analysis of property interests should caution against its extension to other contexts. See Section III, Parts A and B, infra.
courts view claims challenging unofficial policies with a great degree of skepticism. These differences illustrate a certain irony of property ownership with respect to government intervention. Although the kinds of interests embodied in real property are complex and officially circumscribed, the procedures for challenging such circumscription are relatively straightforward and the doctrines controlling government interference with these interests are well-developed. In contrast, the property interest in one's personal belongings seems relatively simple, but the procedures for challenging policies that deprive people of that interest are unclear, and a unified takings doctrine has not yet emerged.

C. A Property Disability in Policy and Precedent

The municipal policies discussed in this section, and the courts' varying responses to civil rights challenges, work together to create a de facto property disability—in the sense of a legally created and judicially enforced proscription against basic rights of property ownership—for homeless people. The lack of private space exposes homeless people to arbitrary and unpredictable abuses of state power. Municipal efforts to eradicate homelessness create a basic lack of a legal place for the homeless to be, which in turn impinges severely on homeless people's ability to securely possess and control their personal property. When homeless people have contested these seizures, the courts have gone even further, either refusing to recognize that homeless people exercise any property interest whatsoever or limiting those interests in uniquely restrictive ways. Popular and juridical accounts of homelessness use a rhetoric of criminality, filth, and contagion that equates personal belongings with garbage and people with vermin. According to such accounts, any property interest retained by a homeless person in her personal effects is at best abstract and at worst nonexistent. Lack of defensible space coupled with municipal policies of dispossession and judicial derecognition of property interests combine to create a property disability: a situation in which homeless people lack the basic ability to possess property.

A comparison with juridical treatments of other kinds of property throws this disability into even sharper relief. Courts are willing to recognize abstract and formal property interests held by real estate developers and other landowners in the context of Takings Clause challenges. *Seawall* pointedly demonstrates that landowners may not be required to bear the burden of social efforts to redress homelessness when these efforts infringe on their abstract property rights. Conversely, the homeless can be forced to bear the burden of their own displacement; courts' refusal to recognize
homeless people's personal belongings as property helps rationalize dispossession without compensation or other legal recourse. If homeless people cannot exercise property interests, the law need not trouble itself about the consequences of municipal dispossession policies.

The creation of a property disability for a specific, marginalized class of Americans should greatly trouble a legal system predicated on liberal individuality and civic republican political participation. Property disabilities have functioned throughout American history to mark and subordinate groups of people considered less than fully human by dominant social ideology as reflected in law.\textsuperscript{118} American legal and social history have also been shaped by philosophical, political, and juridical efforts to abolish property disabilities and other indicators of de jure subordinate status, and to extend special constitutional protection to the individuals and groups who have labored under sub-person classifications. The political and philosophical implications of this development may point to a set of constitutional remedies that can help restore homeless individuals to equal status in American law and society.

II. Constitutional Objections to Property Disabilities

The previous section established that municipal policies of criminalization and dispossession, as construed by most reviewing courts, have imposed a property disability on homeless people. The question remains, however, whether such a property disability implicates constitutional concerns.

One possible answer to this question lies in the historical context of the Reconstruction Amendments and the early Civil Rights Acts. The Thirteenth Amendment granted Congress power to abolish the "badges and incidents" of slavery,\textsuperscript{119} one of which was the inability of slaves to own property.\textsuperscript{120} Under the Black Codes enacted after the Civil War, many freed African Americans

\textsuperscript{118} See Phyliss Craig-Taylor, To Be Free: Liberty, Citizenship, Property, and Race, 14 HARV. BLACKLETTER L.J. 45, 56 (1998) ("Until emancipation, the overwhelming majority of African Americans were enslaved and treated as property, not citizens or immigrants eligible for citizenship. Therefore, they could not own property and had no legal title to anything they acquired.").

\textsuperscript{119} See Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968) ("Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.").

\textsuperscript{120} See THOMAS R.R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA 235 (U. of Georgia Press 1999) (1858) ("Of the other great absolute right of a freeman, viz., the right of private property, the slave is entirely deprived.").
continued to suffer restrictions on the free exercise of property rights. The 1866 Civil Rights Act, adopted by Congress for this very purpose, explicitly abolished property disabilities. Furthermore, many commentators, and one recent Supreme Court case, suggest that the Privileges or Immunities Clause of the Fourteenth Amendment may offer some substantive protection for citizens' rights, including a right to property. Finally, property-related civic republican arguments advanced during the Reconstruction era and thereafter are consistent with the principles reflected in the drafting and ratification of the Reconstruction Amendments. Indeed, close attention to the moral and philosophical context of Reconstruction reveals that the property disability currently imposed on homeless people is at the very least constitutionally troubling, and quite possibly unconstitutional.

A. Citizens' Rights in the Rhetoric of Reconstruction

The Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution were adopted during a time of great moral and political crisis in the United States. The process of drafting, proposing, and ratifying these amendments—especially the Fourteenth—was both politically and rhetorically complex, drawing on a web of competing accounts of natural law, citizens' rights, equality, and state sovereignty. With respect to the Fourteenth Amendment, this process resulted in textual ambiguities that have perplexed courts and commentators to this day. In a recent

121. Although many of the Black Codes lifted the total property disability that had been imposed on former slaves, they also instituted restrictions on tenancy that left African Americans unable to lease farm land. See Paul Finkelman, "Let Justice Be Done, Though the Heavens May Fall": The Law of Freedom, 70 CHI.-KENT L. REV. 325, 354-56 (1994); see also ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 199-201 (1988) (describing how Black Codes forced former slaves into contract labor that resembled conditions of slavery).

122. Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27.

123. See generally WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT (1988). Nelson attempts to address an impasse in Fourteenth Amendment scholarship by looking beyond the record of congressional debate to other primary source materials that provide a more robust account of the rhetoric, morality, and philosophy underlying the vague text of the Amendment, and asking new questions about the Amendment's meaning rather than speculating on whether the framers of the Amendment intended its provisions to address contemporary questions, such as the right to abortion, that they never could have anticipated. Id. at 5-6. Akhil Reed Amar also recently has analyzed the historical and rhetorical context surrounding the Amendment's adoption, although his analysis is directed primarily to whether the Fourteenth Amendment incorporated the provisions of the Bill of Rights and made them applicable to the states. See AKHIL REED AMAR, THE BILL OF RIGHTS 137ff. (1998).

124. See, e.g., John Harrison, Reconstructing the Privileges or Immunities Clause, 101 YALE L.J. 1385, 1387 n.5 (1992) (noting the standard view, advanced by Judge Robert H. Bork,
historical treatment of the Fourteenth Amendment, William Nelson cautions that the “vagueness and ambiguity of section one’s language and the failure of the framing generation to settle how it would apply to a variety of specific issues should not lead those who must interpret [it] to conclude that the section has no meaning.” Nelson argues instead that the Amendment’s meaning lies in “[w]hat was politically essential” for the North to accomplish following the Civil War: that its victory “be rendered permanent and the principles for which the war had been fought rendered secure, so that the South . . . could not undo them.” In this light, Nelson finds nothing odd in the failure of proponents to resolve specific legal issues. Indeed, one should expect the debates about section one to be cast in terms of the moralistic libertarian and egalitarian rhetoric through which the supporters of the Amendment had attained national political power, and for which they had fought and won the war.

This rhetoric encompassed often overlapping “principles of higher law, citizens’ rights, and equality.” Higher law ideals deriving from religious and abolitionist conceptions of natural rights permeated the rhetoric surrounding the debates. Notions of rights belonging by definition to the citizens of free governments found their way into newspaper editorials, constituents’ letters, and statements of congressional representatives. The content of these citizens’ rights was not specified, Nelson argues, because “the vagueness of the concept gave it greater power in the hands of proponents of the Fourteenth Amendment, who, by promising to protect rights, offered to many Union citizens federal support for whichever ones they “valued most.” Finally, the Fourteenth Amendment’s proponents, including one of its primary drafters, John A. Bingham, drew higher law and citizen’s rights together under the rubric of “the right of supreme importance to their generation—the right of equality.” In this sense, the historical meaning of the Fourteenth Amendment’s text is best characterized as broad, moral, philosophical, and general rather than specific and prescriptive.

125. NELSON, supra note 123, at 61.
126. Id. at 61.
127. Id. at 62.
128. Id.
129. Id. at 64-67.
130. Id. at 67-71.
131. Id. at 71.
132. Id. at 72.
Nelson argues that the Reconstruction debates refined and clarified these principles in applying them to a pro-Fourteenth Amendment political position. Through this process, the principles began to take on a more legalistic, doctrinal character, although determining their ultimate meaning was left to the courts:

The debates on the Fourteenth Amendment were, in essence, debates about high politics and fundamental principles—about the future course and meaning of the American nation. The debates by themselves did not reduce the vague, open-ended, and sometimes clashing principles used by the debaters to precise, carefully bounded legal doctrine. That would be the task of the courts once the Fourteenth Amendment, having been enacted into law, was given over to them to reconcile its ambiguities and its conflicting meanings.

The historical context surrounding the adoption of the Reconstruction Amendments thus can be seen as one in which rhetoricians invoked broad moral principles in response to thorny political and moral questions. It is beyond dispute that the status of former slaves, the establishment of national citizenship, and the empowerment of Congress to address violations of citizens’ rights were the guiding historical questions facing the Reconstruction generation. The principles they invoked in framing their response to these questions, however, were of a general moral and philosophical character, rooted in a conflation of the natural rights belonging to all human beings and the civil rights belonging to all citizens, and a unification of these principles under a broad rubric of equality. The expansiveness of the Reconstruction Amendments’ guiding principles necessarily confronts courts with the difficult task of applying them to situations that the Amendments’ framers did not and could not choose to resolve.

B. The Thirteenth Amendment, the Civil Rights Cases, and Property Disabilities

The Thirteenth Amendment abolished slavery and involuntary servitude in the United States, and granted Congress the power to enact legislation necessary to execute the Amendment’s prohibitions. While the Thirteenth Amendment itself does not

133. Id. at 62.
134. Id. at 62-63.
135. U.S. CONST. amend. XIII. The text of the Thirteenth Amendment reads:
Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
Section 2. Congress shall have power to enforce this article by appropriate legislation.
mention property, the Supreme Court in the Civil Rights Cases\textsuperscript{136} made an explicit connection between state-imposed property disabilities and the forms of subordination the amendment was created to abolish. Writing for the majority, Justice Bradley held that the enforcement power granted Congress under both the Thirteenth and Fourteenth Amendments was “corrective” in nature, and thus limited to addressing instances of existing state discrimination.\textsuperscript{137} Justice Bradley identified the “disability to hold property” as one of the “inseparable incidents of slavery that the Thirteenth Amendment empowered Congress to correct.\textsuperscript{138}"

Justice Bradley cited the 1866 Civil Rights Act as an example of such corrective legislation.\textsuperscript{139} Section One of the Civil Rights Act of 1866 secured to all citizens the right “to inherit, purchase, lease, sell, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens . . . ."\textsuperscript{140} The 1866 Civil Rights Act in both its original and subsequent amended forms were certainly intended to override racially discriminatory laws, like the Black Codes, adopted by Southern states almost immediately following emancipation.\textsuperscript{141} The statute’s prohibition against property disabilities cannot easily be construed to apply to homeless people.\textsuperscript{142} Justice Bradley’s characterization of the Civil Rights Act’s broader purpose—to “secure to all citizens of every race and color . . . . those fundamental rights which are the essence of civil freedom,” including specifically the rights to “inherit, purchase, lease, sell, and convey property”\textsuperscript{143}—is nonetheless instructive. Here, Justice Bradley does not rely on a narrow conception of rights, applicable only in a certain historical context, but rather invokes the same broad moral and philosophical principles that gave the Reconstruction Amendments their political and moral force.\textsuperscript{144}

\begin{itemize}
\item \textsuperscript{136} 109 U.S. 3 (1883).
\item \textsuperscript{137} See id. at 13-14 (Fourteenth Amendment) and 21 (Thirteenth Amendment). This conclusion supported Bradley’s much-criticized determination that the Civil Rights Act of 1875, which prohibited race discrimination in access to public accommodations, exceeded Congress’s authority because the discrimination at issue was “private” and “social” rather than a function of state law. See id. at 25-26.
\item \textsuperscript{138} Id. at 22.
\item \textsuperscript{139} Id.
\item \textsuperscript{140} Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27 (quoted in Harrison, supra note 124, at 1404-1405). These provisions, in slightly different form, are currently codified at 42 U.S.C. §§ 1981-1982.
\item \textsuperscript{141} See Harrison, supra note 124, at 1402 (quoting the bill’s author, Senator Lyman Trumbull).
\item \textsuperscript{142} See, e.g., Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968) (holding that § 1982 “deals only with racial discrimination”).
\item \textsuperscript{143} Civil Rights Cases, 109 U.S. at 22 (emphasis supplied).
\item \textsuperscript{144} See text accompanying notes 123-34, supra.
\end{itemize}
Under this historical reading of the Reconstruction Amendments, a property disability visited on any American citizen—including a homeless person—should be constitutionally troubling.

C. Privileges, Immunities, and Property

Section One of the Fourteenth Amendment, among other things, prevents states from making or enforcing any law that abridges the privileges or immunities of citizens of the United States. This Privileges or Immunities Clause has been considered something of a dead letter since the Supreme Court first interpreted away much of its content in the Slaughter-House Cases. Writing for the majority, Justice Miller distinguished state from national citizenship and held that the privileges or immunities protected by the Fourteenth Amendment did not include the fundamental rights of state citizenship. According to Justice Miller, the rights derived from state citizenship were the fundamental rights of life, liberty, and happiness, including “the right to acquire and possess property of every kind.” The privileges or immunities incident to national citizenship, on the other hand, included the right to “come to the seat of government” and transact business with it, the right to the “care and protection of the Federal government” when on the high seas or in a foreign country, the right to take up residence in any state and obtain the benefits of state citizenship, and the right to use the navigable waters of the United States. Thus the Slaughter-House Cases left most of the important rights of citizens in the hands of the states, and deprived the newly-created national citizenship notion of much of its substantive potential.

Dissenting opinions in the Slaughter-House Cases also relied on notions of citizens’ basic rights, but did not subsume those rights

145. U.S. CONST. amend. XIV, § 1. The section reads in full: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

146. See, e.g., Harrison, supra note 124, at 1387 (“No important line of decision rests on the clause; every student of constitutional law quickly learns that it was virtually read out of the document by the Slaughter-House Cases.”)

147. 83 U.S. (16 Wall.) 36 (1873).

148. Id. at 73.

149. Id. at 74.

150. Id. at 76 (quoting Corfield v. Coryell, 6 F. Cas. 546 (Cir. Pa. 1823)).

151. Id. at 79-80 (quoting Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867)).

152. See id. at 82.
exclusively under the rubric of state citizenship. Justice Bradley expressed this notion most forcefully:

In this free country, the people of which inherited certain traditionary rights and privileges from their ancestors, citizenship means something. It has certain privileges and immunities attached to it which the government, whether restricted by express or implied limitations, cannot take away or impair. It may do so temporarily by force, but it cannot do so by right. And these privileges and immunities attach as well to citizenship of the United States as to citizenship of the States.

Later commentators also have criticized Justice Miller's opinion as out of step with the principles of natural rights and citizens' rights that surrounded adoption of the Fourteenth Amendment, and have argued for reinvesting the amendment's Privileges or Immunities Clause with various kinds of content.

Signaling a possible willingness to revive the clause, the United States Supreme Court recently struck down a California law imposing residency requirements on recipients of welfare benefits on the ground that the law infringed on the "right to travel," one of the privileges or immunities protected by the Fourteenth Amendment. Although this decision may signal new potential for the Privileges or Immunities Clause to provide a basis for federal limits on state action, at least one caveat is in order. Justice Stevens' opinion for the majority relied on a citizen's right to equal benefits of citizenship in any state in which she might take up residence, a notion common to both the majority and the dissenting opinions in

153. See id. at 91 (Field, J., dissenting) (observing that the rights enumerated in the 1866 Civil Rights Act, including property rights, were intended to be rights of all "citizens of the United States as such.").
154. Id. at 114 (Bradley, J., dissenting).
155. See, e.g., Nelson, supra note 123, at 163 (calling Miller's opinion "flatly inconsistent with the history of the framing in Congress and its ratification by the state legislatures.... [S]ection one [of the Fourteenth Amendment] was designed to put to rest any doubt about the power of the federal government to protect basic common law rights of property and contract.").
156. See, e.g., Michael Kent Curtis, Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States, 78 N.C. L. Rev. 1071 (2000) (arguing that the clause incorporates the provisions of the Bill of Rights and applies them to the states); Harrison, supra note 124; Daniel J. Levin, Reading the Privileges or Immunities Clause: Textual Irony, Analytical Revisionism, and an Interpretive Truce, 35 Harv. C.R.-C.L. L. Rev. 569 (2000) (suggesting that "the clause constitutionalizes various privileges of civil and political participation"); William J. Rich, Privileges or Immunities: The Missing Link in Establishing Congressional Power to Abrogate State Eleventh Amendment Immunity, 28 Hastings Const. L.Q. 235 (2001) (arguing that the clause "changed federal and state relationships in order to protect future generations from state interference with privileges or immunities established by either the Constitution or laws of the national government").
the *Slaughter-House Cases*. In this sense, *Saenz* adds nothing to the Privileges or Immunities Clause that Justice Miller would have found objectionable. Nonetheless, *Saenz* marks the first time in more than sixty years that the Supreme Court relied upon the Clause in striking down state legislation, inviting a reexamination of the Clause and the content of the national citizenship created by the Fourteenth Amendment.

John Harrison, engaging in a historical analysis influenced by William Nelson, has advanced a reinterpretation of the Clause that may be useful in challenging property disabilities visited upon homeless people. Under Harrison’s “interstate comity reading” of the Privileges and Immunities Clause found in the text of the Constitution itself, “the privileges and immunities of citizens are their rights under state law.” More specifically, these “privileges and immunities constitute a substantial part of the content of a state’s law, especially its basic law of private civil capacity, such as the right to make contracts and own property.” Harrison contends that “Justice Miller was wrong” in assuming that:

[T]he clause protects a class of rights—the Privileges or Immunities of citizens of the United States, rather than a group of people—the citizens of the United States, whose privileges and immunities may not be abridged. . . . If the Constitution says that a state may not abridge the privileges or immunities of a particular group of citizens, then the state may not abridge any of that group’s privileges or immunities, no matter which citizenship those rights are associated with.

Thus Harrison concludes that the Fourteenth Amendment did not separate the rights of state and national citizenship, but rather “staple[d] them together” in conferring both kinds of citizenship on all Americans. In this sense, the privileges and immunities of state citizenship, including the “private law rights of property ownership, contractual capacity, and personal security, and access to governmental mechanisms that protect those primary rights,” were converted also into rights of national citizenship by the Fourteenth Amendment.

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158. *Id.* at 503-04.
159. *Id.* at 511 (Rehnquist, C.J., dissenting).
161. See U.S. CONST. art. IV, § 2.
163. *Id.* at 1401.
164. *Id.* at 1414.
165. *Id.* at 1415.
166. *Id.* at 1416. Harrison sees congruency between the Fourteenth Amendment’s privileges or immunities and the basic civil rights enumerated in the 1866 Civil Rights Act.
Critical to Harrison’s argument is the distinction between creation and equal enforcement of the fundamental rights evoked by the clause. Harrison’s interpretation does not entirely upset Justice Miller’s observation that fundamental citizens’ rights of property and contract were created by state law, but rather reads the Fourteenth Amendment as “including positive law rights of state citizenship within the scope of the privileges and immunities of citizens.” The clause does not create new rights for citizens per se, but rather recognizes the fundamental rights that all citizens are presumed to possess, and explicitly prohibits states from abridging those rights. Harrison understands this prohibition by reference to the “equality principle” that animated debate on the 1866 Civil Rights Act and the Fourteenth Amendment. Advocates of the Civil Rights Act argued that “[t]he states would remain free to create whatever rights they pleased, as long as they gave them to all citizens.” Under this analysis, state citizens were presumed to have certain fundamental rights; the Fourteenth Amendment incorporated these fundamental rights into the baseline of national citizenship and prohibited states from allocating them unequally among their citizens. In Harrison’s account, the right to “inherit, purchase, lease, sell, hold, and convey real and personal property” is one of the “privileges or immunities” that a state may not deny to its citizens on an unequal basis.

Harrison’s reinterpretation of the Privileges or Immunities Clause as a source of substantive, fundamental rights calls for a reexamination of the Equal Protection Clause. For Harrison, the Slaughter-House Cases shifted the constitutional locus of federal civil rights to the Equal Protection Clause, as evidenced by the arguments of proponents of the 1875 Civil Rights Act. These arguments, according to Harrison, stretched the boundaries of equal protection beyond what the text intended. Harrison would read “equal protection of the laws” to mean not “equality with respect to everything,” but rather equality in the “protection of the laws” itself, which in nineteenth-century usage “referred to the mechanisms through which the government secured individuals and their rights against invasion by others.” The Privileges or Immunities Clause and the Equal Protection Clause thus overlap, with the Privileges or Immunities Clause constitutionalizing various

167. Id. at 1424.
168. Id. at 1403. This observation squares nicely with Justice Stevens’ rationale in Saenz, 526 U.S. at 503-04.
169. Id. at 1424.
170. Harrison, supra note 124, at 1430.
171. Id. at 1434.
172. Id. at 1435.
fundamental rights that states could not deny to certain classes of their citizens, and the Equal Protection Clause mandating equal access to government procedures for defending and enforcing those rights.

Harrison’s view, if accepted, would require a fundamental revision in equal protection and due process jurisprudence. He also reaches some uncomfortable conclusions. For instance, while equal protection is available to all persons within the jurisdiction of the United States, privileges and immunities are available only to citizens, meaning that a state could impose a property disability on noncitizens. Whatever the merits or dangers of his broader reading of the Fourteenth Amendment, Harrison’s conclusions nonetheless support the argument that a state would violate the Privileges or Immunities Clause by imposing a property disability on a certain class of citizens.

D. Property, Citizenship, and the “Neo-Republican Synthesis”

The Reconstruction Amendments drew on a broad discourse of fundamental rights in redefining and extending American citizenship. There are strong parallels between the rights for which Republicans sought protection during the debates on passage of the Reconstruction Amendments and early Civil Rights Acts, and the rights essential to the exercise of citizenship in traditional civic republican theory. Property rights are central to both conceptions.

Phyliss Craig-Taylor has analyzed the historical relationships and tensions among property, individuality, and citizenship in republican theory. In the European republican tradition, “ownership of productive property and the protection of property rights play a central role” in defining citizenship. According to Craig-Taylor, American republican theorists were split as to whether this essential concept required guaranteeing citizens the right to acquire property, “ensuring an equality of condition and stabilizing the property ownership patterns that had been established,” or “ensuring minimal universal access to the ownership of productive property to all citizens.” Indeed, “property was the integral link to liberty of action and freedom, for

173. See id. at 1442-44. Harrison sees this distinction carried forward into the difference between 42 U.S.C. § 1981, which applies the equal protection of the laws to all persons, and § 1982, which protects the property rights of citizens.
174. Harrison, supra note 124, at 1442.
175. Craig-Taylor, supra note 118.
176. Id. at 47.
177. Thomas Jefferson espoused the latter view in a proposed draft of the Virginia Constitution that would have ensured a minimum allotment of 50 acres of land to “[e]very person of full age.” Id. at 48.
without it, one could be subject to control or manipulation. This belief in the role of property fueled advocacy for a wide distribution of property.\textsuperscript{178}

Various forms of state intervention designed to accomplish the wide distribution of productive property took shape throughout the nineteenth century. Craig-Taylor identifies numerous land laws, culminating in the 1862 Homestead Act, through which “hundreds of millions of acres of federally held, public land were sold or given away to state governments, settlers, railroads, squatters and land companies.”\textsuperscript{179} During the same historical period, however, a new industrial economy was taking shape that would dramatically alter the material relationships among property ownership, citizenship, and liberty. As greater numbers of Americans began working for wage labor, and American law declined to intervene on behalf of workers increasingly subject to control and manipulation by employers,\textsuperscript{180} the locus of citizenship shifted away from the archetypal Jeffersonian productive plot of land:

The republican vision of citizenship, Jefferson’s vision of the citizen-producer, had become a national folk ideal, but in practice, for a growing majority of citizens, this vision had become an impractical hope. . . . The ideal citizen, a producer/owner who both created value and used the newly created wealth, was replaced by the wage employee who produced use-exchange values for someone else. Independent, self-sustaining income from the ownership of use-exchange values was replaced by income derived from wage work. Therefore, building home equity became the primary way that most working and middle-class households could hope to accumulate property.\textsuperscript{181}

The family home, in this sense, replaced the family farm as the paradigmatic form of property constitutive of citizenship. Government policy accommodated this shift, which Craig-Taylor labels the “neo-republican synthesis,” through a “new homestead strategy” aimed at increasing employment, providing access to

\textsuperscript{178} Id. at 49. The article quotes JOHN M. BLUM ET AL., THE NATIONAL EXPERIENCE PART I 131 (7th ed. 1989) (1921), to the effect that “if America were to become like Europe, with a mass of propertyless workers and peasants, liberty would fall with equality and authority concentrated in the hands of a few [and it] would turn into tyranny.”

\textsuperscript{179} Craig-Taylor, supra note 118, at 50.

\textsuperscript{180} Craig-Taylor identifies Lochner v. New York, 198 U.S. 45 (1905), as a paradigmatic example of this shift: “One consequence of this case was confirmation of the gulf between liberty and the ownership of productive property with attendant implications for access to the republican ideal of liberty and citizenship for a growing majority of citizens. The primary means by which most citizens were to earn an income—wage labor—was not invested with rights comparable to ownership of property.” Craig-Taylor, supra note 118, at 53.

\textsuperscript{181} Id. at 53.
credit, and securing the right to buy and sell property. As Craig-Taylor makes very clear, however, "[a] significant exception was the sustained and intentional public and private discrimination against African Americans."

The situation of homeless people in contemporary America, of course, is not precisely analogous to that of African Americans either before or after the passage of the Reconstruction Amendments. The obstacles to home ownership currently faced by African Americans are very different from those facing homeless people. Craig-Taylor's "neo-republican synthesis" model nonetheless sheds light on the importance of property ownership to participation in the structures of citizenship, and identifies critical ways in which government policies impeding property ownership interfere with citizen participation. In this sense, Craig-Taylor's analysis dovetails with that of Nelson, Harrison, and other commentators who would read the guarantees of the Fourteenth Amendment more broadly than current doctrine might allow.

E. Potential Objections to Constitutionalizing Homeless People's Property Rights

Two general objections to this line of argument immediately come to mind. First, the conditions of chattel slavery and homelessness barely resemble one another; the architects of the Reconstruction Amendments could not have had homelessness in mind when they sought to abolish property disabilities. More specifically, the property disabilities contested by the Thirteenth and Fourteenth Amendments took the form of explicit class legislation that barred or impeded African Americans from holding property. In contrast, the property disability imposed on homeless people is less explicit, more ad hoc, and generally difficult to locate even in official municipal policies, much less in specific, formal legislation. Second, homeless people may not suffer the same kind of property disability as slaves because they, at least theoretically, still have a property interest in their own labor. As such, homeless people can still sell their labor for wages and escape their condition.

While the historical and material realities of slavery and homelessness are in many ways utterly dissimilar, and the property

182. Id. at 54-55.
183. Id. at 55. Much of Professor Craig-Taylor's sweeping argument details how race-based discrimination has prevented and continues to prevent African Americans from obtaining the property necessary for full citizenship. See generally id. at 56-90.
184. As discussed in text accompanying notes 123-34, supra, William Nelson would point out that the framers of the Fourteenth Amendment, by appealing to broad conceptions of natural and citizens' rights, necessarily left such specific questions to the courts for resolution.
disabilities imposed on each class profoundly different, the broader
moral and philosophical considerations underlying the adoption of
the Reconstruction Amendments nonetheless partially answer the
first objection. These considerations also bear upon the second
objection; the Reconstruction Amendments and Civil Rights Acts
explicitly regarded state interference with rights to real and personal
property, not merely property in self and labor, as constitutionally
significant.

1. The Property Disabilities Imposed on Homeless People are Informal
   and Not Constitutionally Suspect

   Unlike African Americans before abolition, homeless people are
   not subject to explicit legal rules barring them from owning
   property, nor are they openly considered non-people by the law. It
   is highly unlikely that any municipality would enact an ordinance
   specifically prohibiting homeless people from owning property. As
   such, one could argue that the difficulties homeless people face in
   securing their personal belongings are unlike the property
disabilities addressed in the Reconstruction Amendments and the
Civil Rights Act, and are thus not constitutionally significant.

   It is true that state laws both before and after abolition
contained explicit restraints on certain people’s ability to exercise
property interests. This objection, however, hinges on an untenable
distinction between public and private law. The property disability
imposed on homeless people, arising from a conjunction of exercises
of local police power and judicial interpretations of resulting
constitutional challenges, is no less a function of law than the more
explicit disabilities found in nineteenth-century state legislation.
Justice Bradley’s opinion in the Civil Rights Cases seemed to
acknowledge the difficulty of drawing such clear lines between
public and private law: “slavery cannot exist without law any more
than property in lands and goods can exist without law, and
therefore the thirteenth amendment may be regarded as nullifying
all state laws which establish or uphold slavery.” Justice Bradley’s
reference to “all state laws which establish or uphold slavery”
indicates that state property laws perpetuating a property disability,
one of the badges and incidents of slavery, would be as
constitutionally objectionable as public laws perpetuating the
institution itself. Although the municipal practices that deprive
homeless people of their property are dissimilar in many ways from the kinds of state legislation at issue during the Reconstruction debates and thereafter, in that they are generally uncodified and not facially class-based, they do infringe dramatically on the ability of homeless people to exercise property interests. Municipal policies that violate constitutional rights, furthermore, may be actionable under federal law regardless of whether they have been enacted into specific legislation.\textsuperscript{188}

Beyond this statutory theory of municipal liability, which courts have construed narrowly to deprive dispossessed homeless people of a remedy for their losses,\textsuperscript{189} lie the broad conceptions of citizens' rights and equal treatment that framed the Reconstruction Amendments. If John Harrison is correct that the right to exercise property interests is one of the privileges or immunities of citizenship, and that the equality principle behind the Fourteenth Amendment and the 1866 Civil Rights Act prevents states from denying privileges or immunities to certain classes of citizens, then municipal policies singling out homeless people for dispossession are constitutionally problematic. In this light, the participation of federal courts in denying homeless people the ability to exercise a property interest, much less an effective remedy for their losses, is especially egregious. The Act of April 20, 1871, which created the Section 1983 remedy currently relied on by most citizens challenging deprivation of constitutional rights,\textsuperscript{190} specifically appealed to the federal judiciary as a guardian of those rights against state and local overreaching. In cases like \textit{D'Aguanno, Love, and Church},\textsuperscript{191} federal judges are arguably contributing to the deprivation of broadly construed constitutional rights instead of upholding the principles of citizens' rights and equality that animated constitutional discourse during Reconstruction.

2. \textit{Homeless People Retain Property in Their Bodies and Their Labor}

One further objection to this constitutional line of argument is that homeless people, regardless of their inability to exercise a

\textsuperscript{188} See generally 42 U.S.C. § 1983; Monell v. Dept. of Social Svcs., 436 U.S. 658, 694 (1978) (holding that, "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.").

\textsuperscript{189} See text accompanying notes 46-54, supra.

\textsuperscript{190} Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (creating cause of action against persons who violated constitutional rights under color of state law or other authority, and specifying "such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts").

\textsuperscript{191} See Part I, supra.
secure interest in their personal property, still retain a property interest in their bodies and their labor. Justice Field, in his Slaughter-House dissent, objected on “free labor” grounds to the majority’s decision to uphold a Louisiana statute granting a virtual monopoly to a few slaughterhouse owners.\textsuperscript{192} In support of his objection, Justice Field quoted Adam Smith: “The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable.”\textsuperscript{193} Homeless people, by this account, still retain the ability to work and lift themselves out of their impoverished condition. This is a familiar suggestion, repeated regularly in contemporary public discourse surrounding homelessness.\textsuperscript{194}

This objection, however popular, is misplaced for at least two basic reasons. First, homeless people are not free to engage in even the most basic life activities.\textsuperscript{195} A person unable to eat, sleep, or relieve herself without running afoul of the law has at best a limited kind of “property” in her body, and is inhibited in many ways from effectively seeking employment. Without an address and a place to shower, much less the resources to design, print, and send out resumes, it may be extremely difficult to find many kinds of work. Indeed, Justice Field’s further invocation of Adam Smith seems quite appropriate in this respect: “The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property.”\textsuperscript{196} Municipal policies that criminalize homeless existence not only contribute to dispossession but also inhibit homeless people’s ability to find employment. In this sense, such policies infringe even on the “most sacred property” of free labor.

Second, the property interests considered fundamental to liberty in the Reconstruction Amendments and the early Civil Rights Acts were of the “real and personal” kind,\textsuperscript{197} and not limited to property in self and labor. The importance of real, productive property to notions of citizenship and civic participation

\textsuperscript{192} 83 U.S. (16 Wall.) 36, 110 (1873).
\textsuperscript{193} Id. at n.\textsuperscript{a} (quoting SMITH’S WEALTH OF NATIONS, b.1, ch. 10, part 2).
\textsuperscript{194} See, e.g., Patricia Paquette, “Sympathy’s Misplaced,” Letter to the Editor, Boston Herald (Jan. 23, 2002) at O24. Responding to an article about recent deaths among Boston’s homeless population, Ms. Paquette wrote, “Are we supposed to feel sorry for the two young people on Page 3 who are supposedly homeless? They certainly look like they are well able to go out and get a job and stop living off us.... Let them get off their lazy butts and work like the rest of us.”
\textsuperscript{195} See Part I.A., supra.
\textsuperscript{196} The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 110 n.\textsuperscript{a} (1873).
\textsuperscript{197} Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 (codified at 42 U.S.C. § 1982).
underscores the inappropriateness of limiting a citizen’s ability to exercise property interests in anything other than his body and labor. The property disabilities contained in the Black Codes passed by southern states immediately following the Civil War would have imposed just such a limitation on African Americans; these Black Codes were precisely the kind of state legislation—legislation that abridged the privileges or immunities of American citizens—that the Fourteenth Amendment was designed to eliminate. In short, the fact that one may still retain a limited property interest in one’s labor does not justify the abrogation by state and local authorities of every other kind of property interest.

III. Rights and Remedies

If homeless people are subject to a property disability, and if such disabilities in general are constitutionally problematic, questions still arise as to appropriate remedies. One might suggest, following Harrison, that the right to personal property should be recognized as fundamental and immune from any kind of state abridgment. This suggestion, however, does not accurately reflect Harrison’s focus on the “equality principle” at work in Reconstruction discourse, and may run a Lochner-like risk of constitutionalizing specific property interests. Moving on from this suggestion, one might think that the Takings Clause would be an obvious remedy, although this approach is also problematic for several reasons. Furthermore, many homeless litigants, and several commentators, have argued (mostly in vain) that the homeless should be considered a suspect class for purposes of equal protection analysis. Even if homeless litigants were to prevail in such arguments, however, the remedy provided under a suspect classification—strict scrutiny of municipal policies—may not be sufficient. Such remedies do not address the more structural conditions, such as the limitation on liberty imposed by basic principles of property law, that contribute to the property disability currently imposed on homeless people. Advocates for the homeless have long argued that adequate, supportive housing, with treatment for drug dependency and mental illness, is not only the most humane and legally defensible approach to homelessness but also the most cost-effective. Rather than spending enormous amounts of money and energy criminalizing the homeless, municipalities should be redirecting their efforts to housing and recovery.
A. A Fundamental Right to Property

One possible remedy would be to place all property rights beyond the reach of state abridgment. At first glance, John Harrison’s placement of property rights among the privileges or immunities of citizens, especially in the context of William Nelson’s historical rereading of Reconstruction discourse about fundamental rights incident to liberty and citizenship, would seem to support making the ownership of property a constitutional right immune to state infringement. Libertarian legal academics indeed have advanced such arguments. For example, Richard Epstein introduces a recent article by quoting Justice Washington’s observation in *Corfield v. Coryell* that the right to property is among the privileges and immunities, or fundamental civil rights, of citizens of all free governments. Notably, Epstein does not allow Justice Washington to finish his sentence; Washington went on immediately to observe that these fundamental property rights are “subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.” Harrison, by locating property rights among a citizen’s privileges and immunities, and locating those rights within a broader “equality principle,” makes clear that the state may indeed regulate the property rights of its citizens so long as it does so equally. Thus it is inaccurate to consider property rights so fundamental as to be beyond infringement by the state.

Also following Harrison, homeless people could argue that policies depriving them of property unequally abridge their privileges or immunities under the Fourteenth Amendment. Such arguments, at least theoretically, could provide some relief where homeless people can demonstrate that they and their property have been treated differently than other trespassers, pedestrians, or users of public space. The Supreme Court’s recent reliance on the Privileges or Immunities Clause in *Saenz v. Roe* may indicate a willingness to give it renewed substance. As discussed above, however, Justice Stevens’ decision still relies on Justice Miller’s majority opinion in the *Slaughter-House Cases*, which rejected any nationally-based citizens’ right to property ownership. Although an argument to include property rights among the privileges or immunities of citizenship could be considered non-frivolous given the careful historical analysis of Harrison and others, it may be


201. 6 F. Cas. at 552.

unrealistic to expect that the Privileges or Immunities Clause will provide any comprehensive, immediate relief for homeless people suffering from dispossession.

B. A Question of “Just” Compensation

Homeless individuals and their advocates may wish to argue that property seized from homeless people is seized for public use, thus entitling its owners to compensation under the Takings Clause of the Fifth Amendment. Although the possibility of a Takings Clause remedy may bear examination in specific cases, on the whole it may not provide an adequate remedy for dispossessed homeless people.

From a practical standpoint, advocates pursuing challenges under the Takings Clause need to weigh the benefits and drawbacks. As discussed above, courts have had difficulty even recognizing that homeless people possess any compensable property interests, and have not applied takings standards equally to cases involving the property of homeless people and others. Decisions such as Pottinger (and even Love) nonetheless show that compensation may be required for at least some of the possessions taken in property sweeps.

Harry Simon outlines the potential benefits, and some of the limitations, of Fifth Amendment challenges to property seizure and destruction. Echoing the discussion in Pottinger, Simon describes the Fifth Amendment’s “public use” requirement as “coterminous with the scope of the government’s police powers,” and argues that confiscating the property of homeless persons “could qualify as a taking of property for public use.” He also suggests that the “nuisance exception” to the Takings Clause, which allows officials to abate a nuisance without compensation, would not excuse property seizures because “local officials must show that the possession of property by the homeless constitutes an active menace to the public good. The mere possession of property by homeless persons falls far short of the type of nuisance that can be abated without just compensation.” For Simon, property sweeps are clearly uncompensated takings, and subject to Fifth Amendment challenge. Simon also argues that the Fifth Amendment’s Due Process Clause should apply to seizures of homeless people’s property for several reasons, including the inability of a later

203. See Part I.C., supra.
204. Simon, supra note 5, at 673-75.
205. Id. at 673.
206. Id.
207. Id.
hearing to correct the damage done by the seizure, the insufficiency
of common law tort actions as a remedy for deprivation, and the
tremendous implications of being deprived of everything one
owns.\textsuperscript{208}

Simon nonetheless points to some of the limitations of the
Takings Clause in the context of property sweeps. Because
compensation for a taking is available after the fact, the Takings
Clause cannot support a prospective claim for equitable relief. In
other words, the Fifth Amendment does not protect against a
deprivation of property, but only provides for compensation after
the deprivation has occurred.\textsuperscript{209} Nonetheless, Simon’s suggestion
that homeless people are entitled to due process before they are
deprived of their property might support a claim for injunctive relief
prior to deprivation. Furthermore, takings claims are not ripe until
the plaintiffs have sought redress at the local and/or state
levels.\textsuperscript{210} This places an enormous burden on homeless people, who must
find the time and resources to initiate not just one but potentially
several successive actions in order to recover the value of their
property.

Finally, any attempt to widen the ambit of the Takings Clause
should be undertaken with great care. By way of example, the
formalist “bundle of rights” analysis exemplified in \textit{Seawall} could
arguably offer greater recognition and protection of homeless
people’s property interests, but would also have an enormous effect
on a wide range of other regulations. Advocates thus should be
especially careful in their arguments that they do not open the door
to indiscriminate, radical expansion of the Takings Clause. A small
victory for a homeless plaintiff could translate into a huge defeat for
a number of other important causes that depend on the
government’s ability to regulate private property.

In summary, the Takings Clause offers at best a possibility of ex
post facto relief for homeless people deprived of their possessions,
although the vagaries of individual decisions render the extent of
compensation uncertain. Future expansion of the Takings Clause
could augment this protection, but only at the risk of seriously
undermining other forms of legitimate government regulation.
Taken on its own, the Takings Clause may provide only limited
relief to homeless people, relief likely to be literally too little, too
late.

\textsuperscript{208} \textit{Id.} at 674-75.
\textsuperscript{209} \textit{Id.} at 674 n.273.
\textsuperscript{210} \textit{Id.}
C. Homelessness as a Suspect Classification

The notion of a “suspect class” arises from the famous footnote in which the Supreme Court observed that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.” At first glance, homelessness—a discrete category marked by certain self-evident characteristics such as a shopping cart, bundles or bags of belongings, or disheveled appearance—seems to be a natural fit for such inquiry. The homeless are a minority, constituting between one-tenth to three-tenths of a percent of the general population. Finally, the prejudice of the housed majority contributes significantly to the exclusion of homeless people from the political process. Thus it would seem that courts would subject legislation and policy that disproportionately affects the homeless to a greater degree of scrutiny.

Legal scholars have argued in different contexts that the homeless should be recognized as a suspect class or at least as a quasi-suspect class. The judiciary, however, has been overwhelmingly unwilling to do so. Although there is no Supreme Court decision directly on point, courts routinely refuse to recognize homelessness as a suspect classification. Courts tend to follow three different strands of reasoning in reaching this conclusion. In Joyce v. City and County of San Francisco, the court appeared to hold that suspect classifications are limited to “race or gender.” Other

212. These are the familiarly stereotypical indicia of “homelessness.” The actual condition of homelessness, however, is more varied and difficult to define. For purposes of certain kinds of aid to states, the federal government defines “homelessness” as lacking a “fixed, regular and adequate nighttime residence,” or having a nighttime residence that is a shelter, institution, or “public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.” See 42 U.S.C.A. § 11302.
213. See range of estimates supra, note 3.
216. See Wright, supra note 5, at 198 n.519 (collecting cases).
217. 846 F. Supp. 843, 859 (N.D. Cal. 1994) (reading Personnel Adm’r of Massachusetts v. Feeney, 442 U.S. 256, 271-74 (1979), to indicate that only racial and gender classifications are suspect). Janet Halley points out that this narrow reading of the Equal Protection Clause “has not carried the day.” See Janet Halley, The Politics of the Closet:
courts simply declare without analysis—or follow as precedent earlier decisions that declared without analysis—that the homeless are not a suspect class. Finally, many courts conflate homelessness with poverty, then go on to cite Supreme Court cases holding that poverty alone does not give rise to a suspect classification.

Homelessness, however, is not identical to poverty, although the two conditions may be very closely related. The concept of homelessness implicates wealth relations only indirectly. The primary thrust of homeless status concerns a crucial property relation. None of the cases holding that poverty alone cannot trigger strict scrutiny examines the ways in which lack of a home contributes to the overwhelming disenfranchisement and oppression of homeless people. The home in liberal theory is central to the exercise of numerous important liberties. According to Waldron, people without homes lack the private and defensible space necessary to perform essential life functions. Margaret Jane Radin goes a step further, finding that the home is the paradigmatic instance of “property for personhood,” property she deems essential to the constitution and full development of human personality. Lack of this space for full personal development is the precise property relation that defines homeless status. Craig-Taylor details the ways in which African Americans are still deprived of access to


218. Kreimer v. Bureau of Police, 958 F.2d 1242 (3d Cir. 1992), is perhaps the “leading case” in this respect. To describe the holding in Kreimer as “conclusory” is generous; the court merely states in a footnote that the homeless are not a suspect class. Id. at 1269 n.36. Other courts have had no trouble citing this bald declaration as authority in dismissing suspect class arguments. See, e.g., D’Aguanno v. Gallagher, 50 F.3d 877, 879 n.2 (11th Cir. 1995); Davison v. City of Tucson, 924 F. Supp. 989, 993 (D. Ariz. 1996); Johnson v. City of Dallas, 860 F. Supp. 344, 355 (N.D. Tex. 1994), rev’d in part and vacated in part on other grounds, 61 F.3d 442 (5 th Cir. 1999); Joel v. City of Orlando, 232 F.3d 1353, 1357-58 (11th Cir. 2000) (collecting cases, including Kreimer, and declaring that “[c]onsequently, rational basis review is appropriate.”).


220. See Leckerman, supra note 214, at 563-64 (“To say that economics is solely responsible for homelessness belies the evidence of the many causes and characteristics of homelessness that show otherwise... Homelessness is a state of being, not merely an economic class.”).

221. See Waldron, supra note 6, at 301-03.

the type of property most essential to our contemporary understanding of republican citizenship.\textsuperscript{223} Furthermore, as municipal dispossession policies and numerous court decisions indicate, homeless people cannot even securely exercise a property interest in their personal belongings. As a condition in which lack of one type of property considered essential to subjecthood and citizenship defeats the ability to own any other type of property, homelessness consigns a discrete and insular minority of Americans to a status outside full legal personhood. This is exactly the type of classification that equal protection analysis should find suspect. Supreme Court precedents focusing on poverty as a potentially suspect classification do not engage in, and thus arguably do not foreclose, this type of analysis.

Beyond these philosophical arguments, homeless people and their advocates can certainly point to the ways in which homeless status impinges upon access to the political process.\textsuperscript{224} Many of the tools used by municipalities to criminalize homeless existence—ordinances prohibiting panhandling, anti-camping ordinances, laws banning sleeping in public, and the like—are adopted in majoritarian political settings to which the homeless do not have ready access.\textsuperscript{225} Daniel Levin has argued that access to this political process itself is among the privileges or immunities protected by the Fourteenth Amendment.\textsuperscript{226} Levin identifies two major interpretations of the Privileges or Immunities Clause.\textsuperscript{227} The first, epitomized by Justice Miller's opinion in the \textit{Slaughter-House Cases}, would "render the clause a nearly empty set"; the second, following Justice Bradley's \textit{Slaughter-House} dissent and Justice Black's incorporation jurisprudence, would "read richer unenumerated rights into the clause, hinting that a modern judiciary could protect these substantive rights not just pursuant to current due process

\begin{itemize}
  \item \textsuperscript{223} Craig-Taylor, \textit{supra} note 118.
  \item \textsuperscript{224} See \textit{Pottinger v. City of Miami}, 810 F. Supp. 1551, 1578 (S.D. Fla. 1992) ("This court is not entirely convinced that homelessness as a class has none of [the] 'traditional indicia of suspectness.' It can be argued that the homeless are saddled with such disabilities, or have been subjected to a history of unequal treatment or are so politically powerless that extraordinary protection of the homeless as a class is warranted.").
  \item \textsuperscript{225} Many commentators locate the primary significance of the \textit{Carolene Products} footnote in its discussion of political representation. The classic argument to this effect is \textsc{John Hart Ely}, \textsc{Democracy and Distrust: A Theory of Judicial Review} (1980). Prejudice by a majority may indicate a "distortion of the political process under which certain minorities are rendered politically powerless," thus necessitating special action and scrutiny on the part of the judiciary. See \textsc{Farber, Eskridge, and Frickey}, \textsc{Constitutional Law} 23 (2d Ed. 1998).
  \item \textsuperscript{226} Levin, \textit{supra} note 156.
  \item \textsuperscript{227} Id. at 571.
\end{itemize}
analysis, but with the Privileges or Immunities Clause as well."

Levin's argument challenges both of these readings as overlooking a middle position: that the normative content of the "privileges or immunities of citizens of the United States" is embedded in conceptions of structural participation of self-government rather than in more general notions of personal liberty... [i.e.] the participatory privileges that make up a citizen's architectural role in the political and judicial process of civil government."

For Levin, the representation-reinforcing, political process rights currently understood as arising from a concurrent reading of the Equal Protection and Due Process Clauses find better textual support in the Privileges or Immunities Clause. Levin sees the Slaughter-House Court's obsession with personal liberty and autonomy as having "bleached out" the Fourteenth Amendment's commitment to citizens' structural political participation, although the "structural privileges of citizenship (rather than the liberty rights of due process) worked as a strong undercurrent in many participatory rights decisions of the Warren Court and have worked more subtly in decisions since." Thus access to the political process itself arguably should be considered a fundamental right of citizenship.

Jason Leckerman identifies two reasons that the homeless should be considered politically powerless and thus a suspect class for equal protection purposes. First, the political process "caters to those who vote." Homeless people, by virtue of a lack of education and/or a transient existence, may have great difficulty availing themselves of this privilege. Second, the political process "caters to those who have money." Leckerman concludes that "because the homeless have historically had no political power and have not influenced the political process through either of the two..."
means through which citizens can do so, the vote or the dollar, they constitute a discrete and insular minority.\textsuperscript{235}

One objection to this type of analysis—and, indeed, to any type of argument that homelessness should be suspect—is that the category of “homelessness” itself is not rigid or immutable in the ways that other suspect classifications, such as race and gender, are supposed to be.\textsuperscript{236} The Supreme Court’s analysis in \textit{San Antonio Independent School District v. Rodriguez},\textsuperscript{237} relied upon by various lower courts in refusing to recognize homelessness as a suspect class,\textsuperscript{238} turns in part on whether a boundary firm enough for equal protection purposes can be drawn around the category of poverty.\textsuperscript{239} Because “poor” is a relative and shifting classification rather than one that signals an absolute deprivation of some identifiable good, the Court refused to hold that the residents of impoverished school districts in San Antonio were a protected class.\textsuperscript{240} Courts might raise similar objections to an argument that homeless people constitute a suspect class. Homeless people at least theoretically could find the

\textsuperscript{235} Leckerman, \textit{supra} note 214, at 565.

\textsuperscript{236} Recent legal scholarship, incorporating theories about the social construction of identity, has demonstrated how supposedly immutable categories such as “race” and “gender” vary considerably from situation to situation, depending upon who is delineating the boundaries of the classification and for what purpose. Ian Haney-Lopez argues that the law plays a critical role in constructing and reinforcing both the ideological content and the material reality of racial subordination. \textit{See} Ian Haney-Lopez, \textit{The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice}, 29 HARV. C.R.-C.L. L. REV. 1 (1994). Haney-Lopez captures the complexities inherent in the social construction of race very nicely: “Race is neither an essence nor an illusion, but rather an ongoing, contradictory, self-reinforcing process subject to the macro forces of social and political struggle and the micro effects of daily decisions.” \textit{Id.} at 7. \textit{See also} Halley, \textit{supra} note 217, at 924 (“If immutability were a requirement for strict scrutiny under the equal protection clause, race could not be a suspect classification . . . . [T]he very conception of race, and the taxonomy of “races,” are products of culture rather than of nature. . . . If the boundaries between races can shift, the racial categorization of individuals can shift—a profound source of mutability.”) This kind of scholarship suggests that the law itself (re)produces, rather than merely depends upon, the “immutability” of the classifications on which equal protection jurisprudence sometimes relies.

\textsuperscript{237} 411 U.S. 1 (1973).

\textsuperscript{238} \textit{See} note 218, \textit{supra}.

\textsuperscript{239} Justice Powell, writing for the majority, criticized the District Court for failing to consider “the hard threshold questions, including whether it makes a difference for purposes of consideration under the Constitution that the class of disadvantaged ‘poor’ cannot be identified or defined in customary equal protection terms, and whether the relative—rather than absolute—nature of the asserted deprivation is of significant consequence.” \textit{Rodriguez}, 411 U.S. at 19.

\textsuperscript{240} Distinguishing prior cases in which poverty had resulted in some clear and absolute kind of deprivation, Justice Powell criticized the plaintiffs for failing to “[define] the term ‘poor’ with reference to any absolute or functional level of impecunity.” \textit{Id.} at 19 n.49 (emphasis added).
assistance or resources necessary to put an end to their homeless status. Furthermore, the conditions of homelessness (in terms of deprivations suffered and legal barriers imposed) vary widely between and even within jurisdictions. Accordingly, a court might follow Justice Powell’s lead in Rodriguez, and refuse to recognize that homelessness is immutable enough even to warrant definition, much less protection.  

This objection ignores, however, the extent to which the “traditional indicia of suspectness” are materially present for people who are homeless, regardless of whether they may at one time have been or might in the future again be housed. With respect to the first part of the Rodriguez test, homeless people are subject at any given moment to arbitrary deprivations of property and liberty. Their most fundamental life activities are regulated and proscribed, they lack any permissible place in which to be, and they cannot exercise a recognized property interest in their most valued personal possessions. These are profound disabilities that indicate not only the suspectness of homelessness but also the sub-person status it imposes. Moving on to the second part of the test, city councils and business leaders openly conspire to drive the homeless from the areas in which they live. Journalists and housed citizens react to their very presence with disgust and horror. Twentieth-century popular Americana is replete with references to the ill treatment of the vagrant, the hobo, the bag lady, the bum. These are certainly indications of a history of purposeful unequal treatment. Finally, homeless people face incredible difficulty registering to vote and otherwise participating in the political process. It seems the height of callousness for courts to refuse special scrutiny of laws that disadvantage homeless people because particular individuals might one day no longer be among the group thus disadvantaged.

241. In a slightly different context involving an Eighth Amendment challenge to San Francisco’s anti-homeless “Matrix” program, the District Court held that “fundamentally, homelessness is not readily classified as a ‘status.’” Joyce v. City & Cty. of San Francisco, 846 F. Supp. 843, 857 (N.D. Cal. 1994). The court took great pains to differentiate the “condition” of homelessness from a “status” like drug addiction, holding that “[t]o argue that homelessness is a status and not a condition... is to deny the efficacy of acts of social intervention to change the condition of those currently homeless.” Id. The court then declined to engage in any such intervention by refusing relief from the anti-homeless ordinances and enforcement policies that became notorious under “Matrix”: “it would be an untoward excursion by this Court into matters of social policy to accord to homelessness the protection of status.” Id. at 858.

242. Rodriguez, 411 U.S. at 28 (“The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”).
The notion of immutability thus should not distract courts from what many consider to be the central purpose of the Carolene Products footnote: to protect minorities from burdens imposed by a distorted majoritarian political process. Janet Halley argues persuasively that "immutability is neither a necessary nor a sufficient precondition for the recognition of a suspect classification, and where it has appeared as a factor in the Court's analysis, it has always been shorthand for inquiry into the fairness of the political process burdening the group." For Halley, the suspect class inquiry is better characterized as a search for "acute vulnerability in the political process" rather than an inquiry into the "immutability of any trait uniting or defining the group." This observation not only lends additional weight to the more traditional political process argument but also provides a basis for distinguishing, or better, revisiting, Rodriguez and its progeny. Several key factors attendant upon homelessness—difficulty registering to vote, lack of access to politicians and the media, and sub-citizen status imposed by a property disability—directly impede homeless people's access to municipal political processes and local political discourse. It is the inability of the homeless to participate in the political process that defines and constrains their existence, not their poverty, which requires strict scrutiny of legislation and policies that contribute to their disenfranchisement.

This latter point is important. It is in the debates among policymakers and in the pages of newspapers that the popular understanding of homelessness is constructed and municipal approaches to homeless existence are formulated. Letters from suburban shoppers and tourists to the editors of metropolitan papers frame policies aimed at excluding the homeless from commercial centers. Stereotypical representations of filth, addiction, and begging, repeated by influential journalists, shape policies aimed at "cleaning up" cities. These policies target public sleeping,
panhandling, and urination—in essence, all of the basic life activities that homeless people are unable to perform in private. Thus homeless people generally do not participate in the popular and legal construction of what it means to be a homeless person; it follows that they have little influence over the enactment of punitive and discriminatory policies shaped by popular representations of what homelessness means. The homeless not only have immense trouble registering, voting, and influencing the outcome of city council meetings and internal police department procedures, but also play only an attenuated role in the often more important process of framing the relevant issues for debate, the most crucial of which is what it means to be homeless.

The homeless should be treated as a suspect class, therefore, on two grounds. First, cases holding that poverty is not a suspect classification can be distinguished because homelessness as a status concerns a property relation rather than a relative degree of wealth. Second, homeless people meet the tests set out in Rodriguez for a class displaying all the requisite "indicia of suspectness," chiefly their vulnerability to burdensome and discriminatory laws and policies adopted through majoritarian political processes to which they have limited access. These processes define not only what they may and may not do, but also who they are, in the eyes of the law. The homeless do not represent themselves fully in any of these processes, and thus require the special protection envisioned in the Carolene Products footnote.

D. Toward a Right to Shelter

None of the remedies considered in this section, however, address the primary problem posed by Jeremy Waldron: that the homeless, because of the operation of background property principles, have no place to be. 247 This condition exposes homeless people's personal belongings to most of the depredations considered in this paper. Unable to be anywhere legally, homeless people and their belongings both suffer. While creative constitutional arguments and individual lawsuits may provide some relief, the only truly adequate remedy for the property disability imposed on homeless people is a remedy for homelessness itself.

To this end, government should provide secure and permanent shelter for everyone who needs it. Constitutional arguments based on a property disability may not entirely compel this conclusion, although to the extent such arguments demand an effective remedy, they do support it. So do empirical studies of supportive housing.

247. See Part I.A.1, supra.
The unequal treatment of homeless people imposes huge costs on society, both financial and moral. Indeed, taking the moderately redistributive steps necessary to guarantee permanent housing and adequate treatment for the nation’s homeless could prove both more constitutionally palatable and more cost-effective than continuing an ad hoc policy of repression, incarceration, and dispossession.

**Conclusion**

The condition of homelessness and the response of both municipalities and courts to homeless people combine to undermine homeless people’s ability to exercise a property interest in their personal belongings. While this can be characterized as a de facto property disability, it is nonetheless rooted in law. Local exercises of police power, background property and trespass principles, and the vagaries of jurisprudence are among the primary socio-legal factors currently depriving homeless people of their last remaining belongings. Given the history of the Reconstruction Amendments and the broad principles of citizens’ rights that supported the abolition of slavery, the creation of a new property disability and its imposition on modern American citizens should be considered constitutionally troubling enough to justify adequate remedies. Rather than pursue policies of criminalization, harassment, depersonalization, and dispossession in the streets and the courts of our country, governments from the local to the federal should join with homeless people in an effort to provide safe, supportive, and permanent shelter for America’s dispossessed.

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248. Hoge, supra note 9, at A20. Hoge cites a University of Pennsylvania study concluding that “it costs nearly the same amount of taxpayer money to keep [some 5,000 mentally ill homeless] people on the streets as it does to give them permanent housing with voluntary services for mental health, substance abuse and employment issues.” Another study cited in the article, by the Goldman School of Public Policy at the University of California, Berkeley, found that supportive housing dramatically reduced the health care costs of homeless and inadequately housed participants. See Hoge, supra note 60, at A1. In all fairness, San Francisco is also recognized as a leading city in terms of supportive housing and other services. See Hoge, supra note 9, at A20.

249. By one estimate, San Francisco spends “about $22,000 every hour on homeless people.” Hoge, supra note 58, at A1. This figure ostensibly includes the $650,000 per year that the city spends on confiscating shopping carts full of homeless people’s belongings. See Hoge, supra note 60, at A1. In all fairness, San Francisco is also recognized as a leading city in terms of supportive housing and other services. See Hoge, supra note 9, at A20.

250. “Studies show that the United States could clear its streets of most of the homeless, and ultimately save money, if it would just commit nationally to providing permanent, supportive housing to all who need it. . . . Despite evidence that such housing could provide a national solution to the problem of homelessness, there is little political will to turn funding in this direction.” Id.