

This PDF includes a chapter from the following book:

# **Just Housing**

## **The Moral Foundations of American Housing Policy**

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# Notes

## Introduction

1. The US Department of Housing and Urban Development defines a severe housing problem as an expenditure on rental housing costs that exceeds 50 percent of a household's income or the condition of living in homes with severely inadequate plumbing, heating, electrical systems, or upkeep (Watson et al. 2020).
2. The US Department of Housing and Urban Development defines a family as very low income if it earns an income that does not exceed 50 percent of the median family income for the surrounding metropolitan area (US Department of Housing and Urban Development 2019). As this book goes to press, rents have begun to decline within the largest US cities, as many of the most mobile urban workers have abandoned urban living to reduce their exposure to COVID-19 (Salviati, Popov, and Warnock 2020). The long-term effects of this trend on urban housing affordability are unclear, particularly given that the least mobile urban workers have also been hit the hardest by unemployment.
3. The term "manifesto right" comes from Joel Feinberg (1973).

## Chapter 1

1. Refer to Risse (2012) for a discussion of these and other grounds of justice.
2. According to Jeremy Waldron (1988, 64), "In any but the most intuitionistic moral or political theory, it is possible to distinguish between judgements or propositions that are more or less basic in the sense that less basic judgements are derivable from or justified by more basic ones (perhaps with the help of premises concerning matters of fact)."
3. Ronald Dworkin (1978) assumes that right-based and duty-based theories are grounded in an individualistic morality. As I discuss later in the book, right-based theories may also be grounded in a collectivistic morality.

4. The term “impartial spectator” comes from Adam Smith (2000 [1759]).
5. I draw inspiration for the inquiry into housing’s special moral qualities from Shlomi Segall (2010), who asks a similar question in defense of his conception of justice in health and health care.
6. Another way of saying the same thing is to say that housing’s value to an owner reflects both an investment value and a consumption value (Ioannides and Rosenthal 1994).
7. The view that value diversity has intrinsic rather than instrumental value is itself a controversial conception of value on which to ground distributive principles.
8. Adams (1932, 404) defines the American dream as a “dream of a land in which life should be better and richer and fuller for every man, with opportunity for each according to his ability or achievement.”
9. This book’s definitions of *liberalism* and *republicanism* draw from the standard definitions given by political philosophers and should not be confused with the definitions often given by contemporary American politicians and pundits. In contemporary political discourse, the term *liberal* typically describes political views that are consistent with left-leaning welfare-state liberalism, whereas the term *republican* typically describes the conservative views advanced by the Republican political party. Contemporary Democrats in the United States often hold republican views of civic life, while Republicans often favor economic policies that are consistent with classic liberalism.

## Chapter 2

1. The legal protections for home under ancient Roman law were not based on the idea of homeownership as it is understood today. The idea of ownership, or *dominium*, did not emerge until the end of the Roman republic, after the time of Cicero (Domingo 2017).
2. The idea of home and property as a physical domain of privacy and exclusion traces back to the English practice of enclosing land to improve the efficiency of sheep grazing. Until the mid-1500s, land for grazing was owned by feudal lords and available for common use by tenant farmers. Farmers soon learned that by enclosing a portion of the commons, through a process known as “engrossment,” sheep could be more closely monitored, and the concentration of sheep manure deposits helped to fertilize the soil (Linklater 2013).
3. A similar conception of the “right to necessity,” or “subsistence right,” can be found in the writings of Thomas Aquinas, Hugo Grotius, Samuel Pufendorf, and Francis Hutcheson (Mancilla 2016).

4. Richard Dagger (1997) offers a contemporary political theory that fuses liberalism and republicanism.
5. Despite early experimentation with communal systems of land ownership, most land in the American colonies would eventually be privately owned fee simple or through a similar system known as “free and common socage” (Price 1995).
6. John Stuart Mill (1965 [1848]) made a similar argument years earlier, referring to the increased value of land attributable to collective improvements as the “unearned increment” of land value. Mill argued that the unearned increment of land value should be taxed, whereas Henry George argued that land value minus the value of property improvements should be taxed.
7. The connection between labor and land reform in New York is somewhat unique, given the historical ties between these two movements since the early 1800s. In Chicago, for example, labor leaders sought to improve workers’ housing conditions by boosting wages. In their call for a citywide strike in July 1881, labor reformers conflated employers with landlords, urging workers to strike against both. Chicago labor activist Joseph Gruenhut regularly attacked employers and landlords, arguing that higher wages and the expansion of homeownership opportunities were the keys to improving workers’ living conditions (Garb 2003).
8. While the building and loan industry was in its infancy in the early nineteenth century, it was well developed, albeit local, after the 1870s (D. Mason 2004).

### Chapter 3

1. In *Trustees of Dartmouth College v. Woodward* (1819), the court held that corporations enjoyed the right to enter into contracts, and in *Pembina Consolidated Silver Mining Company v. Pennsylvania* (1888), the court held that the rights of due process applied to corporations.
2. Unlike the property and contract clauses of the Constitution, which limit the government’s ability to interfere with private property rights, the police power doctrine justifies government restrictions on private property rights, provided those restrictions are designed to enhance public health, safety, and welfare. Police powers are not explicitly enumerated but are implied by the Tenth Amendment, which reserves certain powers to state governments.
3. Some scholars argue that despite its radical intent, the abolitionist movement ironically laid the groundwork for the liberty of contract doctrine by providing rhetorical ammunition for an expansive reading of free labor ideology to include protections against any government-imposed constraints on employment contracts, including government measures designed to improve working conditions (Ely 1998).

4. "By Utilitarianism is here meant the ethical theory, that the conduct which, under any given circumstances, is objectively right, is that which will produce the greatest amount of happiness on the whole; that is, taking into account all whose happiness is affected by the conduct" (Sidgwick 1890, 411).
5. Although not always acknowledged by the progressives, American land reformers made this same argument but from a natural rights perspective. Thomas Skidmore argued for a stronger state role in limiting the amount of land that could be owned, and anarchists such as Benjamin Tucker, Ezra Heywood, and Joshua Ingalls argued that property rights should be limited to the rights of occupancy and use only. Similarly, Henry George's single tax constrained the right to earn income from land.
6. Homer Hoyt questioned Burgess's assertion that cities grew outward in well-defined circles of activity. His "sector theory" was based on the idea that activities tended to concentrate in sectors that extended outward radially from the center (Gottdiener, Hutchison, and Ryan 2014).
7. Simon Patten criticized the negative understanding of freedom because it "put the freedom of person above group welfare" (Schafer 2000, 53).
8. Baltimore's 1910 law was preceded by a report commissioned by the city's Charity Organization Society that proposed a dual regulatory system that differentiated between tenement and alley house districts. Within the alley house districts, which housed a large concentration of Baltimore's Black population, the report recommended the adoption of stringent regulatory measures that included mandated reductions in housing density, condemnation of uninhabitable dwellings, a ban on sleeping in basements, and prohibitions on the construction of new alley housing. The report also singled out the city's Black alley house residents for criticism, condemning the "gregarious, light-hearted, shiftless, irresponsible alley dwellers" and their "low standards and absence of ideals" (Power 1983, 297).
9. In Boston, Benjamin Flower applied Georgist reasoning to the slum problem. He wrote that the landlord has no incentive to improve his dwellings, because "he will have his taxes doubled or tripled for his pains." Facing these disincentives to improve the "death-dealing atmosphere" of rented dwellings, the landlord enjoys an "enormous per cent on his investment" (Kersten 1973, 22).
10. Robert Wiebe (1967, 176) argues that New York State housing regulations succeeded "primarily out of upstate Republican antagonism to Tammany Hall."

## Chapter 4

1. The characterization of American federal housing policy in terms of its "two tiers" comes from Gail Radford (1996).

2. In New York, the number of persons per dwelling unit declined from 20.4 persons per dwelling in 1900 to 12.3 in 1930 (Barrows 1983).
3. In the manufacturing sector, real wages fell by 15 percent between 1929 and 1932 (Wolman 1933).
4. Catherine Bauer changed her name to Catherine Bauer Wurster in 1940, when she married architect William Wurster.
5. Richard T. Ely described American homebuilding as a process where the family would first “buy the site, gradually pay for it, then . . . mortgage it through a building and loan association or otherwise . . . construct the home with the aid of the mortgage and gradually . . . extinguish the mortgage” (Harris 2009, 526).
6. Whereas in *Muller* Brandeis appealed to social science evidence to argue in favor of the disparate treatment of women working in factories, in *Shelley* NAACP lawyers relied on social science evidence to argue against the disparate treatment of Black home seekers.
7. The Douglas Commission’s report was not released until after the adoption of the Fair Housing Act.
8. The “right to community” should not be confused with Lefebvre’s (1968) “right to the city.” I discuss the right to the city in later chapters.
9. The Back-of-the-Yards district had earned notoriety when Upton Sinclair described the deplorable living and working conditions of its residents in *The Jungle* (1906).
10. The Back-of-the-Yards Council was known for its slogan, “We, the people, will work out our own destiny” (Jacobs 1961, 297).
11. Earlier in 1947, philosophers had been asked to reflect on the question, “How is an agreement conceivable among men who come from the four corners of the earth and who belong not only to different cultures and civilizations, but to different spiritual families and antagonistic schools of thought?” (Glendon 2002, 222).
12. Appeals to republican values could only be taken so far. Because most republicans believed that those without property lacked the civic virtues to govern themselves, republican arguments often justified exclusionary restrictions on political enfranchisement.

## Chapter 5

1. In the US Court of Appeals case *Williams v. Barry* (1983), Judge Robert Bork made a similar argument, writing that “no one has plausibly maintained that there is a Constitutional or other legal right to city-provided shelter” (Berger 1991, 325).

2. The push for a reform of relations among federal, state, and local governments was initiated by the establishment of the Advisory Commission on Intergovernmental Relations in 1959 under President Dwight Eisenhower. During the 1960s, scholars such as Vincent Ostrom, Charles Tiebout, and Robert Warren took an interest in questions related to the appropriate scale of governance for local public goods when citizens have heterogeneous preferences for the level and mix of goods (Ostrom, Tiebout, and Warren 1961).

3. The federal government only allowed savings and loan (S&L) institutions to pay interest rates on deposits that were substantially below the interest rates on deposits paid by banks. Also, the federal government allowed S&Ls to originate only mortgages, not any other lending products. In short, S&Ls funded their long-term, fixed-rate mortgages with short-term deposits. This strategy became increasingly risky in the late 1970s and early 1980s, when inflation and interest rates dramatically increased, creating a funding crunch for most S&Ls. Although regulators responded by deregulating the S&L industry in the early 1980s, a vast number of S&Ls collapsed, were bailed out by taxpayers, or were absorbed by banks in the late 1980s and early 1990s (Hays 2012; D. Mason 2004).

4. Fannie Mae was created as a government agency in 1938 to purchase FHA-insured loans and was chartered as a GSE in 1968. In response to growing concerns about Fannie Mae's visible public debt liability, in 1968 Congress split Fannie Mae into two units: the Government National Mortgage Association (Ginnie Mae), which remained a government entity that bought government-issued affordable housing loans that were sold to investors, and the privatized Fannie Mae, henceforth owned by stockholders while retaining its public mission. When Fannie Mae was converted from a government agency to a regulated GSE, it was authorized to purchase non-FHA-insured conforming mortgages that met certain loan size requirements (Hays 2012).

5. I participated in several research symposia sponsored by the PATH regulatory barriers initiative.

6. The Housing and Community Development Act of 1974 resurrected the rhetoric of the nineteenth-century land reform movement to expand homeownership opportunities for the urban poor under the newly repackaged label of "urban homesteading." Section 810 authorized HUD to transfer repossessed residential properties to localities for use in a HUD-authorized urban homesteading demonstration program, building on the local successes of earlier programs in Baltimore, Philadelphia, and Wilmington (Blackburn, Millman, and Schnare 1981, 1).

7. The community land trust movement arose from the efforts of civil rights leaders Robert Swann and Slater King to establish New Communities, Inc., a large land trust in Lee County, Georgia.

8. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.* (1977), for example, the finding that Arlington Heights was overwhelmingly white led

the court to override a local zoning ordinance that precluded the construction of low-income housing that “would be a significant step towards integrating the community” (Gordon 2006, 444). In this case, disparate impact was defined in terms of “the effect which the decision has on the community involved; if it perpetuates segregation and thereby prevents interracial association” (Gordon 2006, 443–444). At issue in the *TDHCA v. ICP* case was whether allocating too many LIHTCs to majority-Black inner-city neighborhoods and too few to predominantly white suburban neighborhoods constituted a disparate impact. To support its *prima facie* case, it was shown in a lower district court decision that “from 1999–2008, [TDHCA] approved tax credits for 49.7% of proposed non-elderly units in 0% to 9.9% Caucasian areas, but only approved 37.4% of proposed non-elderly units in 90% to 100% Caucasian areas.” Second, it found “92.29% of [LIHTC] units in the city of Dallas were located in census tracts with less than 50% Caucasian residents” (*TDHCA v. ICP*, 576 U.S. \_\_\_ 2015, 3). Thus, unlike individual instances of discrimination, where it must be shown that an individual was denied a single housing opportunity because of the individual’s membership in a protected class, litigants of disparate impact cases typically rely on statistical evidence to demonstrate that a given policy or practice has the effect of perpetuating the spatial segregation of protected class members.

## Chapter 6

1. Nussbaum argues that if one has a right to shelter, it is better to understand this right in terms of capabilities, rather than in terms of resources or utility, because

giving resources to people does not always bring differently situated people up to the same level of capability to function. The utility-based analysis also encounters a problem: traditionally deprived people may be satisfied with a very low living standard, believing that this is all they have any hope of getting. A capabilities analysis, by contrast, looks at how people are actually enabled to live. Analyzing economic and material rights in terms of capabilities thus enables us to set forth clearly a rationale we have for spending unequal amounts of money on the disadvantaged, or creating special programs to assist their transition to full capability. (Nussbaum 2000, 99)

2. Some liberals interpret the public-private distinction as an order of justification for public action that assumes a presumption in favor of private liberty (Gaus 2011). Other liberals interpret the public-private distinction as an assumption about the scope of justice. In the Lockean conception of justice, for example, justice pertains only to the laws governing relations outside the private realm. Contemporary “public reason” liberals such as Rawls (1971) interpret the public-private distinction as a constraint on the reasons that may be presented in defense of public laws and institutions.

3. The distinction between moral equality and relational equality is inspired by, but subtly different from, Rondel’s (2018) distinction between horizontal and vertical equality.



4. Refer to Wall (1998) for an elaboration on the tensions between perfectionism, state neutrality, and the promotion of autonomy.
5. Refer to Raz (1986) for an argument supporting the view that the promotion of autonomy is consistent with Mill's (1978 [1859]) harm principle.
6. As discussed in chapter 1, utilitarianism also provides a justification for being concerned about extreme levels of housing inequality, because the positionality of housing and the law of diminishing marginal utility imply that extreme inequalities in housing consumption may reduce aggregate utility.
7. The argument that choice justifies certain inequalities has been the focus of a sustained critique by many relational egalitarians. "Luck" egalitarians such as Ronald Dworkin (2000), Richard Arneson (1989), and G. A. Cohen (1989) argue that as long as any morally arbitrary conditions arising from luck or other circumstances beyond one's control have been neutralized, any remaining inequalities that arise from free choice are just. Furthermore, as long as everyone faced an acceptable range of opportunities prior to making a choice, any inequalities resulting from choice are just. This argument has intuitive appeal as an answer to the question of why equality matters, but it also has perverse implications for housing justice. First, some may make poor choices that render them without any housing whatsoever. Second, one's choices are often influenced by relations of social domination or oppression. Third, the choice between two equally bad alternatives is arguably not a free choice. Fourth, extreme housing inequalities, particularly those caused by prejudice or discrimination, may be unjust from a relational equality perspective even if the inequalities resulted from free choice. Fifth, the sufficientarian objection still applies. If all that matters from the standpoint of justice is everyone having their most basic housing needs met, housing inequalities above the threshold of sufficiency are not a concern of justice. Elizabeth Anderson (1999) elaborates on these and other objections to luck egalitarianism.
8. Theorists have traditionally understood rights in one of two ways. Interest-based theorists understand rights as morally weighty interests that obligate some other party to take action to satisfy that interest, where interests are defined in terms of the aims of each rightholder, taken one at a time (Raz 1986). Choice-based theorists understand rights not in terms of the interests that they serve but in terms of the zone of decision-making autonomy within which the rightholder has discretion to act (Hart 1955). Both conceptions have limitations. The interest-based theorist must respond to the challenge that the value of the interests justifying rights is agent-relative and incommensurable with the value of the same interest for other agents. The choice-based theorist must provide an account of rights that does not require the rightholder to possess the power to waive others' duty to satisfy rights (Mack 2000). Eric Mack (2000) offers a third "jurisdictional" conception of rights that responds to both these challenges.
9. The term "predistribution" comes from Jacob Hacker (2011).

## Chapter 7

1. According to G. W. F. Hegel (1967 [1821]), individuals possess free will independently of any relation to material objects, but full development of the autonomous will is only possible through the embodiment of the will in external objects. Embodiment includes both the possession and use of an object, and it is through embodiment that people's subjective conception of themselves becomes concrete and recognizable to themselves and others (Waldron 1988).

2. According to Allan Gibbard (1976, 77), "If a person owns a thing, his ownership enhances his liberty, but it does so at the expense of the liberty of others. Ownership of a thing gives a person the right to exclude others from its use, and that right, though it adds to the freedom of the owner, detracts from the freedom of those others."

3. The pervasiveness of propertylessness in a world where others own property has led some to conclude that private property cannot be justified. During the English Civil War, various revolutionary groups argued that unless everyone had access to some property, the institution of property was illegitimate. The Diggers denied that God had granted land to man for exclusive appropriation, and they sought to return to a state of communally owned land. The Levellers took a different approach and argued that property rights are legitimate only if everyone has the same amount of property (Linklater 2013). Pierre-Joseph Proudhon (1876) famously equated private property with robbery. For Karl Marx, the right of private property "leads every man to see in other men not the realization, but rather the limitation, of his own liberty" (Tucker 1978, 42). Marx believed that private property institutionalizes the illusion that freedom consists in the separation among human beings.

4. Homeowners who are unable to stay current on their mortgages face the threat of foreclosure and lack secure control rights. For these homeowners, the tenure security requirement justifies a variety of foreclosure prevention and mediation measures that help homeowners remain in their homes.

5. Under LEC arrangements, occupants' ownership shares are tied to a long-term lease, and the occupant enjoys a durable right of occupancy that includes the rights to exchange and alienate ownership shares upon residential mobility.

## Chapter 8

1. Homeownership tax expenditures in the 2020 tax year are lower than in previous years due to reductions in homeowners' tax benefits following the Tax Cuts and Jobs Act of 2017.

2. Milton Friedman (1962) popularized the negative income tax idea.

3. One concern with a housing wealth increment tax is that it may reduce homeowners' willingness to sell homes, creating supply shortages in tight housing markets. An alternative approach that is less likely to have negative supply-side impacts is an annual tax on the stock of housing wealth or a tax on those who own homes that are more expensive (Dawkins 2020a).
4. If the tax on imputed rental income is equal to some fraction of estimated housing value and housing capital gains are also taxed, the full annual negative housing tax obligation for those who sell their homes at the end of the tax year is equivalent to a tax on the stock of housing wealth.
5. Another critique of the negative housing tax is that it is likely to encounter political resistance, particularly among elderly homeowners, who may not have the financial means to pay the housing consumption tax. One simple solution to this problem is to exempt low-income seniors from negative housing tax obligations. Another approach is to award low-income seniors who "age in place" a tax credit equal to the housing wealth increment tax revenue that would have been generated from the sale of a home (Dawkins 2020a).
6. Complex equality is not the only distributive principle that considers the interrelations among different goods. Standard neoclassical economic models, for example, assume that utility is maximized when the marginal utility per dollar spent on each good is equal across all goods consumed. The question that remains is whether the distributive relationships among different goods are best understood through the lens of complex equality or an approach that aims to achieve complementarity between the distributive principles of different distributive spheres.
7. For example, if local public education is a good that should be distributed to everyone at a minimum level of adequacy, but adequate education can only be accessed in areas where housing is expensive, the source of the injustice is the dominance of the sphere of housing over the sphere of education, irrespective of how housing or education should be distributed.
8. Galster (1992) argues that a stable integrative process does not require restrictions on housing choice to promote integration but is consistent with choice-expanding options such as race-based affirmative marketing strategies and the provision of information to those seeking to make prointegrative moves. Race-based marketing strategies potentially improve relational equality, but they also risk perpetuating the commodification of race within housing markets, only in a prointegrative fashion.

## Conclusion

1. Tigg Montague is a loan shark who announces that "charity begins at home, and justice begins next door" in Charles Dickens's novel *Martin Chuzzlewit*.