

NEW JERSEY'S CONSTITUTIONAL NEGATIVE RIGHT TO SHELTER

Brett G. Weise*

ABSTRACT

“The point is to make it uncomfortable enough for them in our city so they will want to move on down the road.”

– Lily Morgan, Grants Pass City Council President.¹

Lily Morgan, here referring to the unhoused in her city, is anything but a lone crusader. After her city's anti-camping ordinance was upheld against a Cruel and Unusual Punishment Clause challenge in Johnson v. City of Grants Pass, the U.S. Supreme Court cleared the way for cities nationwide to deprive the civility and dignity of our country's most vulnerable citizens—our unhoused neighbors. Public officials are responding accordingly, effectively banishing homeless communities into exile. This comes at a time when states are grappling with a homelessness crisis.

New Jersey is no exception. But New Jersey is not without recourse. The seminal decision of the New Jersey Supreme Court in Southern Burlington County NAACP v. Mount Laurel Township provides an analytical framework by which shelter should be recognized as a negative right under the state constitution—protecting individuals against government punishment for simply being unsheltered.

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1. Sam McCann, *Will the Supreme Court Criminalize Homelessness?*, VERA INST. JUST. (June 6, 2024), <https://www.vera.org/news/will-the-supreme-court-criminalize-homelessness>.

This Note will argue that the New Jersey Constitution provides for a negative right to shelter, implicit within its text. Recognition of a negative right to shelter would ensure that the government be restrained from exacting any civil or criminal punishment for the status of being homeless unless and until the government provides adequate shelter. Fundamental guarantees of substantive due process and equal protection compel this outcome.

This Note will review the Mount Laurel decision and its progeny, articulate its constitutional principles, and apply them to unsheltered homelessness. Fifty years of case law proves that extending the Mount Laurel doctrine to unsheltered homelessness is not a radical proposal but the natural result of the doctrine's reasoning.

Addressing homelessness is fundamentally a public policy issue. No court can issue a decision that will build the millions of homes necessary to exit the affordable housing crisis. But, this Note will explain why, even with inadequate funding and enforcement, a negative right to shelter alone will provide significant protection for New Jersey's homeless population. A negative right to shelter is not a departure from the strictures of the Mount Laurel doctrine—on the contrary, it is entirely within the spirit of the law.

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I. INTRODUCTION

Jermaine Lee “Cat” White is unhoused.² Despite his severe PTSD and anxiety, he has managed to survive.³ However, it has not been easy. The city where he lives conducts frequent sweeps of encampments. Cat has been targeted through these sweeps on several occasions. “During one sweep, the City destroyed his four bikes, his guitar, and everything else in his camp, all of which were destroyed by trash compactors.”⁴ On a separate occasion, “the City came out in riot formation to destroy people’s belongings, and he was too traumatized to stay and watch his belongings be destroyed.”⁵ At no point had the city stored any of his belongings during any of the evictions that he had been subjected to.⁶ For Cat, each sweep robs him of his livelihood: “People in my situation, we grow so attached to our belongings. . . . [E]verything that we have is home.”⁷

Cat and six others sued the city for various constitutional violations, including the deprivation of their Eighth Amendment right against cruel and unusual punishment.⁸ Less than a year later, the U.S. Supreme Court in *City of Grants Pass v. Johnson* emphatically announced that encampment sweeps do not constitute cruel and unusual punishment, even when zero shelter beds are available.⁹ This compels an ultimatum for the unsheltered: leave the city or go to prison. Cat and the other plaintiffs in his case were forced to dismiss their Eighth Amendment claim.¹⁰

Grants Pass overruled a Ninth Circuit case, *Martin v. City of Boise*, that afforded a class of homeless individuals a remedy through the Eighth Amendment—the invalidation of Boise’s anti-camping ordinance.¹¹ Before *Grants Pass*, courts outside the Ninth Circuit had

2. Prado v. City of Berkeley (*Prado II*), No. 23-CV-04537, 2024 WL 3697037, at *3 (N.D. Cal. Aug. 6, 2024).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Supriya Yelimeli, *Berkeley’s Biggest Homeless Camps Were Closed. Where Are the Residents Now?*, BERKELEYSIDE (Sept. 2, 2021, 1:54 PM), <https://www.berkeleyside.org/2021/09/02/berkeleys-biggest-homeless-camps-were-closed-where-are-the-residents-now> [https://perma.cc/8PL2-74RB].

8. Prado v. City of Berkeley (*Prado I*), No. 23-CV-04537, 2023 WL 6307921, at *7 (N.D. Cal. Sept. 27, 2023).

9. 603 U.S. 520, 542–43, 553–54 (2024).

10. *Prado II*, 2024 WL 3697037, at *27.

11. 603 U.S. at 556 (characterizing the *Martin* decision as an “experiment” and overruling the Ninth Circuit’s decision). See generally *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019).

considered adopting *Martin's* reasoning.¹² This includes the Third Circuit, of which New Jersey is a constituent state.¹³ Now, cities are rushing to criminalize unsheltered housing, passing bans on public camping and vagrancy.¹⁴ This shift has been rapid, with advocates characterizing post-*Grants Pass* encampment bans as a swing of the pendulum.¹⁵ With more than 10,000 residents of New Jersey experiencing homelessness, this swing could be devastating.¹⁶ And while Black residents make up twelve percent of New Jersey's population, roughly half of all unhoused individuals in the state are Black.¹⁷ Nearly half have a disability.¹⁸ More than a third of homeless "households" are families with at least one child under the age of eighteen.¹⁹ The demographics of homelessness in New Jersey reflect a profoundly inequitable system beset by decades of institutionalized racism and anti-poverty sentiment.

12. See, e.g., *Murphy v. Raoul*, 380 F. Supp. 3d 731, 763, 766 (N.D. Ill. 2019) (granting summary judgment to homeless plaintiffs on Eighth Amendment claim, who alleged they were being punished for their "status"); *Geddes v. City of Boston*, No. SJ-2021-0408, 2021 WL 5441085, at *1 (Mass. Nov. 10, 2021) (expressing willingness to adopt *Martin*, but remanding for further fact-finding by the trial court).

13. See *Better Days Ahead Outreach Inc. v. Borough of Pottstown*, 703 F. Supp. 3d 581, 585, 588–90 (E.D. Pa. 2023) (granting preliminary injunction against Pottstown's ejection of encampments on city property on the basis of the Eighth Amendment). The Borough of Pottstown filed a notice of appeal of the decision in January 2024. The U.S. Supreme Court decided *City of Grants Pass v. Johnson* just a few months later. While this matter was still on appeal at the time this Note was written, the litigants are almost certain to stipulate to a dismissal of their Eighth Amendment claim.

14. Thomas Birmingham, *Cities Rush to Criminalize Homelessness After Supreme Court Ruling*, APPEAL (Aug. 27, 2024), <https://theappeal.org/supreme-court-homelessness-grants-pass-ruling-camping-bans/> [https://perma.cc/J2KD-FKA5]; Jennifer Ludden, *100-plus US Cities Banned Homeless Camping This Year After Grants Pass Ruling*, OR. PUB. BROAD. (Dec. 26, 2024, 10:10 AM), <https://www.opb.org/article/2024/12/26/homeless-camping-ban-grants-pass/> [https://perma.cc/KMX2-XJM8] (explaining that anti-camping laws have been passed in rural, urban and suburban towns and cities, in both Republican-led and Democrat-led municipalities).

15. Jim Hinch, *'The Pendulum Has Swung.' Countywide Momentum Gathers for Homeless Encampment Bans*, VOICE OF SAN DIEGO (Sept. 16, 2024), <https://voiceofsandiego.org/2024/09/16/the-pendulum-has-swung-countywide-momentum-gathers-for-homeless-encampment-bans/> [https://perma.cc/4FHN-A7KV].

16. MONARCH HOUS. ASSOCS., *NEW JERSEY 2023 POINT-IN-TIME COUNT 4* (2023), <https://monarchhousing.org/wp-content/uploads/2023/08/New-Jersey-PIT-Report-2023.pdf> [https://perma.cc/JH78-3PTX].

17. Dana DiFilippo, *Homelessness Continues Climbing in New Jersey, New Annual Count Shows*, N. J. MONITOR (Oct. 22, 2024, 5:35 PM), <https://newjerseymonitor.com/2024/10/22/homelessness-continues-climbing-in-new-jersey-new-annual-count-shows/> [https://perma.cc/FS5N-9ADN].

18. *Id.*

19. *Id.*

While *Grants Pass* was a major setback for the millions of people in America without a home, the Eighth Amendment is not the only recourse for those challenging punitive measures against homelessness. With limited success, litigants have pursued claims under the umbrella of federal law, such as the state-created danger doctrine,²⁰ the Fourth Amendment prohibition against unreasonable seizures,²¹ and the “right to travel.”²²

However, there is one potentially overlooked source of protection for the unsheltered: state constitutions. For instance, the New Jersey Constitution begins with a profound declaration:

All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.²³

This provision, found at the beginning of article I, guarantees substantive due process and equal protection.²⁴ And the New Jersey Civil Rights Act—the state’s analog to the federal civil rights act²⁵—confers a cause of action to any person whose state constitutional rights have been violated.²⁶ Claims resting on state constitutional rights offer a

20. See, e.g., *Sanchez v. City of Fresno*, 914 F. Supp. 2d 1079, 1101 (E.D. Cal. 2012) (“[The state-created danger doctrine] provide[s] for liability under substantive due process where a state or local official acts to place an individual in a situation of known danger with deliberate indifference to their personal, physical safety.”); see also *Jeremiah v. Sutter County*, No. 18-CV-00522, 2018 WL 1367541, at *4, *6 (E.D. Cal. Mar. 16, 2018) (granting temporary restraining order against enforcement of county anti-camping ordinance).

21. See *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1025, 1030–31 (9th Cir. 2012) (upholding trial court judgment that the city’s summary destruction of the plaintiff’s family photographs, identification papers, portable electronics, and other property was unreasonable under the Fourth Amendment). But see *Fitzpatrick v. Little*, No. 22-CV-00162, 2023 WL 129815, at *10 (D. Idaho Jan. 9, 2023) (recognizing that pre-deprivation notice and adequate opportunity to move an encampment is sufficient to defeat an unreasonable seizure claim).

22. *Aitken v. City of Aberdeen*, 393 F. Supp. 3d 1075, 1083–85 (W.D. Wash. 2019) (granting temporary restraining order enjoining city from enacting camping ordinances under right to travel theory). While the right of interstate travel has been recognized as a basic constitutional freedom, the court in *Aitken* argued that it “is not a right to remain indefinitely wherever one pleases.” *Id.* at 1083–84.

23. N.J. CONST. art. I, ¶ 1.

24. *Peper v. Princeton Univ. Bd. of Trs.*, 389 A.2d 465, 477 (N.J. 1978).

25. 42 U.S.C. § 1983.

26. N.J. STAT. ANN. § 10:6-2(c) (West 2024); see also *Gormley v. Wood-El*, 93 A.3d 344, 358 (N.J. 2014) (recognizing that the New Jersey Civil Rights Act applies to the deprivation of both federal rights and to the substantive and equal protection rights guaranteed by New Jersey’s Constitution and laws).

tremendous benefit for plaintiffs: state courts are not required to apply exclusionary federal principles of standing and justiciability.²⁷ Further, state constitutions can expand individual rights beyond the floor set by the U.S. Constitution.²⁸

The remedial power of article I is significant. Its utility was on full display in *NAACP v. Mount Laurel Township* (“*Mount Laurel I*”).²⁹ There, the New Jersey Supreme Court held that article I mandates municipalities to consider the regional housing needs and regional ramifications of their land use plans.³⁰ This was a groundbreaking decision since it imposed an affirmative duty on every municipality in the state to ensure that their zoning laws accommodate their fair share of low-income residents.³¹ The court stated that “[i]t is elementary theory that all police power enactments, no matter at what level of government, must conform to the basic state constitutional requirements of substantive due process and equal protection of the laws.”³² And perhaps most relevant here, the court acknowledges that the requirements of the New Jersey State Constitution “may be more demanding than those of the federal Constitution.”³³

Now that the U.S. Supreme Court has left the promise of *Martin v. City of Boise* in tatters, unsheltered litigants in states across the country must change course. In New Jersey, the path forward is clear. The New Jersey Constitution, as well as *Mount Laurel I* and its progeny, provide a negative right to shelter.

II. NEGATIVE RIGHT TO SHELTER

Homeless rights advocates have called for a “right to shelter” across the United States for decades.³⁴ This right is typified as a positive right—

27. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 501 (1977).

28. *Id.* at 495; see also Robert F. Williams, *Introduction: The Third Stage of the New Judicial Federalism*, 59 N.Y.U. ANN. SURV. AM. L. 211, 211 (2003).

29. S. Burlington Cnty. NAACP v. Mount Laurel Township (*Mount Laurel I*), 336 A.2d 713 (N.J. 1975).

30. *Id.* at 724, 726.

31. *Id.* at 724.

32. *Id.* at 725.

33. *Id.*; see also Greenberg v. Kimmelman, 494 A.2d 294, 302 (N.J. 1985) (“From the face of the two charters, it is apparent that the New Jersey Constitution is not a mirror image of the United States Constitution.”).

34. See *Lindsey v. Normet*, 405 U.S. 56, 73 (1972) (“[Appellants] contend that the ‘need for decent shelter’ and the ‘right to retain peaceful possession of one’s home’ are fundamental interests which are particularly important to the poor and which may be treasured upon only after the State demonstrates some superior interest.”).

one that would “obligate the government (generally state or local) to provide housing to all homeless persons who request it.”³⁵ These efforts predominately took place in the courtrooms, with litigation being “the preferred tool of advocacy groups.”³⁶ Under this framework, a positive right to shelter is grounded in moral theory, which compels “the government to provide for shelters in the first instance, . . . as well as a duty on government officials that they respect those conditions when making decisions as to whom to take in.”³⁷ Since its inception, it has been an “open question” about the ideal legal arrangement for this right: some argue that (a) all are entitled to “peremptorily demand” the enforcement of their right to shelter, and others argue that (b) some official should be vested with the discretion to determine, on an *ad hoc* basis, how best to distribute limited shelter resources.³⁸

However, these efforts have often been fruitless in the courtroom. In 1972, the U.S. Supreme Court foreclosed the notion that the U.S. Constitution provides “any constitutional guarantee of access to dwellings of a particular quality.”³⁹ The Court reasoned that “the assurance of adequate housing . . . [is a] legislative, not judicial, function[.]”⁴⁰ The Court went so far as to say that “the Constitution does not provide judicial remedies for every social and economic ill.”⁴¹ Judges are understandably wary about imposing an affirmative obligation on government agencies to finance the construction of adequate shelter and be responsible for its provision. Their hesitation is borne primarily out of concerns about separation of powers.⁴² Furthermore, federal judges are

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

36. Geoffrey Mort, Note, *Establishing a Right to Shelter for the Homeless*, 50 BROOK. L. REV. 939, 940 (1984).

37. Cécile Fabre, *The Dignity of Rights*, 20 OXFORD J. LEGAL STUD. 271, 280 (2000).

38. Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 OXFORD J. LEGAL STUD. 18, 24–25 (1993).

39. *Lindsey*, 405 U.S. at 74.

40. *Id.*

41. *Id.* See generally Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1, 4–5 (2005) (exploring multiple explanations for why the U.S. Constitution does not create social and economic rights).

42. See *Martin v. City of Boise*, 920 F.3d 584, 593 (9th Cir. 2019) (Smith, J., dissenting) (“By creating new constitutional rights out of whole cloth, my well-meaning, but unelected, colleagues improperly inject themselves into the role of public policymaking.”); see also *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1157 n.12 (Cal. 1995) (“[T]he apparently intractable problem of homelessness . . . should be addressed to the Legislature Neither the criminal justice system nor the judiciary is equipped to resolve chronic social problems”).

more likely than state judges to dismiss suits on jurisdictional grounds.⁴³

Even in legislatures, advocates struggled to gain traction. Only four United States jurisdictions have recognized an enforceable right to shelter: New York City, West Virginia, Washington D.C., and Massachusetts.⁴⁴ Even then, shelter conditions in those jurisdictions are inadequate or dangerous.⁴⁵ State bills pushed by advocates and sponsored by progressive legislators frequently succumb to the death-by-a-thousand-cuts deliberative process.⁴⁶ Ballot measures, following years of arduous campaigning, resulted in limited success.⁴⁷ And where voters passed them, right-to-shelter initiatives were quickly discarded by the legislature or by referendum.⁴⁸

Many advocates have since pivoted, instead focusing on pursuing a “negative” right to shelter.⁴⁹ This alternative conception recognizes “a fundamental, constitutional right to shelter oneself without government interference.”⁵⁰ Practically speaking, this would allow individuals experiencing homelessness to conduct self-sheltering activities without the threat of state punishment.⁵¹ Although the concept of a negative right to shelter has not escaped criticism,⁵² this right would “ensure that homeless individuals have the freedom to choose where and how to find shelter, to protect themselves and their property, and to build meaningful connections with others.”⁵³

The negative right-to-shelter concept suffers from additional pitfalls. Most critically, the right is defeasible in a sense. Under the *Martin*

43. See, e.g., *Cannady v. Valentin*, 768 F.2d 501, 503 (2d Cir. 1985) (affirming district court’s abstention); *Edwards v. District of Columbia*, 628 F. Supp. 333, 342 (D.D.C. 1985) (holding that court lacked federal question jurisdiction).

44. Ben A. McJunkin, *The Negative Right to Shelter*, 111 CALIF. L. REV. 127, 148–55 (2023).

45. *Id.* at 148; see also *id.* at 155 (noting that the state agency responsible for administering the right-to-shelter law in Massachusetts “typically denies about 40 percent of all applicants for shelter”).

46. See, e.g., *AB-3269 State and Local Agencies: Homelessness Plan*, CAL. LEGIS. INFO., https://leginfo.ca.gov/faces/billStatusClient.xhtml?bill_id=201920200AB3269 (last visited May 4, 2025).

47. See, e.g., Katie J. Wells, *Policy-Failing: A Repealed Right to Shelter*, 41 URB. GEOGRAPHY 1139, 1145 (2019).

48. *Id.* at 1149.

49. McJunkin, *supra* note 44, at 127.

50. *Id.*

51. *Id.* at 174.

52. See Jonathan Bertulis-Fernandes, *Progressive Property Theory and the Wicked Problem of Homelessness: The Case for a National Right to Shelter*, 64 B.C. L. REV. 1681, 1718 (“A negative right to shelter fails to foreground human flourishing sufficiently and to ensure that individuals are provided with the capabilities necessary for broader social development and participation.”).

53. McJunkin, *supra* note 44, at 174–75.

formulation, if municipalities prove that their available shelter beds outnumber their unsheltered population, they may be permitted to enforce encampment bans.⁵⁴ This is especially problematic since most unsheltered residents prefer to live “on the streets” rather than occupy a municipal shelter.⁵⁵ This is a rational choice for many. Shelters can be host to communicable diseases,⁵⁶ higher risk of overdose,⁵⁷ poor sanitation,⁵⁸ sexual assault,⁵⁹ homophobia and transphobia,⁶⁰ and more.

Additionally, it will be difficult for municipalities to determine what makes a shelter sufficiently “adequate” to survive judicial scrutiny and to define shelter in the first place. There is no clear definition for shelter or standard for “adequate.” Shelters with curfews may be inadequate for unhoused individuals who work night shifts. Shelters outside of city limits may be inadequate for unhoused individuals with children who attend school in the city. Religious restrictions for shelters may deter unhoused individuals who do not subscribe to the same faith or who are not religious at all. The U.S. Supreme Court acknowledged these

54. See *Martin v. City of Boise*, 920 F.3d 584, 617 (9th Cir. 2019), *abrogated by* *City of Grants Pass v. Johnson*, 603 U.S. 520 (2024).

55. LINDSEY DAVIS, COAL. FOR THE HOMELESS, *VIEW FROM THE STREET: UNSHELTERED NEW YORKERS AND THE NEED FOR SAFETY, DIGNITY, AND AGENCY* 11 (2021), <https://www.coalitionforthehomeless.org/wp-content/uploads/2021/04/View-from-the-Street-April-21.pdf> [<https://perma.cc/5SQC-4BWY>] (“Seventy-seven percent of respondents stated that they have tried the municipal shelter system and instead choose to sleep on the streets.”); see also Jeremy Jojola & Katie Wilcox, *We Asked 100 Homeless People if They’d Rather Sleep Outside or in a Shelter*, 9NEWS (Nov. 21, 2017, 7:42 AM), <https://www.9news.com/article/news/investigations/we-asked-100-homeless-people-if-theyd-rather-sleep-outside-or-in-a-shelter/73-493418852> [<https://perma.cc/FK2A-L3V5>] (conducting informal survey of one hundred homeless individuals in Denver and finding that seventy percent prefer sleeping on the streets to shelter services).

56. See Daniela Leonardi & Silvia Stefani, *The Pandemic and Homeless People in the Turin Area: The Level of Housing Adequacy Shapes Experiences and Well-being*, 24 HOUSING, CARE & SUPPORT 93, 95 (2021). See generally Deborah K. Padgett et al., *From the Streets to a Hotel: A Qualitative Study of the Experiences of Homeless Persons in the Pandemic Era*, 32 J. SOC. DISTRESS & HOMELESSNESS 248 (2023).

57. Joanne Neale & Caral Stevenson, *A Qualitative Exploration of the Spatial Needs of Homeless Drug Users Living in Hostels and Night Shelters*, 12 SOC. POL’Y & SOC’Y 533, 538 (2013).

58. Yoonsook Ha et al., *Barriers and Facilitators to Shelter Utilization Among Homeless Young Adults*, 53 EVALUATION & PROGRAM PLAN. 25, 29, 31 (2015) (explaining how youth are discouraged from accessing shelter facilities that are not “safe and clean”).

59. Adeline M. Nyamathi et al., *Sheltered Versus Nonsheltered Homeless Women: Differences in Health, Behavior, Victimization, and Utilization of Care*, 15 J. GEN. INTERNAL MED. 565, 567 (2000). While this study recognizes that sheltered women face a similarly high risk of sexual assault as unsheltered women, this can explain why, for many women, homeless “shelter” is a misnomer. *Id.*

60. Deborah Coolhart & Maria T. Brown, *The Need for Safe Spaces: Exploring the Experiences of Homeless LGBTQ Youth in Shelters*, 82 CHILD. & YOUTH SERVS. REV. 230, 234 (2017).

problematic questions in *Grants Pass*.⁶¹ But even if these questions are complex, they are solvable. At bottom, shelter must be conceived as providing freedom from infringing individual liberties.

III. THE NEW JERSEY CONSTITUTION

A. *Drafting History and Its Significance*

In 1947, New Jersey hosted a constitutional convention seeking to update its foundational document.⁶² The 1947 New Jersey State Constitution has been celebrated as a national model, considered by many to be “one of the best state constitutions in the country.”⁶³ Among its innovative structural reforms of New Jersey’s *trias politica* were groundbreaking anti-discrimination and collective bargaining provisions.⁶⁴

Equally innovative was New Jersey’s adoption of article I, paragraph 1, which was recognized as the state’s constitutional equal rights amendment.⁶⁵ New Jersey was among the earliest states to adopt such an amendment.⁶⁶ The origins of this provision date back to New Jersey’s 1844 Constitution.⁶⁷ This paragraph was, in part, “a general recognition of those absolute rights of the citizen which were a part of the common law.”⁶⁸

Consequently, New Jersey’s 1947 state constitution “released New Jersey from formal state constitutional rigidity.”⁶⁹ This adaptation allowed the judiciary to complete “the necessary exercise of state powers in response to state residents’ real needs and active demands for

61. *City of Grants Pass v. Johnson*, 603 U.S. 520, 554 (2024).

62. ROBERT F. WILLIAMS, *THE NEW JERSEY STATE CONSTITUTION* 26–27 (2d ed. 2012).

63. Robert F. Williams, *New Jersey’s State Constitutions: From Ridicule to Respect*, N.J. LAW., June 1997, at 8, 11 (quoting John E. Bebout & Joseph Harrison, *The Working of the New Jersey Constitution*, 10 WM. & MARY L. REV. 337, 337 (1968)).

64. See John E. Bebout & Joseph Harrison, *The Working of the New Jersey Constitution*, 10 WM. & MARY L. REV. 337, 337–38, 354–55 (1968); see also N.J. CONST. art. I, ¶ 5, 19.

65. Robert F. Williams, *The New Jersey Equal Rights Amendment: A Documentary Sourcebook*, 16 WOMEN’S RTS. L. REP. 69, 70 (1994).

66. See Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness in Advancing Protection Against Sex Discrimination*, 36 RUTGERS L.J. 1201, 1202 (2005).

67. Compare N.J. CONST. art. I, ¶ 1, with N.J. CONST. of 1844 art. I, ¶ 1.

68. *King v. S. Jersey Nat’l Bank*, 330 A.2d 1, 10 (N.J. 1974) (quoting *Ransom v. Black*, 24 A. 489, 490 (N.J. 1892)).

69. WILLIAMS, *supra* note 62, at 36.

service.”⁷⁰ The New Jersey Supreme Court came to appreciate the revamped state constitution’s flexibility:

The question whether the equal protection demand of our State Constitution is offended remains for us to decide. Conceivably a State Constitution could be more demanding. For one thing, there is absent the principle of federalism which cautions against too expansive a view of a federal constitutional limitation upon the power and opportunity of the several States to cope with their own problems in the light of their own circumstances.⁷¹

And over time, the New Jersey Supreme Court began to lay the foundation for judicial independence from federal constitutional jurisprudence. This new judicial federalism⁷² allows New Jersey to preserve rights beyond the floor set by the U.S. Supreme Court, particularly concerning equal protection and substantive due process.

B. Article I, Paragraph 1

Unlike its federal counterpart, article I of the New Jersey Constitution does not contain the words “due process” or “equal protection.”⁷³ Yet, it provides similar rights.⁷⁴ And the New Jersey Supreme Court has historically engaged in an “intellectually rigorous and forcefully progressive” interpretation of state constitutional law.⁷⁵ Consequently, the court has departed from federal constitutional doctrine in its treatment of social and economic rights.⁷⁶ Advocates of this departure include former U.S. Supreme Court Justice and New Jersey

70. *Id.* at 36–37 (quoting FRANK P. GRAD & ROBERT F. WILLIAMS, STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, VOLUME 2: DRAFTING STATE CONSTITUTIONS, REVISIONS, AND AMENDMENTS 12 (Robert J. Spitzer ed., 2006)).

71. *Robinson v. Cahill*, 303 A.2d 273, 282 (N.J. 1973).

72. Williams, *supra* note 28 (“Over the years, state judges in numerous cases have interpreted their state constitutional rights provisions to provide more protection than the national minimum standard guaranteed by the Federal Constitution.”).

73. See N.J. CONST. art. I, ¶ 1.

74. *Greenberg v. Kimmelman*, 494 A.2d 294, 302 (N.J. 1985) (“[A]rticle 1, paragraph 1, like the [F]ourteenth [A]mendment, seeks to protect against injustice and against the unequal treatment of those who should be treated alike. To this extent, article 1 safeguards values like those encompassed by the principles of due process and equal protection.”).

75. Gerald J. Russello, *The New Jersey Supreme Court: New Directions?*, 16 ST. JOHN’S J. LEGAL COMMENT. 655, 655 (2002).

76. Helen Hershkoff, *The New Jersey Constitution: Positive Rights, Common Law Entitlements, and State Action*, 69 ALB. L. REV. 553, 553–54 (2006).

Supreme Court Justice William J. Brennan Jr., who urged state courts to deviate from their increasingly conservative federal counterparts.⁷⁷

In the 1970s, Chief Justice Weintraub of the New Jersey Supreme Court explained the balancing process courts must engage in when adjudicating equal protection or due process claims under the New Jersey Constitution:

[A] court must weigh the nature of the restraint or the denial against the apparent public justification, and decide whether the State action is arbitrary. In that process, if the circumstances sensibly so require, the court may call upon the State to demonstrate the existence of a sufficient public need for the restraint or the denial.⁷⁸

The court must “consider[] the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction.”⁷⁹ This balancing test “allows greater flexibility in the examination of citizens’ rights and the justification for state-imposed limits on those rights.”⁸⁰ But more fundamentally, “there is absent the principle of federalism which cautions against too expansive a view of a federal constitutional limitation upon the power and opportunity of the several States to cope with their own problems in the light of their own circumstances.”⁸¹

In New Jersey, substantive due process and equal protection are closely related concepts, each conferring upon the judiciary the power to rule on the validity of state law. New Jersey courts, when reviewing substantive due process claims, apply a “rational relationship” or “substantial connection” test when determining the constitutionality of a law.⁸² Courts will look for a reasonable relationship between the means the government chooses to advance its interests and the ends sought to be achieved.⁸³ If the means unnecessarily burden the right, the law is

77. Brennan, *supra* note 27, at 503; see also Robert F. Williams, *Justice Brennan, the New Jersey Supreme Court, and State Constitutions: The Evolution of a State Constitutional Consciousness*, 29 RUTGERS L.J. 763, 773–83 (1998).

78. Robinson v. Cahill, 303 A.2d 273, 282 (N.J. 1973).

79. Greenberg, 494 A.2d at 302.

80. Deborah T. Poritz, *A Roadmap Through the Modern New Jersey Constitution*, 44 RUTGERS L.J. 599, 605 (2014).

81. Robinson, 303 A.2d at 282.

82. See, e.g., State ex rel. C.K., 182 A.3d 917, 934 (N.J. 2018) (applying “rational relationship” test); Schmidt v. Bd. of Adjustment of Newark, 88 A.2d 607, 612 (N.J. 1952) (applying “substantial connection” test).

83. See State ex rel. C.K., 182 A.3d at 933.

struck down.⁸⁴ Although all statutes are presumed constitutional, “no law can survive scrutiny under Article I, Paragraph 1 unless it has a rational basis in furthering some legitimate state interest.”⁸⁵

For example, in *Schmidt v. Board of Adjustment of Newark*, the New Jersey Supreme Court upheld a Newark ordinance requiring the denial of a gasoline service station in a residential zone.⁸⁶ Justice Heher set down the standard for review in substantive due process terms:

There must be a substantial connection between the means invoked and the public interest designed to be advanced. . . . Arbitrary discrimination in the purported exercise of the power would violate the essence of the constitutional authority and the cited enabling statute and infringe the substance of due process and work a denial of the equal protection of the laws. It is basic in use-zoning as so provided that the use restriction be general and uniform in the particular district.⁸⁷

Similarly, the New Jersey Supreme Court generally employs a balancing test when analyzing claims under the equal protection provisions of the state constitution.⁸⁸ This approach rejects the two-tiered analysis used by the U.S. Supreme Court for claims arising under the Fourteenth Amendment Equal Protection Clause.⁸⁹ Instead, state courts apply a three-prong test established by the New Jersey Supreme Court in *Greenberg v. Kimmelman*, considering “the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction.”⁹⁰ There is no rigid analytical structure applied in state equal protection cases.⁹¹

New Jersey’s state equal protection provision of article I, paragraph 1 also protects classes of individuals, ensuring that persons situated alike shall be treated alike.⁹² Courts tend to give leeway to the legislature’s establishment of classifications, forbidding only “invidious

84. *Id.* at 934.

85. *Id.*

86. *See Schmidt*, 88 A.2d at 610.

87. *Id.* at 612–13.

88. *Greenberg*, 494 A.2d at 302.

89. *Id.*

90. *Id.* (first citing *Right to Choose v. Byrne*, 450 A.2d 925, 936 (N.J. 1982); and then citing *Robinson*, 303 A.2d at 282).

91. *See Robinson*, 303 A.2d at 282.

92. *ADA Fin. Serv. Corp. v. State*, 416 A.2d 908, 913 (N.J. Super. Ct. App. Div. 1979) (citing *Robinson*, 303 A.2d at 282).

discrimination.”⁹³ Differences in the treatment of individuals must not be arbitrary, and distinctions between persons must be justified by an appropriate state interest, bearing a real and substantial relationship to furthering governmental ends.⁹⁴

Judicial federalism can benefit civil rights litigants in New Jersey state courts, at least in concept. The equal protection rights of article I, however, closely track that of the federal constitution. For instance, much like its federal counterparts,⁹⁵ the New Jersey courts have held that “[p]overty does not give rise to membership in a suspect class.”⁹⁶ And much like its federal counterpart, the state’s constitutional equal protection provisions do not provide any assurance of government funding.⁹⁷ Furthermore, some state rights are “coextensive” with the identical or similar federal constitutional guarantee.⁹⁸

Still, the New Jersey Supreme Court is the final authority on the state constitution’s interpretation, which is not bound by federal jurisprudence.⁹⁹ The trend for many states is to rely on state constitutions to protect fundamental liberties.¹⁰⁰ And since the interpretation of a state supreme court of its own state constitution is generally not reviewable by the United States Supreme Court,¹⁰¹ state

93. *Pleasure Bay Apartments v. City of Long Branch*, 328 A.2d 593, 600 (N.J. 1974) (quoting *David v. Vesta Co.*, 212 A.2d 345, 352 (N.J. 1965)).

94. *ADA Fin. Serv. Corp.*, 416 A.2d at 913–14.

95. *Harris v. McRae*, 448 U.S. 297, 323 (1980) (“[T]his Court has held repeatedly that poverty, standing alone is not a suspect classification.”).

96. *Costello v. Bd. of Rev., Dep’t of Lab.*, 642 A.2d 1034, 1036 (N.J. Super. Ct. App. Div. 1994) (citing *Right to Choose v. Byrne*, 450 A.2d 925, 934 (N.J. 1982)); *see also Barone v. Dep’t of Hum. Servs., Div. of Med. Assistance & Health Servs.*, 526 A.2d 1055, 1061 (N.J. 1987).

97. *Franklin v. New Jersey Dep’t of Hum. Servs.*, 543 A.2d 56, 68 (N.J. Super. Ct. App. Div. 1988), *aff’d*, 543 A.2d 1 (N.J. 1988) (“[T]he right of the individual [under Article I, paragraph 1] is freedom from undue government interference, not an assurance of government funding.” (alterations in original) (quoting *Right to Choose v. Byrne*, 450 A.2d 925, 935 n.5 (N.J. 1982))).

98. *See, e.g.*, N.J. CONST. art. I, ¶ 11 (double jeopardy); N.J. CONST. art. I, ¶ 20 (taking of property without just compensation). These provisions correspond to the Fifth Amendment of the U.S. Constitution.

99. *See* Edward Devine, Marc Feldman, Lisa Giles-Klein, Cheryl A. Ingram, & Robert F. Williams, *Special Project: The Constitutionality of the Death Penalty in New Jersey*, 15 RUTGERS L.J. 261, 310–14 (1984); *see also* *Greenberg v. Kimmelman*, 494 A.2d 294, 302–03 (N.J. 1985) (finding that interpretation of article I, paragraph 1 is not bound by federal analysis).

100. Robert F. Williams, *Why State Constitutions Matter*, 45 NEW ENG. L. REV. 901, 905 (2011); *see also* G. Alan Tarr & Mary Cornelia Porter, *Gender Equality and Judicial Federalism: The Role of State Appellate Courts*, 9 HASTINGS CONST. L.Q. 919, 920–27 (1982) (discussing expanded constitutional protections afforded by state courts).

101. Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 709 (1983).

courts are an excellent venue for expanding individual rights. Indeed, the “New Jersey Supreme Court has an impressive history of extending broad civil rights to state citizens under the state constitution.”¹⁰²

IV. MOUNT LAUREL: AN EVOLVING DOCTRINE

New Jersey is a leader in the re-emergence of state constitutional law. Chief among the New Jersey Supreme Court cases supporting this proposition is the family of *Mount Laurel* exclusionary zoning decisions.¹⁰³

In 1975, the New Jersey Supreme Court issued its first *Mount Laurel* decision (“*Mount Laurel I*”), imposing the state constitutional requirement, under article I, paragraph 1, that each community in New Jersey plan to meet its fair share of the region’s need for affordable housing.¹⁰⁴ Municipalities “cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing.”¹⁰⁵ More specifically, the New Jersey Supreme Court held that municipalities “must affirmatively afford that opportunity, at least to the extent of the municipality’s fair share of the present and prospective regional need.”¹⁰⁶

The second *Mount Laurel* decision, (“*Mount Laurel II*”), decided in 1984, created an enforcement mechanism for the court’s earlier decision—the builder’s remedy.¹⁰⁷ The New Jersey Supreme Court’s decision obligated towns “to take further affirmative steps to encourage both low- and moderate-income housing.”¹⁰⁸ This decision caused an uproar.¹⁰⁹ Soon after, New Jersey passed the Fair Housing Act, which set up an administrative agency known as the Council on Affordable Housing (“COAH”).¹¹⁰ This agency was tasked with enforcing the

102. Williams, *supra* note 65, at 73.

103. See generally Susan J. Kraham, *Right for A Remedy: Observations on the State Constitutional Underpinnings of the Mount Laurel Doctrine*, 63 RUTGERS L. REV. 835, 845–46 (2011).

104. See *Mount Laurel I*, 336 A.2d 713, 724–25 (N.J. 1975).

105. *Id.* at 724.

106. *Id.* (emphasis added).

107. S. Burlington Cnty. NAACP v. Mount Laurel Township (*Mount Laurel II*), 456 A.2d 390, 452–53 (N.J. 1983).

108. Norman Williams, Jr., *The Background and Significance of Mount Laurel II*, 26 WASH. U. J. URB. & CONTEMP. L. 3, 21 (1984).

109. Peter A. Buchsbaum, *Affordable Housing and the Mount Laurel Doctrine Enforcement Has Returned to the Courts*, N.J. LAW., Oct. 2022, at 56, 56–57.

110. N.J. STAT. ANN. § 52:27D-305 (West 2025) (repealed by 2024 N.J. Laws § 37).

affordable housing obligation of New Jersey municipalities, replacing the courts' assumed role in enforcing *Mount Laurel*.¹¹¹

The third *Mount Laurel* decision in *Hills Development Company v. Bernards* ("*Mount Laurel III*") effectively ratified the legislature's passage of the state Fair Housing Act.¹¹² However, in the ensuing years, the Council foundered.¹¹³ Eventually, in 2024, the New Jersey legislature and Governor Phil Murphy abolished COAH entirely.¹¹⁴ Instead, it delegated the authority to calculate affordable housing obligations to the state Department of Community Affairs, with enforcement from the judiciary.¹¹⁵ Interestingly, Governor Chris Christie, a Republican and the predecessor to Democratic Governor Murphy, led an unsuccessful legal effort to abolish COAH a decade earlier.¹¹⁶

Still, *Mount Laurel I* and *II* were groundbreaking decisions that dismantled the barriers of statewide exclusionary zoning.¹¹⁷ Although the court in *Mount Laurel I* rested its holding on substantive due process and equal protection grounds, it spent little time discussing these principles in detail in the majority opinion.¹¹⁸ Nevertheless, *Mount Laurel II* confirmed that zoning regulations that fail to permit the production of a municipality's fair share of housing "conflict with the

111. Opinion, *Judicial Duty in New Jersey*, N.Y. TIMES (Feb. 24, 1986), <http://www.nytimes.com/1986/02/24/opinion/judicial-duty-in-new-jersey.html>. This opinion editorial includes a quote from then-Chief Justice Robert Wilentz, who said, "[t]his kind of response, one that would permit us to withdraw from this field, is what this court has always wanted and sought. It is potentially far better for the state and its lower-income citizens." *Id.*

112. Joseph Marsico, *A Forty-Year Failure: Why the New Jersey Supreme Court Should Take Control of Mount Laurel Enforcement*, 41 SETON HALL LEGIS. J. 149, 172 (2016); see also *Hills Dev. Co. v. Bernards (Mount Laurel III)*, 510 A.2d 621, 653 (N.J. 1986).

113. Buchsbaum, *supra* note 109, at 57.

The agency set up to enforce [the *Mount Laurel* Doctrine], the Council on Affordable Housing . . . essentially ceased to function. For 15 years it failed to adopt a valid set of affordable housing allocations for that period. Its efforts were rejected by the Supreme Court which found that all the formulas it had devised essentially rewarded exclusion by making past growth the key, even where a community has not grown due to restrictive ordinances.

Id.

114. Press Release, Phil Murphy, N.J. Governor, Governor Murphy Signs Landmark Affordable Housing Legislation (Mar. 20, 2024), <https://www.nj.gov/governor/news/news/562024/20240320b.shtml> [<https://perma.cc/7V99-ZP9Z>].

115. N.J. STAT. ANN. § 52:27D-304.1 (West 2025) (reforming responsibilities concerning provision of affordable housing and abolishing COAH).

116. See *In re Plan for Abolition of Council on Affordable Hous.*, 70 A.3d 559, 561 (N.J. 2013).

117. Paula A. Franzese, *The Evolution of Inclusion: The Mount Laurel Doctrine at Fifty*, 48 NOVA L. REV. 264, 264 (2024).

118. Bruce L. Ackerman, *The Mount Laurel Decision: Expanding the Boundaries of Zoning Reform*, 1976 U. ILL. L.F. 1, 4.

general welfare and violate the state constitutional requirements of substantive due process and equal protection.”¹¹⁹

V. THE NEGATIVE RIGHT TO SHELTER

Despite efforts from the legislative and executive branches of the New Jersey government to resolve the long-standing issue of homelessness,¹²⁰ the problem remains. Each year, thousands of unsheltered New Jersey residents must face harsh weather, mounting barriers to stability, and enduring poverty.¹²¹ Meanwhile, they must also navigate a complicated web of social services while being harmed by the unpredictable enforcement of anti-encampment ordinances. The New Jersey courts have a role to play in addressing this crisis. One option that can provide meaningful relief to individuals facing the deprivation of their constitutional rights is a judicially recognized negative right to shelter.

Although this Note is not the first to suggest that the New Jersey Constitution provides for an implicit constitutional right to shelter,¹²² scholarship has typically focused on whether the New Jersey State Constitution confers a *positive* right to shelter—meaning that, à la *Mount Laurel I*, municipalities have an affirmative obligation to construct adequate shelter.¹²³ More broadly, advocates argue that state

119. *Mount Laurel II*, 456 A.2d 390, 415 (N.J. 1983).

120. Between 1984 and 1985, the Legislature enacted the Prevention of Homelessness Act, N.J. STAT. ANN. § 57:2D-280 to -287 (West 2025), and the act providing for the Emergency Shelters for the Homeless, N.J. STAT. ANN. § 55:13C-1 to -6 (West 2025). These statutes empowered the state’s Department of Community Affairs to establish a system for providing temporary rental and other housing assistance, among other provisions. N.J. STAT. ANN. § 52:27D-282 (West 2025). In 1985, the Legislature also passed the Fair Housing Act, which recognizes the need for state intervention in providing adequate and affordable housing for all citizens. N.J. STAT. ANN. § 52:27D-302 (West 2025). *See generally* Maticka v. City of Atlantic City, 524 A.2d 416, 424 (N.J. Super. Ct. App. Div. 1987) (canvassing nearly five decades of legislative acts designed to “ameliorate the consequences” of poverty and homelessness).

121. *See supra* note 16 and accompanying text.

122. *See, e.g.*, John M. Payne, *Reconstructing the Constitutional Theory of Mount Laurel II*, 3 WASH. U. J.L. & POL’Y 555, 564 (2000); Kraham, *supra* note 103, at 836; John C. Connell, *A Right to Emergency Shelter for the Homeless Under the New Jersey Constitution*, 18 RUTGERS L.J. 765, 766–67 (1987); Connie M. Pascale, *Homeless People Have Rights Too*, N.J. LAW., Oct. 1993, at 18, 22.

123. *See* Payne, *supra* note 122, at 577 (“It may be time to require that every municipality’s compliance plan address alternate ways to provide housing families below the income level that is the de facto floor . . .”); *see also* Kraham, *supra* note 103, at 845–46; Connell, *supra* note 122, at 820 (“[E]mergency shelter is a *sine qua non* of the guarantees of personal security and safety which are the government’s affirmative duty to secure under the constitution of this state.”); Pascale, *supra* note 122, at 22.

constitutions are the proper tool to implement a positive right to shelter since 1) state constitutions provide textual support for granting a positive right to public assistance and access to shelter; 2) state constitutions' legislative histories are favorable to general assistance benefits; and 3) states are better able to deal with the separation of power issues raised by positive rights claims.¹²⁴

The New Jersey appellate courts have rejected these arguments, holding that a positive right to shelter does not exist within the state.¹²⁵ Further, the New Jersey Supreme Court has never held that the state's constitution confers a right to shelter. They rejected the opportunity to do so on at least one occasion.¹²⁶ However, New Jersey appellate courts have recognized that all three branches of government in New Jersey concur with the principle that "the prevention of homelessness is a necessary governmental function, at least when all private resources have proved unavailing."¹²⁷ The judiciary has consistently supported the government's obligation to respond to homelessness.¹²⁸ Still, the judiciary can do more.

124. Robert Doughten, *Filling Everyone's Bowl: A Call to Affirm a Positive Right to Minimum Welfare Guarantees and Shelter in State Constitutions to Satisfy International Standards of Human Decency*, 39 GONZ. L. REV. 421, 428 (2003–2004). But see Robert C. Ellickson, *The Untenable Case for an Unconditional Right to Shelter*, 15 HARV. J.L. & PUB. POL'Y, 20–21 17 (1992) (arguing that positive rights, such as a right to shelter, make for poor social policy as they create disincentives to work).

125. *L.T. v. New Jersey Dep't of Hum. Servs.*, Div. of Fam. Dev., 624 A.2d 990, 994–95 (N.J. Super. Ct. App. Div.), *rev'd on other grounds*, 633 A.2d 964 (1993) ("[T]he Court [in *Mount Laurel I*] did not impose an obligation on State or local government to construct affordable housing for those persons."); see also *Franklin v. New Jersey Dep't of Hum. Servs.*, 543 A.2d 56, 67–68 (N.J. Super. Ct. App. Div.), *aff'd*, 543 A.2d 1 (1988) (finding that there was no support in article I, paragraph 1 of the New Jersey Constitution for imposing an obligation of the state government to provide certain necessities of life for indigent persons, including shelter).

126. *L.T. v. New Jersey Dep't of Hum. Servs.*, Div. of Fam. Dev., 633 A.2d 964, 974 (N.J. 1993) ("The question before us is not whether the homeless have a constitutional right to shelter. Rather, it is, for now, what the Legislature intends. . . . We believe that the executive and legislative branches of New Jersey's government still share that intention." (citation omitted)).

127. *Maticka v. City of Atlantic City*, 524 A.2d 416, 425 (N.J. Super. Ct. App. Div. 1987).

128. See, e.g., *Taxpayers Ass'n of Weymouth Twp, Inc. v. Weymouth Township*, 364 A.2d 1016, 1025 (N.J. 1976) (explaining that "[i]n fact, not only do housing needs fall within the purview of the 'general welfare,' but they have been recognized as 'basic' by this Court"); *Oakwood at Madison, Inc. v. Township of Madison*, 371 A.2d 1192, 1218 (N.J. 1977) (recognizing the "governmental-sociological-economic enterprise of seeing to the provision and allocation throughout appropriate regions of adequate and suitable housing for all categories of the population . . ."); *New Jersey Mortgage Fin. Agency v. McCrane*, 267 A.2d 24, 27 (N.J. 1970) (noting that "[t]he question of whether a citizenry has adequate and sufficient housing is certainly one of the prime considerations in assessing the general health and welfare of that body"); *Apartment House Council v. Mayor & Council of*

A. Constitutional Basis for a Negative Right to Shelter

Mount Laurel II's actual "constitutional basis" is that the "New Jersey Constitution embodies an implicit constitutional right to shelter."¹²⁹ Under this formulation, "plaintiffs would have a straightforward case to make, which in its most dramatic form would be that the government must either provide shelter directly to those needing it, or that it must ensure that other housing providers do so, at costs affordable to people of all incomes."¹³⁰ However, under this formulation, *Mount Laurel* and its progeny only require a "realistic opportunity" for affordable housing development and not a "realistic house."¹³¹ This Note posits that a similar approach can be applied to homeless shelters, where the court does not impose an affirmative obligation upon municipalities to construct shelters but merely creates opportunities for their availability and restrains enforcement of anti-encampment laws until shelter beds are reasonably available.

The courts' hesitation to declare a positive right to shelter, whereby municipalities would have an affirmative obligation to provide shelter, makes sense. Given the procedural problems that emerged in the aftermath of *Mount Laurel I*, the justices of the New Jersey Supreme Court may balk at the idea of broadly constitutionalizing a right to shelter. Additionally, constitutionalizing such a broadly construed right would set the judiciary on a path of confrontation with the executive and legislative branches. But still, the moral claim of the state's homeless residents is profound. The judiciary's comity toward their co-equal branches should be limited in this respect. As Chief Justice Wilentz recognized, "the Constitution of our State requires protection of the interests involved and because the Legislature has not protected them," the judiciary must.¹³² And "[i]n the absence of adequate legislative and executive help, [the judiciary] must give meaning to the constitutional doctrine in the cases before [it] through [its] own devices, even if they are relatively less suitable."¹³³

Ridgefield, 301 A.2d 484, 488 (N.J. Super. Ct. Law Div. 1973) ("[T]he law cannot be so helpless that an immediate effort could not be made in the interest of proper and safe shelter. The dignity of every human being demands a right to be housed. It is an affront to the dignity of that human to provide indecent housing even for a short spell. And that right presupposes continued habitation without being uprooted.").

129. Payne, *supra* note 122, at 564.

130. *Id.*

131. *Id.* at 565.

132. *Mount Laurel II*, 456 A.2d 390, 417 (N.J. 1983).

133. *Id.* at 417–18.

New Jersey's Constitution, like many state constitutions, "guarantees individual rights in natural law terms."¹³⁴ Article I, paragraph 1 "is written in broadly inclusive terms as a set of concrete examples of these rights, rather than a definitive and exhaustive list."¹³⁵ Among the rights recognized are "those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."¹³⁶ A negative right to shelter appears to fit squarely within these enumerated rights. Shelter is essential to a productive life. It is the foundation for the pursuit of happiness. Moreover, it would betray logic to suggest that the state does not infringe on the right to acquire and possess property by forcibly evicting people from their only shelter—whether it be a dwelling, vehicle, or tent. Indeed, a negative right to shelter would protect each of these fundamental rights.

For instance, the New York State Court of Appeals (the state's highest court of appeals) construed its state constitution to protect a broad swath of rights, even where those rights were not explicitly stated. It recognized that its constitutional provision requiring the "aid, care and support of the needy" mandates the state to support impoverished residents.¹³⁷ The court issued an earth-shaking pronouncement that "the provision for assistance to the needy is not a matter of legislative grace; rather, it is specifically mandated by our Constitution."¹³⁸ Two years later, in the seminal case of *Callahan v. Carey*, the New York Supreme Court (the state's trial court) directed state and city officials to furnish meals and lodging to homeless men of the Bowery District in New York City.¹³⁹ This resulted in a binding consent decree between the parties.¹⁴⁰ This protection was extended to homeless women in New York City two years later¹⁴¹ and then to homeless families,¹⁴² both on equal protection grounds.

The New Jersey courts have not gone as far as those in New York, but there have been moments of recognition for the rights of homeless plaintiffs. In 1987, the Appellate Division struck down onerous

134. Payne, *supra* note 122, at 565.

135. *Id.*

136. N.J. CONST. art. 1, ¶ 1.

137. Tucker v. Toia, 371 N.E.2d 449, 452 (N.Y. 1977).

138. *Id.* at 451.

139. Callahan v. Carey, No. 42582/79 (N.Y. Sup. Ct. Aug. 26, 1981) (final judgment by consent).

140. *Id.*

141. Eldredge v. Koch, 459 N.Y.S.2d 960 (Sup. Ct.), *rev'd on other grounds*, 469 N.Y.S.2d 744 (App. Div. 1983).

142. See McCain v. Koch, 502 N.Y.S.2d 720, 729 (App. Div. 1986), *rev'd on other grounds*, 511 N.E.2d 62 (N.Y. 1987).

requirements imposed on families to obtain emergency shelter as arbitrary and unreasonable.¹⁴³ In *Maticka*, the Public Advocate challenged a ninety-day limitation on the availability of emergency assistance to homeless families with dependent children.¹⁴⁴ The court remanded for a rule-making hearing to better define the statutory grant of power to the Department of Human Services under the Assistance for Dependent Children Act (“AFDC”).¹⁴⁵ The court expanded on *Maticka* that same year by expanding its holding to include single homeless persons.¹⁴⁶

The court did not invalidate the limitation placed on the implementation of the AFDC on constitutional grounds.¹⁴⁷ Nevertheless, the court recognized the role that the judiciary has in responding to homelessness.¹⁴⁸ Its holding rested on the logic that “a civilized society cannot tolerate the homelessness of those of its members who are too impoverished to provide shelter for themselves.”¹⁴⁹ Moreover, the court acknowledged that “the inordinately difficult and pressing societal problem of homelessness is one which must engage all levels of government whose involvement is legitimately invoked.”¹⁵⁰ This Note invokes that pronouncement and argues that the state constitution grounds the negative right to shelter.

This Note does not argue for the New Jersey courts to go as far as the courts of New York. However, the New Jersey Supreme Court should impose a negative right to shelter—one that does not carry an affirmative obligation and financial burden. As this section will demonstrate, the New Jersey state constitution should be construed to require municipalities to protect the rights enumerated in article I, paragraph 1.

1. Enjoying and Defending Life and Liberty

Access to shelter can be understood as a necessary predicate to constitutionally recognized and protected liberties. Nothing is more fundamental to “enjoying and defending life and liberty” than a home. First, shelter protects against life-threatening externalities, including inclement weather and violence. By prolonging the experience of

143. *Maticka v. City of Atlantic City*, 524 A.2d 416, 425 (N.J. Super. Ct. App. Div. 1987).

144. *Id.* at 418.

145. *Id.*

146. *Rodgers v. Gibson*, 528 A.2d 43, 43–46 (N.J. Super. Ct. App. Div. 1987).

147. *Id.* at 45.

148. *See id.* at 44 (canvassing New Jersey court decisions bearing on questions related to housing and homelessness).

149. *Maticka*, 524 A.2d at 423.

150. *Id.* at 428.

homelessness, enforcement of anti-encampment ordinances increases the risk of death for unsheltered individuals. Simply put, homes and non-congregate shelters provide a buffer of security.¹⁵¹

Empirical studies show that, even when compared to housed individuals living in poverty, people experiencing homelessness face a much greater risk of mortality.¹⁵² Mortality reports in several U.S. cities reveal significant disparities in life expectancy—the average age of death for adults experiencing homelessness ranges from forty-one to fifty-one years, approximately twenty-six years shorter than the median adult.¹⁵³ Individuals experiencing homelessness develop chronic health conditions, such as anemia, asthma, dementia, epilepsy, cirrhosis, and chronic lung disease at a much faster clip than the general population.¹⁵⁴

The exposure to infectious, communicable diseases poses an even greater risk to long-term health prognoses for unsheltered individuals.¹⁵⁵ For instance, in 2017, a Hepatitis A outbreak ravaged San Diego County, killing twenty people and infecting nearly 600 more.¹⁵⁶ This outbreak had a disproportionate impact on San Diego's homeless population.¹⁵⁷ Government officials promoted vaccinations, washed streets, installed portable toilets, and built temporary shelters.¹⁵⁸ Much of the spread of Hepatitis A could be attributed to public defecation, given the scarce

151. Hannah Chimowitz & Adam Ruege, *Affirming Truths About Homelessness*, CMTY. SOLS. (May 1, 2023), <https://community.solutions/research-posts/the-truth-about-homelessness> (“Compared to 2% of the national population reporting experiences of violent criminal victimization, as many as 49% of individuals experiencing homelessness are estimated to be victims of violence.”).

152. ILINA LOGANI, ET AL., *THE MORTALITY OF THE US HOMELESS POPULATION* (2023), <https://bfi.uchicago.edu/wp-content/uploads/2023/03/The-Mortality-of-the-US-Homeless-Population.pdf> [<https://perma.cc/GRK4-6CPH>].

153. JAMES J. O'CONNELL, NAT'L HEALTH CARE FOR THE HOMELESS COUNCIL, *PREMATURE MORTALITY IN HOMELESS POPULATIONS: A REVIEW OF THE LITERATURE* 3, 5, 12 (2005), <https://sbdww.org/wp-content/uploads/2011/04/PrematureMortalityFinal.pdf> [<https://perma.cc/7KGM-6QKT>]; *Life Expectancy*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/nchs/fastats/life-expectancy.htm> (Oct. 25, 2024) (stating average life expectancy for the median adult in the United States is 77.5 years).

154. HARPER SUTHERLAND ET AL., DEP'T OF HEALTH & HUM. SERVS., *HEALTH CONDITIONS AMONG INDIVIDUALS WITH A HISTORY OF HOMELESSNESS* 7–8 (2021), https://aspe.hhs.gov/sites/default/files/migrated_legacy_files/199441/HomelessHistRB.pdf.

155. See generally Ulla Beijer et al., *Prevalence of Tuberculosis, Hepatitis C Virus, and HIV in Homeless People: A Systematic Review and Meta-Analysis*, 12 LANCET INFECTIOUS DISEASES 859, 859 (2012).

156. Paul Sisson, *Two Years After It Started, San Diego Declares End to Deadly Hepatitis A Outbreak*, SAN DIEGO UNION-TRIB. (Nov. 1, 2018, 4:10 PM), <https://www.sandiegouniontribune.com/2018/10/30/two-years-after-it-started-san-diego-declares-end-to-deadly-hepatitis-a-outbreak-2/> [<https://perma.cc/YPC7-4NW5>].

157. *Id.*

158. *Id.*

availability of public restrooms.¹⁵⁹ The government's response to the Hepatitis A crisis, by providing restrooms, shelter, and hand-washing stations, demonstrates that there are less intrusive means of handling issues such as public defecation and urination than criminalization. It also demonstrates that opportunities exist for the state's interests to align with the public's interests.

For children, even a temporary stint of homelessness can yield disastrous long-term health ailments. Compared to low-income children in housed families, children experiencing homelessness are more than twice as likely to be hospitalized.¹⁶⁰ These are just the physical impacts. Unhoused adults are twice as likely as the general population to have experienced a traumatizing event during their childhood.¹⁶¹ This demonstrates a strong correlation between early childhood trauma and adversity faced later in their adult life.¹⁶²

Detractors may argue, correctly, that enforcement of anti-vagrancy laws do not force people into homelessness—it only affects those who are already homeless. But it must be recognized that these laws perpetuate and often make permanent the experience of homelessness.¹⁶³ While public officials arguably do not create the danger of homelessness in the first instance, punitive measures against the unsheltered are an often insurmountable barrier to housing and stability, significantly increasing the risk of death and disease among unsheltered individuals than if officials did nothing at all. A family's financial capacity should not solely determine their health and welfare. The state should not condemn those who cannot afford their survival.

The New Jersey Appellate Court, on at least one occasion, has expressed disagreement with the proposition that a right to shelter is a

159. Lisa Halverstadt, *San Diego Scrambles to Address Long-Festering Lack of Restrooms*, VOICE OF SAN DIEGO (Sept. 18, 2017), <https://voiceofsandiego.org/2017/09/18/san-diego-scrambles-to-address-long-festering-lack-of-restrooms/> [https://perma.cc/5X9Q-ULP4].

160. Linda Weinreb et al., *Determinants of Health and Service Use Patterns in Homeless and Low-income Housed Children*, 102 PEDIATRICS 554, 557 (1998).

161. See Michael Liu et al., *Adverse Childhood Experiences and Related Outcomes Among Adults Experiencing Homelessness: A Systematic Review and Meta-Analysis*, 6 LANCET PUB. HEALTH 836, 842 (2021).

162. Karen Hughes et al., *The Effect of Multiple Adverse Childhood Experiences on Health: A Systematic Review and Meta-Analysis*, 2 LANCET PUB. HEALTH 356, 356 (2017).

163. See Brief for 57 Social Scientists with Published Research on Homelessness as Amici Curiae in Support of Respondents at 3, *City of Grants Pass v. Johnson*, 603 U.S. 520 (2024) (No. 23-175) (“Enforcement [of laws criminalizing homelessness] also exacerbates poverty and extends an individual's homelessness, most prominently through incarceration, the mark of a criminal record, and impossible-to-pay fines and fees.”).

constituent part of the constitutional right to life.¹⁶⁴ However, their concerns were animated by the argument that the New Jersey State Constitution imposed “an affirmative obligation upon State government to provide certain necessities of life for indigent persons, including shelter”¹⁶⁵ This Note argues that, instead of a mandated affirmative provision of shelter to all New Jerseyans, unhoused individuals should be protected from deprivations of their right to life, vis-à-vis the invalidation of anti-encampment laws when no adequate shelter is available. Consequently, the state would have no financial obligation to preserve the right to life, but rather an obligation to avoid its infringement.

The threat to liberty is similarly straightforward. Public welfare laws, such as those prohibiting encampments and loitering, disproportionately affect unhoused individuals. This effectively restricts the freedom of unhoused individuals to rest,¹⁶⁶ to use the restroom,¹⁶⁷ and even to vote.¹⁶⁸ The Fourth Amendment, which protects individuals from unwarranted government searches and seizures, is severely limited outside the home.¹⁶⁹ This renders the right nugatory for people living on the street. By enforcing anti-encampment laws and consequently extending the experience of homelessness, public officials consign the

164. *L.T. v. New Jersey Dep’t of Hum. Servs., Div. of Fam. Dev.*, 624 A.2d 990, 995 (N.J. Super. Ct. App. Div.), *rev’d on other grounds*, 633 A.2d 964 (1993).

165. *Id.* at 994.

166. See Hanna Brooks Olsen, *Homelessness and the Impossibility of a Good Night’s Sleep*, ATLANTIC (Aug. 14, 2014), <https://www.theatlantic.com/health/archive/2014/08/homelessness-and-the-impossibility-of-a-good-nights-sleep/375671/> [<https://perma.cc/7JGH-W37N>].

167. See, e.g., DAVID G. JONES, SEATTLE OFF. OF CITY AUDITOR, REVIEW OF NAVIGATION TEAM 2018 QUARTER 2 REPORT 21 (2019), <https://s3.documentcloud.org/documents/5731981/Navigation-Team-Audit-2-7-2019.pdf> [<https://perma.cc/8VUE-K29T>] (finding that there are only six public restrooms available 24/7 in all of Seattle).

168. *A Legal Matter: Laws That Disproportionately Impact People Experiencing Homelessness*, NAT’L ALL. TO END HOMELESSNESS (June 17, 2021), <https://endhomelessness.org/blog/a-legal-matter-laws-that-disproportionately-impact-people-experiencing-homelessness/> [<https://perma.cc/PC9J-53VT>] (explaining that common voter restrictions such as ID and residency requirements can be difficult for unhoused individuals to satisfy); see also Maggie Grether, *The Hidden Barriers to Voting While Unhoused*, NATION (Oct. 23, 2024), <https://www.thenation.com/article/politics/voting-barriers-suppression-unhoused-homelessness/>.

169. See U.S. CONST. amend. IV; Maureen E. Brady, *The Lost “Effects” of the Fourth Amendment: Giving Personal Property Due Protection*, 125 YALE L.J. 946, 950 & n.9 (2016). See generally Tim Donaldson, *Abandoned or Unattended? The Outer Limit of Fourth Amendment Protection for Homeless Persons’ Property*, 46 HASTINGS CONST. L.Q. 793, 817 (2019) (arguing in favor of Fourth Amendment protections for unabandoned personal property of homeless individuals while in a public area).

unsheltered to second-class citizen status. This deprivation of liberty violates the precepts of the state constitution.

2. Acquiring, Possessing, and Protecting Property

By enforcing anti-encampment ordinances, cities effectively deprive unsheltered individuals of their constitutional right to acquire, possess, and protect property. Anti-encampment ordinances are often drafted with provisions that govern the removal of occupants' personal property. For instance, in Berkeley, the city maintained an ordinance that, after seventy-two hours' notice, city staff are empowered to dispose of items that they consider to be "refuse or garbage."¹⁷⁰ If staff determined that items collected from a homeless encampment had a high apparent resale value or were usable for shelter, they could inventory them and place them in a secured storage container, where the property would be held for at least fourteen days.¹⁷¹

This policy may seem like an eminently reasonable accommodation that does not offend due process. However, in practice, this disposal procedure often leads to the wholesale destruction of property. In Berkeley, city officials destroyed and disposed of various personal items, including pots and pans, tents, clothing, suitcases, sleeping pads, a therapy tool, and more.¹⁷² One resident claimed that anything she could not physically move away from her encampment in this short time frame would be placed into a garbage pile.¹⁷³ One resident asserted the written notice he received from the city did not inform him on how to retrieve his property; and because he did not own a cell phone, he could not learn how to do so.¹⁷⁴ Some unsheltered residents were forced to comply with this law under threat of enforcement by uniformed police officers donning SWAT gear.¹⁷⁵

These removal proceedings can be disastrous and can yield long-term consequences. As the Ninth Circuit recognized in *Lavan v. City of Los Angeles*, finding these kinds of sweeps illegal, "[f]or many of us, the loss of our personal effects may pose a minor inconvenience. However, . . . the loss can be devastating for the homeless."¹⁷⁶ Sometimes, residents would tend to necessary tasks such as eating, showering, and using the

170. Sullivan v. City of Berkeley, 383 F. Supp. 3d 976, 982 (N.D. Cal. 2019).

171. *Id.*

172. *Id.* at 980–81.

173. *Id.* at 985.

174. *Id.* at 980–81.

175. *Id.* at 983.

176. 693 F.3d 1022, 1032–33 (9th Cir. 2012) (second alteration in original) (quoting Pottinger v. City of Miami, 810 F. Supp. 1551, 1559 (S.D. Fla. 1992)).

restroom, only to find that their belongings were considered abandoned by the city and subsequently seized and destroyed.¹⁷⁷ In *Lavan*, the items seized from homeless residents and destroyed included “personal identification documents, birth certificates, medications, family memorabilia, toiletries, cell phones, sleeping bags and blankets.”¹⁷⁸ As anyone who has tried to secure a driver’s license or birth certificate can attest, replacing one of these items can be a tremendous undertaking. Several of these items are necessary to apply for benefits, jobs, housing, and other essential resources to survive.

But even beyond that, the plaintiffs alleged that as they “stepped away from their personal property, leaving it on the sidewalks, to perform necessary tasks[,] . . . City employees . . . seized and summarily destroyed . . . personal identification documents and family memorabilia . . .”¹⁷⁹ These objects can be irreplaceable, particularly family photos, heirlooms, and letters. In emergencies, these are the first items we grab from our homes if forced to evacuate. But for the unsheltered, every day is an emergency, every day could be an evacuation, and every day their personal property is threatened.

3. Pursuing and Obtaining Safety and Happiness

The home is the necessary foundation for the pursuit of happiness. Despite the reality that a significant proportion of unsheltered residents maintain gainful employment,¹⁸⁰ it is difficult to find a job without the benefits of a home—a mailing address, a place to store work attire, a shower, a restroom, and access to the internet. Further, enforcement of anti-encampment ordinances, as previously established, can make it challenging to preserve the necessary documentation to seek housing and employment, prevent the destruction of essential medications, and impose a criminal record. Each of these independently creates barriers to the pursuit of happiness in itself.

Part and parcel of the ability to pursue happiness is the right to privacy,¹⁸¹ which the New Jersey Supreme Court has explicitly recognized.¹⁸² Indeed, this right arises from the substantive due process

177. *Id.* at 1025.

178. *Id.*

179. *Id.*

180. Julie Pagaduan, *Employed and Experiencing Homelessness: What the Numbers Show*, NAT’L ALL. TO END HOMELESSNESS (Sept. 2, 2022), <https://endhomelessness.org/blog/employed-and-experiencing-homelessness-what-the-numbers-show/> [https://perma.cc/2649-BA7F].

181. *Doe v. Poritz*, 662 A.2d 367, 412 (N.J. 1995).

182. *Hennessey v. Coastal Eagle Point Oil Co.*, 609 A.2d 11, 17–18 (N.J. 1992).

protections afforded by article I, paragraph 1 of the New Jersey State Constitution.¹⁸³ The New Jersey courts define the right of privacy as “the right of an individual to be . . . protected from any wrongful intrusion into his private life which would outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.”¹⁸⁴ Denial of shelter of the sort that the *Grants Pass* decision considers permissible would constitute a complete deprivation of the right to privacy. Unhoused individuals cannot effectively conduct their personal affairs without being seen by the ever-present gaze of local law enforcement and the public. Nor is this deprivation even-handed—citizens resting in a park are not the focal point of laws criminalizing the occupation of public land.

The privacy interests of unhoused individuals are also impinged in the criminal context. The New Jersey Supreme Court assures the home’s sanctity against unreasonable searches in every case.¹⁸⁵ In *State v. Brown*, the court noted that the state and federal constitutions “make no distinction between a manor estate in an affluent town and a ramshackle hovel in an impoverished city.”¹⁸⁶ However, a person does not have a reasonable expectation of privacy when residing on property they are unlawfully occupying.¹⁸⁷ The proverbial hovel can only cast its shroud of constitutional protection if the occupant owns the land on which it is constructed or is otherwise lawfully present as a tenant. Unhoused individuals are out of luck.

The New Jersey courts have been generally “unreceptive to arguments that the state constitutional ‘happiness and safety’ clause imposes an affirmative obligation.”¹⁸⁸ But that leaves open the question of whether the government must refrain from impinging on the happiness and safety of its residents in the absence of a compelling interest. The negative right to shelter calls for this type of scheme.

183. *Id.* at 18.

184. *Burnett v. County of Bergen*, 954 A.2d 483, 491 (N.J. Super. Ct. App. Div. 2008) (alteration in original) (quoting *McGovern v. Van Riper*, 43 A.2d 514, 518 (N.J. Ch. 1945)), *aff’d in part, rev’d in part*, 968 A.2d 1151 (2009).

185. *State v. Brown*, 83 A.3d 45, 50 (N.J. 2014).

186. *Id.*

187. *United States v. Cortez-Dutrieuille*, 743 F.3d 881, 884–85 (3d Cir. 2014).

188. Joseph R. Grodin, *Rediscovering the State Constitutional Right to Happiness and Safety*, 25 HASTINGS CONST. L.Q. 1, 32 (1997) (citing *Franklin v. New Jersey Dep’t of Hum. Servs.*, 543 A.2d 56 (N. J. Super. Ct. App. Div.), *aff’d*, 543 A.2d 1 (N.J. 1988)). In *Franklin*, the court noted that the government did not have any obligation to provide social services. *Franklin*, 543 A.2d at 68.

B. Application of State Constitutional Protections

The New Jersey Constitution's guarantee of due process and equal protection is construed broadly. This provision extends to the right to marry and concomitant marital benefits to people regardless of sexual orientation.¹⁸⁹ This provision protects both privacy and reputation interests.¹⁹⁰ The New Jersey Supreme Court also relied on this provision to strike down a municipal law prohibiting more than four unrelated individuals from sharing a single housing unit, where the city cited its interest in "preserv[ing] the family character" of their neighborhoods.¹⁹¹ The New Jersey Supreme Court should extend the guarantees of article I paragraph 1 to individuals experiencing homelessness in the state.¹⁹²

This is not to say that the New Jersey Supreme Court should impose a legal right to remain indefinitely in a public space. A municipality may have legitimate interests in requiring the disassembly of encampments. However, by establishing a constitutional negative right to shelter, the court would compel the government to ensure the availability of adequate shelter as a precondition to enforcement of anti-encampment ordinances. Without this necessary precondition, the enforcement of anti-encampment ordinances essentially criminalizes the status of homelessness. If no shelter is available, then no space within a city would be lawful for an unsheltered individual to rest. This offends the substantive rights of unsheltered individuals.

If an individual experiencing homelessness were to take shelter on private property, they would be trespassing. And if all public property were to be declared uninhabitable, without shelter as an alternative, then anti-encampment ordinances would banish all unhoused individuals from the municipality. This indirect form of banishment partly animated the *Mount Laurel I* court to establish a sweeping

189. *Lewis v. Harris*, 908 A.2d 196, 220–21 (N.J. 2006) (holding the state equal protection clause entitles committed same-sex couples to the same benefits and privileges afforded married opposite-sex couples); *Garden State Equality v. Dow*, 79 A.3d 1036 (N.J. 2013) (finding same-sex couples have a right to marry under state equal protection clause).

190. *Doe v. Poritz*, 662 A.2d 367, 412, 419–20 (N.J. 1995); *see also* *Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620, 631 (N.J. 2000) (stating article I, paragraph 1, of the New Jersey Constitution includes a right of privacy).

191. *State v. Baker*, 405 A.2d 368, 369–70 (N.J. 1979) (internal quotations marks omitted).

192. Since the New Jersey Supreme Court has previously held that poverty is not a suspect classification, an equal protection analysis cannot proceed on that basis. *Barone v. Dep't of Hum. Servs., Div. of Med. Assistance & Health Servs.*, 526 A.2d 1055, 1060–61 (N.J. 1987). However, this Note does not foreclose the possibility that unsheltered individuals be considered a suspect class, given the unique way that they are singled out by vagrancy laws and disenfranchised from the political process.

remedial scheme for every municipality's land use plan throughout the state.¹⁹³

When adjudicating substantive due process and equal protection claims under the state constitution, courts must weigh the restraint against the public justification for such laws.¹⁹⁴ Doing so here, a negative right to shelter properly accords the competing interests between cities and its unsheltered residents. By requiring the municipality to provide shelter beds as a precondition to enforcing anti-encampment laws, courts ameliorate due process and equal protection concerns. By implementing their laws in this manner, municipalities would not necessarily be denying shelter per se—they would only be denying unsheltered residents their preferred form of shelter. Of course, this evokes concerns about the adequacy and safety of homeless shelters. For many, it is rational to prefer sleeping outside in a tent to a homeless shelter.¹⁹⁵

This brings the discussion to the critical connection between the *Mount Laurel* line of cases and the thesis of this Note. For decades, local government has increasingly involved itself in deciding how and where people obtain shelter.¹⁹⁶ For the past century, this has taken the form of zoning ordinances, health codes, building and housing codes, and the creation of public spaces. To preserve the general welfare, the state has conferred local government with the broad authority to regulate land use.¹⁹⁷ But with this delegation of power comes a perennial limitation: government “cannot favor rich over poor.”¹⁹⁸

The exercise of extensive land use controls has made the construction of affordable housing and accessible shelter difficult, if not impossible.¹⁹⁹ Prior to the modern urban planning apparatus in most cities today, families exercised their fundamental right to survive by obtaining shelter in any way they could. This included the construction of “shanty towns”

193. See *Mount Laurel I*, 336 A.2d 713, 727–28 (N.J. 1975).

194. *Robinson v. Cahill*, 303 A.2d 273, 282 (N.J. 1973).

195. See Talk of the Nation, *Why Some Homeless Choose the Streets over Shelters*, NPR, at 01:39 (Dec. 6, 2012, 1:00 PM), <https://www.npr.org/2012/12/06/166666265/why-some-homeless-choose-the-streets-over-shelters> [<https://perma.cc/N57A-LSWE>].

196. See Craig Anthony (Tony) Arnold, *The Structure of the Land Use Regulatory System in the United States*, 22 J. LAND USE & ENV'T L. 441, 454 (2007) (noting the land use system's “pervasive use of discretionary land use permits, such as conditional use permits, subdivision maps, and site plan reviews”).

197. See *Mount Laurel II*, 456 A.2d 390, 415 (N.J. 1983).

198. *Id.* at 415.

199. See Vanessa Brown Calder, *Zoning, Land-Use Planning, and Housing Affordability* (Cato Inst., Pol'y Analysis Series No. 823, 2017), <https://www.cato.org/sites/cato.org/files/pubs/pdf/pa-823.pdf> [<https://perma.cc/XE4E-32TF?type=image>].

and homesteading.²⁰⁰ These emergency shelter options are impossible today, particularly in urban centers. The result is that the sidewalk has become home for many Americans. And with anti-encampment ordinances criminalizing sidewalk habitation, unsheltered individuals find that they have two choices: leave or go to prison.

As the New Jersey Supreme Court has recognized, the police power is an attribute of the state's sovereignty to serve public needs.²⁰¹ However, the court also recognized that the exercise of the police power is a denial of substantive due process under the state constitution if it is "palpably unreasonable or unduly discriminatory."²⁰² Even with reasonable presumptions in favor of exercising anti-encampment laws, the stark discriminatory impact should render such laws unconstitutional.

Few laws could implicate the constitutional protections of due process and equal protection more than this indirect method of banishment. Affected persons can no longer enjoy their right to life, liberty, and the pursuit of happiness. Such persons are deprived of the right to consider the city where they live as their home. Municipalities across the state of New Jersey will likely continue to grapple with endemic homelessness for generations. But as the legislative and executive branches chart a path forward, all persons must be afforded the guarantees granted by the state constitution.

VI. CONCLUSION

Homelessness is a housing issue. The New Jersey Supreme Court itself has acknowledged this fact.²⁰³ Despite public housing initiatives throughout the United States, the production of housing is still primarily within the realm of the private market, subject only to legislative regulation. The judiciary's role in addressing homelessness is limited but important. The New Jersey Constitution guarantees certain individual

200. See Sarah M. Ramirez & Don Villarejo, *Poverty, Housing, and the Rural Slum: Policies and the Production of Inequities, Past, and Present*, 102 AM. J. PUB. HEALTH 1664, 1666 (2012) (comparing 1950s agricultural shanty towns in California to New York tenements); Roger D. Billings, *The Homestead Act, Pacific Railroad Act and Morrill Act*, 39 N. KY. L. REV. 699, 714 (2012) (documenting a brief history of the Homestead Act of 1862, in which the federal government provided 160 acres of surveyed public land to a broad swath of the American population to reside and cultivate).

201. *Reingold v. Harper*, 78 A.2d 54, 59 (N.J. 1951).

202. *Id.*

203. *Franklin v. New Jersey Dep't of Hum. Servs.*, 543 A.2d 1, 3 (N.J. 1988) ("It is this structural problem of too little affordable housing that gives rise to most homelessness . . .").

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rights to all, and it is the courts' responsibility to preserve those rights against government interference.

Anti-encampment laws are offensive to the state constitution and implicate three enumerated rights within the very first provision, article I, paragraph 1: 1) the right to enjoy and defend life and liberty; 2) the right to acquire, possess, and protect property; and 3) the right to pursue and obtain safety and happiness. The government certainly has an interest in keeping public spaces clean and accessible for all and ensuring that no one person commandeers these spaces for their exclusive benefit. But when this limited interest is weighed against the profound interests of the unsheltered in their life, liberty, and property, the courts must step in and declare that the New Jersey Constitution affords them a negative right to shelter.