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LAW, POLITICS AND THE HOMELESS

INEZ SMITH REID*

I. INTRODUCTION

The plight of the homeless is one of the most vexing social problems confronting policy makers in this country. So pervasive is this problem that it touched the 1984 presidential election, and prompted the incumbent president to make a promise concerning the establishment of a model facility for the homeless in Washington, D.C., a promise that became the subject of legal action in 1985.¹

Had the social problem of the homeless emerged publicly in the decade of the sixties, undoubtedly it would have been handled by President Lyndon Johnson's "Great Society" and "War on Poverty," and perhaps even resolved in large measure by funding through programs such as Model Cities. Moreover, the plight of the homeless certainly would have captured the imagination and commanded the legal talents of dedicated poverty lawyers who were determined to establish a constitutional right to life, including the basics of human existence: food, shelter, and even medical care.

However, the social problem called "homelessness" did emerge in full bloom, but not in the days of the "War on Poverty" which was designed to help realize

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¹ On November 4, 1984, two days prior to the 1984 presidential election, Mitch Snyder of the Community for Creative Non-Violence (CCNV), the foremost advocate for the homeless, was in the midst of a fast that already had lasted for 51 days. The fast had drawn national attention and ended when the President of the United States, Ronald Reagan, promised to turn a Washington, D.C. dilapidated 800 bed shelter for the homeless, run by Mitch Snyder's CCNV, into a model facility. When the Reagan Administration attempted to step away from that promise, a lawsuit, *Robert Robbins v. Ronald Reagan*, Civil Action No. 85-1963, was filed in summer 1985 in the United States District Court for the District of Columbia on behalf of homeless persons residing at the shelter, known as the Second Street shelter. In December, 1985, a District Court judge Charles R. Richey ruled that the United States could close the shelter. *Robbins v. Reagan*, 616 F. Supp. 1259 (D.D.C. 1985), *aff'd*, 780 F.2d 37 (D.C. Cir. 1985). However, President Reagan stopped plans for evicting the homeless from the shelter; these plans would have been implemented in late December 1985. The federal government then, over the opposition of the CCNV, some citizens of the District of Columbia, and public officials in Washington, D.C., opened another shelter and funded a non-profit group to operate the facility. A number of CCNV adherents were totally dissatisfied and began political action and publicity to obtain funds to renovate the Second Street shelter. In mid-February 1986, Mitch Snyder began another fast. When his health began to deteriorate in mid-March 1986, key actors, including the Federal government, the District of Columbia government, and the CCNV agreed to a resolution of the longstanding dispute concerning the President's 1984 promise. Under the March 16, 1986, resolution, title to the Second Street shelter was given to the District of Columbia government, which in turn agreed to lease the shelter to the CCNV. The federal government also agreed to provide five million dollars to renovate the Second Street shelter. On April 30, 1986, the federal government also closed another shelter which it operated through another non-profit group. The Congress must ratify the land transaction.

an ideal "Great Society." Rather, the problem has surfaced full bloom in changing and economically troubling times. Moreover, the homelessness social problem has appeared when the United States Supreme Court is being meager with additions to its list of Equal Protection suspect classifications, and at a time when the Court is increasingly unreceptive to an expansion of fundamental rights and interests under either the Due Process or Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States of America. Indeed, instead of a desire to protect allegedly disadvantaged groups or to embrace the perceived need for recognition of certain interests as fundamental, the Supreme Court has revealed a clear desire to leave deep socioeconomic questions to the legislative chambers and the legislative process rather than resolving them through judicial decision. This clear desire may be traceable to the discomfort of tackling one problem with reasoned theory, only to discover that new but related cases prove even more difficult to decide within a framework of principled and rational legal theory.

Furthermore, the vexing problem of the homeless has intensified just as the society is realizing the fruits of a conscious policy of deinstitutionalization (e.g., of the mentally ill and the mentally retarded), the results of decades of drug and alcohol abuse, the disaffection and disassociation of teenagers with their families, and the emergence of permanent pockets of poverty referred to by some as the "underclass." Then, too, the setting for the homeless problem is marked by dedication to budget cutting and deficit reduction, traceable in part to a national policy of federal government retreat which in turn has placed significant strains on state and local resources. These complications have presented a serious challenge to states and localities to develop a rationally planned allocation of their limited resources.

The political, social, and economic context in which the problem of the homeless has arisen makes it extraordinarily difficult to protect this very vulnerable and stigmatized segment of America's current population through appeal to the legislative or the judicial process. The flow of government benefits and entitlements has been laden with obstacles, the suspect classification analysis of Equal Protection theory has been virtually unavailable to new classes, and the path of fundamental rights, once vibrant and expansive, has become stagnant.

This article focuses on the District of Columbia in examining a long, discouraging, still pending struggle to establish a right to a government benefit, entitlement, or statutory entitlement to shelter for the homeless. It then explores the suspect classification and fundamental rights theories as sources for the establishment of a right to shelter for the homeless in contemporary America. Finally, it suggests that the tendency to turn to the political or legislative arenas to resolve the problem of the homeless overlooks an urgent need for the statement of clear principles that will govern the existence of one of the most vulnerable and stigmatized populations of our current society.

II. THE LONG STRUGGLE TO ESTABLISH A STATUTORY ENTITLEMENT TO SHELTER FOR THE HOMELESS IN THE DISTRICT OF COLUMBIA: LEGAL AND POLITICAL COMPLICATIONS

*Williams v. Barry*² signaled the initial stage of an effort to establish a statutory entitlement to shelter for the homeless in Washington, D.C. When advocates of the homeless commenced legal action in May 1980, it is doubtful that they envisioned a struggle that would continue into the last half of the 1980s. As late as May 1986, the issue of a statutory entitlement to shelter in the District of Columbia remained unresolved.

Tracing the tortuous path of the search for a statutory entitlement reveals the difficulty of establishing a right to shelter based on a state statutory entitlement. It also reveals the political complications facing the hybrid form of government³ situated in the nation's capital, at the seat of federal power and the arena of intricate political power struggles.

The first strategy of the advocates of the homeless was to draw upon the growth of an idea, the idea of a governmental benefit embodying a right or an entitlement. According to this idea, the judiciary would recognize the entitlement for those on the edge of subsistence to receive the minimum needs of life from government.⁴ As written by Charles Reich, an early advocate of this idea,

The concept of right is most urgently needed with respect to benefits like unemployment compensation, public assistance, and old age insurance. These benefits are based upon a recognition that misfortune and deprivation are often caused by forces far beyond the control of the individual, such as technological change, variations in demand for goods, depressions, or wars. The aim of these benefits

² *Williams v. Barry*, 490 F. Supp. 941 (D.D.C. 1980), *aff'd in part, vacated in part*, 708 F.2d 789 (D.C. Cir. 1983).

³ The District of Columbia has the responsibility and functions both of a city and state government. Although it has local legislative power which has been delegated from the United States Congress, the ultimate legislative power rests in the Congress and is exclusive and plenary under Article I, Section 7, Paragraph 17 of the Constitution of the United States. In *Feldman v. Gardner*, 661 F.2d 1295, 1307 (D.C. Cir. 1981), *cert. denied*, 458 U.S. 1106 (1982), *vacated*, 460 U.S. 462 (1983), Chief Judge Spotswood W. Robinson III, described the District government as "a semi-autonomous governmental unit, an entity unique in our governmental structure." Traditionally, the majority of the District of Columbia population, now predominantly minority, has identified itself with the liberal and democratic spectrum of American politics. Thus, the presence of a conservative and Republican national administration has produced philosophical as well as political tensions between the federal government and the local District government.

⁴ A. Samuel Krislov reveals the goal of early welfare rights lawyers to establish a constitutional guarantee of human life, a "right to life." This goal, says Krislov, was traceable to a concept taken from A. SMITH's work, *THE RIGHT TO LIFE* (1955). As Krislov put it, "Smith's doctrinal contribution of the 'right to life' was that of entitlement, that every individual in the society is entitled as of right to receive the minimum needs of life from that society." See Krislov, *The OEO Lawyers Fail to Constitutionalize a Right to Welfare: A Study in the Uses and Limits of the Judicial Process*, 58 MINN. L. REV. 211, 230 (1973).

is to preserve the self-sufficiency of the individual, to rehabilitate him where necessary, and to allow him to be a valuable member of a family and a community; in theory they represent part of the individual's rightful share in the commonwealth. Only by making such benefits into rights can the welfare state achieve its goals of providing a secure minimum basis for the individual well-being and dignity in a society where each man cannot be wholly the master of his own destiny.⁵

The Supreme Court of the United States embraced this notion of government benefits as entitlements, and placed the concept within the context of the Fourteenth Amendment Due Process Clause by focusing on the word "property." In *Goldberg v. Kelly*,⁶ the Supreme Court noted that welfare benefits "are a matter of statutory entitlement for persons qualified to receive them."⁷ Furthermore, the Court acknowledged its partial indebtedness to Charles Reich: "It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.' Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property."⁸ The Court continued its development of the entitlements concept in *Board of Regents of State Colleges v. Roth*⁹ and *Perry v. Sinderman*.¹⁰ The property interest flowing from a benefit is based on "existing rules or understandings that stem from an independent source such as state law."¹¹ Moreover, a property interest in a benefit cannot be based on "an abstract need or desire" nor may it be based solely on a "unilateral expectation."¹² Nonetheless, it may be traced to "actually explicit understandings that support [a] claim of entitlement to the benefit. . . ."¹³

A. Phase One of the Struggle: Depending on "Mutually Explicit Understandings"

The words "mutually explicit understandings" played a major role in the *Williams v. Barry* strategy. The plaintiffs in *Williams* attempted to show that, beginning in early 1978, the local government of Washington, D.C. had created "actually explicit understandings" that homeless persons had a right to shelter provided by the District of Columbia government. The actions and words of government officials supposedly established the "mutually explicit understandings" as well as "a state fostered expectation of continued shelter services."¹⁴

⁵ Reich, *The New Property*, 73 YALE L. J. 733, 785-786 (1964).

⁶ *Goldberg v. Kelly*, 397 U.S. 254 (1970).

⁷ *Id.* at 262.

⁸ *Id.* At n. 8.

⁹ *Board of Regents of St. Colleges v. Roth*, 408 U.S. 564 (1972) [hereinafter cited as *Roth*].

¹⁰ *Perry v. Sindermann*, 408 U.S. 593 (1972).

¹¹ *Roth*, 408 U.S. at 564. See also *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982) in which the Supreme Court stated: "The hallmark of property . . . is an individual entitlement grounded in state law. . . ."

¹² *Roth*, 408 U.S. at 564.

¹³ *Perry*, 408 U.S. at 601.

¹⁴ Pertinent actions and words included: the use of two public schools, beginning in 1978, to house approximately 330 homeless men per night, execution of a contract between the District gov-

Using this approach, the plaintiffs were able to persuade the district court to enter a temporary restraining order against the District government. The district court concluded that the plaintiffs were likely to succeed on the merits of their case because:

- 1) "the homeless persons possess a property interest in continued occupancy and use of their shelter;"¹⁵ and
- 2) the shelters for homeless persons amounted to a statutory entitlement.¹⁶

Further, the court stated that the actions of District officials "constitute . . . the consistent, positive action . . . necessary to find an entitlement in the absence of a statute."¹⁷ In effect, "[t]he City created a state fostered expectation of continued shelter services. This expectation, created by the City, rose above the level of mere hope or desire. The continued funding of the shelters therefore may also amount to a 'mutually explicit understanding'."¹⁸

The district court opinion in *Williams v. Barry* was a victory for the advocates of the homeless, but it was a short victory. The *Williams* case moved forward through the judicial process, eventually confronting the United States Court of Appeals for the D.C. Circuit in 1983.¹⁹ Judge Harry T. Edwards, writing for a panel of three judges, severely impaired the significance of the district court's earlier ruling. Judge Edwards circumvented the entitlement question and, in doing so, observed that the evidence of entitlement was "weak and inconsistent."²⁰ In his concurring opinion, Justice Bork was even more blunt:

Judge Edwards makes clear that the claim to a "property interest" in homeless men's shelter here is insubstantial and will not support any claims that additional process is due.

ernment and the Gospel Mission for the housing of about 60 homeless men per night, the February 1979 announcement of Mayor Marion Barry, Jr.'s "Policy on Homelessness" which included a statement that "shelter is a basic right," the establishment of a Mayor's Commission on Homelessness, and a 1979 agreement between the Commission and the Mayor concerning the "operation of some of the shelters." *Williams*, 490 F. Supp. at 942-943.

¹⁵ *Id.* at 946.

¹⁶ *Id.* at 946-947.

¹⁷ *Id.* at 947.

¹⁸ *Id.* In *Caton v. Berry*, 500 F. Supp. 45 (D.D.C. 1980) there was an attempt to enjoin the District from closing a shelter facility and transferring residents to another facility. Judge Oberdorfer observed that based on *Williams*, there was a "colorable claim to an entitlement to some minimal form of shelter that cannot be denied without due process of law." *Caton*, 500 F. Supp. at 48. "However," continued Judge Oberdorfer, "the plan now proposed by the [District government] in no way infringes upon this protected interest." *Id.* Thus, "the ... plaintiffs can no longer claim to be suffering from a deprivation of any constitutionally protected interest." *Id.* at 49. And "[a]lthough it may be that transfer will have an effect on plaintiffs, the existence of some adverse impact on plaintiffs by a government decision does not form the predicate for finding a constitutional property or liberty interest requiring due process protection." *Id.* at 52.

¹⁹ *Williams v. Barry*, 708 F.2d 789 (D.C. Cir. 1983).

²⁰ Judge Edwards stated that "[w]e need not resolve the question whether the statements, declarations, and actions of City officials created a constitutionally cognizable entitlement. But the weak

No one has plausibly maintained that there is a constitutional or other legal right to city-provided shelter. . . .²¹

Hence, Justice Bork's views were similar to those of the Supreme Court, displaying the desire to shy away from its previous approach to government benefits, property interests, and entitlements. In fact, the promise of *Goldberg*, *Roth*, and *Perry* began to evaporate in the 1970s as the Supreme Court seemed to lay the foundation for curbing, and perhaps ultimately rejecting, the entitlement approach. The first setback came in 1970 with the case of *Dandridge v. Williams*.²² In *Dandridge*, the Court rejected efforts of poverty lawyers to establish even greater rights for those dependent on welfare benefits. The second major blow came in 1976 with the decisions in *Mathews v. Eldridge*,²³ *Bishop v. Wood*,²⁴ and *Paul v. Davis*.²⁵

and inconsistent nature of the evidence of entitlement provides further support for our ultimate determination that the District Court accorded the homeless men all the process they are due." *Id.* at 792.

²¹ *Id.* at 793 (Bork, J., concurring).

²² *Dandridge v. Williams*, 397 U.S. 471 (1970). *Dandridge* involved a challenge to Maryland's maximum AFDC welfare grant regulation. The Supreme Court sustained the validity of Maryland's regulation. The Court found no violation of the Fourteenth Amendment Equal Protection Clause because "[i]n the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *Id.* at 485. Moreover, the Court saw no conflict with its *Goldberg* decision. "The Constitution may impose certain procedural safeguards upon systems of welfare administration [citing *Goldberg*]. But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients." *Id.* at 487. Thus, the Supreme Court tipped the balance to the side of state interests in the face of limited resources, rather than to the side of the interests of welfare recipients in the adequacy of governmental benefits. See also *Arnett v. Kennedy*, 416 U.S. 134 (1974), and Tushnet, *The Newer Property: Suggestion for the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261.

²³ *Mathews v. Eldridge*, 424 U.S. 319 (1976). In *Eldridge*, the Court refused to consider disability benefits under the Social Security Act in the same category as the welfare benefits examined in *Goldberg*. Thus, no pretermination hearing was required. The Court distinguished *Goldberg* by pointing out that "welfare assistance is given to persons on the very margin of subsistence," *Id.* at 340, whereas "eligibility for disability benefits ... is not based upon financial need." Mashaw describes *Eldridge* as a "retrenchment from the [Supreme Court's] procedurally interventionist posture in the early 1970s." J. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE*, 104, 161 (1985). See also Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977), and Note, *Discriminations Against The Poor And The Fourteenth Amendment*, 81 HARV. L. REV. 435, 439 (1967).

²⁴ *Bishop v. Wood*, 426 U.S. 341 (1976). In *Bishop*, the Court held that a city policeman who was dismissed from his job had no protected property interest because he held his job at the pleasure of the city. Moreover, the Court refused to recognize any violation of a liberty interest based on the stigma of dismissal from his job. The Court concluded that: "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." *Id.* at 349. Further, said the Court, "[i]n the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions." *Id.* at 350.

²⁵ *Paul v. Davis*, 424 U.S. 693 (1976). In *Paul*, the Supreme Court held that including a person's name and picture on a flyer of "active shop-lifters" was not a violation of a property or liberty

B. *Phase Two of the Struggle: The Effort to Establish a Statutory Entitlement Through the Initiative Process*

The “negative” trend in property rights and entitlement cases and the Court of Appeals decision in *Williams v. Barry* both played a role in the next strategy embraced by the advocates of the homeless in Washington, D.C. The new strategy involved an attempt to create an actual statutory entitlement to shelter rather than depending on the mutually explicit understandings approach.

Instead of seeking the direct enactment of a pertinent local law by the Council of the District of Columbia, the advocates of the homeless decided to appeal for support to the total electorate through the local initiative process. On December 23, 1983, the advocates presented a proposed initiative to the District of Columbia Board of Elections and Ethics. That initiative was known as the “District of Columbia Right to Overnight Shelter Initiative of 1983,” which soon became trapped in a web of legal and political maneuvers. Even as late as the early months of 1986, the fate of the initiative was still unclear.

The Board of Elections moved expeditiously to set the stage for an eventual vote on the initiative. It gave its initial approval and certified the measure for the citizens’ petition process in February 1984. This allowed the proponents of the initiative 180 days to gather a requisite number of signatures from the electorate to place the initiative on the November 1984 ballot.²⁶ This task was accomplished and on August 1, 1984, the Board certified the initiative, now referred to as Initiative 17, for the November 1984 general election ballot.

Although the Executive Branch of the District of Columbia government, which had to defend against the suit in *Williams v. Barry*, had been publicly silent (as a government)²⁷ on Initiative 17, internal discussions were in progress. Of utmost concern was how the District of Columbia Court of Appeals would handle a pending case involving an unemployment compensation initiative, as well as the prohibition in District law against using the initiative process to advance any proposed law which could be interpreted as “[a]” law making an appropriation.” On August 22, 1984, the District of Columbia Court of Appeals handed down the awaited decision, *District of Columbia Board of Elections and Ethics v. Phinis Jones*.²⁸ In essence, the court ruled that the unemployment compensation initiative

interest. This was true because “reputation” alone, apart from some more tangible interests such as employment does not constitute either “‘liberty’ nor ‘property’” sufficient to invoke the procedural protection of the Due Process Clause. Furthermore, the individual did not assert “denial of any right vouchsafed to him by the State and thereby protected under the Fourteenth Amendment.” *Id.* at 712.

²⁶ D.C. law generally requires 5% of the registered voters to agree to placing an initiative on the ballot. See D.C. CODE ANN. §§ 1-282, and 1-1320 (i) (1981). In numbers, some 21,024 signatures were required before Initiative 17 could be placed on the ballot.

²⁷ Mayor Marion Barry, Jr. was one of those whose signatures appeared on a petition to place Initiative 17 on the ballot.

²⁸ *District of Columbia Bd. of Elections and Ethics v. Jones*, 481 A.2d 456 (D.C. App. 1984) [hereinafter cited as *Phinis Jones*].

was an improper subject of the initiative process because it constituted a law making an appropriation.

The *Phinis Jones* decision launched an intense controversy over the validity of Initiative 17 which ultimately spilled into the judicial and political arenas of the District government, and into the national political forum. To understand the controversy, one must begin with the specific provisions of Initiative 17, and then examine the rather nebulous provision of the District's law which prohibited laws making appropriations.

The right to shelter for the homeless, sought through the judicial process in *Williams v. Barry*, is clearly enunciated in Section 2 of Initiative 17: "All persons in the District of Columbia shall have the right to adequate overnight shelter."²⁹ The only limitation on the right to shelter for those eligible was the requirement that they be willing "to abide by reasonable regulations governing the operation of shelter facilities."³⁰ Immediate questions were generated by the wording of Section 2: Did it create an immediate and automatic right? Did it create a statutory entitlement? Does "adequate overnight shelter" mean more than decent lodging, and does it include other necessities of life such as food, clothing, and medical care?

Initiative 17 defined the homeless both in the traditional sense of those persons without living accommodations and those persons subjected to the battered spouse or battered child syndrome.³¹ Sections 5 and 6 of the Initiative contained words suggesting that the right to shelter was not immediate or automatic, nor was it a statutory entitlement. Nonetheless, Section 7 appeared to resolve the ambiguity in favor of a statutory entitlement. Section 5 required the Mayor to determine the number of homeless "desiring shelter" and the availability and adequacy of shelter.³² Section 6 mandated action by the Mayor to provide shelter but relieved the Mayor of the burden of giving shelter to those who enter the District to obtain shelter, or who refuse to abide by the rules of the shelter facility.³³ Aside from

²⁹ "Adequate overnight shelter" was defined as "that which to a reasonable degree maintains, protects, and supports human health, in accessible, safe, sanitary, and has an atmosphere of reasonable dignity." D.C. CODE ANN. § 3-601 (Supp. 1986).

³⁰ See Section 3, Initiative Measure No. 17, "District of Columbia Right to Overnight Shelter Initiative of 1984." Now Codified at D.C. CODE ANN. § 3-602 (Supp. 1986).

³¹ See Section 4 which defined a homeless person as: 1) a person with "no present possessory interest in an accommodation" and "lacks the means necessary to obtain such interest;" and 2) a person with a possessory interest in an accommodation who "is unable to secure entry to that accommodation" or fears abuse in the accommodation in that "occupation . . . would likely lead to violence from another occupant." D.C. CODE ANN. § 3-603 (Supp. 1986).

³² Under Section 5, the Mayor has 30 days to make the initial requisite determination and must make such determination on an annual basis thereafter. D.C. CODE ANN. § 3-604 (Supp. 1986).

³³ Under Section 5, the Mayor "shall take reasonable steps to provide health-maintaining and accessible overnight shelter space offered in an atmosphere of reasonable dignity to all homeless persons." The action must be taken "within 30 days of the assessment required by § 3-604 (Section 5)." Moreover, "[s]helter need not be provided . . . to persons who can be shown to have entered the District of Columbia for the express purpose of obtaining free shelter . . . or who are unwilling to

the difficulties of proof and the complexities of determining a person's intent within the context of Initiative 17, the prohibition on shelter to persons who journey to the District just to gain access to shelter appeared at least to raise the question of whether Initiative 17 violated a person's right to interstate migration, and whether the initiative penalized this constitutional right. However, since the prohibition did not neatly fall into the durational residency requirement category, it is at least arguable that the principles enunciated in *Shapiro v. Thompson*³⁴ and *Memorial Hospital v. Maricopa County*³⁵ could not be used to invalidate this prohibition. This is especially true in light of cases such as *Dunn v. Blumstein*³⁶ where the Court stated that "appropriately defined and uniformly applied bona fide residence requirements"³⁷ could be held valid, and *Martinez v. Bynum*³⁸ which involved a residency provision similar to that found in Initiative 17.

Section 7 accords a private right of action to the homeless to enforce the right to shelter. Simultaneously, Section 7 lifts the exhaustion of remedies barrier to litigation, removes the right of the government to assert sovereign immunity to block the effectiveness of legal action, and permits the assessment and award of reasonable attorneys' fees and court costs to a prevailing homeless person.

comply with duly enacted rules and regulations governing operation and use of shelter facilities." D.C. CODE ANN. § 3-605 (Supp. 1986).

³⁴ *Shapiro v. Thompson*, 394 U.S. 618 (1969). The Court concluded that the one year residency requirement for welfare benefits infringed the constitutionally protected right of interstate migration or travel, and no compelling state interest could justify the residency classification; therefore the classification was invidious.

³⁵ *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974). Here the Court concluded that a man who had journeyed to Arizona for medical reasons was penalized for his interstate migration because of the Arizona one year residency requirement as a condition for receiving medical care at government expense. Both *Shapiro v. Thompson* and *Memorial Hospital v. Maricopa County* involved the basic necessities of life.

³⁶ *Dunn v. Blumstein*, 405 U.S. 330 (1972).

³⁷ *Id.* at 342 n.13.

³⁸ *Martinez v. Bynum*, 461 U.S. 321 (1983). It should be noted that in the *Memorial Hospital* case the Court rejected a fiscal argument and concluded that such an argument was inadequate to support a durational residency requirement. "The conservation of the taxpayer's purse is simply not a sufficient state interest to sustain a durational residence requirement which, in effect, severely penalizes the exercise of the right to freely migrate and settle in another state." *Memorial Hospital*, 415 U.S. at 263. *Martinez* involved a child who was born in the United States in 1969, was taken to Mexico to live until 1977, and was then sent to Texas to live with his sister in order to attend school. Section 21.031 of the TEX. ED. CODE ANN. provided that "it must be established that [the child's] presence in the school district is not for the primary purpose of attending the public free schools." The Supreme Court sustained the statute on the ground that the constitution permits a state to restrict eligibility for tuition-free education to its bona fide residents. Further, the Court noted that, "[a] bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents. Such a requirement with respect to attendance in public free schools does not violate the Equal Protection Clause of the Fourteenth Amendment. It does not burden or penalize the constitutional right of interstate travel, for any person is free to move to a state and to establish a residence there. A bona fide residence requirement simply requires that the person *does* establish residence before demanding the services that are restricted to residents." *Martinez*, 461 U.S. at 328-329.

This provision could be interpreted as ending any speculation as to whether Initiative 17 establishes a statutory entitlement or a mandatory right. If the right to shelter was considered to depend on the discretion of the Mayor, then there apparently would be no reason to include a private right of action provision to enforce the right to shelter, unless the drafters believed that the Mayor would consistently abuse his discretion in this matter.

Clearly then, if Initiative 17 contained a statutory entitlement, as it at least arguably did, fiscal implication surrounded the initiative, and could provide a stumbling block to its validity. The court in *Phinis Jones* concluded that the citizens of the District could not “use the initiative to launch the appropriations process”, and that an initiative which “would compel a prohibited interference with the management of the financial affairs of the District” could not stand. *Phinis Jones* seemed to have negative meaning for Initiative 17 but the matter was not without doubt, particularly since the court’s explication of its conclusion contained the word “automatic” in a key passage:

We see no distinction between the effect on fiscal planning of this provision (the unemployment compensation initiative increasing benefit levels after the legislature had reduced them in 1983), which calls for *automatic* increases in unemployment benefits, and that of a provision which would authorize an *automatic* raise for all D.C. government employees. Either would compel a prohibited interference with the management of the financial affairs of the District.³⁹ (emphasis added).

While the unemployment compensation initiative, and apparently the court’s own comparative example, contained explicit (or in the case of the comparative example, at least implicit) specific dollar amounts, Initiative 17 was silent on the matter of funding. It is not surprising then, that the District government decided to challenge Initiative 17⁴⁰ despite: 1) the humane issue involved, 2) the political attractiveness and inevitability of granting aid to a highly vulnerable population located in the nation’s capitol, and 3) the Board of Elections and Ethics’ approval of the initiative for the November 1984 ballot. Neither the underlying laws regarding prohibited initiatives, nor the court’s interpretation of those laws provided comfort against the possibility of citizens using the initiative process, on a variety of issues, to compel the government to fund desired benefits, activities, and projects. Yet, repeated resort to the initiative process, without adequate concern for fiscal impact, inevitably would destroy any notion of rational fiscal planning, and could possibly thrust the government into an unwanted and unaffordable crisis.⁴¹ More-

³⁹ *Phinis Jones*, 481 A.2d at 460.

⁴⁰ The District filed suit against the Board of Elections and Ethics on October 11, 1984, after its internal review of *Phinis Jones*, and after the Board of Elections and Ethics responded negatively to the September 10, 1984, City Administrator’s request that the Board reconsider its decision to put Initiative 17 on the ballot in light of *Phinis Jones*.

⁴¹ In granting limited home rule to the District of Columbia government, the Congress of the United States expressed reservations about the financial health of the District, and hence, placed fiscal constraints on the District’s home rule powers. Thus, no expenditure of District money (or even money raised by the District itself from such sources as property taxes, sales taxes, and income taxes) must

over, it would provide an open arena to citizens disappointed in their efforts to convince the Mayor or the Council to include funding for specific projects or programs in the proposed fiscal year budget. This open arena could significantly hinder the competitive legislative process in which the Mayor and the Council weigh competing demands for limited resources, and make hard choices in order not to exceed the available resources.

Initially, District law stated simply that citizens could propose laws by way of the initiative process so long as they were not "laws appropriating funds."⁴² Later the Council enacted procedures governing the initiative process and mandated that the Board of Elections and Ethics reject a law that is not a "proper subject of initiative". A proposed initiative would be considered improper if it would "negate or limit an act of the Council of the District of Columbia."⁴³ Obviously the phrase "proper subject of initiative" is not self-explanatory, although the words "negate or limit an act of the council" appear clear on their face.

Unfortunately, the first major case in which the District courts were required to wrestle with interpretation of the phrases "laws appropriating funds", "proper subject of initiative", and "negate or limit an act of the Council of the District of Columbia" involved a highly political project which was the construction of the District's Convention Center.⁴⁴ This may explain why the opinion in *Con-*

be appropriated by the Congress of the United States. See Section 446 of the District of Columbia Self-Government and Governmental Reorganization Act, D.C. CODE ANN., § 47-304 (1981). Moreover, during Mayor Barry's first term as Mayor, and in 1980, the District was beset by a major fiscal crisis that required the use of layoffs to bring the budget in line with revenues.

⁴² D.C. CODE ANN. §§ 1-281(a) and 1-1302(10) (1981) provide: "The term initiative means the process by which the electors of the District of Columbia may propose laws (except laws appropriating funds) and present such proposed laws directly to the registered qualified electors of the District of Columbia for their approval or disapproval." The nature of the District government's relationship with the federal government, and particularly the District's budgetary process involving the Mayor, the Council of the District of Columbia, and the Congress, makes it difficult to rely on other jurisdictions for an interpretation of the phrase "laws making appropriations." For example, the Council does not make appropriations for the District; only the Congress appropriates money (including revenues raised by the District government through various local taxes). Moreover, while emergency laws enacted by the Council take effect immediately, civil acts of the Council may become laws only after a 30 day Congressional review period, and criminal laws after a 60 day Congressional review period. See Section 602(c)(1) and (2) of the District of Columbia Self-Government and Governmental Reorganization Act, D.C. CODE ANN. §§ 1-233(c)(1) and (2) (1981). Nonetheless, it is instructive to know the approach of other jurisdictions with respect to the concept "laws appropriating funds." See, e.g., Note, *Referendum: The Appropriations Exception in Nebraska*, 54 NEB. L. REV. 393 (1975), *Thomas v. Bailey*, 595 P.2d 1 (Alaska 1979), *Kansas City v. McGee*, 364 Mo. 896, 269 S.W. 2d 662 (1954), *State ex. rel. Sessions v. Bartle*, 359 S.W. 2d 716 (Mo. 1962), *State ex. rel. Card v. Kaufman*, 517 S.W.2d 78 (Mo. 1974).

⁴³ D.C. CODE ANN. § 1-1320(b)(1)(D) (Supp. 1986), known popularly as the Dixon Amendment and officially as the Initiative Procedures Act, did not become effective until 1979. A 1982 amendment removed the phrase "proper subject for initiative" but left intact the words, "negate or limit an act of the Council." See D.C. CODE ANN. § 1-1320(k)(1)(G) (Supp. 1986).

⁴⁴ In fiscal year 1978 the Council included in a budget amendment act a request for funds to construct a convention center. The Mayor had proposed the Convention Center at an initial cost of

*vention Center Referendum Committee v. District of Columbia Board of Elections and Ethics*⁴⁵ is so confusing, and why it was a plurality opinion. It is also important to note that the *en banc* court was badly split, a split which in part may be traceable to particular views about the need to protect a relatively new home rule government which had not yet reached its tenth anniversary.

The plurality opinion in the *Convention Center* case (supported in rationale by three of the nine justices)⁴⁶ must be read against the dissenting opinion (championed by four of the justices). Clearly evident in the plurality decision were two themes. The first of these themes espoused the need for the fiscal integrity of a young home rule government. The second theme propounded the unfettered right of the District's electorate to vote on citizen initiated proposed laws,⁴⁷ a theme advocated repeatedly by the dissenters.⁴⁸ These two, perhaps conflicting themes

\$27 million. The total cost was estimated to be \$98.7 million. The budget amendment was approved by Congress and in June 1978 Congress appropriated the \$27 million. Some District residents were opposed to building a convention center in downtown Washington D.C. and sought to block construction by, in essence, repealing the funds appropriated for the initial phase of construction. Those residents wanted to use the new initiative process. However, the Charter Amendments Act which provided for the initiative process was not self-executing and the Council had been required to enact implementing procedures by September 6, 1978. Because the procedures were not in effect by October 1978 (the Council did not act until June 1979), the opponents of the Convention Center proceeded to file a petition with the Board of Elections and Ethics in October 1978, and sought to enforce the Charter Amendments Act without legislation. This effort failed, and when the Council considered the Dixon Amendment in June 1979 (the Initiative Procedures Act), the initiative opposing funds for the Convention Center project already had been circulated to voters. Hence, many regarded the Dixon Amendment as an effort to defeat the initiative measure.

⁴⁵ *Convention Cent. Referendum Comm. v. District of Columbia Bd. of Elections and Ethics*, 441 A.2d 889 (D.C. App. 1981).

⁴⁶ Two justices supported the decision reached by the three judge plurality.

⁴⁷ The source of a right to vote on an initiative is the Charter Amendments Act, effective March 10, 1978, D.C. CODE ANN., §§ 1-281(a) and 1302(10) (1981).

⁴⁸ Prior to the *en banc* decision in the *Convention Center* case, a three judge panel had analyzed the issues. See *Convention Cen. Referendum Comm. v. District of Columbia Bd. of Elections and Ethics*, 441 A.2d 871 (D.C. App. 1980). Interestingly enough, there was also a split in the panel which reflected varied and conflicting themes. Judge Theodore Newman, Chief Judge of the Court, emphasized the theme of separation of powers and the executive authority of the Mayor, while dissenting Judge Gallagher zeroed in on the "right to vote" theme. Judge Newman noted the "general rule" that initiatives apply "only to acts which are legislative in character, and not to those dealing with administrative or executive matters." *Id.* at 874. Because Congress already had enacted the Budget for the District and thus had already appropriated funds for the Convention Center, "only administrative tasks were left to be performed in connection with the project and . . . the Mayor was vested with the responsibility for carrying them out." *Id.* at 880. Thus, since the Mayor was assigned these administrative or "ministerial" tasks, "the Council could not interfere with the Mayor's performance" of such tasks; "neither could the electorate so interfere through use of the initiative." *Id.* at 881.

At the very outset of his dissenting opinion, Judge Gallagher stated: "We are confronted here, fundamentally, with a right to vote issue. . . . It is a very basic right." *Id.* (Gallagher, J., dissenting). Judge Gallagher also took issue with Judge Newman's conclusion that *Convention Center* involved "only administrative-executive acts." *Id.* at 883-887. Judge Gallagher vested the right to vote on initiatives as "essentially the basis of Home Rule," and also regarded voting on initiatives as a portrayal of the "vitality of government." As Judge Gallagher put it: "Other rights, even the most

haunted both judges involved with Initiative 17 in the Superior Court of the District of Columbia. Those judges were Judge Salzman at the temporary restraining order and preliminary injunction stage, and Judge Wagner at the “merits” stage of the case.

In *Convention Center*, Judge Ferren, writing for the plurality, neatly summarized the competing forces: “In construing the amendment, we must weigh two major public interest concerns of the Council reflected in the Charter Amendments—the elector’s right of initiative and responsible fiscal management—with a view to enhancing the value of each without undue intrusion on the other.”⁴⁹ (emphasis added).

Since the *Convention Center* case involved an effort to reject a budget item already approved by the Council of the District of Columbia and the Congress, the issue was basically an easy one for the plurality, but the scope of the plurality opinion may have produced a more complicated result. The plurality concluded that District law did not “sanction use of the initiative power to rescind the legislature’s established fiscal plans.”⁵⁰ However, the plurality went on to state:

[W]e conclude that the “laws appropriating funds” exception prevents the electorate from using the initiative to (1) adopt a budget request act or make some other affirmative effort to appropriate funds, or (2) to block the expenditure of funds requested or appropriated as of the effective date of the initiative act.

The Council’s fiscal concerns, however, do not compel the conclusion that the “laws appropriating funds” exception also should be read to preclude wholly prospective initiatives. . . .

Accordingly, we further conclude that the “laws appropriating funds” exception does not preclude initiatives (1) to establish substantive authorization for a new project (2) to repeal existing substantive authorization for a program (without rescinding its current funding) or (3) to prohibit future budget requests.⁵¹

Although the plurality had produced an opinion with a somewhat extended scope, three significant issues remained unclear. First, the plurality left unexplained the words, “or make some other affirmative effort to appropriate funds.” Second, the opinion failed to clarify the proper interpretation of the words “substantive authorization for a new project.” With regard to this particular phrase, it is not clear whether or not a difference was intended between words such as “project” and “establishment,” and “program” and “repeal.” This is important in determining whether the court meant to focus solely on capital-type specific projects or on the broader social service programs. Finally, the plurality opinion failed to explain what it actually meant by “wholly prospective initiatives” or “initiatives with a prospective but not a present fiscal effect.”⁵²

basic, are illusory if the right to vote is undermined.” *Id.* at 889, (citing *Wesberry v. Saunders*, 376 U.S. 1 (1964)).

⁴⁹ *Convention Center*, 441 A.2d at 912.

⁵⁰ *Id.* at 913.

⁵¹ *Id.* at 913-14.

⁵² *Id.* at 914 and 915.

In contrast to the plurality opinion which considered the "laws appropriating funds" exception to be "ambiguous on its face,"⁵³ the dissenters believed the clause to be "plain enough."⁵⁴ Moreover, relying upon a position taken by the American Civil Liberties Union (which represented one Councilmember) as *amicus curiae*, the dissenters stressed the right of citizens to vote on initiatives and the need to protect that right "no matter that there may be official apprehension as to the outcome."⁵⁵ On the other hand, although the plurality was willing to accept the basic proposition that "the power of the electorate to act by initiative is coextensive with the power of the legislature to adopt legislative measures,"⁵⁶ and that "the initiative right should be liberally construed,"⁵⁷ to sustain the initiative, the plurality nonetheless believed that certain fiscal factors could stop a vote on an initiative. In the words of the plurality, "the electorate cannot interfere, by way of initiative, with the legislature's established fiscal plans."⁵⁸

The tension between the plurality and dissenting opinions not only accentuated disagreement about the need to protect the right to vote on initiatives in order to strengthen home rule government, but also imparted a vague understanding about when fiscal considerations should be allowed to prevent citizens from voting on initiatives. For the dissenters, fiscal considerations important enough to stop an initiative translated into a "budget request act." In essence, it could be presumed that only an attempt by citizens to place a formal budget request act before the electorate through the initiative process could be invalidated. As the dissenters stated:

Everything costs money and all legislation has some sort of an impact on the budget. . . .

If we simply translate "laws appropriating funds" as "budget request acts", the only sensible thing to do, then the Charter language says only that *the people may not, by initiative, themselves propose a budget request act*. The unmistakable meaning of the term is that the people may not by initiative enact an appropriations law (or transmit a budget request to Congress).⁵⁹

Thus, even if the initiative was "fiscally irresponsible"⁶⁰ the vote should take place. Otherwise, the court would emerge as "the self appointed decider of 'reasonable fiscal management'" and hence would be a "super legislature."⁶¹

For the plurality, fiscal considerations translated into not only the adoption of a budget request act but a forbidden "affirmative effort to appropriate funds"

⁵³ *Id.* at 911.

⁵⁴ *Id.* at 924 (Gallagher, J., dissenting).

⁵⁵ *Id.* at 930-31.

⁵⁶ *Id.* at 897.

⁵⁷ *Id.* at 913.

⁵⁸ *Id.* at 916.

⁵⁹ *Id.* at 924 (Gallagher, J., dissenting).

⁶⁰ *Id.* at 926.

⁶¹ *Id.* at 925-926.

or to “launch the appropriations process,” but “wholly prospective initiatives,” most of which inevitably involve fiscal outlays (particularly if they are new capital projects) are not forbidden to the initiative process. Yet, if responsible fiscal management is the goal of the plurality, would not that goal be undermined by a series of initiatives which command future budget requests, under the rubric of the “authorized new project,” for a variety of endeavors not previously proposed or advocated by the Mayor or the Council? Moreover, does the term “new project” refer only to discrete capital projects similar to the convention center project, or does it encompass social service type programs such as subsistence entitlements which require substantial outlays to meet the costs of such government benefits?

Given these questions about the *Convention Center* opinion, it is interesting to note that Judge Newman, writing for a three judge panel,⁶² wrote a short and concise opinion in *Phinis Jones*. First, he distilled two principles from the *Convention Center* case: 1) that the electorate may not use an initiative to launch the appropriations process, and 2) that the electorate may not use an initiative to make an affirmative effort to appropriate funds.⁶³ Additionally, these two principles were supplemented with a third: that the electorate may not use an initiative to interfere with the management of the financial affairs of the District. This principle also is traceable to *Convention Center*. Thus, when citizens interfere with the management of the financial affairs of the District, they illegally launch the appropriations process.

After determining that the appropriations process had been launched in the *Phinis Jones* case, Judge Newman identified “affirmative efforts” to appropriate funds for the unemployment compensation initiative through the inclusion of provisions necessitating 1) additional borrowing from the U.S. Treasury (which would also require additional interest payments), 2) additional appropriation requests from the Council to the Congress, and 3) automatic increases in benefit levels.

By not using or emphasizing the “authorization for a new project” concept found in *Convention Center*, Judge Newman may have helped clear up one of the inherent ambiguities in applying that concept to Initiative 17, without undermining the *Convention Center* plurality’s goal of enabling the District to achieve “responsible fiscal management.” A logical conclusion is that an initiative which establishes an entitlement to a government benefit interferes with the management of the financial affairs of the District, and hence launches the appropriations

⁶² The other two judges included Judge Mack who had joined the plurality opinion in the *Convention Center* case and Judge Terry who was not involved in the case.

⁶³ These may be regarded by some as identical principles. However, it is possible to distinguish between them by regarding the second as the evidentiary principle. In effect, there must be some evidence of an affirmative effort to appropriate funds before the initiative can be invalidated. The first principle, then, could be viewed as the ultimate forbidden result: the launching of the appropriations process.

process in that it requires that the benefit be given automatically to those who qualify for it. Consequently, the Initiative necessitates additional appropriation requests by the Council to the Congress. However, if one focuses on the "authorization of a new project language" and interprets "project" broadly to include government benefit or entitlement programs, then the plurality's "wholly prospective fiscal implications" language could be used to validate Initiative 17, since no specific sums of money are mentioned in Initiative 17 as they were in the unemployment compensation initiative.⁶⁴

Initiative 17 was under consideration by the Superior Court of the District of Columbia from October 11, 1984, to July 19, 1985. The next forum was the District of Columbia Court of Appeals where the matter was noted for appeal in the summer of 1985, argued on October 17, 1985, and placed under consideration until May 20, 1986. Judge Salzman, bound by the rules governing a request for a temporary restraining order and a preliminary injunction order, was the only judge to quickly render an opinion as early as October 24, 1985. His opinion reflected the same tension that appeared in the plurality and dissenting opinions in the *Convention Center* case. Judge Salzman read Initiative 17 as creating benefits "as a matter of right" and as a measure that "would tie the District's fiscal hands by making mandatory what is now done only voluntarily."⁶⁵ Thus, Judge Salzman was satisfied that "there is a substantial likelihood that the District will ultimately prevail on the merits."⁶⁶ Nonetheless, Judge Salzman believed that in balancing the interests of the respective parties, the weight rested on the side of the right to vote just as the dissenters concluded in *Convention Center*. As he put it:

In this Court's judgment, the power reserved to the people to vote on matters that are before them lies closest to the heart of the democratic process. Whatever theoretical harm to the initiative process may result from allowing an [sic] possibly improper vote, the harm in forbidding a vote on a matter that might be proper is significantly greater.⁶⁷

Hence, Judge Salzman ruled that the Initiative could not be removed from the ballot.

Initiative 17 was approved by the electorate by a vote of 114,698 to 43,966 and, in accordance with District law, was transmitted to Congress for the requisite

⁶⁴ See *Phinis Jones*, 481 A.2d 456.

⁶⁵ *District of Columbia v. District of Columbia Bd. of Elections and Ethics*, No. 12280-84, slip. op. at 7 (D.C. Oct. 24, 1984) (opinion of Judge Salzman). Judge Salzman also stated that "[a] fair reading of the initiative, in the Court's judgment, reveals it is designed to create an entitlement to benefits in those eligible for the shelter program it would establish These benefits would create rights in law that do not now exist and which the District would be obliged to provide by one means or another." *Id.* at 5-6.

⁶⁶ *Id.* at 5.

⁶⁷ *Id.* at 11.

30 day review period.⁶⁸ It became law on March 14, 1985⁶⁹ while Judge Wagner still had the District's motion for summary judgment under advisement.⁷⁰

Judge Wagner's opinion may have been delayed not only because of the pressing and sizeable caseload confronting all Superior Court judges in the District of Columbia, but also because of the confusion surrounding *Convention Center*, and the brief opinion rendered in *Phinis Jones*. Judge Wagner evidently studied *Convention Center* in some detail and aligned herself squarely with the plurality opinion. She concluded that Initiative 17 launched the appropriations process because it "creates a legal right in certain individuals to obtain from the government, upon request, accommodations meeting the standards specified" in the initiative.⁷¹ Moreover, she ruled that Initiative 17 has fiscal implications even though it contains no sum certain, because it is an "open-ended financial obligation" that involves "intrusion into the budgetary process."⁷² The result would be that "whatever the program's financial requirements, the government must meet them," and "elected officials are compelled to seek full coverage for the program through the appropriations process."⁷³ As such, the initiative constitutes a "prohibited interference with the financial affairs of the District" and "an affirmative effort to appropriate funds."⁷⁴ Judge Wagner sidestepped the "authorization of a new project" hurdle by interpreting Initiative 17 as authorizing the expenditure of money for a new project in the face of District law which precludes the electorate from using the initiative process to appropriate monies or to authorize new projects.⁷⁵ Accordingly, Judge Wagner ruled on July 19, 1985, that Initiative 17 was not a proper subject of the initiative process.

Although an appeal was taken in summer 1985, the District of Columbia Court of Appeals did not hear argument on the case until October 17, 1985, and did not render its opinion until the day after the telecast of "The Samaritan," a television movie which portrayed the struggle of Mitch Snyder, and the Community for Creative Non-Violence. It is also interesting to note that the opinion was released just several days prior to "Hands Across America," the massive cross-country demonstration and fundraising effort designed to address problems of hunger and homelessness in America. However, from July 19, 1985, to May

⁶⁸ The Board of Elections and Ethics certified the results of the vote on November 20, 1984. The initiative, consistent with District law, was published in 31 D.C. Reg. 6088 (1984) as D.C. Act No. 5-208.

⁶⁹ D.C. Law 5-146. The law later was invalidated by Judge Wagner, *see infra* n.71.

⁷⁰ The hearing on the motion for summary judgment took place on January 4, 1985.

⁷¹ *District of Columbia v. District of Columbia Bd. of Education and Ethics*, No. 12280-84, slip. op. at 18 (D.C. July 19, 1985) (opinion of Judge Wagner), *rev'd* 509 A.2d 609 (D.C. App. 1986).

⁷² *Id.* at 18.

⁷³ *Id.*

⁷⁴ *Id.* at 23.

⁷⁵ *Id.* at 21-22.

20, 1986, no statutory entitlement to shelter for the homeless was recognized in District law through Initiative 17.⁷⁶

In *District of Columbia Board of Elections and Ethics v. District of Columbia*, a three judge panel glossed over and left ambiguous the question of whether the Initiative contained a mandatory statutory entitlement based on a protected property interest in a government benefit. The court stated that “[n]either the fact that the initiative may be denominated loosely an entitlement program nor the provision for judicial review make an initiative a law appropriating funds.”⁷⁷ What the panel meant by “may be denominated loosely an entitlement program” is not clear but the language used suggests something less than the protected property interests mentioned in *Goldberg* and its progeny. Moreover, the panel concluded that, unlike the initiative in *Phinis Jones*, there was no “self-actuating funding mechanisms” and as a result, “the funding level for overnight shelter still rests within the power of the elected members of the District of Columbia government and Congress.” Finally, the three judge panel returned to the “prospective fiscal impact” concept which had been enunciated in *Convention Center*. The panel decided that the legislative history regarding the “laws appropriating funds” exception revealed that initiatives having “prospective fiscal impact” were permitted. This decision must be interpreted as a victory for those advocating an unfettered right to vote on initiatives. Taken as a whole, the Initiative 17 decision of the Court of Appeals provided little insight into the rights of the homeless in the District.

C. Phase Three of the Struggle: A Detour to the Adult Protective Services Act

In the early 1980s, various jurisdictions began to examine adult protective services acts as instruments to address the needs of the homeless.⁷⁸ Among them was the State of West Virginia. In *Hodge v. Ginsberg*⁷⁹ six homeless persons from Charleston, West Virginia, attempted to prove that they were “incapacitated adults” under West Virginia’s Social Services for Adults Act.⁸⁰ Chief Justice McGraw

⁷⁶ D.C. Law 5-146 Codified at D.C. CODE ANN. §§3-601-3-607.

⁷⁷ *Board of Elections*, 509 A.2d at 614.

⁷⁸ See Langdon and Kass, *Homelessness in America: Looking for the Right to Shelter*, 19 COLUM. J. L. & PROBS. 306, 327-330 and Appendix, 379-386 (1985). Although various state adult protective services acts have been pointed to as a possible source of a right to shelter for the homeless, most were not primarily designed to address the problem of the homeless. Some actually were adopted during the height of nursing home scandals in the 1970s. These acts vary in provisions. Some are directed to a mental or physical impairment, or a mental or physical dysfunction, or a mental or physical incapacitation. Others address the incapacitated or those abused, neglected, or exploited by a caretaker. Others are aimed at the incapacitated, or those unable to make responsible decisions, or those unable to care for themselves, or those suffering from a disability or a developmental disability, or who are disabled or lacking mental or physical capacity, or who are aged and disabled. Some others speak in terms of imminent risk or death or serious bodily harm, or immediate serious physical harm.

⁷⁹ *Hodge v. Ginsberg*, 303 S.E.2d 245 (W. Va. 1983).

⁸⁰ W. VA. CODE § 9-6-1 to -15 (1984 & Supp. 1986). The six also relied on Article III, Section 10 of

ruled that “the term ‘incapacitated adult’ [in the Social Services for Adults Act] . . . was intended by the legislature to encompass indigent persons like the [six homeless persons who sued], who by reason of the recurring misfortunes of life, are unable to independently carry on the daily activities of life necessary to sustaining life and reasonable health.”⁸¹ Further, the Chief Justice found that the West Virginia Department of Welfare had promulgated regulations which established “the duty of the department to provide assistance to incapacitated adults who are the victims of neglect, abuse, or exploitation.”⁸² Accordingly, the West Virginia Supreme Court of Appeals granted a writ of mandamus “directing the Commissioner of the Department of Welfare to provide emergency shelter, food and medical care to the petitioners and other similarly situated persons as required by [the Social Services for Adults Act] . . . and . . . the Department of Welfare’s Social Services Manual.”⁸³

The District of Columbia Adult Protective Services Act⁸⁴ was under consideration by the Council of the District of Columbia as the Initiative 17 litigation unfolded. The Act applies to an adult, 18 years or older who is subjected to “abuse, neglect, or exploitation by another.”⁸⁵ Abuse includes “the intentional or deliberately indifferent deprivation of essential food, shelter, or health care in violation of a caregiver’s responsibilities, when that deprivation constitutes a serious threat to one’s life or physical health.”⁸⁶ Neglect encompasses “the careless deprivation of essential food, shelter, or health care in violation of a caretaker’s responsibilities, when that deprivation constitutes a serious threat to one’s life or physical health.”⁸⁷ An adult in need of protective services is defined in terms of, 1) a physical or mental impairment,⁸⁸ 2) abuse, neglect, or exploitation,⁸⁹ or 3) the likelihood of the continuation of abuse, neglect, or exploitation.⁹⁰ The range

the West Virginia Constitution which provides that: “No person shall be deprived of life, liberty, or property without due process of law, and the judgment of his peers.” W. VA. CONST. ART. III § 10. The due process clause in the West Virginia Constitution “insures that the people receive the benefit of legislative enactments.” *Hodge*, 303 S.E.2d at 247, (citing *Cooper v. Gwinn*, 298 S.E.2d 781, sylb. pt. 1 (W. Va. 1981)). An amicus brief was also filed in the *Hodge* case by two West Virginia attorneys, Gene R. Nichol and Charles R. DiSalvo, representing Community Kitchen, Inc. and Romero House, Inc., two non-profit organizations that service the needs of homeless people in West Virginia. Using Article III, Section 10 of the West Virginia Constitution, the amicus attorneys argued that basic subsistence shelter for the homeless is a fundamental substantive right under the due process and equal protection guarantees of Article III, Section 10 of the West Virginia Constitution.

⁸¹ *Hodge*, 303 S.E.2d at 250.

⁸² *Id.* at 251.

⁸³ *Id.*

⁸⁴ D.C. CODE ANN., §§ 6-2501-6-2513.

⁸⁵ D.C. CODE ANN., § 6-2502.

⁸⁶ D.C. CODE ANN., § 6-2501(1)(E).

⁸⁷ D.C. CODE ANN., § 6-2501(9)(D).

⁸⁸ A person is covered by the Act if he or she is “highly vulnerable to abuse, neglect or exploitation because of a physical or mental impairment.” D.C. CODE ANN., § 6-2501(2)(A).

⁸⁹ A person is covered by the Act if he or she is “being or has recently been abused, neglected or exploited by another.” D.C. CODE ANN., § 6-2501 (2)(B).

⁹⁰ A person is covered by the Act if he or she is “likely to continue being abused, neglected

of protective services which must be provided to an adult covered by the Act, for 90 days, includes "food, shelter, clothing, health care, home care, counseling, legal assistance, and social casework."⁹¹

There are at least three hindrances to a reliance upon the District of Columbia Adult Protective Services Act as the source of a right to shelter for the homeless. First, there is no explicit right to shelter included in the Act, although there are references to the absence of shelter as "neglect" and the provision of shelter as "protective services." In this context, the Act focuses on abuse, neglect, or exploitation by another, rather than an individual's abuse or neglect of self, unless that abuse or neglect "gives rise to instances of abuse, neglect, or exploitation by another."⁹² Second, the traceable, albeit rather ambiguous, legislative history of the Act suggests that it is not the intent of its drafters to create a right to shelter by its passage. The Committee Report on the bill that resulted in the Adult Protective Services Act explicitly states that "this bill is in no way intended to create a 'right' to shelter or any other *specific* protective service."⁹³ However, the Report also included this ambiguous language:

Should a mentally or physically impaired homeless individual be molested, seriously injured, or held "prisoner" by another homeless individual, and should this conduct be reported to DHS (Department of Human Services), the bill's provisions might very well be triggered. The relief mandated by the bill, however, is not to remove the conditions of self-neglect. Appropriate relief, especially when the abuse is recurrent, might be to seek a protective order enjoining the abuser, violation of which is subject to contempt of court and imprisonment. Of course the bill invests DHS with broad discretion to fashion relief, subject to challenge only upon a finding of bad-faith non-compliance.

In the example given, failure to provide shelter would not constitute bad faith on the part of DHS. . . .⁹⁴

According to this excerpt, a protective order⁹⁵ could be obtained by the Department of Human Services to prevent someone else from abusing a homeless person,

or exploited by others because he or she has no one willing and able to provide adequate protection." D.C. CODE ANN., § 6-2501(2)(C).

⁹¹ D.C. CODE ANN., §§ 6-2501(12), 6-2505.

⁹² D.C. CODE ANN., § 6-2503.

⁹³ COUNCIL OF THE DISTRICT OF COLUMBIA, COMMITTEE ON HUMAN SERVICES, COMMITTEE REPORT ON BILL 5-334, ADULT PROTECTIVE SERVICES ACT OF 1984, 7 (October 18, 1984).

⁹⁴ *Id.*

⁹⁵ It is conceivable that in issuing a protective order involving a homeless person, a judge might order the Mayor, through the District's Department of Human Services, to provide shelter, food, and clothing for the homeless person. D.C. CODE ANN., § 6-2506(d)(4) provides that a court may "direct the Mayor to provide specified or unspecified protective services, including at night and on weekends if necessary: Provided, that the court shall not direct the Mayor to provide a type of service not otherwise made available by the District government." Since the District government does provide services for homeless people, it is at least arguable that despite the legislative history, the Adult Protective Services Act may be read as commanding services to a homeless person who falls within the scope of the Act. This is particularly true if one applies canons of statutory interpretation and the pertinent words of the statute are found to be plain and unambiguous.

but DHS also could use its discretion to provide other relief which obviously could include shelter if the circumstances demand such a solution. Yet, providing shelter, according to the Committee Report, is not to be regarded as mandatory. Thus, the District of Columbia Adult Protective Services Act is not an effective route to declaration of a right to shelter for the homeless.⁹⁶

This journey through somewhat tortuous paths to a statutory entitlement to shelter for the homeless reveals the interplay of competing political and legal forces that thus far have blocked a successful outcome in the District of Columbia, as of September 1986. Thus, clear local statutory provisions governing the rights of the homeless to shelter and other necessities of life remain absent from District law. This inevitably leads one to inquire into the possibility of carving out legal principles governing the rights of the homeless based upon federal constitutional law.

III. A CONSTITUTIONAL RIGHT TO SHELTER: THE IMPROBABILITY OF THE HOMELESS BEING DESIGNATED AS A SUSPECT CLASSIFICATION

By initiating legal action in *Williams v. Barry*,⁹⁷ advocates of the homeless in the District of Columbia⁹⁸ hoped to establish a constitutional right to shelter, or a due process property interest for the homeless protected by state law. Establishing a constitutional right to shelter may well be a hopeless endeavor with respect to suspect class theory of Equal Protection law. This route clearly seems foreclosed in view of the 1985 Supreme Court decision in *City of Cleburne v. Cleburne Living Center*.⁹⁹ In *Cleburne*, Justice White's majority opinion suggested that under Fourteenth Amendment Equal Protection analysis, mental retardation is neither a suspect nor a quasi-suspect classification requiring strict or heightened scrutiny of a legislative classification. As suggested by the Court, mental retardation is a condition best addressed by legislators and professionals.¹⁰⁰ Indeed, lawmakers have manifested sensitivity to the needs of the retarded, as

⁹⁶ This is in contrast to the 1981 New York State Social Services Law which focuses on risk of imminent death or serious physical harm to a person who lacks the capacity to understand the probable consequences of remaining a homeless person. After due process guarantees (notice and opportunity to be heard with counsel) are implemented, a homeless person can be given protective services for 72 hours, subject to an additional 72 hours if necessary. The due process guarantees were added because of a concern that involuntary protective services might violate some of the rights of homeless persons. See Note, *Homelessness in a Modern Urban Setting*, 10 FORDHAM URB. L. J. 749, 773-776 and accompanying footnotes (1981-1982).

⁹⁷ *Williams*, 490 F. Supp. 941.

⁹⁸ The *Williams* case was brought by the Community for Creative Non-Violence (under the leadership of Mitch Snyder), two of its members, and some homeless men. See discussion, *supra* notes 14-25 and accompanying text.

⁹⁹ *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249 (1985). For an analysis of the *Cleburne* case, see *The Supreme Court, 1984 Term, Leading Cases*, 99 HARV. L. REV. 120, 161-173 (1985).

¹⁰⁰ The Court stated "[h]ow this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary," *Cleburne*, 105 S. Ct. at 3256.

evidenced by federal and Texas state legislation designed to protect the mentally retarded. Therefore, judicial intervention is unnecessary because there is "no continuing antipathy or prejudice"¹⁰¹ displayed with respect to the mentally retarded. In fact, the mentally retarded are not "politically powerless." Through their advocates they have been able "to attract the attention of lawmakers,"¹⁰² with positive results.¹⁰³ The opinion noted that in any event, if the door to suspect or quasi-suspect classification is opened to the mentally retarded, others may have to be admitted.¹⁰⁴

If Justice White's analysis in *Cleburne* is carried forward in future cases, the homeless may stand little chance of being added to the list of suspect or quasi-suspect classifications. While lawmaker sensitivity toward the homeless may not yet have reached the same degree as that afforded the mentally retarded,¹⁰⁵ clearly the issue of the homeless has forced at least state and local executive branch and legislative branch politicians to focus on socioeconomic conditions faced by the homeless.¹⁰⁶ In the narrow sense of Justice White's use of the term "politically

¹⁰¹ *Id.*

¹⁰² *Id.* at 3257.

¹⁰³ Legislation passed to assist the mentally retarded, as cited by the Court, includes: Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982); Development Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 6010(1)-(2) (1982); Education of the Handicapped Act, 20 U.S.C. § 1412(5)(B) (1982); and Mentally Retarded Persons Act of 1977, TEX. REV. CIV. STAT. ANN., Art. 5547-300, § 7 (Vernon Supp. 1986).

¹⁰⁴ The Court stated: ". . . if the large and amorphous class of the mentally retarded were deemed quasi-suspect for the reasons given by the Court of Appeals, it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. We are reluctant to set out on that course, and we decline to do so." *Cleburne*, 105 S. Ct. at 3257-58. See also Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) (age); Schweiker v. Wilson, 450 U.S. 221 (1981) (mental illness), James v. Valtierra, 402 U.S. 137 (1971) and San Antonio v. Rodriguez, 411 U.S. 1 (1973) (low-income status, poverty, and wealth).

¹⁰⁵ See Note, *Building a House of Legal Rights: A Plea for the Homeless*, 59 ST. JOHN'S L. REV. 530, 533 (1985). But see HOUSE COMM. ON BANKING, FINANCE AND URBAN AFFAIRS, SUBCOMM. ON HOUSING AND COMMUNITY DEVELOPMENT, HOMELESSNESS IN AMERICA-II, VOLUMES 1, 2, AND 3, 98TH CONG., 2D SESS., (1984); HOUSE COMM. ON BANKING, FINANCE AND URBAN AFFAIRS, SUBCOMM. ON HOUSING AND COMMUNITY DEVELOPMENT, HOMELESSNESS IN AMERICA-I, 97TH CONGRESS, 2D SESS., (1982); SENATE COMM. ON APPROPRIATIONS, 98TH CONG., 1ST SESS., STREET PEOPLE, (1983); HOUSE COMM. ON EDUCATION AND LABOR, SUBCOMM. ON HUMAN RESOURCES, OVERSIGHT HEARING ON RUNAWAY AND HOMELESS YOUTH PROGRAM, 97TH CONG., 2D SESS., (1982); HOUSE COMM. ON GOVERNMENT OPERATIONS, SUBCOMM. ON INTERGOVERNMENTAL RELATIONS AND HUMAN RESOURCES, FEDERAL RESPONSE TO THE HOMELESS CRISIS, 98TH CONG., 2D SESS., (1984); HOUSE SELECT COMM. ON AGING, SUBCOMM. ON HOUSING AND CONSUMER INTERESTS, HOMELESS OLDER AMERICANS, 98TH CONG., 2D SESS., (1984); SENATE COMM. ON THE JUDICIARY, SUBCOMM. ON THE CONSTITUTION, HOMELESS YOUTH: THE SAGA OF "PUSHOUTS" AND "THROWAWAYS" IN AMERICA, 96TH CONG., 2D SESS., (1980).

¹⁰⁶ See e.g., CITY OF CHICAGO, REPORT OF THE MAYOR'S TASK FORCE ON THE HOMELESS (1984) [hereinafter cited as CITY OF CHICAGO REPORT]; R. SALERNO, HARDSHIP IN THE HEARTLAND: HOMELESSNESS IN EIGHT U.S. CITIES, (1984); Cal., *Joint Hearing on the Homeless Before the Assembly*

powerless," the homeless may not be so powerless as they have also evidenced an ability to attract the attention of lawmakers. However, attracting the attention of lawmakers may not end the political powerlessness of groups such as the homeless. Even if the Court abandons the somewhat unique quasi-suspect classification analysis in *Cleburne* for future cases, the homeless still seem to have little chance of being elevated to a suspect or quasi-suspect classification. Immutability of characteristics which can produce prejudice is one of the traditional elements previously held necessary for suspect or quasi-suspect status. Yet, homelessness is not an immutable characteristic,¹⁰⁷ unlike the color of one's skin¹⁰⁸ or a person's gender.¹⁰⁹ Therefore, it is unlikely that the homeless would gain suspect or quasi-suspect classification on the basis of some immutable characteristic.

Under the famous footnote analysis found in *United States v. Carolene Products*,¹¹⁰ suspect classification results from a "discrete and insular minority" status.

Human Services Comm. and Senate Health and Human Services Comm. (1985); MCGERIGLE AND LAURIAT, MORE THAN SHELTER: A COMMUNITY RESPONSE TO HOMELESSNESS; REPORT AND RECOMMENDATIONS OF THE PROJECT "HOMELESSNESS: ORGANIZING A COMMUNITY RESPONSE"; MARYLAND DEPARTMENT OF HUMAN RESOURCES GOVERNOR'S ADVISORY BOARD ON SHELTER, NUTRITION AND SERVICE PROGRAMS FOR HOMELESS INDIVIDUALS IN MARYLAND, INTERIM REPORT ON THE STATE HOMELESS PROGRAM, (1985); [hereinafter cited as MARYLAND INTERIM REPORT ON THE STATE HOMELESS PROGRAM]; MCGERIGLE, MANAGEMENT OF FAMILY HOUSING CRISIS IN THE CITY OF BOSTON, (1979); HEALTH AND WELFARE COUNCIL OF CENTRAL MARYLAND, A REPORT TO THE GREATER BALTIMORE SHELTER NETWORK ON HOMELESSNESS IN CENTRAL MARYLAND, (1983); [hereinafter cited as REPORT ON HOMELESSNESS IN CENTRAL MARYLAND]; COMMUNITY SERVICE SOCIETY, INSTITUTE FOR SOCIAL WELFARE RESEARCH, ONE YEAR LATER: THE HOMELESS POOR IN NEW YORK CITY (1982). A few state judicial systems also have addressed the problem of the homeless (in addition to those discussed in the body of this article). See e.g., Callahan v. Carey, N.Y.L.J., Dec. 11, 1979, at 10, col. 4 (N.Y. App. Div., Dec. 5, 1979) (discussed in *Homelessness: A Litigation Roundup*, 18 CLEARINGHOUSE REV. 1255, 1255-1256 (1985)); See also Malone, *Homelessness in a Modern Urban Setting*, 10 FORDHAM URB. L. J. 749 (1982); Note, *Establishing a Right to Shelter for the Homeless*, 50 BROOKLYN L. REV. 939, 943-947 (1984); other state cases discussed in *Homelessness: A Litigation Roundup*, *supra* at 1256-1258, 1262-1264, and *Ross v. Board of Supervisors* (Cal. Super. Ct., Los Angeles County, filed June 11, 1984) (discussed in CLEARINGHOUSE REV. 1209 (1985)).

¹⁰⁷ See *Strauder v. West Virginia*, 100 U.S. 303 (1879); *Korematsu v. United States*, 323 U.S. 214 (1944); *Loving v. Virginia*, 388 U.S. 1 (1967); *Palmore v. Sidoti*, 466 U.S. 429 (1984).

¹⁰⁸ See *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion); *Craig v. Boren*, 429 U.S. 190 (1976); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982).

¹⁰⁹ In addition to race and gender, national origin has been identified as an immutable characteristic. See *Frontiero*, 411 U.S. 677, *Oyama v. California*, 332 U.S. 633 (1948), *Korematsu*, 323 U.S. 214, and *Hirabayashi v. United States*, 320 U.S. 81 (1943). The homeless have no inherently immutable characteristic although there are certain factors by which one can readily identify the homeless: for example, old, tattered, or dirty clothing; possessions packed into shopping bags, trash bags, and other paraphernalia; and sleeping in doorways or on grates at night. While the homeless do not have inherently immutable characteristics such as color and gender, they are subjected to stigma or opprobrium insofar as they are stereotyped and perceived as inferior. There generally is no more than a cursory effort to identify the various elements of our society, personalities and backgrounds that are lumped together in the category called the homeless, and stamped as inferior. Stigma or opprobrium also have been used as a basis for suspect and quasi-suspect classification and the concomitant strict scrutiny or heightened scrutiny of legislative classifications. See *Frontiero*, 411 U.S. 677 and *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹¹⁰ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152, n. 4 (1938): "Prejudice against

Examples of discrete and insular minorities that have been accorded suspect classification status are aliens, and persons of different national origin.¹¹¹ They have been isolated in American society because they have no obvious anonymity: a simple glance usually confirms a racial status, and an accent often reveals a different national origin or an alien status. Moreover, they have been subjected to a history of purposeful discrimination or unequal treatment. While the homeless are found in pockets of some cities and states across the country, generally they are diffused throughout America and throughout cities and states. They are not a population isolated in the same geographical area of the country, or the same area of a city or state due to their homelessness. Although some homeless people are easily identifiable by tattered and dirty clothes as well as worn shopping bags or trash bags containing their possessions, others are not. Furthermore, the homeless have not experienced, solely because of their homeless status, the same type of longstanding purposeful discrimination or unequal treatment that racial minorities and aliens have traditionally faced in this country. In any event, such treatment has not yet been documented. Similarly, the homeless have not experienced the same type of exclusion from the political process that required the protection of racial minorities and aliens under the *Carolene Products* doctrine.¹¹² Indeed, some communities already have extended voting rights to the homeless despite the fact that they cannot satisfy the general requirement of having a fixed address.¹¹³ Some states have accorded other rights to the homeless through their legislative process.¹¹⁴ Nonetheless, the discrete and insular minority route to suspect or quasi-suspect classification appears closed to the homeless.

It is worth noting, parenthetically perhaps, that today even blacks and hispanics might no longer achieve suspect classification under the *Carolene Products* and *Cleburne* theories. As Professor Bruce Ackerman has put it bluntly, “[t]he

discrete and insular minorities may be a special condition which tends to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”

¹¹¹ See *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (alienage and national origin); See also *In Re Griffiths*, 413 U.S. 717 (1973) (alienage); *Sugarman v. Dougall*, 413 U.S. 634 (1973) (alienage); *Foley v. Connelie*, 435 U.S. 291 (1978) (political function exception to the strict scrutiny test for aliens); *Strauder*, 100 U.S. 303 (race); *Korematsu*, 323 U.S. 214 (race); *Loving*, 388 U.S. 1 (race); *Oyama*, 332 U.S. 633 (national origin).

¹¹² See, e.g., *Nixon v. Herndon*, 273 U.S. 536 (1927) (state law excluding blacks from Democratic primaries); *Smith v. Allwright*, 321 U.S. 649, *rev'd*, 322 U.S. 769 (1944) (white primary); *Terry v. Adams*, 345 U.S. 461 (1953) (exclusion of blacks from pre-primary election of the Jaybird Democratic Association); *Anderson v. Martin*, 375 U.S. 399 (1964) (state law requiring that race of a candidate appear on the election ballot); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (Voting Rights Act of 1965).

¹¹³ See Ruling of the District of Columbia Board of Elections and Ethics which permits homeless persons to vote, *N.Y. Times*, August 29, 1984, and *Pitts v. Black*, 608 F. Supp. 696 (S.D.N.Y. 1984); No. 84 Civ. 5270 (S.D.N.Y., October 10, 1984) where the Federal District Court for the Southern District of New York invalidated a bona fide residence test as applied to the homeless.

¹¹⁴ See *Homelessness: A Litigation Roundup*, *supra* note 106, at 1255-1258.

Carolene formula cannot withstand close scrutiny."¹¹⁵ This is true if political power is defined in terms of "the old politics of exclusion" where racial minorities were excluded from "passive" (voting) and "active" (legislative) roles in the political process. Given the gains of racial minorities in state, local, and federal political processes,¹¹⁶ it is no longer true that racial minorities do not "attract the attention of lawmakers," as *Cleburne* put it. Yet, a pluralist political process still can ensnare racial minorities in disadvantaged social, economic, political, and educational positions that require the application of fundamental constitutional values if notions of equality are to be safeguarded. This idea regarding the need of law or principles "higher" than those which emanate from the politics of pluralist democracy is best stated by Ackerman: "[t]here are constitutional values in our scheme of government even more fundamental than perfected pluralism most notably, those that bar prejudice against racial and religious minorities."¹¹⁷

If the theme of prejudice is placed within the context of a "changing political reality," then we can avoid a situation where "we shall have passively allowed the Constitution's profound concern for racial equality and religious freedom to be trivialized into a transparent apologia for the status quo."¹¹⁸ If Ackerman's approach is taken, there may be at least a remote chance of inclusion, as a quasi-suspect classification, of the homeless whose interests are not represented in local, state, and federal legislatures, whose needs are not debated and systematically addressed in legislative halls, and whose exclusion from society is based on the stigma of homelessness, and its accompanying "evils" such as mental illness, physical illness, mental retardation, poverty, and unacceptable physical appearance.¹¹⁹ But the Supreme Court has given no sign of a willingness to embrace such an approach. Indeed, *Cleburne* clearly rejects any approach of this kind.

¹¹⁵ Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 717 (1985). See also Note, *Mental Illness: A Suspect Classification?*, 83 YALE L. J. 1237, 1254 (1974) for a suggestion of changes in the *Carolene Products* discrete and insular minority approach to suspect classification, with respect to political powerlessness.

¹¹⁶ See Stone, *Black Political Power in America* (1968), and publications of the Joint Center for Political Studies, such as the Center's monthly newsletter, Focus.

¹¹⁷ Ackerman, *Supra*, note 115 at 746. Ackerman also argued that:

We must repudiate this reduction of the American Constitution to a simple system of pluralist bargaining if we are to reassert the legitimacy of the courts' critical function. Although the bargaining model captures an important aspect of American politics, it does not do justice to the most fundamental episodes of our constitutional history. We make a mistake, for example, to view the enactment of the Bill of Rights and the Civil War Amendments as if they were outcomes of ordinary pluralist bargaining. Instead, these constitutional achievements represent the highest legal expression of a different kind of politics one characterized by mass mobilization and struggle that, after experiences like the Revolution and the Civil War, yielded fundamental principles transcending the normal processes of interest group accommodation. It is only by reasserting the relevance of this tradition of constitutional politics, . . . that we shall gain the necessary perspective to put pluralist bargaining in its place as one but only one form of American democracy, and the lesser form at that.

Id. at 743.

¹¹⁸ *Id.* at 746.

¹¹⁹ In 1948 the Welfare Council of New York City wrote a report (issued later in 1949) stating,

The homeless do not constitute a homogenous population. Thus, a suspect classification analysis may prove elusive because of the difficulty of developing any principle of constitutional theory. The homeless include minorities who are already considered as being within a suspect classification because of race, and women who are in the quasi-suspect classification because of gender, but the homeless also are composed of mentally retarded, mentally ill, and elderly people who have been rejected for suspect or quasi-suspect classification. Moreover, the ranks of the homeless also embrace ex-convicts, persons with middle class socioeconomic roots, and some who are well-educated. But the Court has rejected poverty or wealth as a basis for analysis as a suspect or quasi-suspect classification.¹²⁰

among other things:

The number of homeless men in New York in need of free lodging, custodial care, or rehabilitative services is currently on the increase. . . . Present facilities for housing and caring for indigent homeless men of the city are grossly inadequate. . . . There is much public misunderstanding of the nature and composition of the homeless group often referred to as "bums" and "derelicts" which needs to be corrected if appropriate remedial action is to be taken. Informed analysis of the group is the starting point for intelligent planning.

WELFARE COUNCIL OF NEW YORK CITY, HOMELESS MEN IN NEW YORK CITY (1949).

This discussion of the 1948 homeless problem in New York City remains relevant with respect to the current homelessness crisis. The U.S. Conference of Mayors reported "that demand for shelter increased by 89% in 1983, with 53 percent of 66 cities surveyed saying they were unable to meet the demand." Mapes, *Faulty Food and Shelter Programs Draw Charge that Nobody's Home to the Homeless*, 17 NATIONAL J. 474,475 (March 2, 1985). Cities have increased their expenditures for emergency shelters; for example, Chicago spent \$405,387 in Fiscal Year 1983, \$690,151 in Fiscal Year 1984, and \$1 million in Fiscal Year 1985. See CITY OF CHICAGO REPORT, *supra* note 106, at 16. While the ranks of the homeless still contain those commonly associated with homelessness (e.g., alcoholics), newcomers are obvious. For example, many of the new homeless are younger people (30 years old and even younger), the newly unemployed, the victims of entitlement program cuts, those with psychiatric problems, families (with children) who cannot make ends meet, single women, and an increasing number of minorities. Causes of the new homelessness have been identified as: 1) Deinstitutionalization of the mentally ill without appropriate community support services (see CITY OF CHICAGO REPORT, *supra* note 106 at 15; SALERNO, *supra* note 106 at 475; MARYLAND INTERIM REPORT ON THE STATE HOMELESS PROGRAM *supra* note 106, at 5; REPORT ON HOMELESSNESS IN CENTRAL MARYLAND, *supra* note 106, at 41; 2) an acute shortage of low-income housing (see CITY OF CHICAGO REPORT, *supra* note 106, at 15; Mapes, *supra* at 475; MARYLAND INTERIM REPORT ON THE STATE HOMELESS PROGRAM *supra* note 106 at 4); 3) Economic conditions, including unemployment (see CITY OF CHICAGO REPORT, *supra* note 106, at 15; SALERNO, *supra* note 106, at 5, 13; LAIRD, TREVOR'S PLACE, 133, (1985)); 4) Substance abuse (See LAIRD, *supra* at 132); 5) Changing federal policies regarding grants and entitlements (See Mapes, *supra* at 474-76; The homeless face an "acute need for health care services;" CITY OF CHICAGO REPORT, *supra* note 106 at 36. For a detailed examination of the health problems of the homeless ranging from the effects of trauma, to infestation, vascular disease, leg ulcers, alcohol and drug abuse, hypertension, diabetes, chronic pulmonary disease, tuberculosis, and the effects of exposure and thermal stress, see BRICKNER *et al.*, HEALTH CARE OF HOMELESS PEOPLE, (1985). For other data on the homeless see Note, *supra* note 106 at 939-43; Langdon and Kass, *Homelessness in America: Looking for the Right to Shelter*, *supra* note 78, at 306-23 (1985); Note, *supra* note 105, at 530-38.

¹²⁰ See *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *James*, 402 U.S. 137. See also Michelman, *The Supreme Court, 1968 Term Foreward: On Protecting the Poor Through*

Until a theory of suspect classification is developed, based on notions of stigma and opprobrium, prejudice, and political representation, it is difficult to see how the current Supreme Court could place the homeless into the suspect or quasi-suspect class in light of *Cleburne*. Accordingly, a starting point in positing a theory of suspect or quasi-suspect classification for the homeless is stigmatization and resulting prejudice. Partly because blacks historically have been subjected to stigmatization which flows from derogatory stereotypes that produce prejudice, the suspect classification analysis is available to them. The homeless, too, have been stigmatized as, among other things, alcoholic, drug addicted, crazy, irresponsible, and unclean. It is arguable that this type of stigmatization is equivalent to the stigma of illiteracy found in *Plyler v. Doe*,¹²¹ the stigma of race due to a badge of inferiority found in *Brown v. Board of Education*,¹²² and the stigma of illegitimacy found in *Weber v. Aetna Casualty & Surety Co.*¹²³ and *Matthews v. Lucas*.¹²⁴ If a person suffers from the stigma of homelessness, that person is likely to be shunned in any effort to obtain employment which might generate the resources essential for the necessities of life. Hence, the stigma of homelessness is likely to "foreclose any realistic possibility that they [the homeless] will contribute in even the smallest way to the progress of our Nation."¹²⁵

If the concepts of stigma and prejudice are supplemented with the concept of political representation or meaningful political representation, the seeds of an acceptable and principled equal protection and suspect classification theory may be planted. The concepts of political representation or meaningful political representation are used intentionally, instead of a notion of political powerlessness usually articulated in suspect classification analysis. To the extent that political powerlessness means simply the failure to attract the attention of lawmakers, it would not support a suspect classification for the homeless. To the extent that political powerlessness connotes the failure of a local, state, or federal legislature to enact laws to protect those suffering from homelessness, it might support a suspect classification for the homeless if no such laws emanate from these legislative bodies. If political representation or meaningful political representation is substituted for political powerlessness, however, and if it embodies a notion of the active representation of particular interests in a legislative body, then the absence of representatives who actively and openly advocate the interests of the

the Fourteenth Amendment, 83 HARV. L. REV. 7 (1969). As the Court said in *Maher v. Roe*, 432 U.S. 464, 471 (1977): "In a sense, every denial of welfare to an indigent creates a wealth classification as compared to nonindigents who are able to pay for the desired goods or services. But this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis."

¹²¹ *Plyler v. Doe*, 457 U.S. 202 (1982).

¹²² *Brown*, 347 U.S. 483. See also the companion case of *Bolling v. Sharpe*, 347 U.S. 497 (1954).

¹²³ *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164 (1972).

¹²⁴ *Matthews v. Lucas*, 427 U.S. 495 (1976). See also *Pickett v. Brown*, 462 U.S. 1 (1983); *Mills v. Habluetzel*, 456 U.S. 91 (1982).

¹²⁵ See *Plyler*, 457 U.S. at 223.

homeless and draft bills into law that are designed to protect those interests might underscore the need of the homeless for extraordinary protection from the majoritarian political process.¹²⁶ This is particularly true in times when the nation's attention is focused on deficit reduction requiring accumulation rather than distribution of governmental resources.¹²⁷

IV. A CONSTITUTIONAL RIGHT TO SHELTER: THE IMPROBABILITY OF THE DESIGNATION OF THE RIGHT TO SHELTER AS A FUNDAMENTAL RIGHT OR INTEREST

Another approach to a Fourteenth Amendment constitutional right for the homeless, the fundamental right or interest approach, should be examined, although it is not the most promising of approaches. Fundamental rights or interests have been carved out of the Equal Protection Clause of the Fourteenth Amendment as well as the Due Process Clause, and any state regulation which concerns a fundamental right or interest is subjected to strict scrutiny or critical examination.¹²⁸

In determining whether an asserted right is constitutionally protected, the Court generally inquires whether the right is "explicitly" or "implicitly" guaranteed by the Constitution.¹²⁹ Among the fundamental interests or rights recognized by the Supreme Court are the right to marry, procreate and bring up children,¹³⁰ the right to individual and marital privacy,¹³¹ the right to participate in elections on "an equal basis with other citizens in the jurisdiction,"¹³² and the right to interstate migration or the right to travel from one state to another.¹³³ On the other hand, the Court has concluded that education "is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected."¹³⁴

¹²⁶ For a discussion of the "we-they" theory which revolves around a notion of political power which connotes political impotency due to the absence of representatives of the class in question from the legislature, see Note, *supra* note 113.

¹²⁷ See Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (1985) which requires, in Sections 251 and 252, the elimination of the full amount of the national deficit excess reported by the Comptroller General. The constitutionality of the Act was challenged and the Supreme Court of the United States ruled parts of the act unconstitutional during its 1985 term. See *Bowsher v. Synar*, 54 U.S.L.W. 5064 (U.S. July 7, 1986).

¹²⁸ See *Zablocki v. Redhail*, 434 U.S. 374 (1978); *San Antonio*, 411 U.S. 1.

¹²⁹ See *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Memorial Hospital*, 415 U.S. 250.

¹³⁰ See *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Zablocki*, 434 U.S. 374, and *Loving*, 388 U.S. 1.

¹³¹ See *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973).

¹³² See *Reynolds v. Sims*, 377 U.S. 533 (1964); *Harper v. Virginia St. Bd. of Elections*, 383 U.S. 663 (1966).

¹³³ See *Dunn*, 405 U.S. 330; *Shapiro*, 394 U.S. 618.

¹³⁴ *San Antonio*, 411 U.S. at 35. Nonetheless, in a case involving the free public education of children of undocumented aliens the Court applied a heightened scrutiny test, reasoning that education is more than a "governmental 'benefit' indistinguishable from other forms of social welfare legislation," and that "illiteracy (of the children of any disfavored group) is an enduring disability." *Plyler*, 457 U.S. at 221-22.

Obstacles exist with respect to the application of the fundamental right or interest approach to the homeless. It is arguable that the Supreme Court has already ruled that the right to shelter is not a fundamental interest under the Equal Protection Clause of the Fourteenth Amendment. In *Lindsey v. Normet*,¹³⁵ a case concerning the constitutionality of Oregon's Forcible Entry and Wrongful Detainer statute, the Supreme Court stated:

We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwelling of a particular quality, or any recognition of the right of a tenant to occupy the property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement.¹³⁶

Furthermore, the Court in *Lindsey* suggested that "[a]bsent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relations are legislative, not judicial functions."¹³⁷

Thus, *Lindsey* has apparently closed the door on a Fourteenth Amendment right to shelter through the Equal Protection Clause.

However, a close reading of *San Antonio Independent School District v. Rodriguez*, *Plyler v. Doe*, and *Lindsey v. Normet*, indicates that the door to a fundamental right to shelter may not be tightly closed. This is true if one limits *Lindsey* to a decision concerning the *adequacy* of shelter, rather than *access* to shelter. Consider that in *Lindsey* there was no "absolute deprivation of a meaningful opportunity to enjoy" shelter (as there was no absolute deprivation of a basic minimum education in *San Antonio*). The individual in question had access to shelter but quarreled about the adequacy of the shelter.¹³⁸ In contrast, the homeless have encountered an absolute deprivation of any opportunity to enjoy shelter unless it is provided to them by the government or a private person or entity. To the extent that a state classification can be interpreted as cutting off any access to shelter by the homeless, *Lindsey* may not be controlling.

¹³⁵ *Lindsey v. Normet*, 405 U.S. 56 (1972).

¹³⁶ *Id.* at 74.

¹³⁷ *Id.* One commentator has written:

[C]ommon sense tells us that housing is quite important. But a right to housing has only sporadically been recognized in nonconstitutional situations. Its link to other constitutional rights is tenuous at best. And the precise contours of even a minimal right to housing have not received the general agreement of informed observers.

Tushnet, *supra* note 22, at 282.

¹³⁸ In examining whether wealth should be a suspect classification, the Court in *San Antonio v. Rodriguez* noted that the advocates for the children involved in the case did not argue that "the children [are] receiving no public education; rather [they argued] that they are receiving a poorer quality education [than] children in districts having more assessable wealth." *Rodriguez* 411 U.S. at 36-37. Similarly, in *Lindsey* the argument was not that there was *no* access to shelter but that the shelter was inadequate.

Nonetheless, the requirement that a fundamental right be “explicitly or implicitly guaranteed by the Constitution” may be a stumbling block. The Court was able to resolve at least two “basic necessities of life” cases under the fundamental rights doctrine, not because welfare assistance or medical care were considered fundamental rights, but because the cases implicated a right to interstate migration or a right to travel interstate which is implicitly guaranteed by the Constitution, and because the durational residency requirements in those cases penalized the right to interstate migration.¹³⁹

In the case of the homeless, a starting point in the effort to establish a constitutional basis for the right to shelter may be found in the *Cleburne* dissent written by Justice Marshall and joined by Justices Brennan and Blackmun. In that dissent, Justice Marshall focused on a right to “establish a home” as one of the fundamental liberties recognized under the Due Process Clause in *Meyer v. Nebraska*.¹⁴⁰ Said Justice Marshall, “[t]he interest of the retarded in establishing group homes is substantial. The right to ‘establish a home’ has long been cherished as one of the fundamental liberties embraced by the Due Process Clause.”¹⁴¹

Consequently, a plausible fundamental rights approach might advocate a homeless person’s “fundamental right to establish a home,” a right to shelter inherent in that right to establish a home, and a right to shelter as a basic necessity of life. Whether such an approach could command a majority of the United States Supreme Court, however, is questionable in view of the converse argument that what is at stake is not the right to establish a home since there is no force or law that prevents the homeless from renting or buying a place to live. Rather, what is at stake and what is being advocated is the right and the duty of the government to create a shelter for a homeless person, and no such right or duty presently exists.

Another approach, suggested by one commentator, requires a focus on the Ninth Amendment to the Constitution, the “catchall” amendment which states that the enumeration in the Constitution of certain rights is not to be construed to deny or disparage others retained by the people. Since this Amendment is so broad, it could be argued that the right to shelter is a right retained by the people.¹⁴²

One additional forward step based on heightened scrutiny of classifications involving possessory interests in property may flow from *Plyler*.¹⁴³ In *Plyler*, the Court refused to carve out a fundamental right to education (as in *San*

¹³⁹ See *Shapiro*, 394 U.S. 618 and *Memorial Hospital*, 415 U.S. 250.

¹⁴⁰ *Meyer*, 262 U.S. 390 (1923).

¹⁴¹ *Cleburne*, 105 S. Ct. at 3266.

¹⁴² See Steinberg, *Adequate Housing For All: Myth or Reality?*, 37 U. of Pitt. L. Rev. 63, 65-71 (1975).

¹⁴³ *Plyler*, 457 U.S. 202.

Antonio v. Rodriguez) but nonetheless applied heightened scrutiny in the resolution of the case. Heightened scrutiny was applied because of the stigma of illiteracy which was perceived as an enduring disability. In essence, undocumented alien children are the offspring of a "disfavored group" and members are of the "underclass". Without education they cannot hope to "raise the level of esteem" in which the majority of our society holds illegal aliens.¹⁴⁴ Thus, because these children faced a potential "lifetime hardship" due to the stigma of illiteracy, and because no national or congressional policy had been articulated against the education of alien children, the Court applied heightened scrutiny in determining the validity of the Texas tuition requirement for such children. Similarly, one could argue that the distinction between *adequate* shelter and *access* to shelter combined with the stigma and vulnerability of the homeless, and their inevitable descent into the ranks of the "underclass," at least requires heightened scrutiny of any classification based on homelessness.¹⁴⁵ One weakness of such an argument, however, is that not all homeless people are without fault with regard to their predicament (as in the case of undocumented alien children), unless one is prepared to maintain that homelessness itself is the result of some type of mental state that mirrors legal incompetency.

V. CONCLUSION

The homeless are a vulnerable population in American society, ignored and despised by many. As a study commissioned by the United Community Planning Corporation of the City of Boston stated, "[t]he need for a place to live . . . to place one's bed, cook one's food, shelter one's children and store one's possessions . . . is so elemental a need that to be deprived of it is one of the classic examples of human privation."¹⁴⁶ While an increasing number of concerned citizens and activists have decided to address the plight of the homeless, state and federal executive branches of government as well as state and federal judicial systems, for the most part, have failed to provide much needed guidance to resolve the problems of the homeless. The current administration, in fact, has identified homelessness as a problem which the federal government has no duty to address. In the administration's view, that duty belongs to state and local governments.¹⁴⁷ While massive non-governmental movements such as "Hands Across America,"¹⁴⁸

¹⁴⁴ *Id.* at 216, n. 14, 219, 220, and 222.

¹⁴⁵ For a discussion of the concept "underclass" see GLASGOW, *THE BLACK UNDERCLASS*, 3-15 (1980); see generally RACE, POVERTY, AND THE URBAN UNDERCLASS (Cottingham ed. 1982). For a discussion of heightened scrutiny in the *Cleburne* case see *The Supreme Court, 1984 Term, Leading Cases*, 99 Harv. L. Rev. 120, 161-173 (1985).

¹⁴⁶ McGerigle, *Management of Family Housing Crisis in the City of Boston*, 40 (1979).

¹⁴⁷ While testifying before a House Budget Committee, on February 18, 1986, James C. Miller, III, President Reagan's Director of the Federal Office of Management and Budget said: "We believe that the homeless are not a Federal responsibility but a State and local responsibility." *New York Times*, February 19, 1986.

¹⁴⁸ "Hands Across America" is "a project of the United Support of Artists for Africa (USA for Africa), a non-partisan, private sector initiative designed to combat hunger and homelessness in

or smaller organizations such as the Community for Creative Non-Violence can arouse public empathy and raise funds to assist the homeless, these interests are without the ability to articulate legal principles to protect the homeless, nor can they bring about the necessary institutional response that would meet the needs of the homeless. In contrast to the dedicated efforts of these non-governmental groups, the federal government has treated the homeless in Washington, D.C. as virtual pawns in a political game. A closer look at this contest reveals the legal maneuvering of the conservative administration that has abandoned its promise to the homeless, and the desires of the local minority-controlled government that does not wish to bear the burden of that promise in light of the attendant financial responsibilities and legal complications that would follow.

This notion seems inconsistent with a governmental system that prides itself on the principles of fundamental fairness, common decency, ordered liberty, and fair play. Nonetheless, it appears that the system can only be aroused by the problems of the homeless in the instance of a single fasting individual whose health began to deteriorate significantly, presenting potential embarrassment for the government. It is also objectionable that the judicial system would delay decision on a critical social problem and release that decision the day after a national telecast of a movie depicting the work of Mitch Snyder and the Community for Creative Non-Violence on behalf of the homeless. Moreover, even though the decision validated a citizen's initiative on the right of the homeless to shelter, it included only an ambiguous sentence concerning the concept of entitlement of the homeless to shelter. This development merely confirms the belief that the entitlement concept in the area of subsistence social services has been pushed aside and placed on the shelf of issues not currently in vogue, in order to accommodate the philosophy and spirit of the conservative administration. In the case of the homeless in the District of Columbia, no definitive mandatory statutory entitlement to shelter has been enunciated by the highest local court despite the specific words of Initiative 17.

It should be noted that three of the most vulnerable populations in contemporary American society today are prisoners stuffed in badly overcrowded correctional facilities without proper services or humane conditions, victims of the Acquired Immune Deficiency Syndrome (AIDS), and the homeless. In the case of prisoners, the Supreme Court of the United States has articulated principles based on the Fifth, Eighth and Fourteenth Amendments to the Constitution by which the behavior of governmental officials can be measured to determine whether it passes constitutional muster. Thus far, however, the Supreme Court either has not been given or has not seized any opportunity to announce legal principles that would guide governmental officials in their interactions with the victims of

America." On May 25, 1986, the group sponsored a demonstration involving "a continuous line of Americans, standing hand-in-hand, coast-to-coast, across a 4000 mile route." See Communication from the Washington, D.C. branch of "Hands Across America" (March 22, 1986).

AIDS, or the homeless. Yet, even if the Supreme Court were to address homelessness today from a constitutional perspective, it is doubtful that a majority of the Court would regard the homeless as a suspect or quasi-suspect classification under equal protection theory. Furthermore, it is equally doubtful that a majority of the Court would rule that the homeless have a constitutional right to shelter or a due process protected substantive right to shelter.

What is missing and what is urgently needed, in the case of the homeless, is a set of uniform principles concerning how a democratic, pluralistic society should view and treat its homeless. In other words, values based on legal concepts are needed to guide the behavior of American officials in local, state, and federal governments toward the homeless.¹⁴⁹ Without such uniform principles or values, the local, state, and federal governments may continue to close their eyes and ears to the needs of the homeless. The homeless, then, would be left to the mercy of the occasionally unkind political process, or would be dependent upon the sympathies of the private sector which, with its limited resources, cannot possibly address the subsistence needs of all the homeless throughout this country.

Now may be the time for the legal community to develop, and distribute widely, model codes on the rights of the homeless. Now may also be the time for judges, in appropriate cases, to enunciate clear principles regarding acceptable, unacceptable, and inadequate treatment of the homeless by federal, state, and local governments. Finally, now is the time for politicians to resist election year promises to the homeless in favor of persistent and principled leadership in rationally planned legislative and executive governmental efforts to resolve an embarrassing American social problem: the existence of homeless people in the midst of a wealth nation which prides itself on concepts of common decency, fundamental fairness, ordered liberty, and a sense of fair play.

¹⁴⁹ Mashaw, for example, suggests a "Dignitary Process" approach grounded in such values as self-respect, individual liberty, and equality. He posits that there is an "individual right to legal arrangements that preserve the preconditions for moral agency and self-respect." *J. Mashaw, supra* note 23, at 220. See also a review of Mashaw's book and idea, Diver, *The Wrath of Roth*, 94 *YALE L. J.* 1529 (1985). Others have suggested principles which should govern the mentally ill homeless who have been deinstitutionalized without proper community treatment. See Rapson, *The Right of the Mentally Ill to Receive Treatment in the Community*, 16 *COLUM. J. L. & Soc. PROBS.* 193 (1980). As early as 1942, Ralph Bunche, political scientist and Statesman, said: "The real objective must always be the good life for all of the people . . . peace, bread, a house, adequate clothing, education, good health, and above all, the right to walk with dignity on the world's great boulevards." This quote was discovered by Professor Lawrence S. Finkelstein of Northern Illinois University. L. Finkelstein, Draft Paper for the Conference "Ralph Bunche: The Man and His Times," (May 5, 1986) (sponsored by the Ralph Bunche Institute on the United Nations, City University of New York Graduate Center).

