

Research Proposal
The Right to Share a Home
Keith Diggs

In our tradition the State is not omnipresent in the home.
Lawrence v. Texas, 539 U.S. 558, 562 (2003).

American history and tradition sanctify the home in matters of conscience, worship, self-defense, quartering of soldiers, search and seizure, self-incrimination, familial upbringing, and privacy—but not, since *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), when “brutal economic necessity” requires “compelled sharing of a household.”¹ As more and more Americans struggle to afford a home, after an unprecedented half-century when single-family zoning has kept housing scarce, federal courts remain bound by *Belle Terre* to deny the right to share a home. I propose to treat this right as fundamental, and *Belle Terre* as wrongly decided, under the original public meaning of the Fourteenth Amendment.

I would proceed with this work in four main parts. Part I would begin in the real world by showing the economics, legal origins, and environmental effects of today’s housing shortage. If nothing else, humans have gathered in urban housing for millennia, and this pattern was established by 1868 when the Fourteenth Amendment was ratified. Part II would turn to the Fourteenth Amendment and the Constitution’s application to housing since. Part III, the novel contribution and heart of the project, would research the original public meaning of the Civil Rights Act of 1866, whose equalization of the right to “inherit, purchase, lease, sell, hold, and convey real and personal property” was key to the Fourteenth Amendment. The link between the Civil Rights Act of 1866 and the Fourteenth Amendment is well understood, but there appears to be no scholarship on the contemporary meaning of the Act’s six verbs. Part III will supply that missing (yet relevant) research. Part IV would review federal and state court decisions since *Belle Terre*, and propose—as Justice Marshall would have done in *Belle Terre*—grounding privacy rights in property rights. I would conclude that the Fourteenth Amendment protects the right to share a home.

¹ Compare *Moore v. City of E. Cleveland*, 431 U.S. 494, 508 (1977) (Brennan, J., concurring), and *id.* at 498–500 (plurality opinion, distinguishing *Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974)), with authorities cited *infra* Part IV.

I. The Reasonable Reaction to a Housing Shortage

America's housing shortage is self-inflicted. Free people adjust to high housing costs by sharing (or downsizing)²—but single-family zoning ordinances deny this freedom. Zoning's racist origins are an open secret.³ And enforced sprawl amplifies the greenhouse gas emissions that could heat the Earth faster than humans can adapt.⁴

- A. When the Rent Is Too Damn High
- B. How Zoning Segregated America
- C. Measuring Dollars Instead of Carbon

Looking forward, a growing number of Americans want to live affordably, belong to a community, and reduce their greenhouse gas emissions. And looking back, sharing homes (and subdividing land) ought to prove “deeply rooted in this Nation's history and tradition” as an economic, fair, and environmentally friendly way of living.⁵ Yet practically everywhere, single-family zoning stands in the way.

II. A Pattern of Abdication on Land Use

Federal courts have abdicated their role in upholding civil rights against land use controls. In *Belle Terre*, the Supreme Court held that “family values” justify abridging the freedom to share a home.⁶ This challenges the original public meaning of the Fourteenth Amendment, which—as I would develop in Part III—was to constitutionalize a statutory guarantee that every citizen have an equal right to “inherit, purchase, lease, sell, hold, and convey” a home.⁷ As history unfolded, the Supreme Court set the boundaries of American zoning law in two distinct bursts. These bursts, in the

² See ALAIN BERTAUD, ORDER WITHOUT DESIGN (2018).

³ See *Buchanan v. Warley*, 245 U.S. 60 (1917); RICHARD ROTHSTEIN, THE COLOR OF LAW (2017).

⁴ See, e.g., PETER BRANNEN, THE STORY OF CO₂ IS THE STORY OF EVERYTHING (forthcoming 2023).

⁵ *Moore*, 431 U.S. at 503 (plurality opinion), *quoted in* *Washington v. Glucksberg*, 521 U.S. 702, 721, 727 n.19 (1997); e.g., *id.* at 505 (“Especially in times of . . . economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life.”); JANE JACOBS, DARK AGE AHEAD 140 (2004) (“The major way in which households hit by the Depression got by was doubling up . . .”).

⁶ *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

⁷ U.S. CONST. amend. XIV, § 1; Civil Rights Act of 1866, 42 U.S.C. § 1982; see, e.g., RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT (2021).

1920s⁸ and 1970s,⁹ bookended the Court’s development of a tiered-scrutiny model for constitutional rights.¹⁰ *Belle Terre* employed tiered scrutiny to “deny or disparage” the right to share housing under the Constitution.¹¹ When advocates later turned to the Fair Housing Act to challenge a home-sharing ban, the Court reaffirmed that “family composition rules are an essential component of single-family residential use restrictions.”¹²

A. *Belle Terre*

B. The Original Meaning of the Fourteenth Amendment

1. Antebellum (1787–1833)
2. Abolition (1808–1865)
3. Amendment (1865–1870)
4. Slaughter (1873–1883)

C. Making Up Rationales for Zoning

1. The 1920s
2. Tiered Scrutiny
3. The 1970s

D. Repeating History with the Fair Housing Act

1. *Oxford House*
2. The Original Meaning of the Fair Housing Act

⁸ *Washington ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116 (1928); *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Gorieb v. Fox*, 274 U.S. 603 (1927); *Zahn v. Bd. of Pub. Works*, 274 U.S. 325 (1927); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

⁹ *Moore*, 431 U.S. 494 (plurality opinion); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Warth v. Seldin*, 422 U.S. 490 (1975); *Belle Terre*, 416 U.S. 1; *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

¹⁰ *E.g.*, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (proposing two-tiered scrutiny).

¹¹ *See* U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”); *cf. Boraas v. Vill. of Belle Terre*, 476 F.2d 806, 815 (2d Cir. 1973) (citing then-developing intermediate scrutiny precedent as requiring “more realistic” judicial review than “minimal scrutiny”), *rev’d*, 416 U.S. 1. Advocates for judicial engagement, including myself, have criticized tiered scrutiny and rational-basis review. *See* CLARK M. NEILY III, *TERMS OF ENGAGEMENT* (2013); Paul V. Avelar & Keith E. Diggs, *Economic Liberty and the Arizona Constitution: A Survey of Forgotten History*, 49 ARIZ. ST. L.J. 355, 363–87 (2017).

¹² *City of Edmonds v. Oxford House*, 514 U.S. 725, 733 (1995); *see* Fair Housing Act of 1968, 42 U.S.C. §§ 3601 *et seq.*; *see also* *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Proj.*, 576 U.S. 519 (2015) (affirming disparate impact theory of Fair Housing Act, in contrast to the Fourteenth Amendment decision in *Arlington Heights*); *Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15 (1988) (*per curiam*).

3. Making Amends with Disparate Impact

Modern jurisprudence thus holds that the government may simultaneously (1) foster a housing shortage while (2) prohibiting reasonable individual decisions to share the financial cost of that shortage. This clashes with the liberal extension of property rights that the Civil Rights Act of 1866 intended.

III. The Original Meaning of the Civil Rights Act of 1866

This is the heart of the research proposal: to examine the original public meaning of the six verbs that pertain to real (and personal) property rights under the Civil Rights Act of 1866.¹³

- A. Inherit
- B. Purchase
- C. Lease
- D. Sell
- E. Hold
- F. Convey

To my knowledge, this research has never been done. The Civil Rights Act of 1866 guaranteed, to all, the same rights “enjoyed by white citizens ... to inherit, purchase, lease, sell, hold, and convey” property. People had shared homes for millennia by the late 1860s. I hypothesize that the Act’s six verbs would protect sharing a home.

IV. Grounding Privacy Rights in Property Rights

American constitutional law has long recognized “the sanctity of a man’s home and the privacies of life.”¹⁴ In upholding governmental restrictions on the often economically necessary act of sharing a home, the Supreme Court dishonored that tradition in *Belle Terre*. The Court was quickly forced to limit *Belle Terre* to protect familial privacy, and outright ignored *Belle Terre* when it later protected “sexual behavior . . . in the most private of places,

¹³ Civil Rights Act of 1866, 42 U.S.C. § 1982.

¹⁴ *Boyd v. United States*, 116 U.S. 616, 630 (1886), cited in *Poe v. Ullman*, 367 U.S. 497, 550–51 (1961) (Harlan, J., dissenting); see U.S. CONST. amends. I–V; *Moore*, 431 U.S. at 513 (Stevens, J., concurring in judgment) (“[T]he common law protected an owner’s right to decide how best to use his own property.”); *Belle Terre*, 416 U.S. at 15–18 (Marshall, J., dissenting) (“The right to ‘establish a home’ is an essential . . . liberty guaranteed by the Fourteenth Amendment.” (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923))); *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (recognizing “right to be let alone”); Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 697–700 (discussing Harlan’s *Poe* dissent).

the home.”¹⁵ Several state courts have meanwhile rejected *Belle Terre* as inconsistent with their constitutional principles.¹⁶

A. The Right to Privacy in Federal Court

1. Before *Belle Terre*
2. Since *Belle Terre*

B. The Reception of *Belle Terre* in State Court

Privacy rights are historically rooted in property rights. As the Court revisits its privacy jurisprudence,¹⁷ it should revisit *Belle Terre* as well.

V. Conclusion

The Fourteenth Amendment protects the right to share a home. As the housing shortage persists, millions of Americans will choose to live together as a middle path between high prices and homelessness. *Belle Terre*, and the family composition rules that it upholds, will continue to draw legal challenges.¹⁸ Courts applying the Fourteenth Amendment must look to its original public meaning, which incorporated the Civil Rights Act of 1866 and its equalized right to “inherit, purchase, lease, sell, hold, and convey” property. These property rights offer a constitutional home for privacy rights seeking shelter from shifting penumbras. *Belle Terre* wrongly denies these rights, and deserves to be overruled.

¹⁵ *Lawrence v. Texas*, 539 U.S. 558, 567 (2003); *Moore*, 431 U.S. at 498–500 (plurality opinion).

¹⁶ See *City of Santa Barbara v. Adamson*, 610 P.2d 436, 440–42 (Cal. 1980) (rejecting *Belle Terre* as a matter of state constitutional law); *Charter Twp. of Delta v. Dinolfo*, 351 N.W.2d 831, 841 (Mich. 1984) (same); *State v. Baker*, 405 A.2d 368, 375 (N.J. 1979) (same); *City of White Plains v. Ferraioli*, 313 N.E.2d 756, 758–59 (N.Y. 1974) (same); see also *Yoder v. City of Bowling Green*, No. 3:17 CV 2321, 2019 WL 415254, at *5 n.7 (N.D. Ohio Feb. 1, 2019) (interpreting Ohio Constitution to reject *Belle Terre*); *Zavala v. City & Cnty. of Denver*, 759 P.2d 664, 669 (Colo. 1988) (questioning *Belle Terre*); *Kirsch v. Prince George’s Cnty.*, 626 A.2d 372, 380–81 (Md. 1993) (same). But see *Dinan v. Bd. of Zoning Appeals*, 595 A.2d 864, 870–71 (Conn. 1991) (adopting *Belle Terre* as a matter of state constitutional law); *Ames Rental Prop. Ass’n v. City of Ames*, 736 N.W.2d 255, 258–63 (Iowa 2007) (same); *Penobscot Area Hous. Dev. Corp. v. City of Brewer*, 434 A.2d 14, 24 n.9 (Me. 1981) (same); *Ass’n for Educ. Dev. v. Hayward*, 533 S.W.2d 579, 588 (Mo. 1975) (same); *State v. Champoux*, 566 N.W.2d 763, 767–68 (Neb. 1997) (same); *Town of Durham v. White Enters., Inc.*, 348 A.2d 706, 709 (N.H. 1975) (same).

¹⁷ See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

¹⁸ *E.g.*, *HomeRoom, Inc. v. City of Shawnee*, No. 2:23-cv-02209 (D. Kan. filed May 9, 2023).