

2015

Occupying the Constitutional Right to Housing

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Lisa T. Alexander, *Occupying the Constitutional Right to Housing*, 94 Neb. L. Rev. 245 (2015)

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Lisa T. Alexander*

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The statist impasse in constitutional creation must soon come to an end. When the end comes, it is unlikely to arrive via the Justices It will likely come in some unruly moment—some undisciplined jurisgenerative impulse, some movement prepared to hold a vision in the face of indifference or opposition of the state. Perhaps such a resistance—redemptive or insular—will reach not only those of us prepared to see law grow, but the courts as well.

Robert M. Cover, *Foreward: Nomos and Narrative*¹

Fight, fight, fight, fight—housing is a human right!

Chant of Housing Rights Activists²

I. INTRODUCTION

Housing rights protestors in San Francisco blocked a Google employee bus transporting employees to the company's headquarters in suburban Mountain View.³ The protestors opposed Google's use of over 200 public San Francisco bus stops for its private employee shuttle buses without paying fines for its illegal use of public infrastructure.⁴ The protestors demanded that the city fine Google \$1 billion dollars,⁵ and dedicate the proceeds to affordable housing initiatives, eviction defenses,⁶ and measures to prevent the conversion of affordable rental units to market-rate condos.⁷ Similar protests also took

Thurgood Marshall Law School, St. Thomas University School of Law, and the Korematsu Center for Law and Equality at Seattle University School of Law. I am also grateful to Sam Ahrendt and Evan Nordgren for their excellent research assistance. Lastly, I am deeply indebted to the activists who agreed to be interviewed for this Article and who inspired this work.

1. Robert M. Cover, *The Supreme Court, 1982 Term—Foreward: Nomos and Narrative*, 97 HARV. L. REV. 4, 67 (1982).
2. Various Artists (Mixed by DJ Boo), *Home (Housing is a Human Right)*, NOMADIC WAX (Aug. 15, 2013), <http://nomadicwax.bandcamp.com/track/home-housing-is-a-human-right>, archived at <http://perma.unl.edu/54LH-XV24>.
3. Lydia O' Connor, *Protestors Block Google Bus, Demand \$1 Billion*, HUFFINGTON POST (Dec. 12, 2013, 2:28 PM), http://www.huffingtonpost.com/2013/12/09/google-bus-protest_n_4414809.html, archived at <http://perma.unl.edu/69UX-ZW2S>.
4. *See id.*
5. Sarah McBride, *Google Bus Blocked in San Francisco Gentrification Protest*, REUTERS (Dec. 9, 2013, 6:16 PM), <http://www.reuters.com/article/2013/12/09/us-google-protest-idUSBRE9B818J20131209>, archived at <http://perma.unl.edu/GN66-673C>.
6. Shalia Dewan, *Evictions Soar in Hot Market; Renters Suffer*, N.Y. TIMES, Aug. 29, 2014, at A1, available at <http://www.nytimes.com/2014/08/29/us/evictions-soar-in-hot-market-renters-suffer.html> (explaining that in many cities, as middle-class wages have stagnated, rents have risen sharply and affordable housing is in short supply, resulting in a surge in evictions in states such as California, Massachusetts, Maine, New Jersey, Georgia, and Wisconsin).
7. Jay Yarow, *Here Are the Demands from the Protestors Who Are Blocking Google's Buses*, BUS. INSIDER (Dec. 9, 2013, 2:52 PM), <http://www.businessinsider.com/heres-the-demands-from-the-protestors-that-are-blocking-googles-buses-2013-12>, archived at <http://perma.unl.edu/X9WC-MSFE>.

place in other cities.⁸ The protestors' main grievance was the increasingly inequitable distributions of local housing and property entitlements in San Francisco and Seattle spurred, in part, by technology companies' growth in the region.⁹

The San Francisco protestors convinced the city to levy fines against the technology companies,¹⁰ and to enact an ordinance that would mitigate the negative effects of the Ellis Act, a state law that allows a landlord to evict all tenants in a rental building, without cause, if the landlord intends to leave the rental market.¹¹ Activists alleged that Ellis Act evictions were increasing and that landlords were abusing the Ellis Act to illegally evict rent-controlled tenants in favor of market-rate owners.¹² The new ordinance required landlords evicting tenants under the Ellis Act to pay relocation payments to evicted tenants representing two years' worth of the difference between the rate-controlled rent and market-rate rent.¹³

Landlords and conservative legal groups challenged the constitutionality of the ordinance in federal court, and the court struck down the ordinance.¹⁴ The city attorney is appealing the decision to the Ninth Circuit.¹⁵ Following the federal court's decision, the city supervisor amended the ordinance to comply with the federal court ruling,

8. Nick Wingfield, *Seattle Gets Its Own Tech Bus Protest*, N.Y. TIMES (Feb. 10, 2014, 11:46 PM), <http://bits.blogs.nytimes.com/2014/02/10/seattle-gets-its-own-tech-bus-protest/>, archived at <https://perma.unl.edu/P5PQ-7D3Y?type=source>.

9. See, e.g., O'Connor, *supra* note 3; Carolyn Said, *Tenant Lawsuits Target Airbnb and HomeAway Hosts in San Francisco*, SKIFT (July 30, 2014, 11:40 AM), <http://skift.com/2014/07/30/tenant-lawsuits-target-airbnb-and-homeaway-hosts-in-san-francisco/>, archived at <http://perma.unl.edu/H5GN-8TWC>.

10. Jessica Guynn, *San Francisco Approves Regulations for Google Buses*, L.A. TIMES (Jan. 21, 2014, 5:34 PM), <http://articles.latimes.com/2014/jan/21/business/la-fi-tn-san-francisco-approves-new-regulations-for-google-buses-20140121>, archived at <http://perma.unl.edu/YD7Y-EAAN>.

11. CAL. GOV'T. CODE § 7060(a) (1985); see also Joe Fitzgerald Rodriguez, *Campos' Ellis Act Payment Law Invalidated by Federal Judge*, S.F. EXAM'R (Oct. 22, 2014), <http://www.sfexaminer.com/sanfrancisco/sf-law-requiring-steep-payouts-to-ellis-act-evictees-struck-down-by-federal-judge/Content?oid=2909870>, archived at <http://perma.unl.edu/QE3E-EDZR> (discussing the invalidation of the Tenant Relocation Ordinance).

12. Joshua Sabatini, *SF Boosts Compensation for Ellis Act Evictees*, S.F. EXAM'R (Apr. 9, 2014, 4:00 AM), <http://archives.sfexaminer.com/PoliticsBlog/archives/2014/04/09/sf-boosts-compensation-for-ellis-act-evictees>, archived at <http://perma.unl.edu/WHT2-WCVE>.

13. Bay City News, *SF Ordinance Requiring Steep Payouts to Evictees Struck Down by Federal Judge*, ABC7 News (Oct. 21, 2014), <http://abc7news.com/news/sf-ordinance-requiring-steep-payouts-to-evictees-struck-down-by-federal-judge/360488/>, archived at <http://perma.unl.edu/BT97-4Z2A>.

14. See *id.*

15. Jay Barmann, *Amended Ellis Act Relocation Law Caps Landlord Payouts at \$50K*, SFIST (Feb. 4, 2015, 10:05 AM), http://sfist.com/2015/02/04/amended_ellis_act_relocation_law_ca.php, archived at <http://perma.unl.edu/Q69P-4MGA>.

and the pro-landlord plaintiffs stated they are prepared to litigate the issue all the way to the Supreme Court.¹⁶ Yet, housing rights activists continue to use property law disobedience¹⁷ to press for a more equitable distribution housing entitlements in the region.¹⁸ This saga is representative of the continuous legal, political, social, and cultural battles between U.S. housing rights movements and private property advocates who seek to thwart these movements' efforts.

This Article's central thesis is that the conflict and contestation between these groups helps forge new understandings of how local housing and property entitlements can be equitably allocated, consistent with the human right to housing and U.S. constitutional norms. While there is no formal federal, state, or constitutional right to housing in America, these movements' illegal occupations and local housing reforms concretize the human right to housing in local American laws, associate the human right to housing with well-accepted constitutional norms, and establish the contours of the human right to housing in the American legal consciousness.¹⁹ These movements construct the human right to housing in American law by establishing through private and local laws a right to remain, a right to adequate and sustainable shelter, a right to housing in a location that preserves cultural heritage, a right to a self-determined community, and a right to equal housing opportunities for non-property owners, among other rights. By challenging local property rights, these movements also demonstrate how non-property owners, who lack adequate housing, also lack equal dignity, equal opportunity, equal citizenship, privacy, personal autonomy, and self-determination—all norms explicit in the U.S. constitutional order. Lastly, the backlash these movements face also reveals the limits of what tenants' and homeless' rights in an American society committed to strong private property protections will tolerate. When these movements reformulate local property and housing entitlements in a manner that enhances equity and vindicates well-accepted constitutional norms, they give legal content to a future American constitutional right to housing.

This Article relies on document analysis and interviews with key members of umbrella housing rights movements in the U.S.—such as

16. *See id.*

17. EDUARDO MOISÉS PENALVER & SONIA K. KATYAL, PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP 64–65 (Yale Univ. Press 2010) (explaining that the term “property law disobedience” refers to intentional civil disobedience to challenge existing property laws).

18. *See id.*

19. Legal consciousness describes “how law is experienced and understood by ordinary people as they engage, avoid and resist the law and legal meanings.” PATRICIA EWICK & SUSAN S. SIBLEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE (1998).

the Occupy Our Homes movements,²⁰ the Take Back the Land movements (TBTL),²¹ and the Home Defenders' League (HDL)²²—to assess how these movements realize an American right to housing, even in the absence of a formal legal right. These umbrella movements are part of informal trans-local networks²³ of housing rights activists, connected nationally and globally through the Internet and social media.²⁴ The author chose these movements because they all used property law disobedience during and after the U.S. housing crisis, participated in Occupy Wall Street, and used the Internet and social media to assert rights that do not exist as a formal legal matter under U.S. law.

These movements apply old legal and constitutional concepts in new ways to assert new housing rights. The Occupy Our Homes and TBTL movements encourage municipalities to use eminent domain to give illegal occupiers title to homes they currently occupy and to transfer ownership of the land under the homes to community land trusts (CLTs)²⁵ owned by the occupiers.²⁶ HDL encourages municipi-

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20. See generally MANUEL CASTELLS, NETWORKS OF OUTRAGE AND HOPE: SOCIAL MOVEMENTS IN THE INTERNET AGE 159 (2012); *Occupy Movement*, WIKIPEDIA, http://en.wikipedia.org/wiki/Occupy_movement (last visited Aug. 27, 2014), archived at <http://perma.unl.edu/BSE8-5XS5>; Kevin Zeese & Margaret Flowers, *Creative Resistance Art Activism*, L.A. PROGRESSIVE, <http://www.laprogressive.com/creative-resistance-art-activism/> (last visited Aug. 27, 2014), archived at <http://perma.unl.edu/8PC9-6CLK>; Les Christie, *Occupy Protestors Take Over Foreclosed Homes*, CNN MONEY (Dec. 6, 2011, 8:22 PM), http://money.cnn.com/2011/12/06/real_estate/occupy_movement_spreads/index.htm, archived at <http://perma.unl.edu/22DT-JDU4>.
21. In 2010, the Take Back the Land movement formed a national network of affiliated local action campaigns connected via the Internet and social media. The local action campaigns in TBTL-National's network included but were not limited to: the Chicago Anti-Eviction Campaign, Take Back the Land-Rochester, Take Back the Land-Madison, Occupy Homes Minnesota, City Life/Vida Urbana in Boston, Occupy Our Homes Atlanta, and Picture the Homeless in New York City. See Skype Interview with Max Rameau, Leader of Take Back the Land (Oct. 31, 2014) (recording on file with author); *Resources*, TAKE BACK THE LAND ROCHESTER, <http://takebackroc.rocus.org/node/2> (last visited Sept. 1, 2014), archived at <http://perma.unl.edu/7CJE-EE6C>.
22. The Home Defenders League formed in May of 2012 as an outgrowth of the Occupy Our Homes movements. HDL focuses, mainly, on the large number of American underwater homeowners in the wake of the foreclosure crisis. See *Local Principal Reduction Background*, HOME DEFENDERS LEAGUE, http://www.homedefendersleague.org/local_principal_reduction_background (last visited Sept. 1, 2014), archived at <http://perma.unl.edu/583D-NLA7>.
23. The term "trans-local networks" describes unaffiliated local activists, unincorporated associations, or local organizations of housing rights activists that are connected to each other nationally and globally through the Internet and social media. See Skype Interview with Max Rameau, *supra* note 21.
24. See CASTELLS, *supra* note 20.
25. A CLT is an alternative form of land tenure that separates the ownership of land from the ownership of improvements on the land, such as homes. By separating

palities to use eminent domain to refinance the loans of underwater homeowners facing foreclosure.²⁷ Other related homeless rights movements create micro-homes villages for the homeless, and reform local zoning laws to accommodate the new uses of the villages.²⁸ It is unclear if these social movements' legal gains will persist as the U.S. housing market gradually improves,²⁹ and as strong private property rights advocates enact state laws to preempt these movements' local successes.³⁰ Yet, these social movements have made headway in the longer-term war to shift Americans' values regarding how local housing and property rights should be allocated to advance the human right to housing and constitutional norms.³¹ As criminal justice, environmental, and pro-immigration movements emerge, this Article demonstrates new ways social movements can advance social and economic rights in the U.S.

Section II.A of this Article summarizes the housing rights and entitlements protected by the human right to housing. Section II.B analyzes the landscape of American housing rights and proves that, although the U.S. does not recognize the human right to housing as a formal legal obligation, the human right to housing is consistent with explicit and implicit American constitutional norms. Section II.C as-

the ownership of land from the ownership of improvements on the land and by including restrictions on the prices and terms under which the homes can be sold, users are often able to keep land and housing affordable over the long haul. In a non-profit CLT, a non-profit organization owns the land and individuals or other groups own the improvements on the land. See David M. Abromowitz, *An Essay on Community Land Trusts: Towards Permanently Affordable Housing*, in PROPERTY AND VALUES: ALTERNATIVES TO PUBLIC AND PRIVATE OWNERSHIP 214–15 (Charles Geisler & Gail Daneker eds., 2000).

26. See *infra* section II.B.

27. *Local Principal Reduction Background*, *supra* note 22.

28. Interview with Brenda Konkol, Board Member, OM Build (Oct. 31, 2013) (recording on file with the author); see also section II.A (discussing grassroots strategies for developing a recognized constitutional right to housing).

29. Ruth Mantell, *Housing Starts Rise to Highest Annual Tally in Seven Years*, MARKETWATCH (Jan. 21, 2015, 10:18 AM), <http://www.marketwatch.com/story/housing-starts-rise-to-highest-annual-tally-in-seven-years-2015-01-21>.

30. Some states, such as Wisconsin, have enacted legislation to restrict renters' rights and strengthen landlords' rights in response to legal gains procured through local housing rights activism. See, e.g., WIS. STAT. § 66.0104 (2014) (prohibiting local governments from obtaining critical identification and credit history on prospective tenants); WIS. STAT. § 66.0104(2)(c) (placing a presumptive cap on the amount of attorney's fees tenants can recover). Other states have seen a surge in evictions leading to displacement. See Dewan, *supra* note 6.

31. Nestor M. Davidson & Rashmi Dyal-Chand, *Property in Crisis*, 78 FORDHAM L. REV. 1607 (2010); see also JOINT CTR. FOR HOUSING STUD., HARVARD UNIV., AMERICA'S RENTAL HOUSING: EVOLVING MARKETS AND NEEDS 1–15 (Oct. 2013), archived at <http://perma.unl.edu/83U7-WDKT> (explaining that all American households except the oldest groups made a shift towards renting, and that many jurisdictions are experimenting with micro-units to increase the affordable housing supply in highly dense, high-cost markets).

serts that social movements can create constitutional meanings through private ordering, as well as through constitutional adjudication and federal and state legislation. Finally, section II.D argues these housing rights movements' private ordering and local property law reform efforts constitute a form of popular constitutionalism, whereby the people create constitutional meanings before those interpretations are validated by courts or legislatures.³² In Part III, this Article analyzes qualitative data and case studies to demonstrate how these movements manifest the human right to housing and advance American constitutional norms. Part IV argues that the Internet and social media help these movements advance Americans' cultural acceptance of the human right to housing and avoid the pitfalls of legal mobilization. Lastly, this Article concludes by outlining the future challenges and obstacles these movements may face.

II. THE RIGHT TO HOUSING AND AMERICAN CONSTITUTIONAL NORMS

A. The Right to Housing

The human right to housing, embodied in several international treaties, declarations, and constitutions, establishes that every person has a right to adequate housing and to the continuous improvement of living conditions.³³ The right is not a binding international legal obli-

32. The author derives this insight from an observation made by legal scholar, Martha Minow.

In my view, efforts to create and give meaning to norms, through a language of rights, often and importantly occur outside formal legal institutions such as courts. "Legal interpretation," in this sense, is an activity engaged in by nonlawyers as well as by lawyers and judges. Interpretive activity appeals not to one overriding authoritative community, but instead to people living in worlds of differences. Through interpretive activity, people summon up a sense of potential community membership without relinquishing struggles over meaning and power.

Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1861–62 (1987).

33. See, e.g., Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 25, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter Universal Declaration]; International Covenant on Economic, Social and Cultural Rights art. 11, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3 [hereinafter Covenant]; Convention on the Rights of the Child art. 27, Nov. 20, 1989, 1577 U.N.T.S. 3; International Convention on the Elimination of All Forms of Racial Discrimination art. 5, Mar. 7, 1966, 660 U.N.T.S. 195; Convention on the Elimination of All Forms of Discrimination Against Women art. 14, Dec. 18, 1979, 1249 U.N.T.S. 13; see also Jessie M. Hohmann, *The True Radicalism of the Right to Housing*, 21 BRIT. ACAD. REV. 22, 22–25 (2013) (explaining that the right to housing is now codified in the International Covenant on Economic, Social and Cultural Rights, in the Revised European Social Charter, in the African Charter on Human and People's Rights and in fifty national constitutions, including France, South Africa, Brazil, and Vietnam).

gation in America and the right is not explicit in the U.S. Constitution.³⁴ Article 25 of the 1948 Universal Declaration of Human Rights (the Declaration) first identified the right to housing as part of the broader right to an adequate standard of living.³⁵ The United Nations (UN) formalized and codified the principles outlined in the Universal Declaration through Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (the Covenant). The Covenant explicitly defines the right to housing as “the right of everyone to an adequate standard of living for himself and his family, including adequate . . . housing”³⁶ It also makes the protection of social and economic rights a legally binding obligation in the form of a treaty.³⁷ Participating countries must “take appropriate steps to ensure the realization of [the right to housing].”³⁸ While countries are not obligated to provide housing for their entire populations, they must “progressively realize”³⁹ the right to housing by adopting legislative, administrative, judicial, budgetary, and other measures to advance the right to housing for all.⁴⁰ The right to housing is also broader than a given country’s property law regime, as it protects the rights of owners and non-owners.⁴¹ Participating countries must balance the rights of each group when implementing the right to housing. Thus, the right to housing includes both positive and negative rights because it requires participating countries to take affirmative steps, rather than to merely refrain from impairing freedoms.⁴²

34. Ann M. Burkhart, *The Constitutional Underpinnings of Homelessness*, 40 HOUS. L. REV. 211 (2003) (arguing that the social and political climate at the time of the framing of the U.S. Constitution was hostile to an affirmative right to housing).

35. Universal Declaration, *supra* note 33, at art. 25 (“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”).

36. Covenant, *supra* note 33, at art. 11(1) (noting the terms “himself and his family” reflect prior gender norms, but the language has been interpreted to apply to all humans).

37. KATHERINE G. YOUNG, *CONSTITUTING ECONOMIC AND SOCIAL RIGHTS in OXFORD CONSTITUTIONAL THEORY* 18 (Martin Loughlin, John P. McCormick & Neil Walker eds., 2012).

38. *See, e.g.*, Covenant, *supra* note 33, at art.11(1); U.N. Office of the High Comm’r for Human Rights (OHCHR), *Fact Sheet No. 21, The Human Right to Adequate Housing*, Fact Sheet No. 21/Rev.1 (Nov. 2009) [hereinafter Fact Sheet No. 21], archived at <http://perma.unl.edu/4VA6-63GS>.

39. Fact Sheet No. 21, *supra* note 38, at 30.

40. *Id.* at 33.

41. Rashmi-Dyal Chand, *Pragmatism and Postcolonialism: Protecting Non-Owners in Property Law*, 63 AM. U. L. REV. 1683 (arguing that property law has a particular problem with non-owners).

42. *Id.* at 3.

The human right to housing is not binding law in the U.S., since the U.S. never ratified the Covenant.⁴³ However, the right to housing still inspires American activists because it emphasizes that humans cannot achieve full freedom, equality, dignity, self-determination, and community without adequate housing. The Covenant also affirms that access to adequate housing is a universal and natural right, rather than a privilege based upon an individual's economic, racial, gendered, or social status.⁴⁴ The right to housing also vitiates against arguments that housing is merely a commodity, and that an unfettered market always optimally and equitably allocates housing entitlements.⁴⁵ Thus, the right to housing operates as an important set of values for housing rights groups pressing for a more equitable distribution of housing entitlements in America.⁴⁶ The right to housing also holds promise for U.S. activists because it encompasses more dimensions than simply the provision of shelter.⁴⁷ The UN Committee on Social and Economic and Cultural rights (the Committee) interprets the right to housing to embody, at the least, seven broad principles, namely: (1) security of tenure; (2) availability of services, materials, facilities, and infrastructure; (3) affordability; (4) habitability; (5) accessibility; (6) location; and (7) cultural adequacy.⁴⁸

Security of tenure, the first principle of the right to housing, connotes protection against illegal and forced evictions, harassment, and other threats to housing security.⁴⁹ This principle can protect renters and non-property owners in struggles over access to land, housing, and shelter. Security of tenure also implies that displacement is a destabilizing event that often undermines the attainment of other

43. Maria Foscarinis, *Homelessness and Human Rights: Towards an Integrated Strategy*, 19 ST. LOUIS U. PUB. L. REV. 327, 346 (2000) (“[T]he ICESCR, was signed by the United States in 1972 but has not yet been ratified.”).

44. See, e.g., Covenant, *supra* note 36, at art. 11(1) (emphasizing that “everyone” has a right to an adequate standard of living, including adequate housing).

45. Fact Sheet No. 21, *supra* note 38, at 33.

46. Sally Engle Merry, Peggy Levitt, Mihaela Serban Rosen & Diana H. Yoon, *Law from Below: Women's Human Rights and Social Movements in New York City*, 44 LAW & SOC'Y REV. 101, 107 (2010).

47. Fact Sheet No. 21, *supra* note 38, at 3.

48. The UN Committee on Economic, Social and Cultural Rights is the institutional body, mandated by the UN Economic and Social Council, that interprets and implements the Covenant. Since 1986, the Committee has issued important statements that give greater content to the human right to housing based on their monitoring experience. See, e.g., U.N. Comm. on Econ., Soc., & Cultural Rights, *General Comment 4 on the Right to Adequate Housing (Art. 11 (1) of the Covenant)*, ¶ 7, U.N. Doc. E/1992/23 annex III at 91 (Dec. 13, 1991), archived at <http://perma.unl.edu/GM4J-AMV9> [hereinafter *General Comment 4*]; U.N. Comm. on Econ., Soc., & Cultural Rights, *General Comment 7 on the Right to Adequate Housing (Art. 11.1): Forced Evictions*, U.N. Doc. E/1998/22 annex IV at 113 (May 20, 1997) [hereinafter *General Comment 7*].

49. *General Comment 7*, *supra* note 48, ¶¶ 1, 10.

human rights, even if the displacement is economically or legally justified.⁵⁰ Even when evictions are legal, security of tenure requires the state to ensure that the eviction is carried out in a “lawful, reasonable and proportional manner,” and to counteract evictions that lead vulnerable individuals to become homeless, economically destabilized, or suffer other human rights infractions.⁵¹ All humans also have security of tenure in all forms of housing and shelter including, but not limited to, public and private rental accommodations, cooperative housing, owner-occupied housing, emergency housing, informal settlements, and occupied land or property.⁵² Thus, security of tenure does not privilege homeownership and private property as the only form of adequate housing, and it protects tenure in many forms of housing and shelter not procured through formal legal titles.⁵³ Security of tenure also requires participating countries to regulate private markets and private actors in a manner that furthers the right to housing for all.⁵⁴ Security of tenure is critical to attaining and maintaining adequate housing, and failing to protect security of tenure can serve as *prima facie* evidence of a violation of the right to housing.⁵⁵

The second principle of the right to housing, availability of services, also affirms that housing is only adequate if it provides certain facilities essential for sustainable health, such as safe drinking water, energy for cooking, heating and lighting, washing facilities, and proper sanitation.⁵⁶ Third, adequate housing must be affordable to all, so that the attainment of other basic human needs is not compromised by housing costs.⁵⁷ Fourth, housing is only adequate if it is habitable, providing sufficient space for protection from threats to health.⁵⁸ Fifth, all disadvantaged and vulnerable groups must be able to access adequate housing within a country’s borders.⁵⁹ Sixth, adequate housing also must be located in a place that does not threaten the right to health and provides access to employment options, health-care services, schools, child-care centers, and other crucial social facilities.⁶⁰ Seventh, housing accommodations and policies are only adequate if they provide all humans with opportunities to express their cultural identities and maintain pluralistic diversity, including the

50. *See id.* ¶¶ 16–17.

51. *See, e.g., General Comment 4*, *supra* note 48, ¶ 11; Fact Sheet No. 21, *supra* note 38, at 5.

52. *General Comment 4*, *supra* note 48, ¶ 8(a).

53. Fact Sheet No. 21, *supra* note 38, at 8.

54. *Id.* at 33.

55. *Id.* at 5.

56. *General Comment 4*, *supra* note 48, ¶ 8(b).

57. *Id.* ¶ 8(c).

58. *Id.* ¶ 8(d).

59. *Id.* ¶ 8(e).

60. *Id.* ¶ 8(f).

preservation of cultural institutions and landmarks.⁶¹ Thus, housing is inadequate unless it is sustainable and connects humans to opportunities for human flourishing.⁶²

No country has implemented the full dimensions of the right to housing. As the Committee noted, “[T]here remains a disturbingly large gap between the standards set in article 11 (1) of the Covenant and the situation prevailing in many parts of the world.”⁶³ Article 2.1 of the Covenant only requires that countries advance the right to housing to “the maximum of [their] available resources.”⁶⁴

South Africa’s history illustrates how countries with explicit textual support for the right to housing still struggle to realize the right in practice.⁶⁵ South Africa signed, but did not ratify the Covenant, and its Constitution explicitly contains the right to housing.⁶⁶ South Africa also adopted national laws that implement the right.⁶⁷ Yet South Africa still struggles to provide adequate remedies to black South Africans whose land was taken or denied them during the apartheid-era.⁶⁸ South Africa also labors to provide adequate housing for former rural dwellers moving to urban locations and for the many dispossessed.⁶⁹ The right to housing does not provide funding, so governments and courts must engage in cost and benefit analyses and creatively identify sources of funds to further the right.⁷⁰ The challenges of implementing the right to housing demonstrate the broader

61. *Id.* ¶ 8(g).

62. Gregory S. Alexander, *The Social Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 748 (2009) (describing “human flourishing” as a norm that enables individuals to live lives worthy of human dignity).

63. *General Comment 4*, *supra* note 48, ¶ 4.

64. Covenant, *supra* note 33, at art. 2.1.

65. See Lucy A. Williams, *The Right to Housing in South Africa: An Evolving Jurisprudence*, 45 COLUM. HUM. RTS. L. REV. 816, 822 (2014) (“[H]uman rights discourse on its own provides limited analytical assistance when addressing the difficult economic and institutional questions that must be faced in order to make housing rights a reality.”).

66. Section 26 of the South African Constitution provides:

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of the court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

S. AFR. CONST., 1996, sec. 26.

67. See, e.g., Rental Housing Act of 50 of 1999 (S. Afr.); Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998 (S. Afr.).

68. See generally BERNADETTE ATUAHENE, WE WANT WHAT’S OURS: LEARNING FROM SOUTH AFRICA’S LAND RESTITUTION PROGRAM (2014).

69. See Kirsten David Adams, *Do We Need a Right to Housing?*, 9 NEV. L.J. 275, 296 (2009).

70. See YOUNG, *supra* note 37, at 22–23.

difficulties associated with implementing social and economic rights. Nonetheless, South Africa's textual support for robust housing rights, in both its domestic and international law, provides the moral and legal basis for cultural shifts in popular opinion about how housing entitlements should be distributed.

The South African Constitution explicitly identifies courts as key institutions that define the right to housing.⁷¹ In the seminal and well-cited case of *Government of the Republic of South Africa v. Grootboom*,⁷² the South African Supreme Court interpreted the right to housing to contain "at the very least, a negative obligation placed upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing."⁷³ Yet, the South African courts evaluate the "constitutional adequacy of the government's programs to fulfill its affirmative obligations"⁷⁴ under a more deferential standard of "reasonableness review."⁷⁵ Courts construe many South African housing programs that provide only minimal housing protections as "reasonable" under this standard. Thus, courts are key institutions that constitute the right to housing in South Africa, although they do not always ensure that the right is fully realized. Non-governmental legal organizations, such as the Legal Resources Center and other groups, help define the right to housing in South Africa through impact litigation and legislative advocacy.

Social movements are also important institutions that help define the right to housing in South Africa. Since *Grootboom*, social movements, such as the Western Cape Anti-Eviction Campaign, an umbrella group of housing rights movements in South Africa, and Abahlali baseMjondolo, the South African Shackdwellers' Movement, use illegal and adversarial tactics such as occupations, squatting, and protests to shift popular understandings of how housing entitlements should be distributed consistent with South African constitutional norms.⁷⁶ By challenging and reformulating prevailing allocations of housing and land entitlements, these activists give content to the right to housing. These activities force courts, governments, and legislatures to determine whether certain social, economic, and cultural

71. See Williams, *supra* note 65.

72. 2001 (1) SA 46 (CC) (S. Afr.).

73. See *id.* at 28, para. 34; Williams, *supra* note 65, at 821.

74. Williams, *supra* note 65, at 821.

75. See *id.*

76. The Western-Cape Anti-Eviction Campaign is an umbrella social movement group organized in November 2000 after the South African Supreme Court issued its opinion in *Government of the Republic of South Africa v. Grootboom*, which interpreted the South African constitutional right to housing. The group and another social movement group, the Abahlali baseMjondolo, were formed to engage in civil and social disobedience to realize the right to housing for the poor and dispossessed in South Africa. Brian Ray, *Demosprudence in Comparative Perspective*, 47 STAN. J. INT'L L. 111, 169-70 (2011).

practices violate the right to housing or are worthy of state protection. The *Grootboom* case demonstrates how a multiplicity of actors, including social movements, constitute the right to housing through a dynamic process of social protest, law breaking, constitutional amendments, adjudication, legislation, and international law.⁷⁷

B. American Housing Rights and Constitutional Norms

The right to housing is not currently a formal legal or constitutional obligation in America. Thus, in America, federal and state courts and legislators do not play a central role in creating or defining the right to housing. Rather, social movements are the primary institutions that define and give legal meaning to an American constitutional right to housing through private ordering and local law reforms. It is unlikely that the U.S. will pass a constitutional amendment to adopt a right to housing in the near future. Congress is also unlikely to pass federal legislation codifying a right to housing for all. While the U.S. has enacted several housing statutes and grant programs, no court has interpreted a federal statute to provide a broad affirmative right to housing for all Americans. U.S. courts interpret the federal Fair Housing Act (FHA) and the U.S. Constitution to protect only a negative right to freedom from discrimination in the attainment of housing on the basis of protected-class status.⁷⁸ Legal recognition of this right does not provide each American citizen with a positive right to adequate or affordable housing.

Many scholars and legal advocates argue that Franklin D. Roosevelt's (FDR) New Deal programs constitute a second American "bill of rights" that recognizes a right to housing and other social and economic rights.⁷⁹ Specifically, the U.S. Housing Act of 1949 (the Housing Act), the culmination of FDR's housing efforts, pledged to realize "as soon as feasible . . . the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth and security of the nation."⁸⁰ Many scholars, activists, and lawyers contend that this federal law is a source of support for federal recognition of a positive American right to housing.⁸¹ Yet U.S. courts have not interpreted these statutes to include the expansive housing entitlements embodied in the human right to housing.

77. See generally YOUNG, *supra* note 37; HEINZ KLUG, *CONSTITUTING DEMOCRACY: LAW GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION* (2000).

78. 42 U.S.C. § 3608(d)-(e) (2005).

79. See generally CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* (2004).

80. The Housing Act of 1949, 42 U.S.C. § 1441 (2012).

81. See, e.g., Adams, *supra* note 69, at 299.

The U.S. Supreme Court also foreclosed the possibility of recognizing broad housing rights in existing provisions of the U.S. Constitution. In *Lindsey v. Normet*, a 1972 class action suit, the named plaintiffs were month-to-month tenants in a rental apartment.⁸² The local authorities found the apartment unfit for human habitation and the tenants requested that the landlord make repairs which, in all cases but one, he refused to make.⁸³ The tenants refused to pay rent until the repairs were made and the landlord threatened to pursue eviction procedures under the Oregon Forcible Entry and Wrongful Detainer Statute.⁸⁴ The plaintiffs sued for an injunction and a declaratory judgment that the statute was unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.⁸⁵ The plaintiffs argued that the statutes' procedures forbidding plaintiffs to plead the landlord's failure to maintain the premises as an affirmative defense denied them Due Process under the Fourteenth Amendment.⁸⁶ The plaintiffs also contended "the 'need for decent shelter' and the 'right to retain peaceful possession of one's home'" were fundamental rights under the Constitution's Equal Protection Clause and thus the Oregon statute should be judged under strict scrutiny rather than a rational basis standard.⁸⁷ The plaintiffs further argued that the state should have to articulate a compelling state interest in order to justify trammeling upon the rights of tenants to retain peaceful possession of their home.⁸⁸

The Court held that the statute did not violate the Due Process Clause because the Constitution does not federalize the substantive law of landlord-tenant relations.⁸⁹ The Court maintained that Oregon could treat the undertakings of the tenant and those of the landlord independently without violating the Due Process Clause because the tenants could sue the landlord in a separate action, just not as an affirmative defense.⁹⁰ With respect to a right to housing protected under the Equal Protection Clause of the Constitution, the Court opined:

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 dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the

82. *Lindsey v. Normet*, 405 U.S. 56, 58-59 (1972).

83. *Id.*

84. *Id.*

85. *Id.* at 60.

86. *Id.* at 64-74.

87. *Id.* at 73.

88. *Id.*

89. *Id.* at 68.

90. *See id.* at 68-69.

terms of the relevant agreement. *Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions. Nor should we forget that the Constitution expressly protects against confiscation of private property or the income therefrom.*⁹¹

Thus, the Court refused to recognize poor tenants as a protected class and rejected the notion of a broad constitutional right to housing that trumped the landlord's property rights. The Court also relegated protection of such rights to the legislature. While some legal advocates argue that this decision only forecloses a right to housing of a "particular quality,"⁹² others interpret it as a death knell to judicial recognition of a constitutional right to housing.⁹³

America's failure to recognize a formal legal right to housing is consistent with its general resistance to positive social and economic rights.⁹⁴ The American legal system primarily protects negative civil and political rights.⁹⁵ The U.S. ratified the International Covenant on Civil and Political Rights,⁹⁶ and the 1950s and 1960s Civil Rights Movements helped codify a variety of civil and political rights in federal and state legislation.⁹⁷ Consequently, some argue that the right to housing should be framed as a negative rather than a positive social and economic right.⁹⁸ Others assert that the human right to housing might protect a civil right to counsel whenever a basic human need such as housing is threatened.⁹⁹ Given this legal landscape, it may

91. *Id.* at 74 (emphasis added).

92. Foscarinis, *supra* note 43, at 349–50.

93. Chester Hartman, *The Case for a Right to Housing*, 9 HOUSING POL'Y DEBATE 223, 231–32 (1998).

94. See, e.g., Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203, 204–05 (2008) ("As a doctrinal matter, the prevailing view is that issues of poverty and distributive justice should be resolved through legislative policymaking rather than constitutional adjudication."); Christopher Serkin, *Passive Takings: The State's Affirmative Duty to Protect Property*, 113 MICH. L. REV. 345, 346 (2014) (citing Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 330 (1985)) (arguing constitutional rights are commonly understood "to impose on government only a duty to refrain from certain injurious actions, rather than an affirmative obligation to direct energy or resources to meet another's needs").

95. See Foscarinis, *supra* note 43, at 328 ("Indeed, our legal system is commonly described as one that protects civil and political rights, but not economic or social rights.").

96. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 (entered into force March 23, 1976; adopted by the United States September 8, 1992) [hereinafter ICCPR].

97. JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* (1978).

98. Adams, *supra* note 69, at 283.

99. See Risa E. Kaufman, Martha F. Davis & Heidi M. Wegleitner, *The Interdependence of Rights: Protecting the Human Right to Housing by Promoting the Right to Counsel*, 45 COLUM. HUM. RTS. L. REV. 772 (2014).

seem unrealistic to argue that Americans will ever recognize a constitutional right to housing. Originalists will surely balk at the suggestion that a constitutional or federal legislative right can develop without a clear textual basis.¹⁰⁰ While state constitutions are also a fruitful source of positive social and economic rights,¹⁰¹ virtually no American states explicitly recognize state constitutional rights to housing.

Yet, it is not implausible to argue that many elements of the right to housing are consistent with values and norms explicit in the American constitutional order. The core tenets of the human right to housing are that individuals—by virtue of their humanity, not their social or economic status—are entitled to certain minimum forms of shelter, security of tenure, dignity, connection to communities, and opportunities that allow for their human flourishing.¹⁰² The human prosperity and dignity that the human right to housing protects is consistent with well-accepted and explicit American constitutional norms such as equal dignity, equal opportunity, equal concern, self-determination, privacy, personal autonomy, and life, liberty, and happiness for all.¹⁰³ These principles are expressed in the Declaration of Independence;¹⁰⁴ the Nobility Clause prohibiting Congress from granting titles of nobility;¹⁰⁵ and the Fourteenth and Thirteenth Amendments of the Constitution.¹⁰⁶ The First Amendment of the Constitution also protects individuals' rights to privacy, autonomy, freedom of association, and self-determination.¹⁰⁷ While the right to housing does not have an explicit textual foundation in the Constitution, it is not implausible to argue that Americans without adequate housing lack equal dignity, equal citizenship, privacy, personal autonomy, or self-determination. The human right to housing, therefore, provides a normative framework to allocate housing entitlements in a manner that is consistent with fundamental norms in a free and democratic society.

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100. See Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, in *THE CONSTITUTION IN 2020* 25, 29 (Jack M. Balkin & Reva B. Siegel eds., 2009) (describing originalism as a theory of constitutional interpretation that upholds fidelity to the Constitution's text and original understandings).
101. Julie K. Underwood, *School Finance Adequacy as Vertical Equity*, 28 U. MICH. J.L. REFORM 493 (1995) (describing the use of state constitutional education clauses as a source of constitutional rights in the educational adequacy movement).
102. See Alexander, *supra* note 62 (arguing that human flourishing is an essential property norm that enables all humans to "live lives worthy of human dignity").
103. See Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE. L.J. 1287, 1299 (2014).
104. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
105. U.S. CONST. art I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States . . .").
106. U.S. CONST. amend. XIV § 1; U.S. CONST. amend. XIII, § 1.
107. See, e.g., U.S. CONST. amend. I; NAACP v. Alabama, 357 U.S. 449 (1958).

These values are property norms as well as constitutional norms.¹⁰⁸ As Harvard Law Professor Joseph Singer has argued, “Property law is not just a mechanism of coordination; it is a quasi-constitutional framework for social life.”¹⁰⁹ The term *constitutional*, as Singer uses it, refers not only to constitutional *law*, but also to the fact that “property institutions are fundamental to social life, moral norms, political power and the rule of law.”¹¹⁰ We can only determine which ownership structures and property relations are valid under American law by reference to basic democratic values enshrined in the Constitution.¹¹¹ Therefore, slavery and feudalism have been outlawed as legitimate forms of property ownership because they violate the principles of equality, freedom, and citizenship protected by the Constitution. Women now have rights to marital property, as male domination of marital property infringes the norms of autonomy and self-determination. Racially restrictive covenants and intentional racial segregation also violate the principle of equality and are prohibited. Strict foreclosure when a tenant is one day behind in rental payments is invalid because it denies tenants equal dignity and due process. These forms of ownership became impermissible through political and social struggles, which demonstrated that these property relationships violated well-accepted American constitutional, legal, and social values. As Singer explains, “Basic democratic values limit the *kinds* of property rights that the law will recognize and they define particular bundles of rights that cannot be created.”¹¹² Thus, the right to housing is compatible with well-accepted American property and constitutional norms, even though no court has explicitly recognized an American constitutional right to housing.

While these norms are explicit and well-accepted, determining how to distribute housing entitlements consistent with these norms is a matter of interpretation and meaning creation.¹¹³ This Article argues that constitutional meanings and understandings evolve in response to cultural, social, economic, and political change.¹¹⁴ Current housing rights movements pressing for more equitable distributions of housing entitlements in America are slowly but creatively forging cultural

108. Gregory S. Alexander, *Property's Ends: The Publicness of Private Law Values*, 99 IOWA L. REV. 1257, 1260 (2014).

109. See Singer, *supra* note 103, at 1334–35.

110. *Id.* at 1299.

111. See *id.* at 1304.

112. *Id.* at 1304.

113. Jack M. Balkin, *Fidelity to Text and Principle*, in THE CONSTITUTION IN 2020, *supra* note 100, 11, 11–24 (“Constitutional interpretation also requires *construction*—deciding how best to implement and apply constitutional text and principles in current circumstances.”).

114. Liu, *supra* note 94, at 210–11 (“Societal norms, traditions, and understandings vary over time and across social goods, and a constitutional doctrine of welfare rights should be sensitive to such variation.”).

value shifts at the local level, through private as well as public law. This assertion rests upon certain presumptions about rights and constitutional norms. If rights are entitlements and freedoms belonging to individuals and groups that the state will protect or advance through its legal and enforcement powers, then the right to housing is afoot in a number of American localities. If discrete groups of everyday people can order their social norms and private legal arrangements to reflect constitutional norms, then recent social movements pressing for housing rights in America are rearranging local housing entitlements and giving expression to constitutional norms through their legal and extra-legal arrangements.

In these instances, the laws through which these groups manifest the human right to housing are private and local law mechanisms—such as new ownership forms, contractual arrangements, zoning ordinances, and new uses of eminent domain—rather than solely constitutional adjudication and federal and state legislation. While many legal and constitutional questions may eventually culminate in litigation, adjudication and legislation are not the sole legal mechanisms defining the right to housing in the U.S. The movements discussed herein, instead, employ a more expansive set of legal strategies to realize an American right to housing. Some movements pursue these local, incremental, and private legal advances even though their long-term goal is to attain an Article V amendment to the U.S. Constitution to codify an American right to housing.¹¹⁵ Cognizant that such a constitutional moment is far afield in America, these movements are using a broader range of legal tools to advance their causes. Their legal successes not only instantiate the human right to housing in U.S. law, but also give expression to constitutional norms.

These events challenge scholars' traditional notions of how rights develop and become a part of our constitutional lexicon and culture.¹¹⁶ This Article argues that these movements are engaged in a long-term process of "bottom up" popular constitutionalism, in which they implicitly and explicitly associate their local housing and property reformulations with long standing constitutional principles. These movements' actions advance property law, increase Americans' acceptance of the human right to housing, and reflect well-accepted constitutional norms. Thus, these movements advance the American constitutional right to housing before that right is explicitly recognized by U.S. courts or legislatures. While these property reformulations will not become *constitutional law* until there is a formal

115. Skype Interview with Max Rameau, *supra* note 21.

116. *But see* RICHARD THOMPSON FORD, RIGHTS GONE WRONG: HOW LAW CORRUPTS THE STRUGGLE FOR EQUALITY 21 (2011) ("[R]ights cannot change deep-seated institutional and cultural injustices without changing the institutions and culture in which they are rooted.").

constitutional amendment or until the courts associate these reformulations with specific provisions of the Constitution, these property reformulations do reorient American constitutional culture, and local, social, and political mores towards greater acceptance of legal arrangements that reflect the right to housing.

C. Popular Constitutionalism, Social Movements, and Private Law

Popular constitutionalists have long argued that “the people themselves” can create constitutional meanings without the formal recognition of the state.¹¹⁷ Popular constitutionalism de-centers federal Article III judges as the preeminent arbiters of constitutional meaning.¹¹⁸ The people themselves play a significant role in the creation of constitutional understandings under this account of our constitutional order.¹¹⁹ In this literature, social movements are key institutions that create constitutional meanings, even though they are not specifically outlined as official interpreters in the text of the Constitution.¹²⁰ Yale Law Professor Reva B. Siegel showed that social movements can change the meaning of the Constitution outside of the constitutionally proscribed Article V amendment process.¹²¹ Through a process of conflict and contestation, social movements generate new understandings of the Constitution that can become settled law without amending the

117. *See, e.g.*, LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 8 (2004) [hereinafter KRAMER, *THE PEOPLE THEMSELVES*].

118. Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 959 (2004) (“In a system of popular constitutionalism, the role of the people is not confined to occasional acts of constitution making, but includes active and ongoing control over the interpretation and enforcement of constitutional law.”).

119. *Id.*

120. *See, e.g.*, JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011) [hereinafter BALKIN, *CONSTITUTIONAL REDEMPTION*]; WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991); Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27 (2005) [hereinafter Balkin, *Social Movements*]; William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2250–69 (2002); Lani Guinier, *The Supreme Court, 2007 Term—Foreward: Demosprudence Through Dissent*, 122 HARV. L. REV. 4 (2008) [hereinafter *2007 Term—Foreward*]; Lani Guinier, *Courting the People: Demosprudence and the Law/Politics Divide*, 89 B.U. L. REV. 539 (2009) [hereinafter Guinier, *Courting the People*]; Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de Facto ERA*, 94 CALIF. L. REV. 1323 (2006) [hereinafter Siegel, *Constitutional Culture*]; Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001) [hereinafter Siegel, *Text in Context*]; Gerald Torres, *Social Movements and the Ethical Construction of Law*, 37 CAP. U. L. REV. 535 (2009).

121. *See* Siegel, *Constitutional Culture*, *supra* note 120, at 1323.

Constitution.¹²² These interpretations, garnered through conflict, can guide courts and legislatures when interpreting the Constitution's mandates.¹²³ This process encourages citizens to become invested in enforcing the Constitution and helps sustain the Constitution's legitimacy over time.¹²⁴ Harvard Law Professor Lani Guinier and Cornell Law Professor Gerald Torres also coined the phrase "demosprudence"¹²⁵ to describe "the role of informal democratic mobilizations and wide-ranging social movements" in the creation of constitutional meanings. Demosprudence emphasizes that "federal courts informed by the interpretations of the 'demos' have more legitimacy."¹²⁶ Several other legal scholars explain how social movements influence a range of other legal actors such as lower federal courts, federal and state legislators, state courts, and the President of the United States.¹²⁷ However, local officials and private law are subordinate in this discourse.¹²⁸

In his seminal *Harvard Law Review* Foreward, *Nomos and Narrative*, Robert M. Cover, a forefather of popular constitutionalism, observed that "the creation of legal meaning—'jurisgenesis'—takes place always through an essentially cultural medium."¹²⁹ The people, first, must define their normative universe before they can determine that a given phenomenon violates constitutional norms. Discrete, insular, and informal communities often develop their own "*nomos*—an integrated world of obligation and reality from which the rest of the world is perceived."¹³⁰ These insular and informal communities develop their own narratives and meanings to vindicate their normative visions. These narratives and legal meanings are given regulatory force first within these interpretive communities, primarily through private lawmaking and associational norms (i.e., contract, property, and cor-

122. *Id.* at 1328.

123. *Id.*

124. *See id.* at 1329.

125. Guinier, *Courting the People*, *supra* note 120, at 545.

126. *See id.*

127. Katie Eyer, *Lower Court Popular Constitutionalism*, 123 YALE L.J. ONLINE 197 (2013) (lower federal court popular constitutionalism); Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 AM. U. L. REV. 457, 459–62, 474–77 (2012) (lower federal court popular constitutionalism); David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2066–67 (2010) (elected state courts); Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871 (1999); David A. Super, *The Modernization of American Public Law: Health Care Reform and Popular Constitutionalism*, 66 STAN. L. REV. 873 (2014) (legislative popular constitutionalism).

128. BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 120; Balkin, *Social Movements*, *supra* note 120; Siegel, *Constitutional Culture*, *supra* note 120.

129. Cover, *supra* note 1, at 11.

130. *Id.* at 31.

porate law, or social norms and religious authority).¹³¹ Thus, constitutional norms are often forged by and among the people through private ordering before courts officially adopt those norms and before legislatures codify those norms in legislation.¹³²

These legal meanings, created within the *nomos* and sealed through private legal arrangements, are constitutional interpretations, even if these meanings are not consonant with the official interpretations of the Constitution.¹³³ Legal meaning, then, can be created outside of the bounds of what we know as formal public lawmaking. These private meanings flow outside the insular community when these groups attempt to align their *nomos* with constitutional norms through civil disobedience.¹³⁴ By breaking the law, these groups often risk the violence or retribution of the state to bring the law into conformity with their vision.¹³⁵ As Cover explained, the 1960s Woolworth's counter sit-in civil rights protestors, by adhering to their own unofficial interpretations of the Fourteenth Amendment of the Constitution in the face of mob and police violence, forced local officials and courts to choose between the official interpretation or the alternative view of the protestors.¹³⁶ While the protestors eventually identified their grievances with specific provisions of the Constitution, initially they were challenging local property law concepts.

D. Local Property Reform as Popular Constitutionalism

As Eduardo M. Peñalver and Sonia K. Katyal demonstrate in their book, *Property Outlaws: How Squatters, Pirates, and Protesters Improve the Law of Ownership*, Southerners initially accomplished segregation in public accommodations through “local custom” and by exercising their common law property rights to exclude.¹³⁷ By violating the Woolworth store owners’ property right to exclude, the protestors expressively challenged the notion that owners have unfettered property rights. Instead, the protestors asserted that when private property rights violate blacks’ rights to equal dignity and citizenship, the private right is unjust and should be curtailed.¹³⁸ The protestors’ disobedience was initially property law disobedience. Their opponents

131. *See id.*

132. *See id.* at 30 (“[P]roperty and corporation law have also been bases for claims to creation of an insulated nomic reserve.”).

133. *See id.* at 11 (“The *nomos* that I have described requires no state.”).

134. *See id.* at 49–53.

135. *See id.* at 47.

136. *Id.*

137. PEÑALVER & KATYAL, *supra* note 17, at 64.

138. *See* Christopher W. Schmidt, *Divided by Law: The Sit-Ins and the Role of the Courts in the Civil Rights Movement*, 33 LAW & HIST. REV. 93 (2015) (arguing that the students who launched the sit-in protests specifically envisioned their protest as an alternative to litigation-based reform tactics).

characterized their actions as infringing private property rights. The sit-in protestors were initially arrested and charged with criminal trespass.¹³⁹

While the protestors had many critics at the local level, their efforts began to slowly forge shifts in cultural values towards integration in privately owned public accommodations. As Peñalver and Katyal explain, a number of merchants in the South, whose profits were affected by the sit-ins and the ensuing boycotts, voluntarily ended the practice of segregated lunch counters.¹⁴⁰ The local efforts of thousands of protesters in various localities throughout the nation slowly led to broader national changes. National chains such as Woolworths felt pressure from Northern sympathizers to resist local Southern segregationist customs and nationalize the policy of integrated lunch counters.¹⁴¹ The protestors' physical occupations brought widespread media attention to their cause and helped nationalize their local struggles and the violence they experienced at the hands of local officials and mobs.¹⁴² By forging their struggles initially outside of the courtroom, they were able to slowly change national attitudes about segregation through property disobedience and local law reform.¹⁴³ Thus, the issue of how private property rights should accommodate the demands of the constitutional norm of equality was not initially generated by litigation or federal legislation but by the protestors' efforts to challenge local property entitlements. Their actions culminated in the Civil Rights Act of 1964 and federal legislation, which formally prohibited discrimination in places of "public accommodation."¹⁴⁴ Now it is well-entrenched in our national and constitutional culture that private owners of public accommodations cannot intentionally exclude patrons on the basis of race.¹⁴⁵

Similarly, when protestors in current housing rights movements in the U.S. resort to self-help strategies such as squatting in absentee-owned housing and creating new housing structures through sweat-equity, they are forcing local police, banks, neighbors, and other local decision-makers, outside of their associational community, to both recognize and choose between their vision of housing rights and the offi-

139. PENALVER & KATYAL, *supra* note 17, at 67.

140. *Id.* at 67–68.

141. *Id.* at 68.

142. *See id.* at 70.

143. *Id.* (“[B]y taking the fight for civil rights out of the professionalized realm of civil litigation, the students succeeded in making it into a mass movement, thrusting the civil rights question to the top of the nation’s political agenda.”).

144. *Id.* at 70.

145. However, whether businesses and owners of public accommodations can discriminate against patrons on the basis of sexual orientation is less well-settled, particularly after the Supreme Court’s decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

cial legal version. When local decision-makers grant these occupiers warrants or permits to temporarily remain in place, they are provisionally acquiescing in the protestors' conceptions of legal meaning and rights. To the extent that these movements obtain long-term warrants or permanent possession of even a few homes that they do not own or rent, they are challenging local property entitlements and manifesting a right to housing at the local level, even if it is not yet recognized as an official constitutional right. This process may not result in an official constitutional or federal legal challenge in the near future, but these protestors' actions are forging gradual shifts in values at the local level.

Housing activists are currently aligning their normative visions of positive housing rights with American constitutional principles such as equity, privacy, security, autonomy, and self-determination. These constitutional principles are also fundamental property norms. Thus, these movements advance constitutional norms by reformulating local property rights to better advance the social dimensions of property law's ends.¹⁴⁶ Yet, because of prevailing interpretations of the Constitution, they rarely refer to the text of the Constitution to name, frame, claim, or assert these rights. Rather, housing activists create legal, and arguably constitutional, meaning through property reforms as well as private and local legal approaches. These movements also develop alternative legal and constitutional interpretations when they use the frame of the human right to housing as an organizing and mobilizing tool. Through these activities, these social movements create an alternate interpretive *nomos*, which recognizes the human right to housing as an entitlement even though it is not formally enshrined in any public law. Even those movements that do not explicitly use the legal frame of the human right to housing implicitly give credence to this right when they assert on websites and through social media that underwater homeowners facing foreclosure have a right to remain in their homes or that the homeless should create micro-homes villages to maintain their dignity. This is bottom-up popular constitutionalism. These movements exemplify and manifest the right to housing from the bottom-up before it ever becomes codified. In so doing, these movements are advancing Americans' legal and extra-legal recognition and acceptance of social and economic rights not explicitly outlined in the text of the Constitution.

146. See Gregory S. Alexander, Eduardo M. Peñalver, Joseph William Singer & Laura S. Underkuffler, *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009) (outlining the social goals and values of property law).

III. OCCUPYING THE AMERICAN RIGHT TO HOUSING

A. Eminent Domain for Squatters' Control of Land

Criticized as a movement without a clear mission, the American Occupy Movement morphed into several subdivisions, including the Occupy Our Homes movement (Occupy Our Homes). In December of 2011, Occupy Our Homes protesters in over two dozen cities in the U.S. focused on local manifestations of the housing crisis.¹⁴⁷ They occupied foreclosed and real estate-owned¹⁴⁸ homes, interrupted auctions of bank-owned homes, and blocked evictions of owners and tenants from foreclosed homes.¹⁴⁹ The Occupy Our Homes activists learned and honed the art of occupying and squatting from other housing rights groups, who used these tactics before the Occupy Wall Street protests, such as the Take Back the Land movement (TBTL) and the Chicago Anti-Eviction Campaign.¹⁵⁰ Learning from activists in South Africa and Brazil, who occupied vacant land and squatted in homes to manifest the human right to housing, these TBTL affiliates used the same tactics in the local American context.¹⁵¹ During the Occupy Wall Street protests, TBTL-National met with Occupy activists, either face-to-face or through social media platforms such as Skype and Google Hangout,¹⁵² to perfect the art of property law-breaking. These groups became an informal coalition of trans-local housing rights activists that used property law-breaking to press for greater housing rights for tenants, homeless people, and foreclosed homeowners.

The Chicago Anti-Eviction Campaign (CAEC), Take Back the Land-Rochester (TBTL-Rochester), Occupy Homes Minnesota (Occupy Homes MN), Take Back the Land-Philadelphia (TBTL-Philadelphia), Housing is a Human Right Roundtable in Baltimore,¹⁵³ and New York City's Picture the Homeless are examples of housing rights move-

147. *See id.*

148. *Real Estate Owned—REO*, INVESTOPEDIA, <http://www.investopedia.com/terms/r/realestateowned.asp> (last visited Sept. 1, 2014), *archived at* <http://perma.unl.edu/E458-F49E> (defining real estate-owned as “[p]roperty owned by a lender—usually a bank—after an unsuccessful sale at a foreclosure auction”).

149. Christie, *supra* note 20.

150. *See generally* MAX RAMEAU, TAKE BACK THE LAND: LAND, GENTRIFICATION AND THE UMOJA VILLAGE SHANTYTOWN (2008) (discussing how earlier campaigns catalyzed a new movement against the housing crisis); Skype Interview with Rob Robinson, Leader of Take Back the Land (Mar. 7, 2014) (recording on file with the author).

151. Skype Interview with Max Rameau, *supra* note 21.

152. *See* Skype Interview with Rob Robinson, *supra* note 150.

153. Alana Semuels, *Could Baltimore's 16,000 Vacant Houses Shelter the City's Homeless?*, THE ATLANTIC (Oct. 20, 2014), <http://www.theatlantic.com/business/archive/2014/10/can-homeless-people-move-into-baltimores-abandoned-houses/381647/>, *archived at* <http://perma.unl.edu/H5ZD-NG7A>.

ments that urge municipalities to use eminent domain to clear the title on occupied homes and then to transfer those homes to CLTs owned and operated by the movements.¹⁵⁴ These movements explicitly use the human right to housing as an organizing framework. As one activist stated, “We’re trying to turn around and reorganize housing as a human right.”¹⁵⁵ Another activist explains, “We’re challenging amoral laws by breaking them.”¹⁵⁶ These movements define their actions as “liberating” homes from the shackles of an unjust and immoral housing system that privileges profits over people.¹⁵⁷ Their use of the human rights mantra is part of a new trend where social movements that have long relied on civil rights laws are turning to human rights frameworks.¹⁵⁸

These movements also use the right to housing to connect people across geography, race, class, and circumstance. One activist argues that the human right to housing connotes, “You and I all deserve a space, we all deserve a place . . . and there is something that connects me as a White homeowner and you as an African-American renter or homeowner.”¹⁵⁹ Members of these movements also chant “housing is a human right” as they occupy vacant and abandoned homes; disseminate messages professing the right to housing on the Internet and through social media; create YouTube videos, songs, and art exhibitions proclaiming that housing is a human right; and develop oral histories of individuals asserting their rights to housing in the face of evictions and foreclosures. Thus, these movements’ members assert rights that they do not have as a formal matter under U.S. law. They also maintain that in exchange for the broad public subsidies banks

154. See, e.g., PATRICIA FRON & CHRIS D. POULOS, CHICAGO’S FORECLOSURE CRISIS: COMMUNITY SOLUTIONS TO THE LOSS OF AFFORDABLE RENTAL HOUSING 21–22 (Lawyers’ Comm. for Better Hous. ed., June 2014), archived at <http://perma.unl.edu/54RD-Y3CQ>; Kimberly Elsham, *Chicago Anti-Eviction Campaign Fights for Tenants’ Moral Rights*, CHI. SUN-TIMES (Jan. 16, 2013), <http://chicagoantieviction.org/2014/04/media-chicago-anti-eviction-campaign.html>, archived at <http://perma.unl.edu/4G6W-4SBY>.

155. Elsham, *supra* note 154.

156. Ben Austen, *The Death and Life of Chicago*, N.Y. TIMES (May 29, 2013), <http://www.nytimes.com/2013/06/02/magazine/how-chicagos-housing-crisis-ignited-a-new-form-of-activism.html>, archived at <http://perma.unl.edu/46EX-HP8L>.

157. See *Home Liberation*, OCCUPY HOMES MINN., http://www.occupyhomesmn.org/home_liberation (last visited Sept. 1, 2014), archived at <http://perma.unl.edu/Y2KP-889R>.

158. See, e.g., Skype Interview with Max Rameau, *supra* note 21; Merry et al., *supra* note 46, at 102 (“[H]uman rights offer a variety of discursive, political, and strategic benefits to social movements even when they do not mobilize them as law.”); Zakiya Luna, *From Rights to Justice: Women of Color Changing the Face of US Reproductive Rights Organizing*, 4 SOCIETIES WITHOUT BORDERS 343, 343–65 (2009).

159. Skype Interview with Rachel Falcone, Director of Housing Is a Human Right (Jan. 10, 2014) (recording on file with the author).

received as a result of the U.S. government bailout, governments should force the private sector to create housing opportunities and benefits for the broad public, including marginalized and dispossessed Americans.

These movements also occasionally reference the text of the Constitution to frame the claims they make against the state. By invoking eminent domain, these groups are asserting novel interpretations of existing constitutional powers to secure community control over land, even though they are not using the Constitution to assert an explicit right to housing. In a few cases, these activists have actually remained in, or retained title to, the homes they occupy.¹⁶⁰ Now these movements are exploring communal forms of ownership to keep these homes perpetually affordable to low- and moderate-income households in their communities. While many legal forms they seek to use are not new, these movements' application of these legal tools in new contexts helps further local acceptance of property arrangements that embody the right to housing. These movements' efforts also implicitly advance constitutional norms by asserting that groups whose economic and social status denies them full and equal participation in housing markets should also have equal rights to housing, self-determination, community, and opportunities for human flourishing.

For example, the CAEC—formed by Willie J.R. Fleming, an activist and a former Cabrini-Green public housing resident, and Tous-saint Losier, a fellow housing activist and PhD candidate at the University of Chicago—has occupied, retained, and rehabbed at least twenty-five foreclosed, vacant, and abandoned homes on Chicago's South and West Sides since 2009.¹⁶¹ The foreclosure rates on rental properties in Chicago from 2009 to 2013 were among the highest in the nation.¹⁶² A few low-income, minority neighborhoods on the South and West sides of Chicago disproportionately bore the brunt of this crisis.¹⁶³ CAEC believes its actions are an appropriate, community-based, self-help response to the market failures and governmental failures that plague the communities in which it operates.¹⁶⁴ While the CAEC acknowledges that its actions are illegal, the movement explicitly uses the human right to housing as a moral justification for its property disobedience.¹⁶⁵

160. Steve Orr, *Rochester Woman Wins Foreclosure Fight*, DEMOCRAT & CHRON. (Nov. 16, 2013, 7:33 AM), <http://www.democratandchronicle.com/story/news/local/2013/11/15/rochester-woman-wins-foreclosure-fight/3582877/>, archived at <http://perma.unl.edu/GZ5J-8QY6>.

161. See, e.g., FRON & POULOS, *supra* note 154, at 22; Shanika Gunaratna, *A People's Housing Authority*, CHI. TONIGHT, June 30, 2013, at 2.

162. See, e.g., FRON & POULOS, *supra* note 154.

163. *Id.* at 2.

164. See Austen, *supra* note 156.

165. Skype Interview with Rob Robinson, *supra* note 150.

Local residents and local officials often condone these movements' property law-breaking because the occupiers often beautify and improve the foreclosed and abandoned homes.¹⁶⁶ Before the CAEC liberates a home, it consults with tenants or homeowners on the block as to whether or not they will support the takeover, and sometimes the CAEC throws a community barbecue.¹⁶⁷ Area residents frequently say they prefer the takeovers to abandoned homes that can be sites for drug and alcohol sales and abuse.¹⁶⁸ Once CAEC members break into a home, they take pictures of the home's condition and train occupiers and local neighbors to improve the home.¹⁶⁹ The CAEC also encourages the occupiers to keep receipts for any costs they incur in helping to rehab the homes in case they are evicted and need to recover their costs.¹⁷⁰ The movement also devised something called the "good neighbor contract—a non-binding but formal agreement to be an asset, not a liability, to the neighborhood."¹⁷¹ Occupiers must sign the good neighbor contract if the CAEC is to help liberate a home.

Because the CAEC's actions often help rather than harm the neighborhood, local police often do not evict the occupiers, even though the occupiers are technically illegal trespassers.¹⁷² The Illinois trespass statute also provides an exception to prosecution for criminal and civil trespass for a person who "beautifies" unoccupied and abandoned residential and industrial properties.¹⁷³ Under the statute, properties are unoccupied and abandoned if the taxes have not been paid for a period of at least two years and the property has been unoccupied and abandoned for at least one year.¹⁷⁴ While this interpretation has not been tested in court, this exception in the Illinois statute provides a justification and rationale for police to let the occupiers remain in homes they do not rent or own. The CAEC has also influenced local banks to donate real estate-owned properties to local non-profits for a tax write-off that will enable the non-profits to rent the homes to the occupiers at a low cost.¹⁷⁵ Finally, the CAEC's long-term goal is to have either the city or the county take title to the occupied homes us-

166. *See id.*; *see also* Semuels, *supra* note 153 (explaining how "perfectly intact" houses are demolished without occupiers).

167. *See id.*

168. *See* Austen, *supra* note 156.

169. *See id.*

170. *See id.*

171. Gunaratna, *supra* note 161, at 4 (noting the contract is symbolic rather than binding because it is unlikely that CAEC would sue to enforce the contract.).

172. Press Release, Chi. Anti-Eviction Campaign, A Month After Eviction, Neighbors to Put Retired Police Officer Back in Her Home (Aug. 17, 2013), *archived at* <http://perma.unl.edu/2NW7-7VPE> (explaining that some sheriffs refuse to carry out evictions).

173. 720 ILL. COMP. STAT. 5/21-3(d) (2012).

174. *Id.*

175. Elsham, *supra* note 154.

ing eminent domain, through the city or through the recently established Cook County Land Bank Authority, and then to transfer ownership of the properties to a CLT or other communal ownership structure owned by the occupiers.¹⁷⁶

TBTL-Rochester also secured an historic victory from Bank of America when the bank re-deeded Catherine Lennon's foreclosed home back to her without a mortgage and debt-free as part of the terms of a settlement agreement.¹⁷⁷ While the bank initially evicted her and pursued a foreclosure action, it ceased the action when the law firm handling its case had been accused of fraud and other improprieties.¹⁷⁸ Thus, TBTL-Rochester was able to pressure Bank of America to give Catherine Lennon a permanent right to remain in her home even though she was not the technical legal "owner" of the home. TBTL-Rochester has also occupied several homes in the Rochester, New York area and hopes to convince local municipalities or counties to take title to the occupied homes and transfer the homes to a community-run CLT.

Occupy Homes MN also liberated at least seven homes and has successfully engaged in foreclosure defenses.¹⁷⁹ The group does not have formal title to these homes, but local Minnesota police have developed a formal policy in which they allow the occupiers to remain in an occupied home indefinitely unless the owner undertakes a citizen's arrest.¹⁸⁰ While some Minnesota police still arrest some homeless occupiers, Occupy Homes MN has been able to obtain temporary control over vacant homes based on this local policy.¹⁸¹ Along with Minnesotans for a Fair Economy, the group also pushed state legislators to enact a Homeowner's Bill of Rights that has made it easier for homeowners to get modifications by eliminating dual tracking—when banks pursue a foreclosure even while modification negotiations are occurring. The law also allows homeowners to sue banks for fraud and halt illegitimate foreclosure processes.¹⁸² Occupy Homes MN was instrumental in advocating for the law, and the Minnesota law predated similar federal mortgage servicing rules issued by the U.S. Consumer

176. *See, e.g.*, FRON & POULOS, *supra* note 154, at 4.

177. Orr, *supra* note 160.

178. *See id.*

179. E-mail from Nick Espinosa, Leader in Occupy Homes MN (Mar. 14, 2014, 4:46 PM) (on file with author).

180. *MPD Foreclosure Protocol*, OCCUPY HOMES MN (Oct. 23, 2013), http://www.occupyhomesmn.org/mpd_foreclosure_protocol, archived at <http://perma.unl.edu/E4DE-HU5Z>.

181. Doug Erlien, *Occupy Homes MN Protests Recent Arrests*, FOX9.COM (Apr. 1, 2014, 2:20 PM), <http://www.myfoxtwincities.com/story/25131888/occupy-homes-mn-protests-recent-arrests>, archived at <http://perma.unl.edu/7FW8-KED7>.

182. MINN. STAT. § 582.043 (2013).

Financial Protection Bureau.¹⁸³ Like the CAEC and TBTL-Rochester, Occupy Homes MN is encouraging the city to use eminent domain to take title to its homes and then to transfer the homes to a CLT owned and operated by Occupy Homes MN.¹⁸⁴

These movements' proposed use of eminent domain likely rests on a solid doctrinal footing. Low-income and predominately minority communities were disproportionately affected by the U.S. subprime mortgage and foreclosure crises.¹⁸⁵ In many of the hardest hit communities, there is an abundance of foreclosed, vacant, and real estate-owned homes that depress the value of surrounding properties.¹⁸⁶ The Tenth Amendment reserves certain plenary powers over property and contract law to the states.¹⁸⁷ Localities' eminent domain powers arise from their roles as sovereigns, and thus states usually grant localities eminent domain power via state statute. The Takings Clause of the Fifth Amendment, "Nor shall private property be taken, for public use, without just compensation,"¹⁸⁸ provides limitations on states' exercise of that power.¹⁸⁹ The Fourteenth Amendment applies the Fifth Amendment to the states. Municipalities have long used their eminent domain powers to take title to abandoned private property with fractionated ownership and clouded title for broad public pur-

183. See 12 C.F.R. § 1024 (2013); 12 C.F.R. § 1026 (2015). California, Colorado, Minnesota, and Nevada also enacted similar state laws. See *New Laws Prohibiting Dual Tracking in the Foreclosure Context*, NOLO, <http://www.nolo.com/legal-encyclopedia/new-laws-prohibiting-dual-tracking-the-foreclosure-context.html> (last visited Feb. 15, 2014) [hereinafter *New Laws*], archived at <http://perma.unl.edu/3YLT-VALH>.

184. See *New Laws*, *supra* note 183.

185. See, e.g., DEBBIE GRUENSTEIN BOCIAN, WEI LI, CAROLINA REID & ROBERTO G. QUERCIA, *LOST GROUND, 2011: DISPARITIES IN MORTGAGE LENDING AND FORECLOSURES* 1, 5 (2011), archived at <http://perma.unl.edu/YE7C-8YZG>; JAMES H. CARR, KATRIN B. ANACKER & MICHELLE L. MULCAHY, *NAT'L COMMUNITY REINVESTMENT COALITION, THE FORECLOSURE CRISIS AND ITS IMPACT ON COMMUNITIES OF COLOR: RESEARCH AND SOLUTIONS* (2011), archived at <http://perma.unl.edu/2UBT-TDJQ>.

186. INGRID GOULD ELLEN, JOSIAH MADAR & MARY WESELOCOUCH, *FURMAN CTR. FOR REAL ESTATE & URBAN POL'Y, THE FORECLOSURE CRISIS AND COMMUNITY DEVELOPMENT: EXPLORING REO DYNAMICS IN HARD-HIT NEIGHBORHOODS* 2 (2013), archived at <http://perma.unl.edu/RK3C-CVMT>.

187. U.S. CONST. amend. X.

188. U.S. CONST. amend. V, § 1.

189. Early American use of eminent domain was influenced by English law, but its source is the federal government and the states as sovereigns. The Fifth Amendment applies to the states through the Fourteenth Amendment of the U.S. Constitution. But, the Tenth Amendment reserves contract and property law plenary authority largely to the states. See U.S. CONST. amend. X; see also Robert Hockett, *It Takes a Village: Municipal Condemnation Proceedings and Public/Private Partnerships for Mortgage Loan Modification, Value Preservation, and Local Economic Recovery*, 18 STAN. J.L. BUS. & FIN. 121, 157–61 (2012) [hereinafter Hockett, *It Takes a Village*] (explaining the concept of federalism and how it applies to the eminent domain power of the sovereign states).

poses such as urban redevelopment or remediating blight.¹⁹⁰ The U.S. Supreme Court upheld this use of eminent domain in *Berman v. Parker*.¹⁹¹ The Court established the following: (1) that redevelopment for blight remediation is an appropriate “public use” under the Takings Clause; (2) that not every property in an area sought for condemnation must be blighted; and (3) that a property may be passed to a private corporation identified at the time of condemnation and still constitute a public purpose.¹⁹² As long as just compensation is paid, the use of eminent domain in this context seems uncontroversial.

The Supreme Court further extended this rationale in *Hawaii Housing Authority v. Midkiff*, where the court upheld a municipal plan to break up a land oligopoly and make the land available to the broad public.¹⁹³ Lastly, in *Kelo v. City of London*, the U.S. Supreme Court held that general economic development outside of the context of blight does constitute a public purpose, rather than a public use.¹⁹⁴ Even in those states that have enacted legislation to limit the reach of *Kelo*, it is still likely that the courts will find these movements’ proposed use of eminent domain constitutional. In Illinois, Senate Bill 3086, enacted into law in 2006, still permits municipalities to use eminent domain in “blighted areas,” defined by the statute as areas containing “excessive vacancies.”¹⁹⁵ New York did not enact any legislative fixes in response to *Kelo*.¹⁹⁶ Minnesota’s legislative fixes did limit the application of eminent domain to blighted properties and prohibited municipalities from taking non-dilapidated buildings in a blighted area unless “there is no possible other way to address blight without doing so.”¹⁹⁷ But, Minnesota’s law still seems to permit Occupy Minnesota’s proposed use of eminent domain. Lastly, Maryland did not enact any significant legislative fixes in response to *Kelo*.

These movements’ additional request that municipalities should transfer the land and homes taken by eminent domain to the occupiers through a privately owned CLT is more unusual, but likely constitutional. The Dudley Street Neighborhood Initiative (DSNI) in Boston, Massachusetts, is the first U.S. grassroots social movement and community-based organization to gain complete eminent domain

190. See, e.g., *Berman v. Parker*, 348 U.S. 26, 33 (1954); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984).

191. 348 U.S. at 26.

192. *Id.*

193. *Midkiff*, 467 U.S. at 240.

194. *Kelo v. City of New London*, 545 U.S. 469 (2005).

195. S.B. 3086, 98th Gen. Assem. (Ill. 2014).

196. NEW YORK, in THE CASTLE COALITION, 50 STATE REPORT CARD: TRACKING EMINENT DOMAIN REFORM LEGISLATION SINCE *KELO* (2007), archived at <http://perma.unl.edu/6GNL-7P6W>.

197. MINNESOTA, in THE CASTLE COALITION, *supra* note 196, archived at <http://perma.unl.edu/BFE5-BC88>.

authority from a municipality and to take title to private land through a non-profit CLT.¹⁹⁸ In 1988, DSNI sought community control over land in what was called the Dudley Triangle, an area of the Dudley Neighborhood with significant vacant land owned partially by the city of Boston and partially by private absentee owners. DSNI came up with the idea to create its own private redevelopment organization, Dudley Neighbors, Inc., to take the fifteen acres of privately owned, but abandoned and fractionated land by eminent domain and transfer it to a CLT run by DSNI.¹⁹⁹

Massachusetts General Laws, Chapter 121A, empowered the Boston Redevelopment Authority (BRA) to delegate the exercise of eminent domain to urban redevelopment corporations for certain projects.²⁰⁰ The Massachusetts Supreme Judicial Court held that “urban redevelopment corporations, although in a sense private corporations, perform public functions analogous to those performed by corporations commonly called ‘public service corporations.’”²⁰¹ Based on this authority and effective community organizing on the part of DSNI, the Boston Redevelopment Authority delegated its powers of eminent domain to Dudley Neighbors, Inc., which held title to the land through a CLT. Dudley Neighbors, Inc. became one of the most successful grassroots community redevelopment corporations in the U.S., and it remains a leader in Boston today. Consequently, current housing rights movements’ requests that municipalities transfer properties taken by eminent domain to privately-owned CLTs seems supported by existing law.

New York City’s *Picture the Homeless*, TBTL-Philadelphia, *Housing is a Human Right* in Baltimore, and other housing movements are also encouraging localities and states to create land banks and then to prioritize transferring the properties taken by the land banks to community-controlled CLTs. Land banks are public authorities created by ordinances or state statutes to efficiently acquire, manage, and clear title on tax-foreclosed properties.²⁰² Since a land bank is not a traditional power of local government, state enabling legislation is often necessary to create a land bank.²⁰³ In response to the U.S. housing crisis many states and municipalities enacted legislation creating

198. See, e.g., PETER MEDOFF & HOLLY SKLAR, *STREETS OF HOPE: THE FALL AND RISE OF AN URBAN NEIGHBORHOOD* 24 (1994); Elizabeth A. Taylor, *The Dudley Street Neighborhood Initiative and the Power of Eminent Domain*, 36 B.C. L. REV. 1061 (1995).

199. *HOLDING GROUND: THE REBIRTH OF DUDLEY STREET* (New Day Films 1996 & 2006).

200. Taylor, *supra* note 198, at 1074–75.

201. See *id.* at 1076.

202. FRANK S. ALEXANDER, *LAND BANKS AND LAND BANKING* 8 (Ctr. for Comm. Progress ed., 2011).

203. *Id.* at 76.

land banks.²⁰⁴ These housing movements push localities to ensure that land bank legislation or ordinances prioritize community control over vacant land. This request adds a new dimension to land banking because land banks often only prioritize allocating properties to private developers who will put the property to the highest and best economic use.²⁰⁵ Yet, these movements also implicitly advance the right to housing by insisting that the land banks protect a right to remain, and a right to control land and housing in their communities. These movements assert and elevate these rights above a purely market-based approach to economic development and revitalization. These movements' suggested approach better returns the benefits of land banking to individuals and groups who lived in, and suffered in, these communities during and before the U.S. housing crisis.

For example, New York City's Picture the Homeless is a grassroots homeless' rights organization that occupied vacant properties both before and during the U.S. housing crisis. The group developed a report in 2007 identifying all vacant properties in New York City on a block-by-block level. Based upon this data, Picture the Homeless worked to encourage a New York City Council member, Brad Lander, to introduce a proposed New York City Land Bank ordinance that incorporates the disposition of vacant properties to community-controlled CLTs as a legislative priority.²⁰⁶ The ordinance provides:

When conveying, leasing as lessor or otherwise disposing of real property for a use that would result in the creation or preservation of affordable housing units, the land corporation shall prioritize disposition to a community land trust, as defined by section 12773(b) of title 42 of the United States code, . . . and shall prioritize disposition for a proposed use that will maximize the number of affordable housing units at the zoning lot containing the property and the affordability of such units.²⁰⁷

The ordinance was patterned after a similar Philadelphia ordinance, inspired by a social movement: Take Back the Land-Philadelphia. The Philadelphia ordinance provided that the land bank should prioritize long-term community control of land and offer properties at

204. Since 2008, the following states have significantly transformed their state-enabling land bank statutes or enacted new legislation: Ohio (2008), New York (2011), Georgia (2012), Pennsylvania (2012), Tennessee (2012); Nebraska (2013); West Virginia (2013). OHIO REV. CODE ANN. §§ 5722.01 to 5722.22 (2008); N.Y. NOT-FOR-PROFIT CORP. LAW §§ 1600 to 1617 (2012); GA. CODE §§ 48-4-60 to 48-4-65 (2012); 68 PA. CONS. STAT. §§ 2101 to 2120 (2014); TENN. CODE §§ 13-30-101 to 13-30-120 (2012); NEB. REV. STAT. §§ 77-3201 to 3212 (2013); W. VA. CODE §§ 31-21-11 to 31-21-20 (2013); see also *National Map of Land Banks & Land Banking Programs*, CTR. FOR CMTY. PROGRESS, <http://www.communityprogress.net/land-bank-map-pages-447.php> (last visited Feb. 15, 2014), archived at <http://perma.unl.edu/6H4W-3MWQ>.

205. See ALEXANDER, *supra* note 202, at 10.

206. N.Y.C., N.Y., A Local Law to Amend the Administrative Code of New York City, in Relation to Creating a Land Bank, Int. No. 335 (May 14, 2014).

207. *Id.* (emphasis added).

less than fair market value to create affordable and mixed-income housing for very low-income people.²⁰⁸ Lastly, Housing is a Human Right in Baltimore and the United Workers for Fair Development Campaign are pushing for the City of Baltimore to consider similar options that would result in fair use and redevelopment of vacant properties.²⁰⁹

Through these actions, these movements manifest the right to housing in private and local law reforms. These movements also make new law as they successfully develop new contractual and ownership arrangements, and persuade local police, local banks, local zoning and county boards, and other decision-makers to adopt policies and enact ordinances that grant the dispossessed long-term possession of homes they do not technically own or rent. By occupying vacant and abandoned homes in their disinvested neighborhoods, these movements implicitly assert that the dispossessed have a right to security of tenure. Through the “good neighbor contract,” the CAEC also asserts that all humans have a right to form communities based upon their present condition, not their past status. The good neighbor contract also advances the sustainability aspect of the right to housing because it makes occupiers promise that they will maintain the premises and make positive contributions to the community in exchange for shelter.

TBTL-Rochester’s efforts tacitly proclaim that even if Catherine Lennon cannot make her payments on time, she has a right to remain in her home if her eviction was illegally procured through fraud. The group also implicitly asserts that, as a productive occupant, Catherine Lennon has a moral right to remain in her home against an absentee bank’s economic and legal security interest. While all Americans may not agree with these interpretations, these movements’ efforts lay the foundation for changes in local attitudes regarding the efficacy of the right to housing. Occupy Homes MN, for example, implicitly affirms that security of tenure requires foreclosures and evictions to be carried out consistent with due process. Occupy Homes MN also asserts that local community members should have equal participation in decisions about how housing entitlements should be allocated within their community. Their actions also demonstrate that very low-income and homeless individuals should have equal access to adequate housing as other renters or homeowners.

Through these actions, these movements also return to a more grassroots and politically engaged approach to urban redevelopment.²¹⁰ Since the 1990s, urban redevelopment has been dominated

208. Phila., Pa., Bill No. 130156-A (Dec. 18, 2013) (enacted).

209. See Semuels, *supra* note 153.

210. Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399 (2001) (defining politically engaged CED as a model “that integrates legal advocacy and

by a predominately neoliberal, professionalized, and market-based approach that often privileges profits over community-based self-determination.²¹¹ Inexperienced and grassroots groups are often left out of urban redevelopment decision-making.²¹² Yet, these movements resurrect a more grassroots and politically engaged era of community development in the 1970s and 1980s, in which Americans engaged in self-help efforts to restore their devastated and disinvested communities.²¹³ These movements are composed of a fairly diverse, grassroots, networked, and engaged populace that seek to control, and participate in housing- and land-related decision-making at the local level. While these movements have not transformed all Americans' views about housing, they are inculcating some new attitudes about housing rights at the local level that provide a foundation for longer-term shifts in values regarding the efficacy of an American constitutional right to housing.

B. Eminent Domain for Local Principal Reduction

Although the Home Defender's League (HDL), the Alliance of Californians for Community Empowerment (ACCE), and affiliated movements do not explicitly use the human right to housing as an organizing mantra, they are using similar tactics to fight unjust foreclosures and evictions, and to promote the use of eminent domain by municipalities for local principal reduction.²¹⁴ Local principal reduction is a plan under which municipalities use their eminent domain powers to purchase and refinance the mortgages of underwater homeowners to reduce those homeowners' principal amounts to manageable levels.²¹⁵ As of May of 2014, approximately 9.7 million American

community organizing to build cross-neighborhood coalitions that promote broad-based economic reform").

211. *See id.* at 400–09.

212. *See, e.g.,* Audrey G. McFarlane, *When Inclusion Leads to Exclusion: The Uncharted Terrain of Community Participation in Economic Development*, 66 *BROOK. L. REV.* 861 (2001); Douglas NeJaime, *When New Governance Fails*, 70 *OHIO ST. L.J.* 323, 363 (2009); Jaime Alison Lee, "Can You Hear Me Now?": *Making Participatory Governance Work for the Poor*, 7 *HARV. L. POL'Y REV.* 405 (2013); David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 *U. PA. L. REV.* 541 (2008); Lisa T. Alexander, *Stakeholder Participation in New Governance: Lessons from Chicago's Public Housing Reform Experiment*, 16 *GEO. J. ON POVERTY L. & POL'Y* 117 (2009).

213. *See* Cummings, *supra* note 210, at 400–09 (describing the shift to a market-based approach and contrasting it with a politically engaged approach).

214. Skype Interview with Jeff Ordower, Leader of Home Defenders League (Feb. 26, 2014) (recording on file with author).

215. *See, e.g.,* Robert Hockett & John Vlaholpus, *A Federalist Blessing in Disguise: From National Inaction to Local Action on Underwater Mortgages*, 7 *HARV. L. & POL'Y REV.* 253 (2013); Hockett, *It Takes a Village*, *supra* note 189, at 150–55.

households were underwater or had negative equity,²¹⁶ down from approximately 11 million during the height of the U.S. housing crisis. Underwater homeowners are more likely to default.²¹⁷ Thus, using eminent domain to refinance underwater mortgages is a form of foreclosure defense because underwater homeowners can possibly avoid foreclosure if they reduce their principal amounts, and thereby make their monthly payments. Local principal reduction is the brainchild of Cornell Law School legal scholar, Robert Hockett, and two other legal academics, Lauren Willis²¹⁸ and Howell Jackson.²¹⁹ As early as 2008, separately, these three legal academics flouted the idea to the federal government.²²⁰ When the federal government declined this idea, opting instead to pursue the voluntary federal Home Affordable Mortgage Program (HAMP) and the federal Home Affordable Refinance Program (HARP),²²¹ Robert Hockett, and his friend, John Vlahoplus, President and Chief Strategy Officer for the consulting firm Mortgage Resolution Partners, LLC (MRP), developed “the Municipal Plan” (the Plan).²²²

Municipalities who opt to use the Plan will condemn, using eminent domain, the mortgages of underwater homeowners owned by private-label, residential, mortgage-backed trusts (RMBS trusts).²²³ Municipalities “will work directly with each willing mortgagor within its jurisdiction to accept a ‘short’—that is, a discounted—repayment of that mortgagor’s obligations. It will do so in an amount corresponding to the level at which the mortgagor can obtain new financing in the current mortgage loan market.”²²⁴ The municipalities will then pay the RMBS trusts the current fair market value of the mortgages as just compensation. The municipalities will obtain the funds to purchase the relevant mortgages through a public-private partnership with private investors—including institutional investors such as pri-

216. Erin Carlyle, *9.7 Million Americans Still Have Underwater Homes, Says Zillow*, FORBES (May 20, 2014, 9:24 AM), <http://www.forbes.com/sites/erincarlyle/2014/05/20/9-7-million-americans-still-have-underwater-homes-zillow-says/>, archived at <http://perma.unl.edu/MYG8-DYEP>.

217. George R. Carter III, *Housing Units With Negative Equity, 1997 to 2009*, 14 CITYSCAPE 149, 153 (2012), archived at <http://perma.unl.edu/YUW2-EZFU>.

218. Lauren E. Willis, LOYOLA L. SCH., <http://www.lls.edu/aboutus/facultyadministration/faculty/facultylists-z/willislauren/> (last visited Aug. 25, 2014), archived at <http://perma.unl.edu/E9MQ-7DN8>.

219. Professor Howell E. Jackson, HARVARD L. SCH., <http://www.law.harvard.edu/faculty/hjackson/> (last visited Aug. 25, 2014), archived at <http://perma.unl.edu/HSM7-W6E6>.

220. See, e.g., Hockett & Vlahoplus, *supra* note 215, at 266.

221. See Hockett, *It Takes a Village*, *supra* note 189, at 143.

222. See *id.*

223. See *id.* at 149.

224. See *id.* at 151.

vate pension funds, hedge funds, investment firms, mutual funds, and current mortgage-backed securities holders.²²⁵

These new investors will purchase interests in eminent domain investment trusts established and maintained by each municipality. Those purchases will generate the funds needed to finance the purchases of the mortgages at fair market value. MRP, a financial consulting firm, will act both as a financial and strategic advisor to municipalities considering the Plan and as a conduit for the private investors who purchase interests in the public-private eminent domain trusts.²²⁶ As syndicators and advisors, MRP will be paid a fee for its services. The municipalities would then issue “new mortgages,” replacing the negative equity loans with modestly positive equity loans,²²⁷ and those new positive equity loans will be conveyed to the original RMBS trusts that owned the underwater mortgages. The contracts of the RMBS trusts do not permit them to do this voluntarily, and many underwater mortgages are serviced by companies who currently do not have an incentive to reduce the principal amounts on these loans.²²⁸ Thus, under the Plan, localities serve as “collective agents,” who sidestep the contractual barriers and market failures that prevent principal write-downs by using their powers of eminent domain to avoid foreclosure and re-invigorate local housing and mortgage markets.²²⁹

No municipality has yet used eminent domain for this purpose.²³⁰ However, the Plan likely rests on a solid legal footing, although it seems more vulnerable to constitutional challenges than the use of eminent domain for community control of land and housing. The Plan likely satisfies the Takings Clause’s public use requirement, however, it is less clear that it satisfies the just compensation requirements. As explained in section III.B, the U.S. Supreme Court broadly interprets the public use requirement to include very expansive public purposes,

225. *See id.* at 150–53.

226. Lydia DePillis, *Richmond’s Rules: Why One California Town Is Keeping Wall Street Up at Night*, WASH. POST (Oct. 5, 2013, 11:08 AM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/10/05/richmonds-rules-why-one-california-town-is-keeping-wall-street-up-at-night/>, archived at <http://perma.unl.edu/D493-GBRE> (“Mortgage Resolution Partners, the firm that’s lining up the capital—from hedge funds for instance—to buy any mortgages that Richmond might seize. After that happens, Mortgage Resolution Partners would help the homeowner refinance through a Federal Housing Administration Loan, and earns a \$4,500 fee per successful transaction.”).

227. Robert Hockett, *Paying Paul and Robbing No One: An Eminent Domain Solution for Underwater Mortgage Debt*, 19 CURRENT ISSUES IN ECON. & FIN. 1, 5 (2013).

228. *See id.*

229. *See id.* at 3.

230. Ben Lane, *Is Eminent Domain Coming to New York City?*, HOUSINGWIRE (June 25, 2014, 5:57 PM), <http://www.housingwire.com/articles/30447-is-eminent-do-main-coming-to-new-york-city>, archived at <http://perma.unl.edu/J736-UY32>.

and defers to state legislatures and state courts in discerning local public needs. After *Kelo*, a municipality can take title to private properties that are not themselves blighted as part of a comprehensive redevelopment plan to further general economic development. In *Midkiff*, the Court also established that municipalities, if they pay just compensation, can take private property from a small group of owners for broader public purposes such as reviving local land and housing markets.²³¹ Lastly, the Court has also established that municipalities can condemn all types of private properties including contracts and intangible properties like mortgages.²³² While California, New Jersey, and Washington have narrowed eminent domain law slightly in light of *Kelo*, the Plan will likely withstand scrutiny under the public use requirements in those states as well.

However, it is less clear that the Plan easily satisfies the just compensation requirements of the Takings Clause under both federal and state law. Under federal law, just compensation is measured by the fair market value of the property taken.²³³ Many states further define how fair market value is to be determined via state statute. Under California law, for example, “The fair market value of property taken for which there is no relevant, comparable market is its value on the date of valuation as determined by any method of valuation that is just and equitable.”²³⁴ This open-ended definition leaves many choices for courts in terms of which valuation methods to apply. As scholars have noted, courts must decide between valuing the property based upon comparable sales, future cash flows, harm to the property owner, the highest and best use, or the gain to the government using eminent domain. While these methods often lead to equal values, sometimes they do not. “As one court noted, there is often a substantial gap between value to the owner and value to others—the government, a hypothetical buyer, or the public at large.”²³⁵

In the case of eminent domain for local principal reduction, fair market value could be determined based on comparable sales of the home or expected cash flows. However, the Plan, by design, requires

231. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984).

232. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 602 (1935) (“If the public interest requires the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain.”); see also Hockett, *It Takes a Village*, *supra* note 189, at 164 (affirming that eminent domain authority is exercisable over all forms of property).

233. Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 Nw. U. L. REV. 677, 683 (2005) (“Courts all agree that takings are to be compensated by the fair market value of the property taken.”).

234. CAL. CIV. PROC. CODE § 1263.320(b) (2012).

235. See Serkin, *supra* note 233, at 687 (citations omitted) (citing *D.C. Redevelopment Land Agency v. Thirteen Parcels of Land in Squares 859, 912, 934 & 4068*, 534 F.2d 337, 338 (D.C. Cir. 1976)).

municipalities to purchase some mortgages that are current, even though underwater, at a steep discount.²³⁶ These methods might yield a value that does not reflect the harm to the owners as defined by the investors in the RMBS trusts. These investors argue that the municipalities and MRP will take the mortgages “at prices equivalent to approximately 80% of the market value of the underlying home, although the offer letters often indicate an even lower price.”²³⁷ After the loans are seized, MRP would refinance the seized loans with new loans priced at approximately ninety-five percent of the underlying home value. If this is true there may be some credence to opponents’ arguments that the RMBS trusts will receive less than fair market value. Thus, the Plan does raise difficult legal questions about the appropriate methods to value the diffuse and securitized mortgage interests seized through eminent domain.

The City of Richmond, California, adopted an ordinance and entered into an agreement with MRP to use eminent domain for local principal reduction. However, the city has not yet condemned any properties. Other cities in California, New Jersey, Washington, and New York are considering the Plan, but no city has condemned any properties.²³⁸ The City of Richmond and MRP were sued by banks, such as Wells Fargo Bank and Deutsche Bank, which serve as trustees for several RMBS trusts that would be affected by Richmond’s adoption of the Plan.²³⁹ The United States District Court for the Northern District of California dismissed the suit on ripeness grounds, finding that since the City of Richmond did not finalize any plans to use eminent domain for local principal reduction, nor seize any homes, the Plaintiff banks’ claims were not ripe for adjudication.²⁴⁰ Yet, it is unclear if municipalities considering the Plan will have the political will to pursue this option.

Banks, large asset managers, real estate interests, the Mortgage Bankers’ Association, the American Securitization Forum, and the U.S. Department of Housing and Urban Development have all raised concerns about the constitutionality and political feasibility of the municipal Plan.²⁴¹ The municipalities of San Bernardino, California;

236. Plaintiffs’ Notice of Motion and Motion for Preliminary Injunction, ¶ 2, *Wells Fargo Bank, Nat’l Ass’n v. City of Richmond*, No. CV-13-3663 (N.D. Cal. Aug. 08, 2013).

237. *Id.*

238. Lane, *supra* note 230.

239. Plaintiffs’ Notice of Motion and Motion for Preliminary Injunction, *supra* note 236.

240. Order Granting Defendants’ Motion to Dismiss and Denying Plaintiffs’ Motion for a Preliminary Injunction, *Wells Fargo Bank*, No. CV-13-3663.

241. Shaila Dewan, *Eminent Domain: A Long Shot Against Blight*, N.Y. TIMES (Jan. 11, 2014), http://www.nytimes.com/2014/01/12/business/in-richmone-california-a-long-shot-against-blight.html?_r=2.

Salinas, California; Brockton, Massachusetts; Las Vegas, Nevada; Seattle, Washington; and others have considered but rejected the Plan. Investors and bond holders have threatened to restrict capital to localities that seriously consider or use the Plan, further leading to economic instability in local housing markets. Despite these threats, Richmond has not yet abandoned the Plan. San Francisco, is also considering working with Richmond to implement the plan. Newark, New Jersey, California, is still considering the Plan and city council members in New York City are exploring the approach in consultation with Professor Robert Hockett and MRP.

Whether courts find the Plan constitutional or whether municipalities move forward with the Plan, the Plan implicitly reflects the right to housing. The Plan implicitly promotes security of tenure through its premise that underwater homeowners facing, or in, foreclosure should have a right to remain in their homes, even if their mortgages are underwater or if they are having difficulty making payments. These movements' assertions that governments should protect underwater homeowners from evictions that will destabilize them, even though underwater homeowners signed mortgage contracts which provide banks a right to foreclose, elevates homeowners' rights to housing above the contract rights of absentee investors. These movements also imply that housing is more than a commodity, and that market imperatives do not always lead to a just allocation of housing entitlements. The Plan indirectly asserts that local governments must step in to stabilize housing markets, and to ensure that low-income minorities who were disproportionately harmed by the crisis have an opportunity to remain in their homes and reclaim their communities.

The Plan also challenges and reformulates established property rights by advocating for approaches to foreclosure and eviction that are consistent with the constitutional norms of equal dignity, equality of opportunity, freedom of association, and self-determination. These movements' assertions help level the playing field of property rights at the local level by giving homeowners who were at an information asymmetry or who were negatively affected by the irrational exuberance of Wall Street an equal opportunity to remain in their homes and to continue in their communities by renegotiating their contracts on more fair and equitable terms. These movements' actions also demonstrate that although mortgagees may be lien holders, they are also absentee owners who do not have an equal interest in the community in which the home is situated. Furthermore, these movements are encouraging municipalities to value current residents' attachments to place over the economic interests of diffuse and absent secondary market investors holding securities interests. Like the 1960s Woolworth counter sit-in civil rights protestors, these activists are implicitly as-

serting that when diffuse private property rights travail upon the equal dignity and local citizenship rights of underwater homeowners, the private right is unjust and should be curtailed.

If successful, HDL, ACCE, and other social movements pressing for eminent domain for local principal reduction will likely have a greater impact on many American households and housing markets than any of the other social movements described earlier in this Article. Local principal reduction is also the strategy that most stridently attacks the market exuberance of Wall Street that contributed to the U.S. housing crisis. Yet local principal reduction may be politically unfeasible, and it does not fundamentally challenge homeownership as a privilege of housing tenure in the U.S. Thus, local principal reduction as a social movement strategy does not reflect the full range of rights protected by the right to housing. TBTL and some local Occupy groups question whether local principal reduction is a transformative social movement strategy because it privileges the housing rights and needs of homeowners over and above those of non-owners.²⁴² The right to housing protects individuals' tenure in many forms of housing besides homeownership. Thus, local principal reduction does not fundamentally question or challenge the privileged position of homeownership in American society. It also suggests that misled homeowners may be more deserving of maintaining their housing rights than renters or homeless individuals. This emphasis on underwater homeowners is groundbreaking in that it may help many Americans and revitalize American housing markets, but it is not fully consonant with the broadest interpretations of the right to housing.

C. Zoning Micro-Homes for the Homeless

OM Build, an affiliate network of the Occupy Our Homes movement, consists of protesters and homeless individuals in the Madison, Wisconsin, Dane County area. OM Build is creating and inhabiting ninety-nine square foot micro-homes on wheels to house formerly homeless people. "Micro-houses" or "tiny homes" are typically small apartments consisting of 300 square feet or less.²⁴³ Micro-homes are typically smaller than the minimum square footage per unit permitted

242. See, e.g., Skype Interview with Max Rameau, *supra* note 21; Interview with Rob Robinson, *supra* note 150; Interview with Cathy Albisa, Executive Director, The National Economic and Social Rights Initiative (NESRI) (Feb. 25, 2014) (recording on file with the author).

243. Wendy Koch, *Mini-Apartments Are the Next Big Thing in U.S. Cities*, USA TODAY (Aug. 1, 2013, 3:38 PM), <http://www.usatoday.com/story/news/nation/2013/07/30/tiny-apartments-apodments-catch-on-us-cities/2580179/>, archived at <http://perma.unl.edu/K6QX-EP8X> (defining mini-apartments and identifying them as a national trend).

under many local building and health and safety codes.²⁴⁴ Many American cities are embracing micro-homes as a way to create more affordable housing options for young millennial newcomers in gentrifying urban centers.²⁴⁵

Housing rights movements in New York, Washington, Oregon, Texas, and OM Build in Madison, Wisconsin, are convincing local officials to change local zoning codes to permit micro-homes villages for the homeless.²⁴⁶ While some opponents question the health and safety of micro-homes for the homeless, these projects provide a local solution to the market, governmental, and non-profit sectors' failures to provide adequate housing for the chronically homeless.²⁴⁷ Unlike the housing rights movements described in section III.A, these movements do not explicitly use the human right to housing as an organizing mantra. However, these homeless' rights movements implicitly model the human right to housing because they establish that the homeless have equal rights to adequate housing that respects their human dignity and promotes their human flourishing.

Quixote Village in Olympia, Washington, Dignity Village in Portland, Oregon, and Opportunity Village in Eugene, Oregon, first used the tiny-homes concept as a solution to the problem of chronic homelessness.²⁴⁸ Dignity Village and Opportunity Village in Portland, Oregon, originated as tent cities of protest squatters.²⁴⁹ Quixote Village first formed as Camp Quixote, a floating tent city of homeless individuals that originated during a protest in a city-owned parking lot.²⁵⁰ The group protested a city ordinance that "made it illegal to sit, lie

244. Susan Johnston, *Micro Apartments Offer Small Slice of City Living*, U.S. NEWS & WORLD REP. (Nov. 15, 2013, 10:20 AM), <http://money.usnews.com/money/personal-finance/articles/2013/11/15/micro-apartments-offer-small-slice-of-city-living>, archived at <http://perma.unl.edu/Z5LQ-55JX>.

245. See Koch, *supra* note 243.

246. See, e.g., Kirsti Marohn, *Tiny Houses Aim to Help Homeless*, USA TODAY (Aug. 21, 2014, 7:22 PM), <http://www.usatoday.com/story/news/nation/2014/08/21/tiny-houses-aim-help-homeless/14411661/>, archived at <http://perma.unl.edu/BCE7-PUH5>; Erika Lundahl, *Tiny Houses for the Homeless: An Affordable Solution Catches on*, YES! MAG., Feb. 20, 2014, at 3, archived at <http://perma.unl.edu/X7FN-SNFH>.

247. Jacoba Urist, *The Health Risks of Small Apartments*, THE ATLANTIC (Dec. 19, 2013, 12:00 PM), <http://www.theatlantic.com/health/archive/2013/12/the-health-risks-of-small-apartments/282150/>, archived at <http://perma.unl.edu/M8TC-MQBZ>; see also Soumya Karlamangla, *Tiny Houses for Homeless at Center of Legal Tight*, L.A. TIMES (Aug. 25, 2014, 3:29 AM), <http://www.latimes.com/local/cityhall/la-me-0825-homeless-tiny-houses-20150825-story.html>, archived at <http://perma.unl.edu/3F9U-VD6B> (discussing the legal problems builders of micro-homes in Los Angeles face).

248. Michael Tortorello, *Small World, Big Idea*, N.Y. TIMES, Feb. 19, 2014, at D1.

249. Sam Howe Verhovek, *In Oregon, a City Provides Public Land for the Homeless*, N.Y. TIMES (Sept. 10, 2001), <http://www.nytimes.com/2001/09/10/us/in-oregon-a-city-provides-public-land-for-homeless.html>.

250. Lundahl, *supra* note 246, at 3.

down, or sell things within six feet of downtown buildings.”²⁵¹ The group moved its location at least twenty times since its founding in 2007.²⁵² Then activists and volunteers worked with city and county officials to obtain and rezone a parcel of county-owned industrial land to create a permanent site for the village.²⁵³ The county makes the land available to Quixote Village through a ground lease at the cost of one dollar per year.²⁵⁴ Quixote Village now consists of thirty “tiny homes” at about 144 square feet each, constructed by the residents through sweat equity.²⁵⁵ The cost of constructing these homes was about \$88,000 per unit compared with the \$200,000 to \$250,000 cost of production for a regular studio apartment for homeless individuals in Western Washington.²⁵⁶ Other homeless’ rights groups are creating micro-homes villages and convincing cities of the efficacy of this approach.²⁵⁷

OM Build’s tiny house movement also originated in Madison, Wisconsin, as a protest movement of homeless individuals, housing rights activists, lawyers, planners, and critics of newly elected Governor Scott Walker’s policies.²⁵⁸ In October of 2011, in solidarity with the Occupy Wall Street protests, Occupy Madison became a formal encampment of homeless individuals in Madison’s Veterans Plaza. Madison Mayor, Paul Soglin, resisted the protestors’ efforts to establish a tent city on East Washington Street. In total, local police moved the group thirty times in 558 days.²⁵⁹ Occupy Madison protesters eventually realized that there was “no public place to be legally homeless in Madison, WI.”²⁶⁰ At the time, Occupy Madison, as the precursor to OM Build, consisted of an interesting mix of professionals (i.e., public interest lawyers, housing rights activists, PhD’s, and graduate students), other activists, and homeless individuals.²⁶¹ Some tech

251. *See id.*

252. Tortorello, *supra* note 248.

253. *See id.*

254. Lundahl, *supra* note 246, at 3.

255. Tortorello, *supra* note 248.

256. Lundahl, *supra* note 246, at 3.

257. In January of 2014, community leaders, businessmen, volunteers, and activists created Second Wind Cottages, a tiny homes village of approximately eighteen homes for chronically homeless men, in the town of Newfield, New York, outside of Ithaca, New York. Each tiny home cost approximately “\$10,000 dollars to build, a fraction of what it would have cost to house the men in a newly constructed apartment building.” *Id.*

258. *History*, OCCUPY MADISON, INC., <http://occupymadisoninc.com/about/history/> (last visited Sept. 1, 2014), *archived at* <http://perma.unl.edu/83XT-YS5V>; *see also* Interview with Luca Clemente, Vice-President, OM Build (Apr. 18, 2014) (recording on file with the author) (discussing the development of the Occupy Madison movement).

259. *See History*, *supra* note 258.

260. Interview with Luca Clemente, *supra* note 258.

261. *See id.*

savvy lawyers in the group began blogging about the activists' efforts and meeting online and offline to search for solutions. Three members of Occupy Madison traveled to Dignity Village, Opportunity Village, and Quixote Village to learn from these homeless advocates' experiences.²⁶²

Reluctantly, Occupy Madison realized that it would have to formalize its organizational structure to accomplish its goal of creating a tiny homes village. In December of 2012, the group incorporated into a formal organization, sought fiscal sponsorship,²⁶³ and applied to the IRS to become a 501(c)(3) organization.²⁶⁴ While the group still relishes its informal, collaborative, and leaderless approach, it identified some formal directors and officers, who obtained construction plans and organizational documents to construct and organize tiny homes villages from other projects and on the Internet.²⁶⁵ OM Build initially rented a space to begin construction of one tiny house.²⁶⁶ The group also relied on the volunteer sweat equity of several individuals to build its first tiny house. OM Build's cost of construction was \$5,000, the lowest cost of construction of any tiny homes for the homeless project in the U.S.²⁶⁷

As the first home was being completed, the group wrestled with how the homes would be classified under Madison's local zoning code. Under the code, the minimum size for a single-family detached dwelling is 500 square feet for the first floor and an apartment must have at least 150 square feet for the first occupant and an additional 100 square feet for the second occupant.²⁶⁸ To save on construction costs, OM Build sought to build the smallest tiny homes that could accommodate up to two people. Consistent with the "we are the ninety-nine percent" slogan of the Occupy movements, the group settled on ninety-eight to ninety-nine square feet, substantially less than the zoning

262. *See id.*

263. A fiscal sponsorship is a contractual arrangement between a project and a 501(c)(3) organization in which the project uses the non-profit organization as a sponsor to receive charitable donations on the project's behalf. *See* JAMES J. FISHMAN & STEPHEN SCHWARTZ, *NON-PROFIT ORGANIZATIONS: CASES AND MATERIALS* 834 (Foundation Press 4th ed., 2010).

264. Brenda Konkel, *OM Build Tiny House Village!*, *FORWARD LOOKOUT* (Jan. 10, 2014, 8:22 AM), <http://www.forwardlookout.com/2014/01/om-build-tiny-house-village/20717>, archived at <http://perma.unl.edu/TN6Q-5G4F>.

265. *See id.*

266. Pat Schneider, *Madison Plan Commission Gives Nod to 'Tiny Homes,' but Not Without Qualms*, *CAPITAL TIMES* (Oct. 2, 2013, 7:30 AM), http://host.madison.com/news/local/writers/pat_schneider/madison-plan-commission-gives-nod-to-tiny-homes-but-not/article_18306bb8-2ad4-11e3-ac05-0019bb2963f4.html, archived at <http://perma.unl.edu/LYA3-PN8L>.

267. *See id.*

268. MADISON, WIS., *CODE OF ORDINANCES* § 29.29(1), (2)(a) (2012).

code allowed.²⁶⁹ In order to comply with the Madison zoning code, OM Build placed its tiny home on wheels and moved the home every forty-eight hours.²⁷⁰ The Madison Plan Commission and the Madison City Council then approved an ordinance that would amend the local zoning code to permit “overnight sleeping in tents or other temporary portable shelters on property owned by religious institutions or other non-profit organizations for which assisting the homeless is consistent with their mission.”²⁷¹ However, this initial plan became unworkable because it was difficult to move the tiny homes during the winter months.²⁷²

OM Build also imagined a permanent village of tiny homes, like Quixote Village, that would provide shelter and empower its homeless residents to make sustainable quality of life improvements in community with others. OM Build sought to purchase private land for a workshop to build the tiny homes and to accommodate at least eleven tiny homes.²⁷³ The group identified Sanchez Motors, a privately owned former gas station as a possible site. OM Build negotiated with the owner and made an offer to purchase with several contingencies such as financing, environmental review, and property conditions.²⁷⁴ Several officers and board members further agreed to personally guarantee the purchase.²⁷⁵ OM Build also negotiated with local officials regarding zoning, environmental remediation, flooding and building codes, and many other issues. OM Build wanted to remain financially independent of the city, county, state, and federal governments, so the group used the Internet and social media to raise funds to partially finance the development of a tiny homes village.²⁷⁶ The group launched a crowdfunding campaign on the social media website Indiegogo.²⁷⁷ Their campaign, “Tiny Homes for Wisconsin Homeless,” raised \$21,162, forty-two percent of their \$50,000 fundraising goal.²⁷⁸

OM Build further envisioned their village as providing more than just shelter. Through the volunteer efforts of urban planners, architects, and lawyers the group developed a site plan that incorporated several uses into one planned development, including residential, light manufacturing, general retail, gardens and greenhouses with a

269. Schneider, *supra* note 266.

270. *See id.*

271. *See id.*

272. Lundahl, *supra* note 246.

273. *Id.*

274. Konkel, *supra* note 264.

275. *See id.*

276. Interview with Luca Clemente, *supra* note 258.

277. *See, e.g., Tiny Homes for Wis. Homeless*, INDIEGOGO, <https://www.indiegogo.com/projects/tiny-homes-for-wis-homeless> (last visited Sept. 1, 2014), *archived at* <https://perma.unl.edu/7JCZ-8HW3?type=source>.

278. *See id.*

farm stand, chicken coops, bee keeping, construction of shared bathrooms, and a communal kitchen.²⁷⁹ Thus, the OM Build Tiny Homes Village operationalizes many key elements of the human right to housing. The site plan reflects the right to housing's commitment to housing options that are affordable, sustainable, and connected to opportunities that promote human flourishing. While OM Build does not explicitly use the human right to housing as a mobilizing and organizing tool, through private law (i.e., its associational contracts, membership requirements, and conduct policies) OM Build does advance elements of the right to housing. OM Build's "Tiny House Contract," which all occupants of a tiny home must agree to and execute, creates a new type of housing tenure called "stewardship."²⁸⁰ Each homeless person who lives in a tiny home does not rent or own the home, but "stewards" the home while they live there. Stewardship means "possession subject to conditions" set out in the contract and related policies.²⁸¹ In exchange for the rights of stewardship, the stewards must provide sweat equity to build the tiny homes and accrue work equity credits, measured in hours of work, toward the purchase of a tiny house that they will steward.²⁸²

Through its contractual obligations and property reformations, OM Build also manifests the right to housing because it implicitly asserts that each person has a right to housing by virtue of his or her humanity, rather than his or her social status. Anyone who peacefully participates in the community of activists by building his or her home, or others' homes, is eligible to become a member of the OM Build Tiny Homes community.²⁸³ OM build does not expressly conduct criminal background checks or view homelessness or poor credit as a barrier to participation.²⁸⁴ While the group does not believe it has any sex offenders as members, it does have homeless persons, poor debtors, former substance abusers, and people with criminal backgrounds among its participants.²⁸⁵ Membership is open to all who participate in OM Build through sweat equity and who prove themselves worthy of membership based upon their present behavior, rather than their past or social status.²⁸⁶ OM Build's concept of stewardship also implicitly af-

279. *Letter of Intent, Plan Commission Submission 2/19/14*, OCCUPY MADISON, INC., <http://occupymadisoninc.com/om-village-2046-e-johnson-st/plans/plan-commission-submittal-21914/> (last visited Sept. 1, 2014), *archived at* <http://perma.unl.edu/D3U3-WQDE>.

280. OCCUPY MADISON, INC., A TINY CONTRACT FOR A TINY HOUSE [hereinafter TINY HOUSE CONTRACT], *archived at* <http://perma.unl.edu/L9A2-BMX6>.

281. *See id.*

282. *See id.*

283. OCCUPY MADISON, INC., CONDUCT POLICY [hereinafter CONDUCT POLICY], *archived at* <http://perma.unl.edu/98LY-G9NB>.

284. Interview with Luca Clemente, *supra* note 258.

285. *See id.*

286. TINY HOUSE CONTRACT, *supra* note 280, at 1.

firms that all types of housing tenures can be adequate housing. Homeownership, therefore, is not privileged as the only housing tenure that promotes autonomy, self-determination, and the virtues of citizenship. OM Build's concept of stewardship also implicitly asserts that the homeless have rights to housing and shelter that provides them a basis for equal dignity with those who live in more traditional private homes and rental arrangements.

OM Build's Tiny Homes Village also implicitly reflects constitutional norms. The village affords its members privacy and community, two other norms explicit and implicit in our present constitutional order. The sweat equity elements of the project, the project's independence from government largess, and its communal housing arrangements also exemplify the notions of self-determination and associational community that are protected by the First Amendment of the Constitution.²⁸⁷ The village's creation of stewardship as a legitimate form of housing tenure based on work, and not rent, not only reformulates local property concepts and reflects the human right to housing, but it also manifests the constitutional norms of equal dignity and equal concern explicit in the Fourteenth Amendment of the Constitution. The village asserts that homeless individuals have an equal right to housing that respects their human dignity, even though they cannot afford market rate or even affordable rentals. While these norms are not explicit, they are implicit in how this small insular community chooses to order their private village community. These property reformulations and private contracts reflect the human right to housing as well as constitutional norms, even though no U.S. court or legislature has explicitly recognized an American constitutional right to housing.

OM Build's implicit private legal meanings only became public law when the group began to make claims against the state. OM Build's protests and proposals forced local officials to determine whether they should amend Madison's local zoning code to support the protestors' solutions or whether they should uphold the existing zoning code which makes the uses illegal. OM Build successfully pushed the Madison Plan Commission to rezone the site as a planned unit development.²⁸⁸ Although there was some neighborhood and law enforcement opposition to the project, the Madison City Council unanimously approved the planned unit development request with several conditions.²⁸⁹ Thus, local zoning officials amended local zoning laws and

287. See U.S. CONST. amend. I.

288. Schneider, *supra* note 266.

289. Doug Erickson, *City Council Approves Tiny Houses Proposal*, WIS. ST. J. (May 07, 2014, 5:45 AM), http://host.madison.com/news/local/city-council-approves-tiny-houses-proposal/article_685220db-9fdd-5809-8ec0-143d50050e1d.html, archived at <http://perma.unl.edu/C6XW-4YVW>.

approved new property formations that reflected the right to housing, even though it is not a formal legal right. OM Build members also nudged the Dane County Board of Supervisors to adopt a county-wide human right to housing ordinance.²⁹⁰ While no litigation has occurred enforcing the ordinance's provisions, the ordinance protects the right to housing at the county level and expresses some of the same goals OM Build seeks to advance through the creation of its private tiny homes village.

Lastly, while the OM Build Tiny Homes sits on land owned by the non-profit Occupy Madison, Inc., the group has also considered turning the OM Build Tiny Homes project into a non-profit CLT.²⁹¹ While OM Build is only one example of how social movements can express legal meanings through private law, several other homeless' rights advocates are adopting this model and their legal successes help reformulate local ownership entitlements and advance locals' acceptance of legal arrangements that reflect an American to housing.²⁹² These property reformulations, contractual arrangements, and local law reforms do not currently raise a formal constitutional question, but they do reflect constitutional norms and slowly instantiate the contours of an American constitutional right to housing in the local American consciousness.

IV. LAW AND SOCIAL MOVEMENTS IN THE INTERNET AGE

A. Trans-Local Networks

The housing rights movements analyzed in this Article could not have as effectively mobilized, instantiated the human right to housing in American law, or propagated their ideas without the Internet and social media. These movements use the Internet and social media to frame their grievances, to communicate messages, and to mobilize people to action in real places, as opposed to action that occurs solely online.²⁹³ These groups also craft, enhance, and develop the human right to housing as an explicit or implicit organizing framework online. The Internet and social media help these movements more effectively mobilize resources and disseminate their property law reformulations by reducing the costs, time, and distance associated with participation in social movements. John D. McCarthy and Mayer

290. Dane County, Wis., Ordinance Res. 292, 11-2 (July 12, 2012).

291. Interview with Brenda Konkel, *supra* note 28.

292. Marohn, *supra* note 246.

293. *See, e.g.*, JENNIFER EARL & KATRINA KIMPORT, DIGITALLY ENABLED SOCIAL CHANGE: ACTIVISM IN THE INTERNET AGE 3-8 (2011) (defining e-mobilizations as internet-supported movements and e-movements as movements that occur solely online); CASTELLS, *supra* note 20, at 177 ("Indeed, the Occupy Wall Street movement is a hybrid networked movement that links cyberspace and urban space in multiple forms of communication.").

N. Zald, in their seminal work *Resource Mobilization and Social Movements: A Partial Theory*,²⁹⁴ argued that resources are critical to social movements because they develop incentives for action that might outweigh the high costs associated with protest and mobilization.²⁹⁵ “Organizations became critical to social movements because they could facilitate the collection and strategic deployment of resources (and in doing so, fund selective incentives).”²⁹⁶ In America, as well as abroad, non-profit, social movement organizations (SMOs) have been critical to social movements’ ability to garner resources and advance their causes. Consequently, SMOs, as movement agents, became a prominent subject of study in socio-legal scholarship focused on resource mobilization.²⁹⁷

Yet, the Internet and social media enable the housing rights movements described in this Article to avoid, or limit the necessity of, formal, national, non-profit, SMOs. Instead, these movements develop trans-local networks of local organizations and unincorporated associations connected to each other nationally and globally through the Internet and social media.²⁹⁸ As trans-local networks, these movements can more easily and cheaply form, adapt, morph, and garner resources as they evolve. For example, the TBTL-National network, and its affiliated local action campaigns, never incorporated as a formal, non-profit, 501(c)(3), SMO. While TBTL-National eventually sunset its operations in mid-2013, TBTL-Rochester, the Chicago Anti-Eviction Campaign, and other local action campaigns in TBTL’s national network continued operations as unincorporated associations.²⁹⁹ Other movements, such as Occupy Homes MN, also never formally incorporated as SMOs. Instead, Occupy Homes MN is a fiscally sponsored organization³⁰⁰ in a contractual relationship with another incorporated 501(c)(3) organization with similar purposes.³⁰¹ Thus far, Occupy Homes MN has been able to substantially support its efforts as a fiscally sponsored organization through nominal membership fees, a listserv, and social media appeals.³⁰² Trans-local net-

294. John D. McCarthy & Mayer N. Zald, *Resource Mobilization and Social Movements: A Partial Theory*, 82 AM. J. OF SOC. 1212, 1212–41 (1977).

295. See EARL & KIMPORT, *supra* note 293, at 69.

296. See *id.*

297. DAVID A. SNOW, SARAH A. SOUL & HANSPETER KRIESI, *Mapping the Terrain, in THE BLACKWELL COMPANION TO LAW AND SOCIAL MOVEMENTS* 3, 9 (David A. Snow, Sarah A. Soule & Hanspeter Kriesi eds., 2004) (“Thus, SMOs were proffered as the orienting, focal unit of analysis for understanding the operation of social movements.”).

298. See, e.g., Skype Interview with Max Rameau, *supra* note 21.

299. See *id.*

300. Skype Interview with Nick Espinoza, Leader in Occupy Homes Minnesota, (Jan. 15, 2014) (recording on file with the author).

301. See Fishman & Schwartz, *supra* note 263, at 834.

302. Interview with Nick Espinoza, *supra* note 300.

works can also more quickly and cost-effectively mobilize many people in several locations at once without requiring that activists be members of a formal SMO. Thus, housing rights movements do not need to rely on the co-presence of activists to undertake actions at the local level that have state, national, and global impacts.

TBTL-National and its affiliates also consciously resisted what they call, the “501(c)(3) Industrial Complex,”³⁰³ a dynamic in which a social movement enters into an agreement with the government to not pay taxes in exchange for 501(c)(3) status.³⁰⁴ As Max Rameau, a leader in the TBTL-movements explains, the 501(c)(3) structure “makes it difficult to challenge the government or other sources of power,”³⁰⁵ since the government grants 501(c)(3) status and requires groups to refrain from certain kinds of political activities if granted 501(c)(3) status.³⁰⁶ Since TBTL-National and its affiliates wanted to use property disobedience as a main organizing tactic they avoided the 501(c)(3) form. Additionally, the 501(c)(3) Industrial Complex often forces social movements into the “the never ending pursuit of funding” and precludes movement leaders from engaging in a wide range of actions, including actions for which the organization does not receive funding.³⁰⁷

According to Max Rameau, “We saw first-hand a lot of the progressive political leadership doing these intellectual gymnastics to try to justify why they were engaging in one act or another, when the real answer was, look this is what we get money for so that’s why we’re going to do this.” TBTL and its affiliates wanted to operate “free and unencumbered” by those considerations. While this choice may have ultimately cost TBTL-National, as it sunset its operations in 2013, the other local action campaigns were easily able to continue their work even after TBTL-National ceased its operations. OM Build was also able to raise substantial amounts of money online through crowdfunding,³⁰⁸ rather than from foundations or government sources. Thus, as trans-local networks connected via the Internet and social media, these housing rights movements did not need to rely solely on SMOs as their primary unit of organization.

Lastly, as trans-local networks, these movements can build more informal, flexible, and democratic organizing structures. The key activists interviewed for this Article came from a range of racial, ethnic,

303. Skype Interview with Max Rameau, *supra* note 21, at 4:23.

304. *See id.* at 5:15–6:15.

305. *See id.*

306. *See id.*

307. *See id.* at 7:23.

308. Lisa T. Alexander, *Cyberfinancing for Economic Justice*, 4 WM. & MARY BUS. L. REV. 310, 351 (2013) (defining crowdfunding as “an approach to raising capital for new enterprises by soliciting financial contributions online from a large number of contributors, at once, through an open call for funds”).

and socio-economic backgrounds. Many movements were aware of each other even if they were not formally connected. While these movements had some structure, they resisted a formal organizational structure with appointed leaders. This informality helps the movements develop more democratic organizing structures, allowing traditionally marginalized groups to be part of informal SMO decision-making. That dynamism also enables the movements to engage in “democratic experimentalism,”³⁰⁹ whereby they experiment with ideas that reformulate local property and housing entitlements, and advance the human right to housing, while solving local problems. These movements problem-solve with local actors to define the contours of a constitutional right to housing in a manner that is consistent with local needs and national constitutional norms.

B. Legal Mobilization Online

These movements’ trans-local networks also impact how they mobilize law. Legal mobilization is the strategic choice of social movements to translate their desires or wants into “a right or lawful claim.”³¹⁰ Legal mobilization scholarship generally analyzes how and why social movements employ law and the effects that legal mobilization has on a movement’s substantive goals and agenda.³¹¹ “Rights” are perceived in this literature as claims of negative liberties or positive entitlements obtained and defined through court-centered litigation.³¹² While socio-legal scholars such as Professors Catherine Albiston, Laura Beth Nielsen, Deborah Rhode, and Anna-Maria Marshall explore how social movement actors claim rights in “everyday locations such as workplaces, neighborhoods, and schools,”³¹³ the bulk

309. See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 267 (1998) (defining democratic experimentalism as a new form of government where “power is decentralized to enable citizens and other actors to utilize their local knowledge to fit solutions to their individual circumstances”).

310. Michael McCann, *Law and Social Movements*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY, *supra* note 297 (defining legal mobilization); see also Scott L. Cummings, *Empirical Studies of Law and Social Change: What Is the Field? What Are the Questions?*, 2013 WIS. L. REV. 171, 184 (2013) (citing generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977)); Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 664 (2012) (noting the LGBT movement’s success in utilizing legal mobilization).

311. See, e.g., Cummings, *supra* note 310, at 176; Gwendolyn M. Leachman, *From Protest to Perry: How Litigation Shaped the LGBT Movement’s Agenda*, 47 U.C. DAVIS L. REV. 1667, 1688 (2014).

312. See Cummings, *supra* note 310, at 184.

313. CATHERINE R. ALBISTON, *INSTITUTIONAL INEQUALITY AND THE MOBILIZATION OF THE FAMILY MEDICAL LEAVE ACT: RIGHTS ON LEAVE* 15 (2010); see also Cummings, *supra* note 310, at 184 (explaining how groups may rely on legal claims within the Supreme Court to bring about social reform for large groups); Scott L. Cummings, *The Pursuit of Legal Rights and Beyond*, 59 UCLA L. REV. 506 (2012)

of the legal mobilization literature focuses on the efficacy of litigation as a tool for social change.³¹⁴

Litigation can bring benefits to social movements such as mainstream media attention,³¹⁵ financial resources, and legitimacy.³¹⁶ These benefits can empower marginalized individuals to press for social change.³¹⁷ Legal mobilization can create leverage for marginalized groups bargaining in the shadow of the law.³¹⁸ Litigation successes can cause opponents to capitulate,³¹⁹ and litigation losses can construct movement identity and mobilize participants.³²⁰ Yet, the Internet and social media enable the housing rights movements studied here to achieve many of these benefits without litigation. These movements can independently publicize their struggles as well as their successes to large numbers of people at once, online, and across expansive geographic terrains. While national media attention is still important, these groups can independently publicize individual eviction and foreclosure actions and convince others of the efficacy of their ideas.

These movements can also frame their local legal successes as manifestations of the human right to housing without engaging in liti-

(discussing the impact public interest lawyers have on social change); Laura Beth Nielsen & Catherine R. Albiston, *The Organization of Public Interest Practice: 1975–2004*, 84 N.C. L. REV. 1591 (2006) (evaluating the change in public interest law between 1975 and 2004); Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027 (2008) (discussing the impact of public interest law and analyzing how public interest law copes with pressure to bring about social change); Anna-Maria Marshall, *Injustice Frames, Legality and the Everyday Construction of Sexual Harassment*, 28 LAW & SOC. INQUIRY 659 (2003) (demonstrating how women use both legal and other types of frames when addressing potential sexual harassment).

314. See generally HANDLER, *supra* note 97; Michael W. McCann, *Legal Mobilization and Social Reform Movements: Notes on Theory and Its Application*, 11 STUD. L. POL. & SOC.'Y 225 (1991); Michael W. McCann, *How Does Law Matter for Social Movements?*, in HOW DOES LAW MATTER? (Bryant G. Garth & Austin Sarat eds., 1998). But see Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1317 (2010) (arguing that scholars should “rethink the appropriateness of the conventional emphasis on litigation in other advocacy contexts and investigate the degree to which the multidimensional model of advocacy deployed in the marriage equality movement applies across different substantive domains”).

315. Leachman, *supra* note 311, at 1688 (citing MICHAEL W. McCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 58 (1994)).

316. Leachman, *supra* note 311, at 1688–90.

317. Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy*, 96 IOWA L. REV. BULL. 61, 63 (2011) (describing some of the presumed benefits of litigation).

318. See generally Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (discussing divorcing couples as a marginalized group).

319. See Albiston, *supra* note 317, at 63.

320. Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011).

gation. A local action campaign in Madison, Wisconsin, can learn about micro-homes villages for the homeless and obtain how-to manuals and legal documents from unrelated campaigns through the Internet and social media. When a local movement obtains a legal concession from local officials, the group can frame that success as an example of the human right to housing, and quickly and easily share its ordinances, contractual documents, or ownership arrangements with other groups both in and outside of its trans-local network. This information-spreading can also have the same legitimation effects as litigation. Further, these movements can influence local decision-makers to capitulate to the movements' interpretations of housing rights by publicizing, via the Internet and social media, these decision-makers' resistance to a local action. Such a threat can also provide movements leverage in negotiations with the private and public actors. The housing rights movements described in this Article can mitigate the pitfalls of legal mobilization through the Internet and social media.³²¹ While legal mobilization can negatively affect how movements define their grievances and communicate injustices to others,³²² the social movements discussed here are able to shape and communicate their grievances in a dynamic way through the Internet and social media. They can assert online that they have rights to housing that they do not have as a formal legal matter, and they can share stories and experiences that exemplify that right through the Internet and social media.³²³

While lawyer domination³²⁴ in litigation can lead to client disempowerment,³²⁵ movement co-optation, and disintegration,³²⁶ in the housing rights movements described in this Article, the activists have a lot of autonomy from lawyers. The legal organizations that support these movements do not dominate the movements' agendas through litigation tactics. The National Center for Social and Economic Rights, the Center for Constitutional Rights and the Harvard Legal

321. See Albiston, *supra* note 317, at 61.

322. See *id.* at 63; HANDLER, *supra* note 97.

323. See, e.g., Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

324. See, e.g., STUART SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS PUBLIC POLICY AND POLITICAL CHANGE* 232-33 (1975); MICHAEL McCANN, *TAKING REFORM SERIOUSLY: PERSPECTIVES ON PUBLIC INTEREST LIBERALISM* 200 (1986); Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 455 (2001); Leachman, *supra* note 311.

325. See Cummings & Eagly, *supra* note 324; Lucie E. White, *To Learn and to Teach: Lessons from Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699 (1988).

326. See generally GERALD LOPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992); Cummings & Eagly, *supra* note 324; Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407 (1995); White, *supra* note 325.

Aid Bureau, Legal Action of Wisconsin, and other legal organizations support the housing rights movements outlined in this Article.³²⁷ Yet, many of these legal organizations are extremely wary of litigation as a primary tool of social reform.³²⁸ These lawyers only recommend litigation as a defensive tactic or as a measure of last resort. These organizations support the movements by doing legal research on alternative ownership structures, helping to interpret the movements' actions from a human rights perspective, assisting the movements to associate their grievances with the right to housing, helping to draft contracts, and devising ownership structures that reflect the movements' multiple goals as well as the right to housing.³²⁹ Thus, the lawyers' efforts support rather than dominate. The Internet and social media also enable these groups to frame and share legal information easily without relying as much on lawyers.

C. Legal Framing Through Private and Local Law

The movements described in this Article do use litigation and legislation as tools in their legal arsenal; however, in their multidimensional approach³³⁰ to legal advocacy, they favor local law reforms and private ordering above federal and state adjudication and legislation. As such, local officials and local private actors are making decisions about whether or not to recognize these movements' interpretations of legal rights. Unlike judges, local officials and decision-makers can make informed decisions that are responsive to local context. The Internet and social media also provide these movements with certain mobilizing, framing, aggregating, and legitimation benefits that enable them to advance their causes nationally through private and local law, rather than through federal and state litigation and legislation. Many of the movements analyzed in this Article use the "sword, shield and offer" method of organizing and housing reform.³³¹ Under this

327. Interview with Cathy Albisa, *supra* note 242.

328. *See id.*; *see also* Skype Interview with Max Rameau, *supra* note 21 (discussing the problems with a strictly litigation-based approach).

329. *See, e.g.*, Interview with Cathy Albisa, *supra* note 242; Interview with Peter Sabonis, Human Right to Work with Dignity Program Director, National Economic and Social Rights Initiative (Mar. 3, 2014) (recording on file with author); Skype Interview with Max Rameau, *supra* note 21.

330. Cummings & NeJaime, *supra* note 314, at 1242 ("[Multi-dimensional advocacy is] advocacy across different domains (courts, legislatures, media), spanning different levels (federal, state, local), and deploying different tactics (litigation, legislative advocacy, public education).").

331. This method was developed by the Boston, Massachusetts-based, grassroots legal organization, City Life/Vida Urbana. CITY LIFE/VIDA URBANA, BANK TENANT ASSOCIATION ORGANIZING MANUAL: BUILDING SOLIDARITY TO PUT PEOPLE BEFORE PROFIT 16 (2012), *archived at* <http://www.campusactivism.org/displayresource-835.htm> [hereinafter 3-Legged Stool], *archived at* <http://perma.unl.edu/G8VT-ZBYG> (expanding upon the definition of the sword, shield, and offer).

approach, formal litigation is only used as a defensive tactic. Individual legal services lawyers represent activists in individual housing actions such as evictions or foreclosures.³³² Lawyers also represent activists during protests and direct actions to help the activists avoid arrest or incarceration as a result of their civil disobedience.³³³ Thus, “The shield is a whole range of legal defense options and community residents’ knowledge of those options.”³³⁴

The “sword” is a range of “community organizing, public protest and public pressure tactics.”³³⁵ In this conception, “law,” in the form of litigation, only serves as a shield to create “secure conditions for organizing.”³³⁶ Yet, through these non-litigation organizing tactics, these movements are also able to devise solutions to local housing problems and to create new distributions of housing entitlements and rights at the local level. In the sword phase of organizing, law does play a role, but law and rights are rarely expressed and asserted through litigation or federal and state legislation. Instead, rights are asserted and given content and meaning through private ordering, civil disobedience, public-private partnerships, or ordinances. Law in this context means entitlements and benefits that are morally just, rather than powers or privileges that are legally authorized. For example, City Life/Vida Urbana (City Life) is a grassroots community organization founded in 1973 in the Jamaica Plain neighborhood of Boston, Massachusetts.³³⁷ The group was also a local action affiliate of TBTL-National.³³⁸ City Life has long used the sword, shield, and offer strategy. During the foreclosure crisis the group, in concert with local legal services organizations, used the shield approach to help tenants facing post-foreclosure evictions. City Life educated residents about their housing rights and how to conduct eviction blockades and delay post-foreclosure evictions.³³⁹

The sword took the form of a request to banks that owned a lot of real estate property to work in a public-private partnership with the city of Boston to let occupiers, residents, and homeowners in foreclosure become owners of the properties.³⁴⁰ Many former owners who were behind on their mortgage payments could not obtain financing to repurchase or refinance their homes, even if they could afford that

332. See 3-Legged Stool, *supra* note 331.

333. Interview with Peter Sabonis, *supra* note 329.

334. See 3-Legged Stool, *supra* note 331.

335. See *id.*

336. See *id.*

337. *Our History*, CITY LIFE/VIDA URBANA, <http://www.clvu.org/ourhistory> (last visited Sept. 1, 2014), archived at <http://perma.unl.edu/R8TF-ARAB>.

338. *Resources*, TAKE BACK THE LAND ROCHESTER, <http://takebackroc.rocus.org/node/2> (last visited Sept. 1, 2014), archived at <http://perma.unl.edu/FRC4-MJVF>.

339. See *id.*

340. See *id.*

home at current values.³⁴¹ City Life devised a solution in partnership with a non-profit loan fund in Boston, Boston Community Capital (BCC). BCC evaluated City Life's members based on their income and credit history, rather than just a composite credit score.³⁴² Many members qualified for BCC mortgages at current value under this assessment. Once members qualified for a mortgage, BCC began negotiations to buy the real estate-owned properties from the foreclosing banks and to then resell the properties to City Life's members.³⁴³ "Since mid-2009, about 25 such properties have been purchased and resold under this method."³⁴⁴ City Life also worked with BCC to buy foreclosed properties as rental units, with the possibility of resale to a cooperative. Based on local protests and rallies, lenders sold the properties to non-profits or to occupants, and BCC was able to purchase, or negotiate to purchase, at least fifteen of sixteen properties in Jamaica Plain through this method.³⁴⁵ Thus, City Life's "offers" constitute a private ordering solution to the problem of mass foreclosures. At the same time, these solutions also give legal form and meaning to the right to remain and the right to secure adequate housing.

Consequently, litigation or federal and state legislation are not the primary legal mechanisms for legal mobilization or legal framing. Activists are not mobilized to action by litigation, but by the crisis they face and the creative organizing solutions that grassroots organizations devise. The term "framing" describes what movements are doing when they "locate, perceive, identify and label occurrences within their life space and within the world at large."³⁴⁶ Framing also describes how movements "organize discontent, leading activists and even the general public to see harm where none existed before and sponsoring action to redress their grievances."³⁴⁷ A legal frame is when movements "invoke legal rights when articulating their demands."³⁴⁸ Many of the movements studied in this Article use the human right to housing as a legal frame, even in the absence of a formal legal right, but they enshrine the right to housing in American law through private and local law reforms.

341. *See id.*

342. *See id.*

343. *See id.*

344. *Id.*

345. *See id.*

346. David A. Snow, E. Burke, Rochford, Jr., Steven K. Worden & Robert D. Benford, *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 AM. SOC. REV. 464, 464-81 (1986).

347. Anna-Maria Marshall, *Injustice Frames, Legality, and the Everyday Construction of Sexual Harassment*, 28 LAW & SOC. INQUIRY 659, 660 (2003).

348. *See id.* at 664.

By asking their members to wave the “sword” of the right to housing in community organizing, public protest, and public and private pressure tactics, these movements also begin to influence their members’ legal consciousness.³⁴⁹ The right to housing, then, begins to frame what these activists perceive they have a right to request or demand from local banks, police officers, zoning board members, city council representatives, and other private and local officials. Further, as these decision-makers acquiesce to the movements’ conceptions of rights, these movements begin to influence not only the legal consciousness of their members, but also the legal consciousness of others living in the surrounding neighborhoods and localities in which their actions occur. The Internet and social media help to broaden the impact of these local value shifts by enabling these movements to quickly and cost-effectively publicize their local legal successes to others through their trans-local networks. Other local action campaigns can easily replicate these legal successes by obtaining information and model documents through the Internet and social media. Consequently, these movements’ property disobedience, local property law reforms, and concrete manifestations of the right to housing can have greater national and global impact because Internet and social media enable these groups to more effectively and cheaply disseminate their ideas.

V. CONCLUSION

Recent housing rights movements in the U.S. have awakened Americans’ legal consciousness regarding the efficacy of an American constitutional right to housing. While these social moments inevitably face a backlash and counter-mobilizations, they have undeniably capitalized on the U.S. housing crisis to help Americans consider and embrace a broader range of housing tenures and entitlements for the homeless and the dispossessed. It is unclear if national and state decision-makers will embrace these movements’ local property reformulations. It is also not clear if the local shifts in American popular understandings of how housing entitlements should be distributed consistent with constitutional norms will be sustained as the housing market slowly recovers.³⁵⁰ Yet, these movements’ “bottom-up” approach to constitutional creation through local democratic instantiation, facilitated by the Internet, has implications for the evolution of American constitutional law and property law in the Internet age. These movements’ successes foreshadow new ways social movements can increase Americans’ acceptance of social and economic rights, such

349. *See supra* note 19.

350. *See* HARVARD’S JOINT CTR. FOR HOUS. STUDIES, STATE OF THE NATION’S HOUSING 2014 (2014), *archived at* <http://perma.unl.edu/9L9J-WWPM> (finding that U.S. housing recovery continues, but that its full rebound faces significant challenges).

as education, health care, and work. Lastly, these developments also have implications for how scholars should understand the role of law in social movements. Private ordering and local law may come to play a greater role in multidimensional social movement advocacy. In the meantime, recent U.S. housing rights movements are occupying the legal meaning of an American constitutional right to housing by reformulating local property and housing entitlements to advance equity and other well-accepted constitutional norms.