

2006

Finding a Right to the City: Exploring Property and Community in Brazil and in the United States

Ngai Pindell

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vjtl>



Part of the [Land Use Law Commons](#), and the [Property Law and Real Estate Commons](#)

Recommended Citation

Ngai Pindell, Finding a Right to the City: Exploring Property and Community in Brazil and in the United States, 39 *Vanderbilt Law Review* 435 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol39/iss2/4>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Transnational Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

Finding a Right to the City: Exploring Property and Community in Brazil and in the United States

Ngai Pindell*

ABSTRACT

Increasing poor people's access to property and shelter in urban settings raises difficult questions over how to define property and, likewise, how to communicate who is entitled to legal property protections. An international movement—the right to the city—suggests one approach to resolving these questions. This Article primarily explores two principles of the right to the city—the social function of property and the social function of the city—to consider how to better achieve social and economic justice for poor people in urban areas. Using Brazil as one example of a country incorporating these principles within constitutional and statutory provisions and employing these principles at the local level through ambitious and innovative property programs, this Article explores the potential application of the right to the city movement in the United States. Such a movement could incrementally advance moral and legal claims to a right to shelter through a more expansive and creative implementation of urban planning laws and land trust programs.

TABLE OF CONTENTS

I.	INTRODUCTION	436
II.	EXPRESSIONS OF THE RIGHT TO THE CITY.....	440
	A. <i>The Right to the City Movement</i>	440
	B. <i>Communities and Contested Property— Favelas and Loteamentos in Brazil</i>	445

* Associate Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. The Author thanks Annette Appell, David Barron, Bret Birdsong, Scott Cummings, Nestor Davidson, Joan Howarth, Kate Kruse, Mary LaFrance, Audrey McFarlane, David Thronson, and Jorge Wilhelm for their comments and suggestions.

C.	<i>The Struggle Between Private Property and the Social Interest</i>	448
D.	<i>The Meaning of the Right to the City</i>	452
1.	National Efforts—The City Statute.....	452
2.	Local Efforts—Pro-favela and Participatory Budgeting	455
III.	APPLICATION OF THE RIGHT TO THE CITY—THE UNITED STATES	459
A.	<i>Individual and Social Conceptions of Property</i>	459
B.	<i>Planning for Affordable Housing</i>	462
C.	<i>Occupation Claims—Squatters and Land Banks</i>	468
1.	Inventory Management and Transfers to Productive Use	474
2.	Reforming Property Laws for Productive Use	476
IV.	CONCLUSION.....	479

I. INTRODUCTION

This Article is inspired by an international movement called the “right to the city” and by Brazil’s adoption of some of the principles of this movement within new constitutional provisions and national legislation. The right to the city, popularized by the French philosopher Henri Lefebvre, incorporates two novel concepts: the social function of property and the social function of the city. The social function of property subordinates individual rights of property to social demands.¹ “In the formulation and implementation of urban

1. A proposed World Charter on the Right to the City defines the social function of property:

(a.) The public and private spaces and properties belonging to the city and to the citizens should be used in such a way as to prioritise the social, cultural and environmental interest. All citizens have a right to participate in the ownership of urban territory based on democratic parameters, on ideals of social justice and under sustainable environmental conditions. In the formulation and implementation of public policies, the socially fair use of both urban space and land must be promoted, with gender and environmental equity and with safety.

(b.) In the formulation and implementation of urban policies the social and cultural interest must take priority over the individual right of property.

(c.) All citizens have the right to participate on the process of generating land value increments by public investments on urban areas, which has been

policies the social and cultural interest must take priority over the individual right of property.”² The social function of the city is not so succinctly summarized. “It contains concepts of inclusion, urban investments for the benefit of all residents, equitable distribution of resources, and environmental sustainability.”³ In part, it provides a context for the exercise of the social function of property. In Brazil, the social function of the city is applied by national statute to generally prioritize city residents’ rights of participation and occupation.⁴ These social concepts have directly shaped constitutional and legislative changes in Brazil; they have broadened opportunities for residents of urban areas to participate meaningfully in land use planning processes and opportunities for residents to acquire legally recognized property rights in the same areas. The most notable change in the law in Brazil is the granting of legal property rights to individuals in local, urban jurisdictions who are best described as “squatters.”

The “city,” as used in this Article, identifies any location where people want to live. This location can be rural or urban and may be large or small.⁵ The city also has symbolic meaning. It has meaning as a place of diverse interaction, conflict, and cooperation. One writer notes that “[t]he city creates a situation, the urban situation, where *different* things occur one after another and do not exist separately but according to their differences.”⁶ People interact on the streets, in

entirely captured by the private owners without any counterpart or activity undertaken in their properties.

World Charter on the Right to the City, pt. I, art. II.3, *available at* http://portal.unesco.org/shs/en/ev.php-URL_ID=8218&URL_DO=DO_TOPIC&URL_SECTION=201.html.

2. *Id.* pt. I, art. II.3.b.

3. *Id.* pt. I, art. II.2.

The cities attend its social function if to guarantee to all persons the full usufruct of its economy, culture and resources, as well if urban projects and invested capital are implemented for the benefit of the citizen, by observing the criteria of equitable distribution, respect for the culture and ecological sustainability; the well being of all citizens in state of harmony with nature, for today and for future generations.

Id.

4. *See infra* notes 55–56 and accompanying text.

5. “[T]he denomination of City is given to any town, village, city, capital, locality, suburb, settlement or similar which is institutionally organised as a local unit of Municipal or Metropolitan Government independently of whether it is urban, rural, or semi-rural.” World Charter on the Right to the City, pt. I, art. I.4.

6. Neil Smith, *Foreward* to HENRI LEFEBVRE, *THE URBAN REVOLUTION* 117 (Robert Bononno, trans., 2003). “The urban is defined as the place where people walk around, find themselves standing before and inside piles of objects, experience the intertwining of threads of their activities until they become unrecognizable, entangle situations in such a way that they engender unexpected situations.” *Id.* at 39. “A crowd can gather, objects can pile up, a festival unfold, an event—terrifying or

public squares, in sidewalk cafes, and in building lobbies. Similarly, Gerald Frug notes that “[a] primary city function—the primary city function—ought to be the cultivation and reproduction of the city’s traditional form of human association. . . . Cities . . . ought to teach people how to interact with unfamiliar strangers”⁷ The city is also a marker of identity. People live in Chicago, grow up in the suburbs of New York, or work in Washington, D.C.

The city is a place in which diverse groups, distinguished by income, race, or other characteristics, engage in a competition for space.⁸ For some, efforts within the competition are focused on *excluding* certain populations. Suburban communities incorporate to separate themselves from cities; some individuals live within the protections of gated communities, and some localities engage in zoning practices designed to limit housing opportunities for low-income individuals.⁹ For others, the struggle centers on gaining *inclusion* to areas and amenities previously unobtainable. Within this latter group, these residents of the city seek to reclaim vacant houses in decaying neighborhoods.¹⁰ They seek affordable rental and ownership opportunities in communities, or resist displacement in gentrifying neighborhoods. They run businesses at the margins of legality. They seek creative ways to occupy the city by doubling up in

pleasant—can occur. This is why urban space is so fascinating: centrality is always possible.” *Id.* at 130.

7. GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* 140 (1999). Effective interaction among city dwellers is frustrated by laws that facilitate the creation of racially identifiable spaces within cities. *See id.*

8. *See, e.g.*, Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990) (showing how local government legal powers enable them to retain autonomy); *see also* EDWARD W. SOJA, *POSTMETROPOLIS: CRITICAL STUDIES OF CITIES AND REGIONS* (2000) (emphasizing a spatial perspective on urban theory); EDWARD W. SOJA, *POSTMODERN GEOGRAPHIES: THE REASSERTION OF SPACE IN CRITICAL SOUND THEORY* (1988) (emphasizing a spatial perspective for social theory).

9. *See, e.g.*, Keith Aoki, *Direct Democracy, Racial Group Agency, Local Government Law, and Residential Racial Segregation: Some Reflections on Radical and Plural Democracy*, 33 CAL. W. L. REV. 185 (1997) (discussing how society can move “toward a radical and plural democratic politics.”); John O. Calmore, *Racialized Space and the Culture of Segregation: “Hewing a Stone of Hope from a Mountain of Despair,”* 143 U. PA. L. REV. 1233 (1995); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1844 (1994) (arguing that “political geography—the position and function of jurisdictional and quasi-jurisdictional boundaries [internal citation omitted]—helps to promote a racially separate and unequal distribution of political influence and economic resources.”); Audrey G. McFarlane, *Race, Space, and Place: The Geography of Economic Development*, 36 SAN DIEGO L. REV. 295, 337–39 (1999) (discussing the connection between the Empowerment Zone and racialized space).

10. *See* discussion *infra* Part III.C.

apartments, squatting in vacant buildings, and building makeshift shantytowns and tent cities on vacant land.¹¹

These competing claims to urban space operate within macro-policies that shape cities. In the United States, the urban form has been shaped by racial conflict as well as by federal government policies such as highways and urban renewal.¹² Additionally, macroeconomic factors shape urban spaces. The gap between income levels and housing prices continues to rise.¹³ Scholars and policymakers have long considered possible solutions to these spatial inequalities and conflicts, yet they persist.¹⁴

This Article considers what a right to the city means in Brazil and what it could mean in the United States. The right to the city suggests, in part, a right to housing. The right to the city incorporates a right to housing in its charter document. Additionally, the full application of the social function of property and the social function of the city, with their emphasis on access to city space, seem to require some degree of increased access to housing. The right to the city, however, is not as pithy as guaranteeing all persons shelter. Instead, it is better conceptualized as a movement increasing the ability of poor persons without property to more effectively access housing and shelter opportunities within cities. Part II of this Article explores the right to the city movement generally as well as its application in Brazil through the City Statute and the Constitution. This Part highlights participation and property themes in Brazil's urban history and in recent trends. Part III traces the possible

11. Some tent cities are able to transition to long lasting and productive communities. Camp Dignity in Portland, Oregon, is one example of the possibilities of tent cities in urban areas. See Dignity Virtual Village, <http://www.outofthedorways.org/index.html> (last visited Feb. 21, 2006). Moving beyond unorganized encampments, Camp Dignity has a website, bylaws, articles of incorporation, and visions for future development. See *id.* Dome Village in Los Angeles, founded in 1993 by activist Ted Hayes, is another example. Dome Village Home Page, <http://www.domevillage.org> (last visited Feb. 21, 2006). Others are bulldozed, and the homeless are uprooted once again. See, e.g., Juliet V. Casey, *Homeless Leave Makeshift Shantytown*, LAS VEGAS REV.-J., July 1, 2001, at A3.

12. Rachel D. Godsil, *Viewing the Cathedral From Behind the Color Line: Property Rules, Liability Rules, and Environmental Racism*, 53 EMORY L.J. 1807, 1847 (2004).

13. See, e.g., JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY, *THE STATE OF THE NATION'S HOUSING 4* (2004) (noting that 2.5–3.5 million people are homeless in a given year, and low-wage earners cannot afford a one bedroom apartment in most areas); NATIONAL LOW INCOME HOUSING COALITION, *OUT OF REACH* (2004), available at <http://www.nlihc.org/oor2004/> ("Once again, this year there is not a single jurisdiction in the country where a person working full time earning the prevailing minimum wage can afford a two bedroom rental home.").

14. See, e.g., Peter W. Salsich, Jr., *Solutions to the Affordable Housing Crisis: Perspectives on Privatization*, 28 J. MARSHALL L. REV. 263, 267 (1995) ("Privatization by itself will not address the core problems of housing for low-income persons, but that privatization has potential for improving the effectiveness of housing programs when careful attention is paid to the privatization mechanisms selected.").

meaning of a right to the city in the United States through the same themes of participation and property, noting how property views in the United States shape the law's ability to conceptualize approaches to a right to housing. Part III concludes by exploring affordable housing planning and land trusts as two hopeful examples of realizing a right to the city in the United States.

II. EXPRESSIONS OF THE RIGHT TO THE CITY

A. *The Right to the City Movement*

The urban landscape imagined as a contest for space is the nucleus of philosopher Henri Lefebvre's right to the city. Henri Lefebvre popularized the right to the city in writings in the late 1960s.¹⁵ Lefebvre's right to the city involves "a transformed and renewed right to urban life."¹⁶ This right to urban life incorporates two principal rights: the right to participation and the right of appropriation.¹⁷ The right to participation means that urban residents should have the opportunity and power to make meaningful determinations of the contours of urban space. The right of appropriation prioritizes the rights of city residents as occupiers and users of city space. The inhabitant of the city should have access to city space.

The right to the city . . . should modify, concretize and make more practical the rights of the citizen as urban dweller . . . and user of multiple services. It would affirm, on the one hand, the right of users to make known their ideas on the space and time of their activities in the urban area; it would also cover the right to the use of the center, a privileged place, instead of being dispersed and stuck into ghettos . . .¹⁸

Lefebvre identifies the inhabitant in large part with the working class and a struggle against the forces of private capital.¹⁹ The antithesis of the inhabitant is speculative capital.²⁰ Private capital

15. HENRI LEFEBVRE, *LE DROIT À LA VILLE* (1968).

16. HENRI LEFEBVRE, *WRITINGS ON CITIES* 158 (Eleonore Kofman & Elizabeth Lebas trans., 1996) [hereinafter LEFEBVRE, *WRITINGS ON CITIES*].

17. *Id.* at 174.

18. *Id.* at 34; see also Henri Lefebvre, *Levels and Dimensions*, in HENRI LEFEBVRE: *KEY WRITINGS* 136, 140 (Stuart Elden et al. eds., 2003) ("The urban phenomenon and urban space are not only a *projection of social relations* but the *site and terrain where strategies confront one another.*").

19. LEFEBVRE, *WRITINGS ON CITIES*, *supra* note 16, at 158.

20. [T]he Olympians of the new bourgeois aristocracy no longer inhabit. They go from grand hotel to grand hotel, or from castle to castle, commanding a fleet or a country from a yacht. They are everywhere and

and speculative capital work to exclude inhabitants from access to city spaces and participation in city life.

Claims to space under the right to the city are multifaceted. For example, Raul Villa details the struggle of Mexicans for urban space in Los Angeles, California, after the arrival of the railroad in the 1870s spurred new urban development.²¹ He describes the appropriation of space through instances of Mexican “public cultural spectacle”²² and “symbolic spatial practices.”²³ Other writers describe the social symbolism of “[t]aking to the streets” in cities across Latin America.²⁴ In the United States, Peter Marcuse demonstrates limitations on taking to the streets in protest in New York after the September 11 terrorist attacks.²⁵ Some descriptions of the right to the city detail the physical struggle to maintain neighborhoods and resist displacement in the face of urban renewal activity,²⁶ and to devise strategies to increase participation in land use and other decisions of city governance.²⁷ Gated communities and “fortified enclaves” limit public spaces and contribute to spatial segregation.²⁸

nowhere. That is how they fascinate people immersed into everyday life.
They transcend everyday life

Id. at 159.

21. Raúl H. Villa, *The Right to the City in Los Angeles: Discourse and Practice of a Chicano Alternative Public Sphere*, in *MASSES, CLASSES, AND THE PUBLIC SPHERE* 41 (Mike Hill & Warren Montag eds., 2000) [hereinafter *MASSES, CLASSES*].

22. *Id.* at 43.

23. *Id.* at 44.

24. John Friedmann, *The Right to the City*, in *RETHINKING THE LATIN AMERICAN CITY* 98, 100 (Richard M. Morse & Jorge E. Hardoy eds., 1992) [hereinafter *RETHINKING*] (emphasis omitted). Describing street activity during Carnival, he writes, “[i]n February of each year, the *favelados* come down from the hills. They come by busloads from the working-class suburbs to the heart of the city to celebrate life on the streets that, during the rest of the year, are effectively denied to them.” *Id.* at 100.

25. Peter Marcuse, *The “Threat of Terrorism” and the Right to the City*, 32 *FORDHAM URB. L.J.* 767 (2005).

I use the phrase ‘public space’ in the lived sense, not in the legal sense I mean public space in its social sense, space that is lived as open and communicative, seen and felt and treated by most as public, without regard to any particular form of ownership or physical arrangement.

Id. at 778.

26. See, e.g., Villa, *supra* note 21, at 46 (discussing slum clearance, displacement, and “Mexican removal”). “Negro removal” is another description used to describe the effects of slum clearance on the African-American population. See Wendell E. Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 *YALE L. & POL’Y REV.* 1, 47 (2003).

27. See Villa, *supra* note 21, at 47–48 (discussing the domination of zoning structure by private development interests); see also NICHOLAS BLOMLEY, *UNSETTLING THE CITY: URBAN LAND AND THE POLITICS OF PROPERTY* 39–46 (2004) (discussing community efforts to reclaim the vacant Woodward building in Vancouver, Canada).

28. Teresa P.R. Caldeira, *Fortified Enclaves: The New Urban Segregation*, in *CITIES AND CITIZENSHIP* 114, 114 (James Holston ed., 1999). “Fortified enclaves are

Highways eliminate local neighborhood streets and the “outdoor political domain of social life” the streets support.²⁹

The literature after Lefebvre has also expanded the right to the city movement to address a larger number of exclusion claims, as evidenced by the provisions of the World Charter on the Right to the City (World Charter).³⁰ Women may be excluded from full participation in the city because of discriminatory popular perceptions³¹ or issues of crime and safety. The homeless may be excluded from public areas of the city with the increasing privatization of public areas and criminalization of homeless activities.³² Groups such as the youth, the elderly, and the disabled may be excluded from school, work, and leisure activities due to insufficient public transportation. This post-Lefebvre writing reflects Lefebvre’s own broad and “radical” conception of the right to the city.³³ This radical conception targets more than the institutional structures that influence the construction of physical space. It targets all influences and structures that determine the lives and experiences of urban inhabitants.³⁴

The right to the city movement is a prominent conversation among international governmental and non-governmental

privatized, enclosed, and monitored spaces for residence, consumption, leisure, and work.” *Id.*

29. James Holston, *Spaces of Insurgent Citizenship*, in *CITIES AND CITIZENSHIP*, *supra* note 28, at 155, 162.

30. See World Charter, *supra* note 1.

31. See Jamie Owen Daniel, *Rituals of Disqualification: Competing Publics and Public Housing in Contemporary Chicago*, in *MASSES, CLASSES*, *supra* note 21, at 62–67, 76–78 (describing the experience of women facing displacement from redevelopment of Chicago public housing in the late 1990s).

The women being displaced from public housing in Chicago must now submit to a new “ritual of qualification,” not to collect benefits, but to be eligible for adequate replacement housing. This ritual of qualification tests not for whether they are good mothers, but whether they are sufficiently respectful of property to deserve a new place to live.

Id. at 76.

32. See DON MITCHELL, *THE RIGHT TO THE CITY: SOCIAL JUSTICE AND THE FIGHT FOR PUBLIC SPACE* 161–227 (2003).

33. Mark Purcell, *Citizenship and the Right to the Global City: Re-imagining the Capitalist World Order*, 27 *INT’L J. URB. & REGIONAL RES.* 564, 576 (2003).

34. Lefebvre describes space using three terms: perceived space, conceived space, and lived space. See Mark Purcell, *Excavating Lefebvre: The Right to the City and its Urban Politics of the Inhabitant*, 58 *GEOJOURNAL* 99, 102 (2002).

Perceived space refers to the relatively objective, concrete space people encounter in their daily environment. Conceived space refers to mental constructions of space, creative ideas about and representations of space. Lived space is the complex combination of perceived and conceived space. It represents a person’s actual experience of space in everyday life.

Id.; see also Purcell, *supra* note 33, at 577.

organizations (NGOs)³⁵ and among sociologists and urban geographers.³⁶ International NGOs have studied and employed principles of the right to the city. Habitat International Coalition (HIC),³⁷ the Centre on Housing Rights and Evictions (COHRE),³⁸ ActionAid,³⁹ and the National Forum for Urban Reform⁴⁰ developed the World Charter.⁴¹ This proposed World Charter is not an official legal document itself, but its principles have been adopted widely, including within the City Statute and the Constitution of Brazil.⁴²

The World Charter is sweeping in its coverage.⁴³ It contains five parts.⁴⁴ Part I—General Dispositions—outlines the social function of the city and the social function of property.⁴⁵ It also includes provisions describing protections of the exercise of citizenship, commitments to equality and non-discrimination, special protection for vulnerable persons, and provisions promoting social and economic unity.⁴⁶ Part II—Rights Relating to the Management of Cities—

35. Several international agencies promote the right to the city movement. See *infra* notes 37–41 and accompanying text; see also U.N. Educational, Scientific and Cultural Organization (UNESCO) Home Page, <http://www.unesco.org>; U.N.-Habitat Home Page, <http://www.unhabitat.org>; Housing International Coalition—Housing and Land Rights Network (HIC-HLRN) Home Page, <http://www.hlrn.org>; Centre on Housing Rights and Evictions (COHRE) Home Page, <http://www.cohre.org>.

36. The theory and application of the right to the city in the United States and internationally is explored in NICHOLAS K. BLOMLEY, *LAW, SPACE, AND THE GEOGRAPHIES OF POWER* (1994); BLOMLEY, *supra* note 27; SAMUEL BOWLES AND HERBERT GINTIS, *DEMOCRACY AND CAPITALISM* (1986); CITIES AND CITIZENSHIP, *supra* note 28; MASSES, CLASSES, *supra* note 21; MITCHELL, *supra* note 32; RETHINKING, *supra* note 24; EDWARD W. SOJA, *THIRDSPEACE* (1996); *THEORIZING THE CITY* (Setha M. Low ed., 1999); *UNDERSTANDING THE CITY: CONTEMPORARY AND FUTURE PERSPECTIVES* (John Eade & Christopher Mele eds., 2002).

37. HIC Home Page, <http://www.hic-net.org>.

38. COHRE Home Page, <http://www.cohre.org>.

39. Action Aid Home Page, <http://www.actionaid.org>.

40. National Forum for Urban Reform Home Page, <http://www.forumreformaurbana.org.br>.

41. The World Charter and related discussions can be found on several websites including, http://www.choike.org/nuevo_eng/informes/2242.html, and http://portal.unesco.org/shs/en/ev.php_URL_ID=5648&URL_DO=DO_TOPIC&URL_SECTION=201.html. The World Charter contains twenty-three articles modeled on “first principles of solidarity, liberty, equality, dignity and social justice.” World Charter on the Right to the City pmb1.

42. Discussions on the implementation of the right to the city take place regularly. UNESCO and U.N.-Habitat sponsored one conference in March 2005. Additional conferences include a World Bank sponsored symposium entitled “Land Development, Urban Policy, and Poverty Reduction” (Apr. 2005), available at <http://www.worldbank.org/urban/symposium2005/index.html>; the World Social Forum in Porto Alegre, Brazil, a conference on the Right to the City in June 2002 in Rome, Italy, and “Rights to the City: Citizenship, Democracy and Cities in a Global Age” in Toronto, Canada in June 1998.

43. See World Charter, *supra* note 1.

44. See *id.*

45. *Id.* pt. I.

46. *Id.*

discusses sustainable development, participation in the design of the city budget, transparency in management of the city, and the right to public information.⁴⁷ Part III—Civil and Political Rights of the City—includes provisions establishing rights to liberty and integrity, rights of political participation, rights of association, assembly, expression and the use of public space, the right to justice, and provisions describing the relationship between citizens and state police forces.⁴⁸ Part IV—Economic, Social, Cultural and Environmental Rights of the Cities—discusses access to public services, transportation, the right to housing, the right to education, the right to work, the right to culture and leisure, the right to health, and the right to the environment.⁴⁹ Part V—Final Dispositions—instructs cities to enact measures to implement the right to the city and details commitments that NGOs and governments will undertake to promote the right to the city. One of the articles in Part V outlines violations of the right to the city, emphasizing the unobstructed participation of the citizens in management, the setting of priorities, and the implementations of decisions reached through participatory processes.⁵⁰

As noted above, the proposed right to the city charter contains an article advocating a right to housing “[i]n so far as [cities] are competent to do so. . . .”⁵¹ Similar claims have been made by housing advocates in the United States⁵² as well as human rights advocates in the United States and abroad.⁵³ The contours of what a right to

47. *Id.* pt. II.

48. *Id.* pt. III.

49. *Id.* pt. IV.

50. *Id.* pt. V, art. XXI.

51. *Id.* pt. IV, art. XIV, cl.1.

52. See generally Frank I. Michelman, *The Advent of a Right to Housing: A Current Appraisal*, 5 HARV. C.R.-C.L. L. REV. 207 (1970) (surveying housing rights). At present, there is no federal constitutional right to housing in the United States, *Lindsey v. Normet*, 405 U.S. 56 (1972), and poverty is not a constitutionally suspect class, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

Advocates acknowledge that recognition of a right to housing would not immediately, or necessarily ever, solve the problems of homelessness and inadequate housing that affect increasing numbers of people in the United States. However, human rights law can help conceptualize and articulate in legal terms the assaults on human rights, dignity, and social inclusion that constituents who are affected experience; human rights law also can help give legal content to emerging advocacy goals.

Maria Foscarinis et al., *The Human Right to Housing: Making the Case in U.S. Advocacy*, 38 CLEARINGHOUSE REVIEW 97 (2004).

53. The Universal Declaration of Human Rights supports a generalized right to housing. Universal Declaration of Human Rights art. 25, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948), available at <http://www.un.org/Overview/rights.html>. The right to housing is also contained in two treaties that codify the principles contained in the Universal Declaration of Human Rights: the International Covenant on Civil and Political Rights and the International Covenant

housing would mean in the United States is unclear. Legal precedents are generally unsupportive, but this does not lessen the moral force of the claim. Chester Hartman captures this amalgamation of hope and reality held by many housing advocates waiting for a right to housing in the United States:

Publishing an article advocating a right or entitlement to decent, affordable housing at a time of shrinking support for public subsidies and a lesser role for public housing . . . and widespread abandonment of essential federal “safety net” programs—on top of the rising incidence of poverty, widening income and wealth gaps, and intensifying racial backlash—could well be regarded as futile, quixotic, even bizarre. But the fact that establishing such a right does not appear to be immediately feasible in no way detracts from the argument that our society ought to embrace it.⁵⁴

This Article does not directly argue for the establishment of a right to shelter in the United States, although the strategies advanced might indeed achieve a similar effect. If the United States ever recognizes a right to housing, it will occur only after significant political and legal advocacy at the neighborhood and local level. Given this reality, the affordable housing and land bank strategies discussed in Part III can be considered pragmatic, intermediate steps toward a right to housing.

B. *Communities and Contested Property—Favelas and Loteamentos in Brazil*

Brazil incorporated the right to the city within its Constitution and national legislation to support significant changes in its planning and property laws.⁵⁵ One of the most significant changes contained in the City Statute involves the conversion of illegal or informal property claims to legal property rights in some instances.⁵⁶ *Favela* and *loteamentos* communities characterize the property relationships the City Statute addresses.

In *favela* and *loteamentos* communities, residents generally live without formal property protections. *Favelas* are squatter

on Economic, Social and Cultural Rights. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at 52, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), available at <http://www.ohchr.org/english/law/index.htm>; The International Covenant on Economic, Social, and Cultural Rights art. 11, G.A. Res. 2200A (XXI), at 49, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966), available at <http://www.ohchr.org/english/law/index.htm>.

54. Chester Hartman, *The Case for a Right to Housing*, 9 HOUSING POL’Y DEBATE 223, 223–24 (1998).

55. Edésio Fernandes, *A New Statute for Brazilian Cities* (2003), http://portal.unesco.org/shs/en/file_download.php/10f9607afa47161a457fedb4c22b08e4city_statute.pdf.

56. *Id.*

communities resulting from invasions of public or private land.⁵⁷ *Loteamentos* often involve greater formal property attributes, but still incorporate informal, illegal attributes associated with the improper subdivision of land. *Favelas* and *loteamentos* have evolved due to poor city planning, rapid growth, and the necessity for poor people in cities to live *somewhere*.⁵⁸ Consequently, these communities arise outside of the legal, formal land market in different ways.⁵⁹ Local governments have employed various *favela* and *loteamentos* reform efforts over the years with mixed results. Although these reform efforts primarily focus on retarding the growth of these informal settlements, they also address legalizing ownership of land in existing settlements, improving service delivery to these communities, and improving infrastructure like roads and sewer services.⁶⁰

Favela communities are characterized by

steep, hilly areas, densely occupied with a spontaneous, irregular and inarticulate pattern of land subdivision. The impoverished streets, alleys and stairways are confusing and not suitable for access or general traffic. *Favelas* lack almost every element of urban infrastructure and collective equipment and the precarious standard of most dwellings makes for unhealthy and dangerous daily living. The

57. Jane Larson has written on informal housing markets associated with *colonias* along the U.S.–Mexico border. See Jane E. Larson, *Free Markets Deep in the Heart of Texas*, 84 GEO. L.J. 179 (1995); Jane E. Larson, *Informality, Illegality, and Inequality*, 20 YALE L. & POL'Y REV. 137 (2002). These *colonias* share some similarities with *favela* and *loteamentos* communities and are primarily developments in outlying areas. See Sylvia Moreno, *Shantytowns Migrate Far North of the Border in Texas*, WASH. POST, Aug. 2, 2004, at A3 (discussing conditions in *colonias*).

58. The scale and importance of illegal, informal communities worldwide are chronicled in ROBERT NEUWIRTH, *SHADOW CITIES* 9 (2005) (“Estimates are that there are about a billion squatters in the world today—one of every six humans on the planet.”).

59. The extralegal sector often grows faster than the legal sector and in a manner that the government has difficulty measuring. For example, the Brazilian construction industry was in a slump in the last six months of 1995 but cement sales were up 20% in the first half of 1996 due apparently to purchases by residents building their own homes in extralegal communities. See HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 76 (2000).

60. The World Bank has studied urban issues in Brazil and funded reform projects. See, e.g., WORLD BANK, *BRAZIL: IMPACT EVALUATION REPORT: LEARNING FROM BEST PRACTICE IN FIVE URBAN PROJECTS*, Rept. No. 16736 (1997) (hereinafter *IMPACT EVALUATION REPORT*); WORLD BANK, *BRAZIL: ATTACKING BRAZIL'S POVERTY: A POVERTY REPORT WITH A FOCUS ON URBAN POVERTY REDUCTION POLICIES*, Rept. No. 20475 (2001) (hereinafter *ATTACKING BRAZIL'S POVERTY*); WORLD BANK, *BRAZIL: PROGRESSIVE LOW-INCOME HOUSING: ALTERNATIVES FOR THE POOR*, Rept. No. 22032 (2002) (hereinafter *PROGRESSIVE LOW-INCOME HOUSING*). All the above World Bank sources are available through <http://www-wds.worldbank.org/>.

invaded land is largely unsuitable for human occupation due to geological and ecological factors.⁶¹

Some of these communities are very large and long established, but their residents (*favelados*) lack legal property rights, as they are deemed mere invaders of public or private land. It is, therefore, significant that the legislation implementing the 1988 Brazilian Constitution significantly expanded the rights of *favelados*.

The incorporation of informal property claims within the legal property system is not without conflicts, and the extra-legal dimension of these communities leaves them vulnerable to manipulation by proponents and opponents alike. For example, one community of squatters, Estrutural, sits atop a water basin contaminated by the community's waste.⁶² Squatters are caught between conflicting stories and values. While the residents of Estrutural praise a local politician, José Edmar, for defending the occupation of their homes, the government accuses him of encouraging the illegal occupation of the land to cultivate a loyal political base to cover other fraudulent activity.⁶³ At the same time, environmentalists decry the contamination of an important water resource.⁶⁴

Loteamentos are another form of illegal land ownership in Brazil. They often develop along the periphery of urban areas. In *loteamentos*, housing developers fail to observe municipal subdivision and infrastructure regulations, which are often cumbersome and difficult to comply with.⁶⁵ As developers sell lots to individuals, the deeds and titles that reflect these transactions may be legally

61. Edésio Fernandes, *Providing Security of Land Tenure for the Urban Poor: The Brazilian Experience*, in HOLDING THEIR GROUND 101, 107 (Alain Durand-Lasserve & Lauren Royston eds., 2002).

62. Celia W. Dugger, *Brazilian Slums Are Seen as Pawns in Political Games*, N.Y. TIMES, Jan. 18, 2004, at Internat'l 3.

63. *Id.*

64. *Id.* According to one resident of Estrutural, "[Edmar] climbed on our rooftops to defend us when the police came to bulldoze our homes." *Id.* Edmar declared that "My children and the children of other people have a right to live in the city They can't be evicted just because of their social conditions." *Id.* Paulo Salles, a professor of ecology at the University of Brasilia, noted in the article that,

[t]hese people like Edmar stimulated the poor to settle in open areas owned by the government They create problems for the whole city without any consideration for the environment or sustainability. These words don't mean anything for them. They're just interested in votes and making money for themselves.

Id.

65. Economist Hernando de Soto writes about this bureaucratic challenge in detailing the 289 days it took de Soto and his team to legalize a one-worker garment shop on the outskirts of Lima, Peru. DE SOTO, *supra* note 59, at 19–20. Similarly, obtaining permission to build a house on government-owned land took nearly seven years and interaction with fifty-two government offices. *Id.*

deficient in some ways, but they still offer some indication of land ownership. Developers generally create *loteamentos* on the outskirts of the city in areas not legally available for urban residential use, but nevertheless soon are occupied by people who have purchased units from the developer. City authorities may later be forced to provide infrastructure to the development and to recognize the transition in land use to urban residential use, but the title to the land may still be in dispute.⁶⁶

In *favelas*, there is seldom an initial attempt by the land occupier to obtain ownership reflected in formal, legal land documents. Instead, the primary goal of the occupier is mere possession for as long as possible. If the land is publicly owned, then the state has either lost track of its ownership or declines to pursue action against occupiers. If the land is privately owned, it may be the case that the legal owner has no interest in occupying land in undesirable locations such as on the side of mountain slopes, where traditional development is illegal or impractical.⁶⁷ It may also be the case that, with the passage of time, the removal of houses becomes more difficult politically and socially.

C. *The Struggle Between Private Property and the Social Interest*

Concepts of property in Brazil have necessarily evolved over time to accommodate changing economic and social needs. The lesson for the United States is not in direct emulation or in somehow abandoning the U.S. property model for another structure. Instead, the lesson is in exposing the underlying forces that shape discussions of property and, concomitantly, revealing how discussions and definitions of property can shape these underlying forces. As orderly and efficient as U.S. property law sometimes is, this very same orderliness mutes and distorts underlying struggles of property use and value.

Brazil has continually struggled with the tension between laws declaring strong protections for private property rights and other laws recognizing extra-legal claims to property possession and similar characteristics of property ownership. It is possible that this tension merely exacerbates some state of chronic confusion and chaos within Brazilian property laws. New property laws, through quantity and contradiction, may effectively add more layers of confusion to existing

66. EDÉSIO FERNANDES, LAW AND URBAN CHANGE IN BRAZIL 74–75 (1995).

67. Sonia Rabello de Castro, *Favela Bairro: A Brief Institutional Analysis of the Programme and its Land Aspects*, in HOLDING THEIR GROUND, *supra* note 61, at 151, 157. Baróss and van der Linden also note the growth of *loteamentos* and their circumvention and corruption of government land regulation. Paul Baróss & Jan van der Linden, *Introduction to THE TRANSFORMATION OF LAND SUPPLY SYSTEMS IN THIRD WORLD CITIES* 1,2 (Paul Baróss & Jan van der Linden eds., 1990).

property relationships and contribute to an increasing normalizing of extralegal solutions to most property disputes.⁶⁸

However, there is a more optimistic characterization of Brazil's situation. With its sometimes chaotic, sometimes ethereal overlay of formal, legal property rules atop the lived experience of urban dwellers using, possessing, building, and speculating on land, Brazil's property system presents the chance to see more clearly the underlying, universal tensions in property law. These tensions exist between use and investment rights, between informal and formal claims, and between claims founded on relationships and those founded on ownership of exchangeable commodities.⁶⁹ In Brazil, there is an omnipresent struggle to define paramount uses of property in contrast to less frequent discussions in the United States explicitly weighing the values of competing uses.

Land practices during the earliest settling of Brazil presaged the enduring tension between private dominion over property and considerations of the social interest. Portugal began exploring and settling Brazil in the early- to mid-1500s.⁷⁰ Early occupants of Brazil held land under the *sesmaria* system; under this system, settlers held land subject to productive use requirements.⁷¹ Settlers who did not make productive use of lands—the main components of which were occupation, clearing, and cultivation—lost their ownership rights.⁷² Over time, owners of these large rural estates acquired more power and influence and received increased legal protection for their landholdings, regardless of use.⁷³ From the earliest years of settling Brazil, there existed gaps between the formal “legal” records of land holdings and the actual dimensions of land holdings “on the ground.”

68. See, e.g., James Holston, *The Misrule of Law: Land and Usurpation in Brazil*, 33 COMP. STUD. SOC'Y & HIST. 695 (1991). “In short, land law in Brazil promotes conflict, not resolution, because it sets the terms through which encroachments are reliably legalized. It is thus an instrument of calculated disorder by means of which illegal practices produce law and extralegal solutions are smuggled into the judicial process.” *Id.* at 695.

69. The housing market in the United States contains its own examples of illegality and informality, including illegally subdividing apartments, unlawful racial or economic discrimination, squatting in vacant building and in tent cities, or renting buildings that violate housing and building codes. See Duncan Kennedy, *Legal Economics of U.S. Low Income Housing Markets in Light of “Informality” Analysis*, 4 J.L. SOC'Y 71, 81–86 (2002). The United States also has a history of protecting the informal property claims of squatters. See *infra* Part III.C.

70. LEE J. ALSTON ET AL., TITLES, CONFLICT AND LAND USE: THE DEVELOPMENT OF PROPERTY RIGHTS AND LAND REFORM ON THE BRAZILIAN AMAZON FRONTIER 33 (1999).

71. *Id.* at 34.

72. *Id.* Beneficial use of land as a condition of ownership is a feature of early U.S. law as well. See *infra* Part VII.B.

73. For example, the Land Law of 1850 legalized existing possession claims in Brazil, with new land claims available through purchase only. ALSTON ET AL., *supra* note 70, at 35.

The gaps appeared because of the vastness of land, the difficulty of traveling to and accessing the appropriate land bureaucrat, and the acceptability of the custom of productive occupation of land as a primary indicator of ownership.⁷⁴ The gap between formal and informal land ownership claims persisted after Brazil's independence in 1822 and the end of the *sesmaria* system. The gap continues today as a seemingly permanent feature of Brazil's land use laws and policies.

Similar to our own traditions in the United States, the older Brazilian Civil Code described property protections broadly.⁷⁵ Interpretations of the law favored the protection of individual property rights.⁷⁶ There is some evidence that municipal and state entities were deterred from creating laws regulating urban growth that might conflict with this federal law.⁷⁷ Although a concept of adverse possession, or *usucapião*, was included in the Civil Code, it required in most cases a peaceful possession of twenty years.⁷⁸ Moreover, title owners to property could find numerous ways to challenge the peaceful possession of a potential adverse possessor.⁷⁹ The reference to a social function of property in the Constitution of 1934 (and affirmed in subsequent constitutions) reinstitutionalized the productive use paradigm of Brazil's founding and attacked a prevailing, individualistic idea of private property rights.⁸⁰ The term

74. Raquel Rolnik, *The City and the Law: Legislation, Urban Policy and Territories in the City of Sao Paulo 37–38 (1886–1936) (1995) (unpublished Ph.D. dissertation) (on file with author).*

75. “[T]he law assures to the owner the right to use, to profit from and to dispose of his/her goods and to get them back from the power of whoever possesses them unjustly (Civil Code art. 524).” FERNANDES, *supra* note 66, at 52. The Civil Code has since been revised to incorporate a social function of property. See *infra* Part II.D.1.

76. FERNANDES, *supra* note 66, at 52.

[P]artly because of the vagueness of the constitutional precept of social function of property, and more likely because of the conservative and positivist formation of Brazilian jurists and magistrates, the majority of judicial decisions . . . have affirmed the Civil Code as the prevailing legal paradigm.

Id. at 53.

77. *Id.* at 52.

In fact, many judicial decisions on cases involving the enforcement of local urban laws (such as zoning laws) either declared them null and void, on the grounds of the federal government having exclusive legislative power on the subject, or blindly followed the paradigm established by the Civil Code: municipal authorities would have no right to impose restrictions as to the use of the properties by their owners.

Id. at 53.

78. *Id.* at 118.

79. *Id.*

80. *Id.* at 52–53.

“social function of property,” however, was not defined in any useful way until the 1988 Constitution.⁸¹

Brazil became independent from Portugal in 1822. The country was ruled as a constitutional monarchy for nine years, followed by the First Republic from 1889 to 1930. Serious consideration of urban housing issues in Brazil began when industrialization (and accompanying downturns in agriculture) fostered, as in many countries, large-scale migrations of people from rural areas to cities. In Brazil, this began in the 1930s.⁸²

By the early 1960s, the number of Brazilians living in cities surpassed the number residing in rural areas.⁸³ By the year 2000, about 80% of the population lived in urban areas.⁸⁴ Brazilian cities grew in a relatively unplanned manner, and *favela* communities of workers began to spring up on the outskirts of growing cities. There has not been sufficient housing to absorb this rapid urban growth. Between 1995 and 1999, the formal housing market⁸⁵ provided only 16% of the 4.4 million housing units produced during this period.⁸⁶ The informal housing market produced the remaining 3.7 million units.⁸⁷

The Land Statute of 1964 again raised the issue of productivity as a condition of ownership. Under the Land Statute, land that was productive could not be expropriated by the government.⁸⁸ Existing landholders could argue that their land was indeed productive, or they could contest the value of compensation owed by the government. Invoking the Civil Code’s protection of private property rights, the judiciary was often sympathetic to landholders’ claims.⁸⁹

81. *Id.* at 62.

82. Lea Ramsdell, *National Health Policy and the Favela in Brazil*, in *THE POLITICAL ECONOMY OF BRAZIL: PUBLIC POLICIES IN AN ERA OF TRANSITION* 164, 167 (Lawrence S. Graham and Robert H. Wilson eds., 1990).

83. See JOSEPH SMITH, *A HISTORY OF BRAZIL* 226 (2002); see also IRA S. LOWRY, *MUNICIPAL DEVELOPMENT IN PARANA: POLICIES AND PROGRAMS 1981–2001* (2002) (discussing the urbanization of municipalities in the state of Parana following the collapse of the state’s coffee industry in the 1970s).

84. SMITH, *supra* note 83 (putting the figure at just under 80%). Smith also notes that even a higher percentage (88%) of people live in urban areas in Argentina and Chile. *Id.* The World Bank notes that 82% of the population lived in urban areas as of 2000. *PROGRESSIVE LOW-INCOME HOUSING*, *supra* note 60, at 11.

85. The formal housing market is structured by laws and access to credit. In it, builders, lenders, and purchasers transact under terms provided by law. The informal housing market lacks these attributes. People often build homes themselves, and not on land they legally own.

86. *PROGRESSIVE LOW-INCOME HOUSING*, *supra* note 60, at 11.

87. *Id.* In addition, only 40 percent of the urban population at the most will be able to afford finished units from the formal market.” *Id.* at 15. Of the 5.8 million inhabitants of Rio de Janeiro, 1.6 million now live in *favelas* in substandard conditions: 700,000 live in *favelas* and 900,000 in *loteamentos*. *Id.* at 36.

88. ALSTON ET. AL., *supra* note 70, at 46–47.

89. *Id.*

In addition to continuing the work of institutions begun in earlier periods, the 1980s were marked by increased social activism aimed at urban and rural land reform. The Movement of Landless Workers formed during this period and began working in rural areas.⁹⁰ Movements to regularize *favelas* grew during this period, and culminated in the passage of urban reforms as part of the 1988 Constitution.⁹¹

D. *The Meaning of the Right to the City*

The massive urbanization experienced by Brazil, and the failure of Brazilian cities to adequately plan for this population growth, sets the stage for urban spatial competition. The right to the city challenges the previous approaches to land use planning originally dominated by centralized government planning and by private interests with economic and political influence. The right to the city movement has succeeded in changing the rhetoric used in the competitions involving property and has employed discrete strategies “on the ground.” What the right to the city means in Brazil must be determined over time. However, some broad themes are clear: increased citizen involvement in planning cities, planning cities so that all citizens have access to its resources and possibilities, legislative and constitutional support for efforts to achieve this access, and an international movement from which to draw political support. The following Subparts illustrate the right to the city in Brazil at the national level and at the local level.

1. National Efforts—The City Statute

Brazilian military rule ended with civilian elections in 1985, and the country’s most recent constitution was adopted in 1988.⁹² A large social movement of grassroots *favela* organizations, and city residents in general, imposed pressure on the 1988 Convention to include

90. This organization’s national struggle for land reform is chronicled in ANGUS WRIGHT & WENDY WOLFORD, *TO INHERIT THE EARTH: THE LANDLESS MOVEMENT AND THE STRUGGLE FOR A NEW BRAZIL* (2003).

91. *Id.*

92. The 1988 Constitution was drafted at a time when the belief in the transformative power of law was at its height and the Brazilian government played a central role in ordering economic and social development. The government was heavily involved in strategic sectors of the national economy and the military regime had recently ceded power in the face of broad-based opposition demanding a return to the rule of law and popular participation in government.

substantive urban policy provisions, and ultimately, to enact the City Statute.⁹³ The Constitutional Congress set out to create a new paradigm of urban land use that would replace the old Civil Code paradigm of individual property rights:

[T]he survival of the conception of the private property right held by the Civil Code throughout the urbanization process in Brazil—and therefore the limited impact of urban legislation—turned property essentially into a factor of production, which basically constituted an exchange-value. Such a liberal posture relating to the means of access to urban land allowed uncontrolled market conditions to define the possibilities of purchasing land and houses, as well as exploiting natural resources, which were all considered as commodities.⁹⁴

Articles 182 and 183 comprise the 1988 Constitution's chapter on urban policy. Article 182 begins by declaring that "[t]he urban development policy carried out by the municipal government, according to general guidelines set forth in the law, is aimed at ordaining the full development of the social functions of the city and ensuring the well-being of its inhabitants."⁹⁵ Paragraph 2 of this article continues: "Urban property performs its social function when it meets the fundamental requirements for the ordainment of the city as set forth in the master plan."⁹⁶ This section is important because it is the first time that the Constitution has provided any detail as to how the social function of property will be achieved. The 1988 Constitution ties the social function of property to the scope of, and participation in, the master plan process. Each city larger than 20,000 people is required to develop a master plan.⁹⁷

Finally, Article 183 of the constitution sets out the basic scheme for *usucapião* of private land by current squatters: "An individual who possesses an urban area of up to two hundred and fifty square meters, for five years, without interruption or opposition, using it as his or as his family's home, shall acquire domain of it. . . ."⁹⁸ *Usucapião* is not available for squatters occupying public lands. Instead, these squatters may obtain a concession or right to use the land for some period of time for housing.

93. Edésio Fernandes and Raquel Rolnik note that over 130,000 people signed the Popular Amendment on Urban Reform which directly informed the 1988 Constitution's provisions on urban policy. Edésio Fernandes & Raquel Rolnik, *Law and Urban Change in Brazil*, in *ILLEGAL CITIES: LAW AND URBAN CHANGE IN DEVELOPING COUNTRIES* 140, 143 (Edésio Fernandes & Ann Varley eds., 1998).

94. FERNANDES, *supra* note 66, at 58. The 1916 Civil Code was rewritten in 2003. *See id.*

95. C.F. ch. II, art. 182 [Constitution of Brazil].

96. *Id.* ¶ 2.

97. *Id.* ¶ 1. The Constitution also authorizes municipal governments to demand that owners of "unbuilt, underused or unused urban soil" adequately use such land or be subject to compulsory parceling or construction, progressive taxation over time, or expropriation using public money." *Id.* ¶ 4.

98. C.F. ch. II, art. 183.

The Statute of the City, or the City Statute,⁹⁹ implements Articles 182 and 183 of the federal constitution. The City Statute legislation is national legislation with authority over state and municipal affairs. The City Statute legislation also has commensurate legal authority as the Civil Code, which was comprehensively reformed in 2003 and now includes the incorporation of social concepts of property paralleling City Statute measures. The legislation establishes sixteen general guidelines for developing “the social function of the city and of urban property.”¹⁰⁰ These guidelines include, among others, the “right to sustainable cities,” the promotion of community participation in the creation and monitoring of development projects, an emphasis on effective planning of urban areas, and the “regularization of land ownership and urbanization of areas occupied by low income populations.”¹⁰¹ The new legislation imposes a master planning requirement on cities over 20,000 people,¹⁰² implements *usucapião* for private land,¹⁰³ and provides details about the planning process.¹⁰⁴ Parallel to *usucapião*, the City Statute creates a Concession of Law for public lands in which squatters can obtain use rights (as opposed to ownership rights) for public lands that they occupy.¹⁰⁵

Brazil’s City Statute incorporates Lefebvre’s principles. The City Statute incorporates the concepts of participation through its requirement of master planning in urban areas. It incorporates the concept of appropriation (the use or occupation of urban space) in its granting of *usucapião* rights to squatters in *favela* communities.

99. *Estatuto da Cidade* [The Statute of the City], Lei No. 10.257, de 10 de julho de 2001, D.O.U. de 11.07.2001. (Brazil).

100. *Id.* ch. I, art. 2. “Urban property fulfills its social function when it meets the basic requirements for establishing order for the city expressed in the master plan, assuring attending the needs of the citizens concerning quality of life, social justice and development of economic activities. . . .” *Id.* ch. III, art. 39.

101. *Id.* ch. I, art. 2.

102. *Id.* ch. III, arts. 39–42.

103. *Id.* ch. II, § V, art. 9. Areas larger than 250 square meters can be claimed by collective bodies. *Id.* ch. II, § V, art. 10. Possessors can tack their period of possession to periods of earlier possessors in order to satisfy the *usucapião* five year requirement. *Id.*; see also Ellade Imperato, *Security of Tenure in São Paulo, in HOLDING THEIR GROUND*, *supra* note 61, at 127, 134 (“The importance of securing tenure goes beyond achieving the social function of urban property to fighting the social and spatial apartheid faced by Brazilian cities.”).

104. Lei No. 10.257, ch. II, § I, art. 4; see PROGRESSIVE LOW-INCOME HOUSING, *supra* note 60, at 22. The City Statute also contains provisions amplifying local governments’ power to tax underutilized land. See Lei No. 10.257.

105. See *Medida Provisória* [Provisional Measure] No. 2.220 ch.I, arts. 1–9, de 4 de setembro de 2001, D.O.U. de 05.09.2001. (Brazil); see also Ramsdell, *supra* note 82, at 183. The Concession of Use Law (*Concessão de Uso*) provides some stability to possessors without a legal transfer of land ownership. Provisional Measure No. 2.220. *Favela* lands are often primarily publicly owned, and *usucapião* is not available for public lands.

Regularization and titling programs also generally reflect this emphasis on the inhabitants and occupiers of the physical space of the city.

2. Local Efforts—Pro-favela and Participatory Budgeting

The national land use provisions of the 1988 Constitution parallel and reinforce similar land use reform efforts at the local level. Since 1934, a tension has existed between the individualistic concepts of the 1916 Civil Code and the vague mentions of the social function of property in the 1934 Constitution. Between 1934 and 1988, localities legislated sparingly on the issue—Belo Horizonte's pro-favela legislation is one example¹⁰⁶—but the 1916 Civil Code provisions remained in effect.¹⁰⁷ Moreover, vacillations between central government and local government control made local land use law all the more unpredictable.

Many of the tensions involved in titling programs can be observed in the pro-favela legislation in Belo Horizonte.¹⁰⁸ In 1955,

106. Other cities provide notable examples of successful local land use reforms. In Rio de Janeiro, the *Favela Bairro*, or Slum to Neighborhood, Program was created in 1993. See Rabello de Castro, *supra* note 67, at 151, 155–56. It is a local program designed to improve favela conditions through infrastructure improvements, title registration, and social development initiatives. See *id.*; see also Ronald E. Ahnan, *Democracy and Homelessness in Brazil*, in INTERNATIONAL PERSPECTIVES ON HOMELESSNESS 239, 250–51 (Valerie Polakow & Cindy Guillean eds., 2001) (describing the *Favela Bairro* Program). Ahnan describes other Rio projects, such as the *Morar sem Risco*, or Live without Risk Project, to relocate people living in dangerous areas (muddy hillsides, along highway entrance, and exit ramps) and a credit program that subsidizes loans for home ownership (*Morar Carioca* or Live Carioca project). Ahnan, *supra*, at 251. The Cingapura program replaces slum areas with newly built apartment homes in São Paulo, where favela residents have increased from 72,000 to 1.9 million between 1973 and 1999. See *id.* Only half of the city's residents live in standard housing. PROGRESSIVE LOW-INCOME HOUSING, *supra* note 60, at 42.

107. See e.g., Committee on the Elimination of Racial Discrimination (CERD) Concluding Observations: Brazil, Aug. 19, 1996, <http://sim.law.uu.nl/SIM/CaseLaw/uncom.nsf/0/e3f24fc5e6c10ac7c12566c5003360d2?OpenDocument> (expressing special concern about the unfair treatment of the indigenous populations in land demarcation and distribution under the 1916 Civil Code and suggesting that Brazil adopt fair and equitable solutions for the demarcation, distribution and restitution of land).

108. PRO-FAVELA (PRO-FAVELA-Programa Municipal de Regularizacao or the Municipal Program for the Regularization of Favelas) was created under Law no. 3.532 of January 6, 1983. A predecessor program, PRODECOM, focused on improving the infrastructure of existing favelas. FERNANDES, *supra* note 66, at 123–24. Lasting only four years, the program recognized the right of favela dwellers to remain on their land, but did not attempt to confer legal title on these residents. *Id.* The pro-favela legislation contained some restrictions on sale of new, legalized plots. *Id.* It also eased the financial burden on new owners by exempting them from local taxes for the first five years. *Id.* “The resistance to PRO-FAVELA should perhaps be attributed to the powerful, though still little understood, ideological action of the magic concept involved—property—which has always provoked all sorts of unfounded feats, defensive attitudes and irrational gestures.” *Id.* at 127.

7% of the city lived in *favelas*. By 1990, an estimated 25%, or 600,000 city residents, lived in *favela* communities.¹⁰⁹ *Favela* communities in Belo Horizonte have shared common difficulties with *favela* communities throughout Brazil. In early years, difficult geographic areas were reserved for *favela* communities, but those communities were later relocated when the land was needed for other purposes or under the guise of urban renewal and modernization.¹¹⁰ The titling process is slow. Between 1983 and 1987, property titles had been regularized in only fifteen *favela* communities.¹¹¹ Additionally, the slow pace of social change is one result of the tendency of governments to co-opt and stall the leadership of grassroots movements with promising, but ultimately empty, reforms of the law that are never fully implemented.¹¹² On the other hand, the longtime presence of the *favela* communities makes their removal difficult. In many instances, title owners (to the extent they can be positively identified) seem resigned to some sort of compromise in which their property is purchased from them in an eminent domain-like transaction.¹¹³ In addition to titling properties, the pro-*favela* program incorporated *favela* communities into the legal land use structure by creating a special urban zone comprising *favela* communities.¹¹⁴ One reason that *favela* communities have remained informal and illegal is that they are often excluded from official recognition under zoning laws and in master planning efforts. *Favela* communities traditionally had not been the beneficiaries of more progressive interpretations of the "social function of property" because, as invaders, the residents had few legal rights to the land.¹¹⁵ Pro-*favela* was the beginning of granting legal rights to *favela* communities. One of the accomplishments of the 1988 Constitution was to legalize and legitimize local attempts to legislate a social function of property.¹¹⁶

109. *Id.* at 112–13.

110. *Id.* at 114. One program, the *Coordenação de Habitação de Interesse Social* (CHISBEL)(Coordination of Housing of Social Interest) removed some 43,000 people from 423 invaded areas. *Id.* at 115. Fernandes also notes that the pattern of growth of Belo Horizonte was typical of other cities and is a primary cause of *favela* creation: "intensive migration, restricted conditions of access to land and housing; high costs of housing production and of urban services, aggravated even further by inflation; unequal (and unfair) patterns of income distribution; real property treated as exchange value; extensive hoarding of idle land; and an intense speculation process." *Id.* at 127.

111. *Id.* at 124. The Author notes that not many *favela* communities have been legalized by 1995 either. *Id.* Resistance by local authorities and property owners was offered as the main source of delay. *Id.*

112. *Id.* at 126.

113. *Id.* at 127.

114. *Id.* at 121.

115. *Id.* at 127.

116. *Id.* at 122.

Titling programs carry benefits¹¹⁷ and costs.¹¹⁸ Community residents living under an informal system for a long time may be unsure whether informal or formal laws will govern a specific property dispute, thereby increasing uncertainty, and violence may occur between squatters and owners competing for government recognition.¹¹⁹ The potential challenges to titling programs amplify the need for sound, comprehensive planning to manage future conflicts¹²⁰ and illustrate the tension between individual property and social property claims. Because *favela* residents obtain legal title to their property as a result of these programs, these residents are able to make economic choices that may negatively impact neighbors. The commodification of property that accompanies infrastructure improvements and legal recognition of ownership enables *favela* residents to sell their legalized lots and potentially drive up housing prices in the *favela* community. If current residents can sell their homes and take the value of infrastructure improvements (or subsidies) away in cash, their housing units become unaffordable to other poor people with housing needs.¹²¹ Additionally, without the need to protect possession through occupancy, newly titled properties may be rented out for income

117. For example, Erica Field studied a property titling program in Peru “in which 1.2 million property titles were distributed to urban squatters on public land, the largest urban property rights reform that has occurred in the developing world” Erica Field, *Property Rights, Community Public Goods, and Household Time Allocation in Urban Squatter Communities: Evidence From Peru*, 45 WM. & MARY L. REV. 837, 839 (2004). The titling program, COFOPRI (Committee for the Formalization of Private Property) and government legislation granted formal legal title to Peruvians squatting on public land largely lying on city peripheries. *Id.* at 846–47. This program has led to increased economic activity outside of the home due to the reduced need for families to self-protect their residential property claims. *Id.* at 841. Field also finds microeconomic support for the increased use of formal law to resolve neighborhood conflicts and a decreased participation in informal community systems of public goods provision (such as roads, parks, electricity, land allocation, and property security). *Id.* at 837.

118. [I]n an irregular settlement, many, if not all, properties may be untitled and the implementation of a formal system of property rights may well replace a preexisting and possibly well-functioning informal system; benefits may not accrue when accompanying markets do not function well; there may be multiple, preexisting, legal owners of the land that has been settled or developed informally, some of whom are private; the government may be unable to refrain from future titling, thereby encouraging additional squatting.

Jean O. Lanjouw & Philip Levy, *A Difficult Question in Deed: A Cost-Benefit Framework for Titling Programs*, 45 WM. & MARY L. REV. 889, 904 (2004).

119. *Id.* at 905.

120. *Id.* at 949–50.

121. See PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 403–13 (1968) (describing the practice of western settlers selling their holdings and debates about restricting the alienability of land acquired under the Homestead Act of 1862).

purposes, thereby decreasing the likelihood that these properties will be owner occupied¹²² and increasing the possibility of capital outflow from the community. These fears could be minimized by accumulation and exit restraints on those *favela* residents benefiting from economic assistance.

Since 1989, citizens in Porto Alegre, Brazil, have been able to directly engage in distributing public resources through a participatory budgeting process.¹²³ This process consists of a series of assemblies during which city residents can propose and prioritize the targets of budget distributions.¹²⁴ City residents elect delegates to manage the finer details of budget proposals as the process continues. The initial large scale meetings are held in regional assemblies, designated largely by existing community boundaries.¹²⁵ Another participatory regime organized around thematic forums allows interests without specific geographic ties, such as unions, environmental organizations, and business organizations, to participate in the budgeting process.¹²⁶ The thematic forums address citywide issues and include education, health and social services, transportation, organization of the city, and economic development.¹²⁷

These national and local efforts in Brazil to achieve a right to the city illustrate the promise and challenge of contesting individualized conceptions of property. These efforts suggest that broad-based, national schemes, supported by international scholars and advocacy organizations, can stimulate and inform local implementation efforts. At the local level, urban inhabitants with competing claims to formal, legal property rights engage in conversations through innovative and ambitious programs that critically examine prevailing property allocations. International and national advocacy creates the opportunity for these conversations to occur, but local officials and urban inhabitants must sort through the competing tensions associated with implementation.

122. Drawing on empirical research of a titling program in Guayaquil and Quito in Ecuador, the authors found that "titled properties were more than twice as likely as untitled properties to be occupied by someone other than the owner." Lanjouw & Levy, *supra* note 118, at 915.

123. REBECCA ABERS, *INVENTING LOCAL DEMOCRACY: GRASSROOTS POLITICS IN BRAZIL 2* (2000).

124. *Id.*

125. *Id.*

126. *Id.* at 2-3.

127. See generally ABERS, *supra* note 123; REBECCA ABERS, *INVENTING LOCAL DEMOCRACY: NEIGHBORHOOD ORGANIZING AND PARTICIPATORY POLICY-MAKING IN PORTO ALEGRE, BRAZIL* (1997).

III. APPLICATION OF THE RIGHT TO THE CITY—THE UNITED STATES

A. *Individual and Social Conceptions of Property*

Establishing a right to the city first involves loosening the hold of an individualized conception of property. Two conceptions of property—one viewing private rights largely in terms of an individual owner and the other emphasizing the social context of property—compete for recognition in the law.¹²⁸ In the United States, a view of property based on the rights and protections due an individual owner—an ownership model—has largely prevailed and frames most legal and political conversations. Within these boundaries, scholars debate the dangers of overly fragmenting property rights,¹²⁹ theories underlying property's coherence,¹³⁰ informal property arrangements,¹³¹ unifying approaches,¹³² and intermediate variations.¹³³

128. Zoning laws illustrate one example of the struggle between the two conceptions of property. The earliest defenses of zoning recognized the necessity of regulating individual property development decisions for the public good, but the ultimate justification of this regulation was the protection of private property values for a privileged few. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926); see also Arthur V.N. Brooks, *The Office File Box: Emanations from the Battlefield*, in *ZONING AND THE AMERICAN DREAM* 3, 7 (Charles M. Haar & Jerold S. Kayden eds., 1989) ("Thus were the battle lines drawn by two forceful advocates: Zoning seen either as a protection against the encroachment of urban blight and danger, or as the unrestrained caprice of village councils claiming unlimited control over private property in derogation of the Constitution."); Richard H. Chused, *Euclid's Historical Imagery*, 51 *CASE W. RES. L. REV.* 597 (2001).

129. In commons regimes, access to a resource by a large number of people generally leads to overuse of the affected resource because resource users are not forced to internalize all the costs of their use. See Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968) (providing a seminal study in this area). In the anticommons, property ownership is overly fragmented leading to inefficient under-use of affected resources. Frank I. Michelman, *Ethics, Economics, and the Law of Property*, in *NOMOS XXIV: ETHICS, ECONOMICS AND THE LAW* 3, 6, 9 (1982) (The origin of the anticommons idea is attributed to this piece by Michelman); see also Michael Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 *HARV. L. REV.* 621 (1998).

130. See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 *YALE L.J.* 1 (2000) (exploring the benefits of a limited number of property forms under the *numerus clausus* principle).

131. See, e.g., Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 *STAN. L. REV.* 623 (1986) (discussing how neighbors handle cattle trespass issues); Andrea McDowell, *Real Property, Spontaneous Order, and Norms in the Gold Mines*, 29 *L. & SOC. INQUIRY* 771 (2004) (discussing California gold miners).

132. Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 *CORNELL L. REV.* 531 (2005) (arguing that property law is important to create and protect value of stable ownership); Craig Anthony Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 *HARV. ENVTL. L. REV.* 281 (2002) (proposing rethinking the bundle of sticks metaphor as a web of interests); Adam Mossoff, *What is Property?*

Property theory determines how lawyers and policymakers think about urban issues and imagine solutions. Solutions to longstanding urban inequality and conflict are limited by prevailing conceptions of individualized property rights centered on a particular owner. An alternative social relations view of property has challenged prevailing rules of property absolutism by focusing less on rigid definitions of the property entitlements of a single owner and more explicitly on definitions of property rights that consider a broader context of social relationships.

In contrast to the legal adoption of the social function of property in Brazil, the dominant view of property in legal and lay discourse in the United States extols the virtues of individual, private property.¹³⁴ It is not necessary to have attended law school or to have spent serious time studying the U.S. Constitution to know from everyday culture that private property cannot be taken without compensation.¹³⁵ From this clearly delineated perch, private property rights are, in the purist sense, absolute. Governmentally-imposed limitations on these rights are often labeled overreaching. This absolute view persists as an expression of possessive individualism which Joan Williams defines as “the notion that free-standing individuals with (property) rights making choices will create the best society if they are left to pursue their own self-interest.”¹³⁶

This idea of property has a significant foothold in popular U.S. culture and policy. This concept of property is powerful because it largely forecloses serious consideration of alternative property arrangements. Another way of examining property relationships is to focus on the relationships and interconnections between individuals—a so called “social relations” view of property.¹³⁷ Although many

Putting the Pieces Back Together, 45 ARIZ. L. REV. 371 (2003) (proposing an integrated theory of property).

133. See e.g., William H. Simon, *Social-Republican Property*, 38 UCLA L. REV. 1335, 1336 (1991) (describing property conditioned on participation in community and provisions limiting inequality among community members).

134. See e.g., BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 98–100 (1977); JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 1–2 (2000) (describing property rights legislation of the 1990s, deregulation, and the dismantling of the New Deal and the welfare state); Steven J. Eagle, *The Development of Property Rights in America and the Property Rights Movement*, 1 GEO. J.L. & PUB. POLY 77 (2002) (calling for increasing delineation of property rights to curb perceived government overreaching of individual property rights); Heller, *supra* note 129, at 660–61 (“People seem to know private property when they see it However, the everyday perspective on property masks its mysterious character.”).

135. U.S. CONST. amend. V.

136. Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 284–90 (1998).

137. Writing about natural resources and takings law, Joseph Sax compares

the traditional view of property rights, which focuses solely on activities occurring within the physical boundaries of the user’s property, with a view

scholars and lawyers would undoubtedly agree that property law must be attentive to relationships among people, in the United States the creation and interpretation of property laws tend not to be infused with an express relational or social foundation.

Instead of beginning from a position of individual, absolute property entitlements and then observing how laws and relationships affect these basic entitlements, a social function of property begins from the outside and seeks to determine what property protections and restrictions are appropriate given the social context. This approach requires individuals and institutions giving content to property definitions to articulate a particular rationale or context for property decisions. The right to the city movement and its articulation of a social function of the city provides such a context.

The work of Joseph Singer and Margaret Radin illustrate a social approach to property law.¹³⁸ Under this approach, decision-makers should use their judgment to construct what property law should be in light of the particular social context rather than taking property law as it appears and deciding whether or not to protect a certain rule or find a reason for an exception.¹³⁹ There may be costs associated with overvaluing the “rights” of the informal property claimants, but there are also costs arising from ignoring competing rights in favor of efficiency concerns or maximizing overall welfare.¹⁴⁰ Similarly, Radin’s work elevates personhood property—property that is more closely linked with the identity of the owner—over fungible property.¹⁴¹ Indeed, “government should rearrange property rights so

founded on the recognition of the interconnectedness between various uses of seemingly unrelated pieces of property. Once property is seen as an interdependent network of competing uses, rather than as a number of independent and isolated entities, property rights and the law of takings are open for modification.

Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 150 (1971).

138. SINGER, *supra* note 134, at 213–16.

139. *Id.* at 215. Singer also develops a reliance theory of property. See Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 635–36 (1988). To support his claim for an expanded view of property, Singer traces the reliance interest in areas of existing property law like adverse possession, easements, custom, the public trust doctrine, linkage programs, landlord tenant relationships, mortgage law, and marriage. *Id.*

140. Singer makes no claim of the superiority of the formal or informal property claim, instead discussing rights and efficiency approaches to property questions. See SINGER, *supra* note 134, at 117. He concludes that rights theorists generally ignore consequential considerations and that efficiency thinkers omit judging between competing rights in favor of maximizing overall welfare. *Id.*

141. Many scholars and political thinkers have emphasized the importance of property in defining a person and insulating that person from the pressure of the state and from other people. See, e.g., BLOMLEY, *supra* note 27, at 89 (describing the philosopher Hegel’s nexus between property and personal freedom and concluding, “[i]t follows, then, that those who do not own property (or, more importantly, those that are

that the fungible property of some people does not overwhelm the opportunities of the rest to constitute themselves in property."¹⁴² It is possible to conceive of a model of property that allocates property rights and protections on a different basis than the prevailing, individualized model. The challenge for this alternative model is to articulate a theory to support what social context is appropriate for defining particular property relationships.

B. *Planning for Affordable Housing*

Considering the emphasis on municipal planning in the Brazilian example, this Subpart considers reforms to existing housing planning laws in the United States as one step in considering what a right to the city would mean in the United States.¹⁴³ Subpart C, exploring occupation claims, considers how cities might best manage conflicting private and public claims to troubled, unproductive property. It concludes that land banks and related efforts offer a more pragmatic approach to claiming underutilized land than encouraging squatters to appropriate these spaces.

The interesting question for the United States is how housing planning and land use would change under a right to the city. Professor John Payne partially considers this question in his analysis of whether an inclusionary-housing judicial decision in New Jersey established a state constitutional right to housing.¹⁴⁴ This decision,

imagined as non-owners) are not only incomplete citizens, but partial or deformed subjects"); Akhil R. Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL'Y 37 (1990).

142. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 990 (1982).

143. Other affordable housing strategies may be consistent with a social function of property or a social function of the city. Some strategies may have explicit "social" attributes, such as low-income housing cooperatives. Other strategies may have more implicit connections to "social" attributes. For example, some neighborhoods are successful in negotiating community benefits agreements requiring local employment and housing benefits in exchange for supporting nearby commercial and residential development. See, e.g., Madeline Janis-Aparicio & Roxana Tynan, *Power in Numbers: Community Benefits Agreements and the Power of Coalition Building*, 144 SHELTERFORCE ONLINE, Nov.-Dec. 2005, <http://www.nhi.org/online/issues/144/powerinnnumbers.html>. This benefits agreement approach illustrates, in part, a strategy recognizing low-income residents aspirations for presence and opportunity in a gentrifying city. The right to the city movement encourages such aspirations. *Id.* This Article selects just two of many approaches that illustrate the potential for the successful application of the right to the city in the United States. *Id.* These two approaches—affordable housing planning statutes and land bank strategies—exemplify methodologies focusing on advance planning of a jurisdiction's regulation of property relationships and a creative management of these same property relationships.

144. John M. Payne, *Reconstructing the Constitutional Theory of Mount Laurel II*, 3 WASH. U. J.L. & POL'Y 555 (2000).

commonly referred to as *Mount Laurel II*,¹⁴⁵ features a rather remarkable moral and legal justification for adopting inclusionary zoning in New Jersey to create more affordable housing.¹⁴⁶ It is worth quoting at least one portion of the decision Payne focuses on at length:

It would be useful to remind ourselves that the [*Mount Laurel*] doctrine does not arise from some theoretical analysis of our Constitution, but rather from underlying concepts of fundamental fairness in the exercise of governmental power. The basis for the constitutional obligation is simple: the State controls the use of land, all of the land. In exercising that control it cannot favor rich over poor. It cannot legislatively set aside dilapidated housing in urban ghettos for the poor and decent housing elsewhere for everyone else. The government that controls this land represents everyone. While the State may not have the ability to eliminate poverty, it cannot use that condition as the basis for imposing further disadvantages. And the same applies to the municipality, to which this control over land has been constitutionally delegated.¹⁴⁷

A second paragraph describes the results of poor people “forever zoned out of substantial areas of the state, not because housing could not be built for them but because they are not wanted. . . .”¹⁴⁸ It concludes by saying this land use pattern “is at variance with the requirement that the zoning power be used for the general welfare. . . .”¹⁴⁹

This passage is noteworthy because it likely describes the contours of a right to the city in the United States. A right to the city, with its incorporation of a right to housing, means at least that the government may not “impose[] further disadvantage” on persons seeking shelter.¹⁵⁰ Furthermore, the zoning power exercised by a local municipality arises from the state’s grant of police power to the local municipality to regulate for the general welfare. Regulation for the general welfare is explicitly “social” in that it forces governments to take into account not only individual property interests, in the case of land use regulation, but also the needs of the greater community.¹⁵¹ If a large segment of the community is excluded from affordable housing opportunities, and if the state police power is

145. *Southern Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983).

146. The *Mount Laurel* litigation involved several cases: *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975) (*Mount Laurel I*); *Southern Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983) (*Mount Laurel II*); and *Hills Dev. Co. v. Township of Bernard*, 510 A.3d 621 (N.J. 1986). Following the *Mount Laurel* litigation, the New Jersey Fair Housing Act of 1985 created the Council on Affordable Housing. New Jersey Fair Housing Act, N.J. STAT. ANN. § 52:27D-301 et seq.

147. *Mount Laurel II*, 456 A.2d at 415.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

being used to foster this exclusion, then this exercise of the police power cannot be congruent with the general welfare.¹⁵²

Professor Payne concludes that *Mount Laurel II* establishes a conditional right to shelter.¹⁵³

A 'conditional' right . . . is one that cannot as a practical matter be exercised free of entanglement with a larger set of social systems in which the collective citizenry has a strong and legitimate claim 'Conditional' rights, in other words, trigger a balancing test.¹⁵⁴

In Brazil, for example, this balancing test would compare individual claims of shelter with other competing claims to the city. Such a conflict might arise in the case of squatter claims to environmentally sensitive land. Sometimes the individual claim to shelter will lose, "but the fact that there is a constitutionally recognized and protected right in the balance insures that the balance will not be struck hastily or insensitively."¹⁵⁵

This last point emphasizing the value of including a "right" within "the balance" of the decision shares some overlap with provisions in the World Charter. A violation of the right to the city occurs when the government or other institutions obstruct "the participation of inhabitants . . . in urban management, or the participation in the implementation of decisions and priorities defined in the participative processes that make up the life of the city."¹⁵⁶ The existence of participative processes suggests that sometimes claims for shelter will not be granted; this result is not due to haste or insensitivity, but rather thoughtful deliberation in which the claimant has a voice. Thinking more broadly about what the right to the city would mean in the United States, the concepts of "voice" and "sensitivity" could be applied generally to evaluate affordable housing planning programs.

In the United States, there is no federal statutory equivalent to the City Statute requiring local governments to engage in city planning. As a practical matter, however, many cities engage in some type of planning process as a condition of receiving federal funds for housing and other services for lower income communities. For example, the Community Development Block Grant¹⁵⁷ and the HOME Investment Partnership¹⁵⁸ programs require that recipient

152. Payne, *supra* note 144, at 558.

153. *Id.* at 569. He admits, however, that this view is "unconventional." *Id.* at 582.

154. *Id.* at 570.

155. *Id.*

156. World Charter, *supra* note 1, art. XXI.

157. Community Development Block Grant, 42 U.S.C. § 5301 et seq. (1988).

158. HOME Investment Partnership, 42 U.S.C. §§ 12741-774 (2005).

cities prepare a Consolidated Plan (ConPlan).¹⁵⁹ The ConPlan requires cities to analyze the local housing market, prepare strategies to create additional affordable housing, identify barriers to the development of affordable housing, and develop means to monitor and measure affordable housing production.¹⁶⁰ Community-based organizations can use ConPlan requirements, particularly those requiring local governments to include residents in the preparation of the plan (and document efforts to facilitate participation), to mobilize residents in addressing longer-term affordable housing plans and near term proposals.¹⁶¹

State planning statutes in the United States provide the closest comparison to the municipal planning required under the City Statute. Land use planning requirements vary among the states.¹⁶² Some states require local jurisdictions to engage in a formal planning process.¹⁶³ Some states make the planning process optional or conditional.¹⁶⁴ States also vary in the degree of planning required of local jurisdictions. Some statutes go into great detail about specific elements jurisdictions must include in their plans, including issues of affordable housing, homelessness, and migrant worker housing.¹⁶⁵ Other statutes are much less directive. In states where land use decisions must be consistent with underlying master plans, these statutory schemes force decision makers to consider how land use and property decisions affect these social goals. Finally, the enforcement of these planning requirements varies. In some states plans are encouraged by fiscal carrots and sticks.¹⁶⁶ In others, private citizens and institutions representing affordable housing interests can enforce statutory planning requirements in court.¹⁶⁷ Statutory schemes permitting affordable housing developers to appeal development denials and statutes requiring affordable housing be included with

159. 24 C.F.R. § 91.1 et seq. (2005).

160. 24 C.F.R. §§ 91.205–91.220.

161. 24 C.F.R. § 91.105.

162. The American Planning Association studied planning and zoning laws across the United States and proposed model provisions. See AMERICAN PLANNING ASSOCIATION, LEGISLATIVE GUIDEBOOK (2002); see also STUART MECK ET AL., REGIONAL APPROACHES TO AFFORDABLE HOUSING (2003).

163. See, e.g., FLA. STAT. ANN. §§ 163.3161–.3215 (West 2000 & Supp. 2006).

164. See, e.g., ARIZ. REV. STAT. ANN. § 9-461.01-.05 (1996) (conditioning development of a general plan on the creation of a planning department).

165. See, e.g., CAL. GOV'T CODE §§ 65580–85 (West Supp. 2006). Additionally, twenty-five state statutes contain some authority that a local comprehensive plan contain a housing element. *Summary of State Statutory Requirements for Comprehensive Plans*, in AMERICAN PLANNING ASSOCIATION, *supra* note 162.

166. See, e.g., FLA. STAT. ANN. § 420.9072(2)(a) (stating that eligibility for State Housing Initiatives Partnership funds requires preparation of a local housing assistance plan).

167. See, e.g., CAL. GOV'T CODE § 65587(b)–(c) (West 1997).

market-rate development represent additional strategies designed to create space in the city for those with little or no formal property.¹⁶⁸

A threshold question is how the concepts of voice and sensitivity are valued currently. Voice can be protected through resident participation and enforcement provisions. Several statutes contain provisions mandating that local governments establish written procedures for resident participation.¹⁶⁹ Redevelopment plans often require resident participation as well.¹⁷⁰ The right to the city would include broad-based participation in planning decisions but would likely go further to make sure that the results of the decision making process are implemented.

States currently approach enforcement in different ways. A state like California includes strong enforcement language within the statute, authorizing a state agency to halt development until a plan is adopted that meets statutory requirements.¹⁷¹ The statute also includes a private right of action of enforcement.¹⁷² Actual enforcement by the courts, however, is not as strong as the statutory language suggests.¹⁷³ New Jersey employs a much stronger enforcement procedure. Jurisdictions that complete a housing planning process approved by a state administrative agency, the Coalition on Affordable Housing (COAH), are immunized from a builder's remedy in which a developer agreeing to include a certain number of affordable housing units can challenge any local land use decision denying their project.¹⁷⁴ The harshness of the builder's remedy is designed to be an incentive for local jurisdictions to adopt comprehensive housing plans to avoid its imposition.

The concept of sensitivity is best expressed through the detail of planning required by the housing statute. California requires a significant amount of detail, obligating each local jurisdiction to plan for its share of a regional affordable housing need.¹⁷⁵ Jurisdictions must analyze the condition of their housing stock, regulatory and other barriers to affordable housing development, housing needs for

168. For a description of this appeals process in Massachusetts and other states in New England, see Symposium, *Increasing Affordable Housing and Regional Housing Opportunity in Three New England States and New Jersey*, 23 W. NEW ENG.L.REV. 3 (2001).

169. See ARIZ. REV. STAT. ANN. § 9-461.06 (Supp. 2005); FLA STAT. ANN. § 163.3181 (West 2000).

170. See Benjamin B. Quinones, *Redevelopment Redefined: Revitalizing the Central City with Resident Control*, 27 U. MICH. J. L. REFORM 689 (1994).

171. See CAL. GOV'T CODE § 65754.5(c) (West 1997).

172. See CAL. GOV'T CODE § 65587(b)-(c) (West 1997).

173. Both a public and a private right of action exist to enforce the California planning statute but they have proven weak measures. See Ben Field, *Why Our Fair Share Housing Laws Fail*, 34 SANTA CLARA L. REV. 35-50 (1999) (noting that strong statutory prose has not cured California's housing ills).

174. See N.J. STAT. ANN. § 52:27D-317 (West 2001).

175. See CAL. GOV'T CODE § 65584 (West 1997 & Supp. 2006).

populations with special needs, and measures to preserve existing affordable housing.¹⁷⁶ Jurisdictions must also inventory land suitable for residential housing on a site-specific basis.¹⁷⁷

A right to the city would also include some assurances that the planning decisions of one jurisdiction would not adversely affect a nearby jurisdiction. Both California and New Jersey include requirements that local jurisdictions consider the regional or statewide need for affordable housing and plan accordingly for their fair share of affordable housing needs. In California, regional agencies develop the fair share allocations of local municipalities.¹⁷⁸ In New Jersey, COAH determines each local jurisdiction's proportionate fair share of affordable housing.¹⁷⁹ The *Mount Laurel II* court described the fair share requirement:

We conclude that every [developing] municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity . . . for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefor.¹⁸⁰

The planning experience in New Jersey illustrates one of the obstacles to effective planning for spaces where lower-income people can live in the city. The enforcement "stick" of the builders' remedy may lead to the creation of more housing plans, but it does not necessarily lead to better planning.¹⁸¹ Considering the title reform programs in Brazil, forcing cities through provisions of the City Statute to prepare general plans as well as to regularize informal communities may not necessarily lead to better-planned cities. To the extent that regularization goals conflict with other land use goals (such as environmental protection or transportation concerns), the

176. See CAL. GOV'T CODE § 65583(a)(1)–(8) (West Supp. 2006).

177. See CAL. GOV'T CODE § 65583.2(a) (West Supp. 2006).

178. See CAL. GOV'T CODE § 65584 (West Supp. 2006). These regional councils of government develop fair share allocations in consultation with the State Department of Housing and Community Development. See *id.*

179. See N.J. STAT. ANN. § 52:27D-307c(1) (West 2001). The formula for calculating a jurisdiction's "fair share" of affordable housing was recently changed to a "growth share" approach requiring affordable housing planning proportional to projected market rate unit construction (one affordable housing unit for every eight market rate units) and job creation (one affordable housing unit for every twenty-five newly created jobs). N.J. ADMIN. CODE tit. 5, § 5:94-2.1. For further discussion of the growth share concept, see John M. Payne, *Remedies for Affordable Housing: From Fair Share to Growth Share*, 49 LAND USE L. & ZONING DIG. 3–6 (1997).

180. *S. Burlington NAACP v. Twp. of Mount Laurel*, 336 A.2d 713, 724 (N.J. 1975).

181. See Daniel R. Mandelker, *The Affordable Housing Element in Comprehensive Plans*, 30 B.C. ENVTL. AFF. L. REV. 555, 562–63 (2003).

quality of the planning process and the care with which a city evaluates competing claims to city space will be equally important.

The process of planning sites for affordable housing within cities is similar to the process of granting property rights to squatters in cities. Both approaches recognize that without planning or property protection, the poor would be excluded from urban space. The variation in planning requirements reflects the struggle in the United States to realize a social function of property and a social function of the city. These two social concepts are illustrated by (1) planning statutes like California's that mandate that cities plan for affordable housing with specificity and (2) other statutes like New Jersey's that determine local jurisdictions' fair share of affordable housing responsibility. But these planning statutes can go further in implementing the right to the city. For example, planning statutes should require measurable outcomes,¹⁸² and financial resources should be available to implement affordable housing planning goals.¹⁸³

The Brazilian experience is helpful in reevaluating the planning experience in the United States because Brazil explicitly connects the planning and land use process to property definitions. Rather than beginning from an ownership conception of property and evaluating its expression or diminution through public laws regulating land use, the City Statute contemplates the creation of property definitions and land use definitions concurrently. In this way, the master planning process gives content to the social function of property. In the United States, planning and zoning are considered in terms of how they will affect preexisting rights of ownership. The City Statute views the interaction through a different lens: how does planning create property rights?

C. Occupation Claims—Squatters and Land Banks

A right to the city applied in the United States or in Brazil forces legal decision makers to determine how to reconcile the claims of squatters with other claimants to city space. As in Brazil, squatters have a long history within the United States. This Subpart acknowledges the force of squatter claims to a right to the city, but ultimately concludes that a land bank strategy better balances

182. See Edward G. Goetz et. al., *The Minnesota Land Use Planning Act and the Promotion of Low-and-Moderate-Income Housing in Suburbia*, 22 LAW & INEQ. 31 (2004) (discussing competing figures for affordable housing planning requirements in Minnesota).

183. Florida's State Housing Initiatives Partnership program (SHIP) is dedicated to affordable housing development. See FLA. STAT. ANN. § 420.9072 (West Supp. 2006).

competing claims on city space and affords a more pragmatic and powerful tool to achieve the right to the city in the United States.

The United States has its own history of debate over the merits of informal claims to property. This debate is not always framed within an individualized, ownership model. Gregory Alexander notes that the property-as-commodity conception is a relatively new one, and that "property-as-propriety" existed previously: "The core of this conception is the idea that property is the material foundation for creating and maintaining the proper social order, the private basis for the public good."¹⁸⁴ Not anti-market, property-as-propriety merely places a higher value on some conception of the social good than on the market.¹⁸⁵

Land squatting and the legalization of squatter claims have been present since the earliest days of the formation of the United States.¹⁸⁶ Hernando de Soto notes the similarities between the early development of the United States and the current status of developing countries throughout the world grappling with creating property institutions:

[T]he transition to integrated legal property systems . . . had to do with adapting the law to the social and economic needs of the majority of the population. Gradually, Western nations became able to acknowledge that social contracts born outside the official law were a legitimate source of law and to find ways of absorbing these contracts. . . . Moreover, this property revolution was always a *political* victory."¹⁸⁷

Colonies and, later, states passed statutes requiring owners to pay squatters the value of improvements made to land in the squatters' possession.¹⁸⁸ Squatters could also purchase land if the legal owner was unwilling to pay the value of improvements.¹⁸⁹ Finally, even

184. Gregory Alexander, *Property as Propriety*, 77 NEB. L. REV. 667, 668 (1998).

185. *See id.*

186. DE SOTO, *supra* note 59, at 114–15 (describing squatting examples in colonial America including ones influential in obtaining Vermont statehood).

187. *Id.* at 106. De Soto also notes that,

[t]he granting of formal property rights to settlers and squatters in the United States, which eventually created the basis for capital generation and transactions in an expanded market, is typically treated as a political strategy to aid American imperial ambitions, help pioneers exploit the country's vast resources, and ease sectional tensions. That these same steps may have also permitted the United States to transcend the conflict between the legal system and the extralegal arrangements of squatters and other pioneers has not been the primary focus of property specialists.

Id. at 109–10.

188. *See* GATES, *supra* note 121, at 219.

189. DE SOTO, *supra* note 59, at 119–20. De Soto also describes the colorful terms used to describe squatters rights including Tomahawk rights, cabin rights, and corn rights. *Id.* at 116–120. In another notable section on boundary delineation, de Soto recalls the barking of dogs as he traversed neighbors' lands in Indonesia.

casual observers of U.S. history are familiar with homestead legislation providing tracts to individuals willing to settle on and improve land.¹⁹⁰

The United States has long been conflicted over the appropriateness of squatter activity. On the recommendation of Henry Knox in 1787, Congress sent troops to the Ohio frontier to protect public lands from squatters.¹⁹¹ Knox railed against “the lawless ‘usurpation of the public lands,’ [and] the ‘audacious defiance’ of the will of Congress by squatters.”¹⁹² Moreover, according to Congress, allowing squatters to achieve legal property rights in western lands would upset existing growth patterns and power structures. The Walker-Jackson reform plan to permit only actual settlers to purchase public lands was attacked as “radical, leveling, and democratic. It would make ownership for the poor and landless too easy, would drain off the laborers from the older areas and reduce land values there, and would accelerate the growth of the West unduly and thereby upset the political balance of power.”¹⁹³ On the other side of the debate, squatters on public land had several supporters in Congress who wished to enable squatters to purchase the lands they illegally possessed on terms the squatters could afford. This created availability of sales of land on credit, curtailment of the purchases of speculators, and grants to western settlers of preemption rights.¹⁹⁴ In 1819, U.S. Senator Ninian Edwards from

Although the boundaries between farms were not recorded anywhere, the dogs’ barking reflected the community understanding of the property limits. *Id.* at 161–62.

190. See Homestead Act of 1862, 43 U.S.C. § 161 (2000), *repealed by* Pub. L. No. 94-579, 90 Stat. 2787 (1976).

191. See GATES, *supra* note 121, at 122–23.

192. *Id.* at 122.

193. PAUL W. GATES, *THE JEFFERSONIAN DREAM: STUDIES IN THE HISTORY OF AMERICAN LAND POLICY AND DEVELOPMENT* 103 (Allan G. & Margaret Beattie Bogue eds., 1996).

194. Preemption refers to the right of current possessors of public land to purchase their holdings from the federal government at a set, modest price in advance of a general auction process. See GATES, *supra* note 121, at 219. This issue was a hotly contested one throughout the first half of the 1800s, with Congress and states legislating various laws on the subject. See *id.* It was common for individuals to petition Congress for passage of general preemption rights for squatters:

We the undersigned, Citizens of Porter County & its vicinity, in the State of Indiana, most Respectfully represent to your Honourable Body in Congress [to protect our homes from public sale] . . . Experience have heretofore taught us that the Poor was indeed but the tool of the Opulent . . . [and at the last land sale] our Neighbors, fathers, Mothers, and little children, were turned off to the Cold hand of Charity by Speculators, those who have but little feeling in Common with the humble labourer that their improvements were taken from them their labour lost and their means Expended, the Settlers, ask but little, only a Quarter Section of land by which he may be enabled to support his family and Educate his children . . .

Id. at 233–34 (reprinting petition submitted to a Senator).

Illinois led an unsuccessful attempt in Congress to continue credit sales of public lands for the benefit of small purchasers.¹⁹⁵ “He wanted to shield the settlers upon the public lands ‘from merciless speculators, whose cupidity and avarice would unquestionably be tempted by the improvements which those settlers have made with the sweat of their brows, and to which they have been encouraged by the conduct of the Government itself. . . .’”¹⁹⁶ Settlers often had little capital to begin with, and what they had was invested in farming equipment in order to improve the land and feed their families. Sometimes public land sales were postponed upon petition to Congress by local interests to give existing squatters time to amass the capital to purchase their holdings under preemption rights.¹⁹⁷ Early settlers of the United States and Brazilian *favela* residents have accrued similar benefits in converting their informal ownership into legal title that can be mortgaged for machinery, livestock, additional land, and other income-producing assets.¹⁹⁸

Early U.S. squatter groups occupied land illegally but administered this land with much the same organization as occupants of informal *favelas* in Brazil.¹⁹⁹ Note the dealings of a group of squatters organized into a claims club in Johnson County, Iowa, founded in 1839:

The fees of the officers and the duties of the judges or adjustors of claims were spelled out, methods of staking out claims were prescribed, a maximum of 480 acres was established as the acreage settlers could hold, and the amount of improvements persons must make to have their claims qualify for protection was stated. Occupancy rights to claims were often conveyed and the relinquishment or conveyance copied on the books of the recorder of the claims association.²⁰⁰

In both the settling of the eastern parts of the United States before the Revolutionary War and continuing with the settling of the western half of the nation, productive use of land was favored over mere tenets of title or speculative ownership. Legislation in colonial Connecticut required owners to “build a house there fit for an

195. See *id.* at 140.

196. *Id.*

Westerners without capital but anxious to own land contemplated with bitterness the extensive tracts owned by absentees who contributed nothing to their development, but insisted on withholding them from sale and use until they would bring a profitable return. In their dislike of absentee owners the westerners took pleasure in stealing their timber, pasturing livestock on their grass, and assessing their land at high valuations.

GATES, *supra* note 193, at 101.

197. See GATES, *supra* note 121, at 148 (noting such a postponement of sale in 1839).

198. See *id.* at 148–49.

199. See *id.*, at 122–23; see *infra* Part II.B.

200. GATES, *supra* note 121, at 156.

Inhabitant to dwell in, . . . upon the penalty of *twenty shillings per year*.”²⁰¹ The penalty in Rhode Island for failure to develop land was forfeiture to the town.²⁰² The conversion of title from possessory rights to formal, legal title to land was viewed as the just reward for enduring the hardscrabble on the frontier and held a higher moral position than nonpossessory ownership for speculative purposes.

The urban homesteading movement of the 1970s and 1980s also embraced the idea that the possession and conversion of nonproductive property to productive use should be rewarded. Individuals and families willing to rehabilitate vacant properties in inner city cores were rewarded with title to the property for little or no cost.²⁰³ Some of those programs continue today.²⁰⁴ New York has experienced a long history of interaction and confrontation between squatter communities and local government and private interests.²⁰⁵ Squatters take over vacant buildings and commence repairs. Their activities are not under any ownership or landlord-tenant relationship and, thus, are similar to the illegal or informal settlements discussed earlier.²⁰⁶ In response to the demands and opportunities presented by squatters’ actions, several cities have created programs that transfer ownership of city-owned buildings in

201. John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1277 (1996) (emphasis added). The productive use of land was often a legal and moral component for property ownership in colonial America. See John F. Hart, *Fish, Dams, and James Madison: Eighteenth-Century Species Protection and the Original Understanding of the Takings Clause*, 63 MD. L. REV. 287, 288 (2004) (arguing that fish passage laws of the 18th century more appropriately balance public and private interests than do modern interpretations of the regulatory takings doctrine); see also Charles Geisler, *Property Pluralism*, in PROPERTY AND VALUES: ALTERNATIVES TO PUBLIC AND PRIVATE OWNERSHIP 65, 70 (Charles Geisler & Gail Daneker eds., 2000) (noting that early American colonial cities were planned communities exhibiting public restrictions on private lands and private uses of public lands).

202. See Hart, *supra* note 201, at 1277.

203. See, e.g., Robert E. Pierre, *Homesteading Reform for a New Generation*, WASH. POST, Apr. 5, 2004, at A01. Another example of developing informal urban spaces in the United States is the transformation of vacant lots from demolished buildings into community gardens. See, e.g., Jane E. Schukoske, *Community Development Through Gardening: State and Local Policies Transforming Urban Open Space*, 3 N.Y.U. J. LEGIS. & PUB. POL’Y 351, 357 (1999–2000). In these gardens, community residents cooperate with one another to prevent neighborhood blight through greening projects. See *id.*

204. Pierre, *supra* note 203, at A01 (discussing the Marquette, Kansas, plan to give land to people willing to move to the city).

205. See, e.g., MALVE VON HASSELL, *HOMESTEADING IN NEW YORK CITY, 1978–1993: THE DIVIDED HEART OF LOISAIDA* (1996) (focusing on the struggles of squatter communities on the Lower East Side in New York City).

206. See *Walls v. Giuliani*, 916 F. Supp. 214, 219 (E.D.N.Y. 1996).

exchange for some nominal purchase price and the promise of infrastructure repairs through sweat equity.²⁰⁷

Urban squatter claims can create conflict. Squatters may not have the skills or financial means to renovate a structure to applicable building and safety code standards. Incomplete renovations create fire risks and uncertainty over the structural soundness of buildings. Squatters, local residents, and local governments may also have different ideas about the best use of a vacant or abandoned building. Local governments may wish to negotiate with a low-income housing developer to renovate the vacant building for future affordable housing uses. Squatters here have effectively “jumped the line” ahead of others waiting for affordable housing.²⁰⁸ Additionally these low-income housing developers will likely have the ability to renovate buildings in accordance with applicable building and safety codes.

Earlier, the discussion of the application of the right to the city in Brazil focused on granting formal, legal property rights to urban squatters.²⁰⁹ While such an approach has parallels in the United States in the form of western and urban homesteading movements, this Article does not suggest direct emulation of the squatter approach as seen in Brazil. Instead, this Article suggests land bank strategies as an alternative approach to implement the social function of the city and the social function of property in the United States.

Land banks offer two key advantages over the individual or collective action of squatters in applying a strategy to reclaim unproductive urban land that is vacant or abandoned by its “legal” owner. First, land banks holding a large inventory of property can make informed decisions about the merits of future land uses in a particular area. Second, land banks can be the catalysts for changes in tax foreclosure laws toward a faster, more efficient termination of the property claims of previous owners and creditors. This last advantage of the land bank particularly relates to the social function of property by modifying underlying property laws to transfer “legal,” but unproductive, property ownership rights to productive users. Similarly in Brazil, the extra-legal claims of *favela* residents making current, productive use of property are prioritized over other formal

207. JAMES W. HUGHES & KENNETH D. BLEAKLY, JR., *URBAN HOMESTEADING* 3 (1975); see also Ted Shaffrey, *For Low Rent, Squatters Get High-End Manhattan Homes*, L.A. TIMES, Nov. 3, 2002, at A18 (describing squatter activity in New York City, “[i]f they want to move out, the old squatters are not allowed to sell their apartments for more than \$9,000—or \$6,000 for smaller apartments—for three years, with small increases after that. Each building remains a low-income housing cooperative.”).

208. See Barry Bearak, *A Turf War for Urban Squatters*, L.A. TIMES, Feb. 27, 1994, at A1 (discussing the response to squatters of a New York City agency charged with overseeing properties seized for unpaid taxes).

209. See *infra* Part II.D.2.

or legal claims through a shortened *usucapião* period under the City Statute.²¹⁰

Land banks can be an essential tool in urban development efforts by converting troubled properties into productive use.²¹¹ Troubled properties may be vacant, abandoned, or tax-delinquent; they can also be a source of crime, arson, or health concerns.²¹² The typical land bank is a governmental agency that facilitates the acquisition and disposition of these properties through a number of approaches that vary among jurisdictions because of property law differences and different development goals.²¹³ A land bank may be used to hold property obtained through drug forfeiture or tax lien foreclosure.²¹⁴ Land banks may also acquire property through purchase and donations.²¹⁵ Some may have a more limited role in urban redevelopment by serving, for example, as a mere holder of vacant land a city intends to use, sell, or exchange in the future.²¹⁶ Land banks playing a more intensive role in redevelopment may have broader powers to acquire unproductive parcels as well as broad powers to strategically manage and transfer parcels to private ownership.²¹⁷ This Article focuses on the operations of this latter, more powerful model as an approach to advance the right to the city in the United States.

1. Inventory Management and Transfers to Productive Use

Land banks derive authority from state legislation, inter-local agreements, and local legislation. They may automatically acquire all properties not sold at a tax foreclosure sale.²¹⁸ Liens arising from unpaid taxes, unpaid utilities, code enforcement violations, unpaid mortgages, and a host of other violations may burden a vacant or abandoned property. These claims cloud the title of affected property and frustrate attempts by developers and individuals to convert the property to productive use. A land bank that has strong powers to extinguish existing property claims quickly can be a powerful tool in

210. See *infra* Part II.D.1.

211. Frank Alexander has written two excellent, recent descriptions of land bank laws and operations. See FRANK ALEXANDER, *LAND BANK AUTHORITIES: A GUIDE FOR THE CREATION AND OPERATION OF LOCAL LAND BANKS* (2005); Frank S. Alexander, *Land Bank Strategies for Renewing Urban Land*, 14 J. AFFORDABLE HOUSING & COMM. DEV. L. 140 (2005).

212. See NATIONAL VACANT PROPERTIES CAMPAIGN, *VACANT PROPERTIES: THE TRUE COSTS TO COMMUNITIES* 3–6 (2005).

213. See ALEXANDER, *LAND BANK AUTHORITIES*, *supra* note 211, at 4, 6.

214. See *id.* at 4–5.

215. See *id.* at 9.

216. See *id.* at 10.

217. See *id.* at 8.

218. See *id.* at 6

strategies to reclaim deteriorating parts of the city. In contrast, squatters may find acquiring title or long-term possession rights overwhelming or impractical.²¹⁹

Land banks can acquire large inventories of property.²²⁰ Merely knowing where properties are and in what condition they are in can be a valuable contribution to neighborhood revitalization efforts.²²¹ While squatters have related aspirations to reclaim neglected property for more productive uses, their efforts may run counter to safety and larger revitalization concerns. Squatters lacking the means or skills to rehabilitate housing may create a danger to themselves and nearby property owners. For example, faulty wiring can cause fires and improperly secured houses often become havens for drug users. Individual squatters may find the process of obtaining legal title overwhelming. Finally, the decisions of individual squatters may conflict with long-crafted development plans of local nonprofit developers and affected community organizations. A land bank presents the opportunity to manage these potential conflicts and facilitate a resolution that advances overall affordable housing needs.

One of the catalysts for the creation of a land bank is to streamline the process for acquiring, managing, and disposing of unproductive properties. Sometimes these properties are subject to tax liens by different government agencies.²²² A land bank, as a

219. See, e.g., *Walls v. Giuliani*, 916 F. Supp. 214 (E.D.N.Y. 1996). In *Walls*, squatters invoked New York City's alleged long-standing encouragement and acquiescence to urban squatter activity as a basis for the recognition of property rights under the Due Process Clause of the U.S. Constitution. See *id.* at 217. The court did not grant title to the squatters, and instead recognized them as tenants at sufferance under New York landlord-tenant law, requiring thirty days notice before eviction. See *id.* at 219. Although the court found that the squatters had no right to avoid eventual eviction, the court did find that the squatters' claims entitled them to a "naked possessory interest" amounting to a property right under the Due Process Clause requiring notice before eviction. See *id.* at 220.

[T]he mandatory thirty-day notice to quit in this case constitutes a significant restriction on the right of the landlord to occupy his property and confers a significant benefit on the occupant by affording her the right to occupy the premises for thirty days during which she can seek alternative housing.

Id.

220. The St. Louis Land Bank (the St. Louis Land Reutilization Authority) held title to about 10,000 parcels of land at the end of 2001. See ALEXANDER, LAND BANK AUTHORITIES, *supra* note 211, at 6. In the alternative, a land bank such as Atlanta's (Fulton County/City of Atlanta Land Bank Authority, Inc.) maintains a relatively smaller inventory. It uses its power to waive the outstanding taxes and liens of delinquent property purchased by a developer willing able to renovate it. See LISA MUELLER, MODEL PRACTICES IN TAX FORECLOSURE AND PROPERTY DISPOSITION: ATLANTA CASE STUDY 1-2 (2003), available at <http://www.lisc.org/content/publications/detail/796> (last visited 2/9/06).

221. See ALEXANDER, LAND BANK AUTHORITIES, *supra* note 211, at 14.

222. See *id.* at 10.

central clearinghouse, can work more effectively with neighborhood community development efforts to identify troubled properties and to rehabilitate properties held in the land bank's inventory. Most land banks are not designed to be developers themselves. Instead, they identify individuals and developers (both non-profit and for-profit) with the capacity to renovate troubled housing and convert it into productive use. Land banks have priorities for disposition; some prioritize affordable housing development and homeownership.²²³ A land bank can give disposition preferences to community-based, nonprofit developers over for-profit developers on the assumption that nonprofit developers have a greater stake in the long-term success of the community.²²⁴ Similarly, land banks adopt policies or are prohibited by statute from transferring properties to buyers merely interested in long-term speculation and not in the immediate development of the property.²²⁵ The state enabling legislation of land banks established in recent years has granted increasingly broader powers on land banks to dispose of property free of the restrictions that would burden typical transfers of government property.²²⁶

Land banks sometimes must balance several competing goals in addition to the development of affordable housing. Eliminating blighted structures and creating opportunities for homeownership are goals that may complement affordable housing development. A land bank must often deal with municipal goals that potentially conflict with affordable housing development, however, including revenue maximization (particularly from tax delinquent properties), creating parks and similar green space, and enforcing housing codes on deteriorated structures.²²⁷

2. Reforming Property Laws for Productive Use

Land banks can be the catalysts for streamlining tax foreclosure laws to facilitate the transfer of land from unproductive to productive uses.²²⁸ This reform of property law—which shortens the process for turning unproductive property into productive property—is not unlike Brazil's efforts to shorten *usucapião* requirements in Brazil for *favela* occupiers. An urban strategy in the United States patterned after the right to the city would push states to reform their tax

223. See, e.g., *id.* at 106 (using the Genesee Land Bank as an example).

224. See, e.g., *id.* at 87 (using the Atlanta Land Bank as an example).

225. See KY. REV. STAT. ANN. § 65.370(5) (Lexis Nexis 2004).

226. See Alexander, *Land Bank Strategies*, *supra* note 211, at 153.

227. See ALEXANDER, *LAND BANK AUTHORITIES*, *supra* note 211, at 30.

228. The formation of the Cleveland Land Bank (Cleveland Land Reutilization Program) in 1976 was aided by tax foreclosure law changes that shortened the time period of foreclosure and lessened notice requirements. See Alexander, *Land Bank Strategies*, *supra* note 211, at 148.

foreclosure laws and procedures to facilitate the reuse of unproductive property for the benefit of lower-income residents.

The property tax lien in all jurisdictions is first in priority of existing liens on a property.²²⁹ In theory, it should be relatively simple for a municipality foreclosing on this first priority lien to acquire title to a property, especially if the value of liens exceeds the value of the house. In practice, this process is complicated by several factors. One of the most serious barriers to obtaining clear title to tax delinquent properties is inadequate notice to affected parties. Due process under the Constitution requires "that a party holding a 'legally protected property interest' whose name and address are 'reasonably ascertainable' based upon 'reasonably diligent efforts' is entitled to notice 'reasonably calculated' to inform it of the proceeding."²³⁰

Local governments sometimes fail this requirement by notifying interested parties through a newspaper publication. Additionally, the foreclosure process might entail two separate procedures: a first procedure selling the lien and a second procedure selling the underlying property. These two disconnected processes may be separated by years, conducted by different parties, and trigger due process notice concerns each instance.²³¹ Adding to the confusion, jurisdictions employ a wide range of methods to enforce tax liens. Some jurisdictions employ two sales while others use just one sale. Some jurisdictions use judicial foreclosure while others use non-judicial methods.²³²

The desire of state governments to protect tax delinquent property owners through redemption periods is one of the contributors to these procedural complications. Statutes typically allow extra time to delinquent property owners to redeem their properties by paying their taxes after they become delinquent.²³³ Most jurisdictions employ a post-sale right of redemption period during which a property owner has from one to three years to pay delinquent taxes and get the property back.²³⁴ Other states allow an

229. See Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 IND. L.J. 747, 760 (2000).

230. *Id.* at 749 (internal citations omitted) (summarizing the U.S. Supreme Court's decision in *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983)). What constitutes constitutionally adequate notice is beyond the scope of this Article. Professor Alexander provides a cogent analysis of the requirements and tensions arising in its application. *Id.*

231. See *id.* at 802 ("A multistaged proceeding spread out over a period of years and controlled by different entities with different motivations faces significant burdens of providing constitutionally adequate notice at each stage of the process.")

232. Alexander notes that, "[s]lightly less than half" of states allow non-judicial sales and an equal amount of states involve a judicial proceeding at some point in the process. See *id.* at 733.

233. See *id.* at 775.

234. See *id.* at 775 n.148 (listing states and applicable redemption period).

owner a period of time to pay before conducting the sale in the first instance.²³⁵ A purchaser may obtain a tax lien or the underlying property itself at a public tax sale. Most states select the highest bidder, with the amount of taxes in arrears plus interest and penalties set as the minimum bid.²³⁶ When the amount of tax delinquency is greater than the value of the property, no one is likely to bid at a tax sale. In these instances, a land bank may automatically receive these properties.²³⁷ Often, a land bank then has the power to foreclose the right of redemption and acquire clean title.²³⁸

The Georgia statute illustrates a reform to traditional tax lien foreclosure processes that addresses due process issues and shortens the time between the initial tax delinquency by one owner and the transfer of title to a second owner.²³⁹ The Georgia statute allows a tax sale after twelve months of tax delinquency.²⁴⁰ This sale is done by judicial process, during which the efforts to provide adequate notice to all interested parties are carefully reviewed and memorialized in the public record.²⁴¹ After a foreclosure sale, the owner has sixty days to redeem the property through payment of delinquent taxes.²⁴² After sixty days, the right of redemption expires automatically and a new deed is issued.²⁴³

This short treatment of land banks and tax foreclosures is not meant to be exhaustive. Instead, it provides an example of a property process in the United States facilitating the transfer of title from one user to another. In both Brazil and the United States, the second user is making some socially designated "more productive" use of the property. Moreover, in both examples, the title to the property before the conveyance is often cloudy with a questionable market value. Therefore, titling programs that confer legal ownership to *favela* residents and programs conferring legal title to individuals in U.S. cities return property to the formal, legal market. Reexamining these existing transfer mechanisms through a more creative or ambitious lens may suggest greater possibilities for achieving a right to the city in the United States.

235. See *id.* at 775 n.150 (listing states and applicable redemption period).

236. See *id.* at 774.

237. See ALEXANDER, LAND BANK AUTHORITIES, *supra* note 211, at 7.

238. See, e.g., GA. CODE ANN. § 48-4-65 (Supp. 2005).

239. See ALEXANDER, LAND BANK AUTHORITIES, *supra* note 211, at 7, 15.

240. See GA. CODE ANN. § 48-4-64(b) (1999).

241. See Alexander, *Tax Liens*, *supra* note 229, at 804.

242. See GA. CODE ANN. § 48-4-81(c) (1999).

243. GA. CODE ANN. § 48-4-81(c)(3)-(d) (1999).

IV. CONCLUSION

Applying the right to the city in Brazil and in the United States involves complicated questions of property definitions and rhetoric. The right to the city emphasizes a social function of property, but also acknowledges the economic and social benefits to poorer urban inhabitants of increased access to traditional, individualized property in prevailing market-based societies. This tension between social and individualized ideas of property can be managed using the ambitious and forward-thinking provisions of the World Charter as guidance and by implementing participatory, comprehensive municipal planning regimes on the ground. Far from a utopian ideal, this right to the city is achievable in the United States through concrete efforts—like those in the ongoing struggle for the reclamation of vacant and abandoned urban lands—and a continuing vigilance toward maintaining widespread avenues for everyday city inhabitants to have a meaningful voice in the construction of city space and city life.
