

THE TAKINGS CLAUSE OF BOYLE HEIGHTS

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ABSTRACT

Poor people and people of color are the authors of community legal thought. Today, that jurisprudence shapes the culture of Boyle Heights, an embattled, primarily Latinx neighborhood in Los Angeles. Rapid gentrification of Boyle Heights has led to tenants' ousters and housing insecurity. Through interviews, inhabitants share their views on what belongs to them, and when that property is taken in violation of human dignity and legal principles. That is, they share their version of the Takings Clause. Though my work is unfinished, interviewees' articulate insistences on takings protections were comprehensive enough to essay a first draft of a Boyle Heights Taking Clause. Marshaling the work of popular constitutionalists and progressive property scholars, and drawing parallels between Supreme Court conceptions of takings and those of Boyle Heightsians, I argue that this fledgling draft of community property rights should be further studied and developed so that it may someday inform formal Takings analyses.

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I.

INTRODUCTION

As I write this article, Los Angeles is gentrifying with remarkable speed.¹ The long-term residents of one of the city’s swiftly transforming neighborhood, Boyle Heights, want the process modified, or halted altogether,² to stop the dislocation

1. See *Boyle Heights Home Prices & Values*, ZILLOW.COM, <https://www.zillow.com/boyle-heights-los-angeles-ca/home-values/> [<https://perma.cc/W7ZB-HX2Z>] (“The median home value in Boyle Heights is \$426,700. Boyle Heights home values have gone up 5.7% over the past year and Zillow predicts they will rise 6.5% within the next year.”). See also Ian Lovett, *Los Angeles Bridge’s Demolition Is a Sign of Changes Sweeping the City*, N.Y. TIMES (Dec. 2, 2015), <https://www.ny-times.com/2015/12/03/us/los-angeles-gentrification.html> [<https://perma.cc/VKJ5-BKQ8>] (“Housing prices are shooting skyward, from Venice Beach to the Eastside; neighborhoods once dominated by immigrants and minorities have grown rapidly whiter and wealthier in recent years.”).

2. See, e.g., Interview with A. (alias), in Boyle Heights, Los Angeles, Cal. (Feb. 6, 2017) [hereinafter A. Interview], *infra* text accompanying notes 259–268 (recounting a resident’s call for the reversal of gentrification).

of poor Latinx³ residents.⁴ In the winter and spring of 2017, I interviewed current and former residents of the neighborhood in order to better understand their viewpoints.⁵ As I listened to their accounts, I began to understand that the low-income Latinx inhabitants of Boyle Heights not only possessed insightful and unconventional convictions about their property rights, but also of *when* their property seemed “taken” in violation of human dignity and legal principles. As a property scholar, I recognized that while these ideas veered from the Takings jurisprudence of the Fifth Amendment of the U.S. Constitution, they resonate strongly with current housing movements and progressive property theory.⁶ In this Article, I begin to piece together the fragments of the Boyle Heights property jurisprudence elucidated by my interviewees. Though my effort at this stage is preliminary, I argue that it may build eventually toward an understanding of property rights that constitutes a Boyle Heights Takings Clause. It is my hope that this alternative vision of property rights might someday become a part of formal Takings analysis to address the housing and community needs of poor people and people of color, such as those who live in Boyle Heights.

In contrast to federal constitutional law, which recognizes no fundamental rights to housing,⁷ the Boyle Heightsians I interviewed emphasized that poor Latinx tenants, workers, and shelter residents hold community property rights as “human rights.”⁸ They also insisted they owned a stake in Boyle Heights because of the labor and cultural capital they invested there.⁹ They discerned that “takings” of their property in gentrifying neighborhoods occurred when landlords evicted them, a development facilitated by California’s rent control-terminating Costa-

3. “‘Latinx[]’ . . . is a gender-inclusive term to acknowledge people of Latin American heritage or descent.” Judith E. Koons, *Pulse: Finding Meaning in a Massacre Through Gay Latinx Intersectional Justice*, 19 SCHOLAR: ST. MARY’S L. REV. ON RACE & SOC. JUST. 1, 21 (2016) (internal quotations omitted).

4. See, e.g., Phone Interview with Beth Gonzalez (alias), Boyle Heights Neighborhood Council, in Boyle Heights, Los Angeles, Cal. (Mar. 13, 2017) [hereinafter Gonzalez Interview], *infra* text following note 320 (describing tenants who have lived in Boyle Heights for “30, 40 years”).

5. See, e.g., Phone Interview with Monica Aldrete, Director of “The Haven,” (Feb. 8, 2017) *infra* notes 66–67 and accompanying text [hereinafter Aldrete Interview]; see also *infra* text accompanying notes 61–63 (describing how “rent’s too high” and it can lead to homelessness in Boyle Heights).

6. See *infra* Part V.

7. See *Lindsay v. Normet*, 405 U.S. 56, 74 (1972); see also Shelby D. Green, *Imagining a Right to Housing, Lying in the Interstices*, 19 GEO. J. ON POVERTY L. & POL’Y 393, 394 (2012) (explaining that housing is not a fundamental right). However, many scholars have rallied for positive constitutional rights to housing. See, e.g., MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 195, 300 (2016); Kristen David Adams, *Do We Need a Right to Housing?* 9 NEV. L.J. 275, 304–305 (2009); Lisa T. Alexander, *Occupying the Constitutional Right to Housing*, 94 NEB. L. REV. 245, 269 (2015).

8. See, e.g., *infra* text accompanying notes 66–67.

9. See, e.g., Interview with Irene Peña, Former Director of Proyecto Jardín, in Echo Park, Los Angeles, Cal. (Mar. 8, 2017) [hereinafter Peña Interview], *infra* text accompanying notes 185–187 (describing the organization of cultural events and the labor of maintaining an urban farm).

Hawkins Act¹⁰ and condominium-boosting Ellis Act.¹¹ Further, they objected to privately-effected takings, and blamed the state for its protection of neoliberal systems that are “all about money.”¹²

The first inklings of a Boyle Heights “Takings Clause” emerge from highly discursive conversations covering a wide terrain of social problems, which I try to write with the care and expansiveness required of Clifford Geertz’s “thick description.”¹³ As such, the bringing together of the rich, emotional, and sometimes conflicting tales of Boyle Heights and the comparatively narrow legal issue of “property law” may appear, at least at first, conceptually awkward. It is a case of narrative maximalism meeting legal minimalism: I attempt to fit a complicated and incompletely described world within the tight confines of the Supreme Court’s takings jurisprudence. In so doing, I interact with the work of legal scholars—who object to the incapacity of rule-bound, relevancy-obsessed, and seemingly omniscient law and legal actors—to address inequality on the ground.¹⁴ My work also depends on the scholars of popular constitutionalism and those who engage the lived experiences of poor people and people of color, like sociologists, anthropologists, and social scientists.¹⁵ In addition, I look to progressive property scholars, whose communitarian values harmonize with Boyle Heights’ takings jurisprudence and support its legitimacy as a source of law.¹⁶

In Part II.A, I describe the housing crisis in Southern California and the laws that affect the housing security of poor people, such as California state statutes forbidding rent control and an inclusionary housing ordinance recently passed in Los Angeles. In Part II.B, I set forth Boyle Heights’ history and its current gentrification conflict. In Part III, I examine federal takings law and study its failure to address the needs of low-income people. To discern how Boyle Heights jurisprudence may influence constitutional determinations that poor people without

10. CAL. CIV. CODE §§ 1954.50–1954.535 (Deering 2009).

11. CAL. GOV’T CODE § 7060 (Deering 2009).

12. Phone Interview with Aldo Medina in Boyle Heights, Los Angeles, Cal. (Mar. 1, 2017) [hereinafter Medina Interview], *infra* text accompanying notes 105–110; Gonzalez Interview, *infra* text following note 320.

13. CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 5–10 (1973) (“Thick description” denotes a writer’s full account of her interactions with other people, which includes the context in which these interactions take place.).

14. See, e.g., Beverly Balos, *The Bounds of Professionalism: Challenging Our Students; Challenging Ourselves*, 4 *CLINICAL L. REV.* 129, 140 (1997) (“The culture and values inculcated within the law school do not support a vision of lawyering that takes into account that lawyering involves responsibility to and relationships with others.”); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241, 1242 (1991) (“Although racism and sexism readily intersect in the lives of real people, they seldom do in feminist and anti-racist practices.”); Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 *MICH. L. REV.* 2128, 2141 (1989) (“When segregation was eradicated from the American lexicon, its omission led many to actually believe that racism therefore no longer existed. Race-neutrality in law was the presumed antidote for race bias in real life.”).

15. See, e.g., *infra* notes 210–228 and accompanying text.

16. See *infra* notes 431–469 and accompanying text.

housing may have been deprived of property, in Part IV, I discuss social movement philosophy and the work of scholars who promote the lived experiences of marginalized people as a locus of legal change. In Part V, I describe the preliminary draft of The Takings Clause of Boyle Heights. I consider also how these three forces—popular constitutionalism, Boyle Heights voices, and progressive property theory—form a conception of takings, and envisage how a more established Boyle Heights Clause could someday influence Fifth Amendment analysis to create opportunities for low-income victims of gentrification. In Part VI, I tackle the counter-charge that Boyle Heights legal thought is so “off the wall” that it will remain alien to conventional legal analysis, by describing how its fragmentary mandates cohere with the insights of progressive property scholars.

Let us begin with an introduction to the neighborhood, whose citizens so generously acquainted me with their community’s legal thought, and the larger city in which they live.

II.

THE LOS ANGELES HOUSING CRISIS AND BOYLE HEIGHTS

A. Los Angeles, Its Housing Crunch, and Its Laws

Like other municipalities in the United States,¹⁷ Los Angeles lacks sufficient affordable housing for its low-income residents. In 2015, the California Supreme Court observed that California’s housing crisis has reached “epic proportions”¹⁸—this is despite L.A. officials’ acknowledgment of and commitment to tackling housing shortages as far back as 1987.¹⁹ In 2014, California finished “dead last” in overall affordability among the states, with housing prices in Los Angeles rising 6.5% between 2015 and 2016.²⁰ In 2015, 58.5% of residents in Los Angeles and Orange County qualified as “burdened” by their rental obligations (spending over 30% of income on rent), and 32.8% were “severely burdened” (over half their income).²¹ In December of 2015, an ominous winter weather forecast led Mayor

17. See, e.g., Jessica A. Tober, *Bringing Home, Home: Is There a Home Rule Argument for Affordable Housing?*, 20 S. CAL. REV. L. & SOC. JUST. 91, 91 (2011) (“In the United States, there is a serious shortage of affordable housing.”).

18. California Bldg. Indus. Ass’n v. City of San Jose, 351 P.3d 974, 977 (2015).

19. In 1987, then-Mayor Tom Bradley called housing a “critical problem,” tasking a new city housing coordinator with finding solutions and announcing the formation of a Mayor’s Affordable Housing Advisory Committee. Victor Merina, *Bradley Appoints Coordinator to Help Develop Low-Cost Housing*, L.A. TIMES, Sept. 18, 1987.

20. Elijah Chiland, *Here’s How Serious California’s Housing Shortage Has Gotten*, L.A. CURBED (Mar. 4, 2016) <https://la.curbed.com/2016/3/4/11159938/california-housing-shortage-homeownership> [<https://perma.cc/3XNX-K97Z>].

21. Bianca Barragan, *58.5 Percent of Los Angeles Renters Can’t Afford Their Rent*, L.A. CURBED (Dec. 10, 2015), <https://la.curbed.com/2015/12/10/9892338/los-angeles-rent-burden-most-unaffordable> [<https://perma.cc/A9A6-XQPA>].

Eric Garcetti to request a “state of emergency” be declared for L.A.’s homeless population—Governor Jerry Brown declined.²²

Tenants-rights advocates²³ cite two key California state laws that exacerbate poverty and housing insecurity in L.A.—the Costa-Hawkins Act and Measure JJJ. The Costa-Hawkins Act, a California state law enacted in 1995, cuts back municipal rent-control policies,²⁴ and, more specifically, the Los Angeles Rent Stabilization Ordinance (“LARSO”) of 1978.²⁵ LARSO applies to rental units certified for occupancy pre-1978, and does not allow rents to be raised to market rates until a tenant vacates a unit.²⁶ The Costa-Hawkins Act requires that LARSO’s rent de-control rule, which permits rent hikes after every tenant vacancy, operate statewide and forbids residential rent control imposition on properties certified for occupancy after February 1, 1995.²⁷ As a result of this act, the number of rent-controlled properties in Los Angeles has decreased.²⁸

In 2016, LAIST estimated that despite Costa-Hawkins, 85% of the city’s rental stock remained rent controlled,²⁹ though LACURBED put it at 75%.³⁰ However, these enduring low-cost tenancies are insecure, due in part to the 1986 Ellis Act.³¹ The Ellis Act allows landlords to evict tenants and remove their multi-family housing units (which can be rent-controlled) from the market,³² purportedly to allow “mom and pop” landlords to exit the rental business.³³ Under the Ellis Act,

22. Peter Jamison, *How an Emergency Declaration Over L.A.’s Homeless Became a Game of ‘Hot-Potato Keep-Away’*, L.A. TIMES (Mar. 17, 2016), <http://www.latimes.com/local/cityhall/la-me-garcetti-brown-homeless-20160308-story.html>.

23. See, e.g., Phone interview with Larry Gross, Executive Director, Coalition for Economic Survival (Feb. 17, 2017) [hereinafter Gross Interview].

24. CAL. CIV. CODE §§ 1954.50–1954.535 (Deering 2009).

25. L.A. MUN. CODE § 151.01.

26. *Id.* See also Emily Milder, *Historically Affordable: How Historic Preservationists and Affordable Housing Advocates Can Work Together to Prevent the Demolition of Rent-Stabilized Housing in Los Angeles*, 25 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 103, 107 (2016) (describing LARSO).

27. CAL. CIV. CODE § 1954.52(a) (Deering 2009).

28. Elijah Chiland, *Tenant Groups Say They Have Enough Signatures for Costa Hawkins Repeal Measure*, L.A. CURBED (Apr. 23, 2018), <https://la.curbed.com/2018/4/23/17270880/costa-hawkins-repeal-california-rent-control-garcetti> [<https://perma.cc/G3XV-NN6F>] (“In Los Angeles, the law prevents the city from applying rent control to buildings constructed after October 1978.”).

29. Julia Bennett Ryan, *You Can Now See If an Apartment Is Rent Controlled Online*, LAIST, (Jan. 27, 2016), http://laist.com/2016/01/27/you_can_now_see_if_an_apartment_is.php [<https://perma.cc/C9VM-J58L>].

30. Jeff Wattenhoffer, *There’s a Handy New Guide out on Los Angeles Renters’ Rights*, L.A. CURBED (July 12, 2016), <https://la.curbed.com/2016/7/12/12164544/tenants-rights-guide-la-campaign> [<https://perma.cc/R45A-J2HG>].

31. CAL. GOV’T CODE § 7060 (Deering 2009).

32. *Id.*

33. See Larry Gross, Op-Ed, *L.A.’s Eviction Game*, L.A. TIMES (June 9, 2015), <http://www.latimes.com/opinion/op-ed/la-oe-0609-gross-housing-ellis-act-20150609-story.html> [<https://perma.cc/75XG-6RFG>] [hereinafter Gross, *Eviction Game*] (arguing that big developers in fact gain from the Ellis Act); Jay Barman, *Local Ellis Act Law Dissed By Mayor Lee As State Limits Move Forward*, SFIST (May 10, 2014), http://sfist.com/2014/05/07/ellis_act_limits_clear_state_

landlords evicting tenants must pay tenant relocation fees³⁴ but are allowed to demolish and convert units into luxury condominiums³⁵ or re-open apartments after five years.³⁶ In boom markets, landlords—and speculators—prefer this alternative.³⁷ Experts estimate that the Ellis Act has been used to remove 20,000 affordable housing units from the market since 2001.³⁸ In Boyle Heights,³⁹ tenants’ activists gauge that 50 to 125 buildings have “been evicted.”⁴⁰

Still, the threat of Ellis evictions does not compare to the LARSO violations caused by “[c]ash-for-keys” buyouts between landlords and low-income tenants.⁴¹ A cash-for-keys buyout refers to a practice where landlords offer tenants a lump sum to quit the building; this sum may be less than the tenant is owed legally under the statute.⁴² Landlord harassment and constructive evictions via “jackhammering people out”⁴³ additionally oust tenants. Very low-income, monolingual Spanish-speaking, undocumented tenants bear the greatest brunt of these tactics.⁴⁴ In December 2016, L.A. City Council enacted an ordinance for additional tenant protections from cash-for-keys buyouts, requiring landlords to inform tenants of their

hurdle.php [https://perma.cc/WC4X-9PFV] (describing law for mom-and-pop landlords). In April 2017, Los Angeles passed a new ordinance requiring owners who sought to reintroduce a formerly rent-controlled property onto the rental market to make at least 20% of its units affordable. Emily Alpert Reyes, *L.A. Stiffens Rules for Replacing Rent-Controlled Rents*, L.A. TIMES (April 19, 2017), <http://www.latimes.com/local/lanow/la-me-ln-housing-ellis-act-20170404-story.html> [https://perma.cc/2HAN-WBSF].

34. L.A., CAL., MUN. CODE § 151.30(E) (2009).

35. *Valnes v. Santa Monica Rent Control Bd.*, 221 Cal.App.3d 1116, 1121–1122 (1990) (holding that Ellis Act is inapplicable to condominiums). *See also* Milder, *supra* note 26, at n. 27.

36. L.A., CAL., MUN. CODE § 151.28(A) (preventing deregulation for five years).

37. *See* Gross, *Eviction Game*, *supra* note 33; *see also* Milder, *supra* note 26, at 110 (describing evictions through Ellis Act).

38. Gross Interview, *supra* note 23. *See also* Gross, *Eviction Game*, *supra* note 33 (“Property owners in Los Angeles evicted tenants from 725 units under the state Ellis Act in 2014, up from 308 the previous year.”).

39. SURVEY L.A., *Boyle Heights Community Plan Area 7* (2014), http://preservation.lacity.org/sites/default/files/Boyle%20Heights%20Report_HPLAEdit.pdf [https://perma.cc/P7NZ-M8PQ].

40. Telephone Interview with Elizabeth Blaney, L.A. Tenants Union (Feb. 8, 2017) (“Ellis ha[s] been used [so that there have been] 50 to 125 buildings being evicted through [it.]”).

41. Gross Interview, *supra* note 23. *See also* Josh McGahan, *L.A. Moves to Curb “Cash-for-Keys” Rent-Control Landlord Scams*, L.A. WEEKLY, Sept. 21, 2016, <http://www.laweekly.com/news/la-moves-to-curb-cash-for-keys-rent-control-landlord-scams-7408607> [https://perma.cc/J464-7G9U].

42. Jason McGahan, *These Are Your Rights If Your Landlord Wants to Buy You Out*, L.A. WEEKLY (Nov. 7, 2017), <http://www.laweekly.com/news/tenants-have-rights-when-la-landlords-offer-a-cash-for-keys-buyout-8818967> [https://perma.cc/N2VB-8H8U] (noting concerns that cash-for-keys buyouts will provide tenants with a lower relocation payment than they are entitled to under the law).

43. Gross Interview, *supra* note 23. Gross uses “jackhammering people out” to describe landlords who commence modifications on other tenant units, and use the resulting noise, dust, and other conditions that make continued residence impossible to constructively force tenants out.

44. *Id.*

relocation fee rights and respect a 30-day reconsideration period.⁴⁵ Still, tenants'-rights advocates worry about vast losses of affordable housing through these often-illegal maneuvers.⁴⁶

In apparent response to this housing insecurity, voters passed the controversial⁴⁷ Measure JJJ, also known as the Build Better LA Initiative ("BBLA"), in November 2016.⁴⁸ Measure JJJ won voter approval in an unsavory political contest that saw opponents describing the other's views as "cancer"⁴⁹ and "urban" (or ethnic) cleansing.⁵⁰ The ordinance requires developers whose projects require general plan amendments or zoning changes to observe labor mandates,⁵¹ replace affordable, demolished housing units,⁵² and provide affordable housing if they seek residential density over 35% of current limitations or build residential housing where previously disallowed.⁵³ Developers may also build off-site housing,⁵⁴ buy and convert properties into affordable housing,⁵⁵ or pay an in-lieu fee.⁵⁶ However, importantly, JJJ does not (and, indeed, perhaps could not⁵⁷) guarantee that

45. Elizabeth Chou, *Garcetti Signs Law Aimed At Curbing 'Cash For Keys' Buyouts*, L.A. DAILY NEWS (Dec. 16, 2016), <http://www.dailynews.com/government-and-politics/20161219/garcetti-signs-law-aimed-at-curbing-cash-for-keys-buyouts> [https://perma.cc/26E8-X5DT].

46. Gross Interview, *supra* note 23.

47. *See infra* notes 48–50.

48. ELECTION DIVISION, CITY OF LOS ANGELES, *Initiative Ordinance JJJ: Affordable Housing and Labor Standards for General Plan Amendments and Zoning Changes*, in VOTER INFORMATION PAMPHLET, SPECIAL MUNICIPAL ELECTION 35 (2016), http://clerk.cityofla.acsitefactory.com/sites/g/files/wph606/f/2016%20November%20County%20WEB_English.pdf [https://perma.cc/9BZ2-7ACP]. Measure JJJ was codified as City of Los Angeles Ordinance No. 184745 [*hereinafter* Measure JJJ], http://clkrep.lacity.org/onlinedocs/2016/16-0684_ORD_184745_2-15-17.pdf [https://perma.cc/3694-ZQJ6].

49. People's World, *Build Better LA: "We Want Prop JJJ, Not Trump's LA!"*, YOUTUBE (Sept. 14, 2016), <https://www.youtube.com/watch?v=aED6fcJUY4w> [https://perma.cc/4M8D-A7HF] (statement of Cliff Smith, a union labor leader, at JJJ rally).

50. *See* Press Release, Preserve L.A., LA Tenants Union Backs the Neighborhood Integrity Initiative (Oct. 19, 2016), <http://2preserve.la.org/wp-content/uploads/2016/10/1019latenantsunion.pdf> [https://perma.cc/3BZR-4GXG] (quoting JJJ opponent Jill Stewart arguing that "[p]eople's dreams are dashed to make way for City Hall's horribly conceived urban cleansing" through the City's support for the proposal). *See also* Elisa Nefertari Ulen, *Encroaching on a Brooklyn Enclave*, in CRISIS 68 (Jul-Aug 2001) (noting that "[u]rban" denotes Black and Latino populations); *cf.* Yxta Maya Murray, *Inflammatory Statehood*, 30 HARV. J. RACIAL & ETHNIC JUST. 227, 245 (2014) (describing ethnic cleansing in the international context).

51. L.A., CAL., MUN. CODE. § 11.5.6(B)(2).

52. § 11.5.11(a)(4) (requiring projects to comply with the replacement requirements in California Government Code Section 65915(c)(3)).

53. *See* § 11.5.11(a)(1)–(2).

54. § 11.5.11. 5(b)(1).

55. § 11.5.11. 5(b)(2).

56. § 11.5.11. (b)(3)(1)–(2) (explaining that the fee is based on 1.1% of the number of affordable units the developer would have built multiplied by an "Affordability Gap" that will be determined by a city study).

57. *See* Texas Dept. of Hous. & Cmty Affairs v. Inclusive Communities Project, Inc., 35 S. Ct. 2507, 2525 (2015) (stating that remedial orders in disparate-impact cases should concentrate on the elimination of the offending practice and should be race-neutral). *Inclusive Communities* is discussed further *infra* note 312 and accompanying text.

tenants evicted from bulldozed domains will be housed in the affordable units eventually constructed. This gap means that housing insecurity will remain a reality for low income people, including those living in Boyle Heights.

*B. Boyle Heights and Gentrification*⁵⁸



58. The author took this photograph in Boyle Heights, California, on February 11, 2017. Kimberly Sugar designed and painted this mural, and she gave the author permission to use this image. Other examples of her work can be seen on Instagram at [@kimberlysugarart](https://www.instagram.com/kimberlysugarart).

1. Interview with Monica Aldrete [alias], Employee of “The Haven”⁵⁹

Monica Aldrete is the alias of an employee of a homeless shelter in Boyle Heights. This shelter serves the Latinx and undocumented population. In the following interview, she describes the pressures that gentrification places on poor people of color in Boyle Heights, and discusses the ways in which it propels them into homelessness.

“We accept men and women from all over Los Angeles who identify with our shelter,” Monica Aldrete tells me over the phone in a soft voice. I learned about Aldrete’s work in early 2017 and found the institution she helps organize through a web search of homeless shelters in Boyle Heights. Aldrete’s institution, which I will call the Haven, has been operating for several decades. It contains both a men’s and women’s shelter. In agreeing to be interviewed, Aldrete requested that I refrain from identifying her or the shelters out of concern for her clients’ safety.

“What do you mean, ‘identify with your shelter?’” I ask.

Aldrete hesitates. “It’s—cultural. We have Spanish speaking staff and—well, we have a history of serving undocumented immigrants.”

“I see,” I say.

“It’s hard,” she murmurs. “Right now.”⁶⁰

“Yes.”

She sighs. “Okay. So. [We serve] approximately 350 . . . people a year. We can have 50 men at our men’s shelter and then 15 women at our women’s shelter. We have breakfast and dinner programs, a locker room, a shower. Both shelters are very different. At [the men’s shelter, the] men sleep inside the church and adjacent room, and they have a big locker room and shower area. And the women’s shelter—we transformed two old classrooms into a shelter, so it’s more of a dorm room. It has a regular shower and a restroom.”

“What are some of your goals in running these programs?”

“We’re trying to help them transition into permanent housing,” Aldrete says. “With the men, we had a transition rate of 33 percent last year. That means that most of the men who are undocumented will find alternative ways of finding housing, so they’ll rent a room or have a roommate. But for the women it’s a lot more difficult because we serve 55 and older, and no one wants to hire them. And also, they’re undocumented and a lot of the times they’re ill. A lot of the women, they don’t have anywhere to transition. There are other women who have been waiting about a year and a half for permanent housing. We just do what we can. We have art therapy and case management. We have different community activities.”

“How do people wind up there?”

59. Aldrete Interview, *supra* note 5.

60. See Maya Rhodan, *Trump Administration's Deportation Raids Spark Fear in Immigrant Communities*, TIME (Feb. 13, 2017), <http://time.com/4669317/donald-trump-deportations-advocates-fear/> [<https://perma.cc/DBM3-ANLJ>].

“You mean, how did they become homeless? So, ah, where do I start? Rent’s too high.⁶¹ Especially for families. There’s lack of work since 2008 when things got so bad.⁶² Also, what’s happening now is that a lot of people are selling the properties that they used to rent, so the renters have to move—and that’s because of gentrification! A family can’t pay because they don’t have a job that would help them pay these rents that are too high.”

“How high is too high?”

Aldrete warms to the subject of escalating housing costs: “There’s a woman who transitioned out and pays \$1200 for a one bedroom in Boyle Heights. But in the past, you’d be looking at \$800 to \$1000 for [a] 1 bedroom here. Now it’s in the \$1200-1400 range. And \$200-400 dollars makes *all the difference*. People lose their homes because they don’t have work, and they can’t pay. If they’re lucky, they can move out of the community that they’ve lived in for many years—someone else just told me they’re living downtown.”

“What are the effects of people becoming homeless? I mean, psychologically, physically?”

“They go through stages of grief. Also, depression . . . it has an impact on their health. A couple of days ago, we had a guy who had chest pains. It’s not easy to live in a shelter—it’s just a huge stressor on your body. And then they’re not eating a healthy diet—they’re predisposed to diabetes—”

“What are they eating?”

“Snacks.”

“Like, what, Chex mix? Sorry, I’m just trying to understand exactly.”

“They don’t have a refrigerator! They don’t have fresh food! It’s not good. And it’s not just the food—it’s everything, everything’s bad—the families get separated.”

“How so?”

“There aren’t a lot of family shelters where the husband and the wife and the child can stay together. The women are in one area, the men have to go to another area.”⁶³

“Okay,” I say. “So, malnutrition—loss of family—health problems—”

61. See Kellie Galentine, Elizabeth Muñoz & Carla Javier, *Boyle Heights: How are Rising Rents Changing the Neighborhood? Tell Us Your Story*, KPCC (July 20, 2016), <http://www.scpr.org/news/2016/07/20/62664/boyle-heights-how-are-rising-rents-changing-the-ne/> [<https://perma.cc/77UW-BS54>] (explaining that the median price of a two-bedroom apartment in Boyle Heights has increased 12% over one year).

62. See Rosa Solache, *Boyle Heights Beat: Hard Times in Boyle Heights, East LA Community Joins Together*, HUFFINGTON POST (Dec. 7, 2011), http://www.huffingtonpost.com/2011/12/06/boyle-heights-economic-hard-times_n_1132693.html [<https://perma.cc/PB64-KZRV>] (describing an increase in foreclosure clinic attendance after 2008).

63. *Family Homelessness Facts*, GREEN DOORS, <https://www.greendoors.org/facts/family-homelessness.php> [<https://perma.cc/82CE-7MRR>] (explaining that many family shelters do not accept men, causing families to separate when they become homeless).

“Look, we just do what is possible here. Like I said, it’s harder now, with Trump? We’re prepared to build a network that will help support our people. There’s definite fear. So, we do the shelters, and we have people come here to eat, . . . [and] we do rights training.”

My ears perk up. “What rights?”

“The rights that they have as human beings.”

I type frantically. “Bahhhhh. . . . what rights are those?”

Aldrete grows quiet for a second. “The right to remain silent,” she finally says. “That they have the right to not respond to any questions. That they have a right to an attorney, but that they should have emergency plans.”

I pause, looking at what I’ve just written down. “Yes, this is great. But, I mean, you’re talking aspirationally, right?”

“What?”

“Monica, do you think these are rights that everybody in this country has because they’re ‘human?’”⁶⁴

“Yes.” Aldrete sounds offended. “Yes!”

“Because, I mean, that’s not exactly how it works—”⁶⁵

I hear Aldrete suddenly talking to someone who has apparently entered her office. Her voice is muffled, and then she gets back on the line.

“Sorry—some beds just came in—I’ve been waiting for these for weeks, I have to go.”

“Wait a minute—this thing you were just talking about, with the rights—”

“Sorry, gotta go!”

We hang up the phone. I blink at my screen. Is she naïve, or onto something? I wonder. Constitutional rights aren’t “human rights,” I remind myself.⁶⁶

Later, I email Aldrete again, and ask her: *Do you think housing is a human right?*

The next day, she replies: “Yes, food, shelter and good quality education are basic human rights that everyone should have access to, the fact that not everyone does is inhumane and it definitely makes it very clear as to what are our local and national governments priorities.”⁶⁷

But what did all of that have to do with the law and the constitutional test for when property is taken?

64. See Terri R. Day & Leticia M. Diaz, *Immigration Policy and the Rhetoric of Reform: ‘Deport Felons not Families’* Moncrieffe v. Holder, *Children at the Border, and Idle Promises*, 29 GEO. IMMIGR. L.J. 181, 197–98 (2015) (arguing that existing practice in immigration proceedings are a “far cry” from the ideal of a Sixth Amendment right to counsel).

65. See Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT’L L. 82, 86 (2004) (arguing that the United States Supreme Court is inattentive to international law that protects human rights).

66. See *Id.*

67. Email from Monica Aldrete, Director of “The Haven” to Yxta Maya Murray, Professor of Law, Loyola Law School (Mar. 30, 2017, 9:01 PST) (on file with author) [hereinafter Aldrete Email].

2. *A Brief History of Boyle Heights and an Overview of Resident Perspectives*

Boyle Heights is nudged against the stony, dry bed of the Los Angeles River on the eastside of Los Angeles.⁶⁸ For decades, Boyle Heights was connected to downtown Los Angeles by the battered concrete 6th Street bridge. In 2017, the city demolished the bridge to make way for an undulating passage that will undoubtedly attract the pedestrians, skateboarders, and bicyclists expected to flock to the Heights' still relatively cheap housing.⁶⁹

Immigrants⁷⁰ established the neighborhood in the 1870's,⁷¹ and was home to Jewish, Japanese, Russian, Mexican, and Armenian residents.⁷² Today, it spans 6.52 miles and contains approximately 100,000 people.⁷³ In 2017, the L.A. Times estimated that it hosts a 94% Latinx population with a median household income of \$33,235 and only 5% of residents age 25 and older graduated from college.⁷⁴ More than half of Boyle Heights residents hail from other countries, and the community skews young.⁷⁵

Small, cozy, if sometimes dilapidated cottages and Victorian houses crowd Boyle Heights's blocks, their peeling dun and oxblood paintjobs burnishing the serried streets.⁷⁶ Observers note that Boyle Heights' bedraggled supermarkets

68. Danny Romero, *Boyle Heights: Colorful, Historic Murals Paint a Story of this Eastside Community*, KABC (Aug. 28, 2018), <https://abc7.com/society/boyle-heights-historic-eastside-la-community/4043268/> [<https://perma.cc/NQ2W-2UYA>].

69. See Rosanna Xia and Christopher Goffard, *6th Street Bridge, Spanning Much of L.A.'s Past, Finally Starts to Fall to Demolition Crews*, L.A. TIMES (Feb. 6, 2016), <http://www.latimes.com/local/california/la-me-0207-bridge-demolition-20160207-story.html> [<https://perma.cc/XDW7-PSLT>] (Positing that the "sleek \$428-million bridge, [will be] better suited to a gentrifying, forward-looking downtown . . . [and the] design, amiable to bikes and pedestrians, looks tailor made for the hipster renaissance.")

70. JAPANESE AMERICAN NATIONAL MUSEUM, LOS ANGELES'S BOYLE HEIGHTS 12 (2005).

71. *Id.* at 11.

72. *Id.* at 27–35. See also Hector Tobar, *A Look Back at the Boyle Heights Melting Pot*, L.A. TIMES (Dec. 9, 2011), <http://articles.latimes.com/2011/dec/09/local/la-me-tobar-20111209> [<https://perma.cc/M8XA-TUG2>].

73. *Mapping L.A., Eastside, Boyle Heights*, L.A. TIMES, <http://maps.latimes.com/neighborhoods/neighborhood/boyle-heights/> [<https://perma.cc/MZ5B-A792>] [hereinafter *Mapping L.A.*, L.A. TIMES]; Rebekah Sagar, *Gentrification in L.A.'s Boyle Heights Leaves Some Latinos Threatened, Others Hopeful*, NBC NEWS, Nov. 14, 2017, <https://www.nbcnews.com/news/latino/gentrification-l-s-boyle-heights-leaves-some-latinos-threatened-others-n820381> [<https://perma.cc/BXR8-8PEM>] ("Today, of about 100,000 residents, 94 percent are Latino.")

73. *Mapping L.A.*, L.A. TIMES, *supra* note 73.

74. *Id.*

75. *Id.* (reporting that the neighborhood's median age is 25).

76. See Jeff Wattenhofer, *Horrible Boyle Heights Crime Scene is a Hot Property*, LACURBED, Feb. 29, 2016, <http://la.curbed.com/2016/2/29/11136144/boyle-heights-crime-scene-hot-home-red-fin> [<https://perma.cc/3DZQ-K4XE>] for photographs and story of one such Victorian, which brokers predicted would sell quickly, despite being the location of a recent fatal shooting.

should qualify the neighborhood as a “food desert.”⁷⁷ Its residents also suffer disproportionately from diabetes and other health problems,⁷⁸ not to mention the nutritional and stress-related health problems that Monica Aldrete recounts in the above interview.⁷⁹ On East Cesar Chavez Avenue, the site where 14-year-old Jesse Romero was shot and killed by police in 2016,⁸⁰ sits White Memorial Hospital, which was founded by the Seventh Day Adventist church in 1913.⁸¹ Today it shoulders a 3-star Yelp rating⁸² and community distrust.⁸³

Boyle Heights once reigned as a gang capital,⁸⁴ but in 2016, it was at the center of an anti-gentrification movement.⁸⁵ The Victorian houses and the construction of a new bridge amplified housing prices, and art galleries began to appear in the neighborhood.⁸⁶ In response, a vociferous, sometimes violent, anti-gentrification social movement erupted: its members harassed gallery owners by chanting, tagging, and issuing threats.⁸⁷ These upsurges garnered national⁸⁸ and

77. Jackie Illum, *Bringing Healthy Food Alternatives to Boyle Heights*, KCET (May 24, 2014, 3:09 PM), <https://www.kcet.org/shows/artbound/bringing-healthy-food-alternatives-to-boyle-heights> [https://perma.cc/PU7Y-C3MX].

78. *Id.* See also UCLA CTR. FOR HEALTH POL’Y RES., BUILDING HEALTHY COMMUNITIES: BOYLE HEIGHTS HEALTH PROFILE (2011), http://healthpolicy.ucla.edu/chis/bhc/Documents/BHC_Fact_Sheet_Boyle_Heights.pdf [https://perma.cc/M427-LTZT].

79. See Aldrete Interview, *supra* text following note 62 (recounting shelter client who experienced chest pains).

80. Veronica Rocha & Brittny Mejia, *Suspect Shot Dead by Police in Boyle Heights Was 14-Year-Old Boy, Coroner Says*, L.A. TIMES. (Aug. 10, 2016, 3:45 PM), <http://www.latimes.com/local/lanow/la-me-ln-shooting-boyle-heights-20160810-snap-story.html> [https://perma.cc/H7G6-DU4W].

81. *About Us*, WHITE MEMORIAL MEDICAL CENTER, <https://www.adventisthealth.org/white-memorial/pages/about-us.aspx> [https://perma.cc/63Q2-MKTX].

82. *White Memorial Medical Center*, YELP, <https://www.yelp.com/biz/white-memorial-medical-center-los-angeles> [https://perma.cc/TS7A-7XHJ].

83. See, for example, *infra* note 191 and accompanying text, which describes a “standoff” at White Memorial between the hospital and community gardeners.

84. Brittny Mejia & Kate Mather, *The ‘Bad Old Days’ in Boyle Heights Are Gone, But For How Long?*, L.A. TIMES. (Sept. 2, 2016), <http://www.latimes.com/local/lanow/la-me-ln-boyle-heights-lapd-20160824-snap-story.html> (“In 1992, the LAPD’s Hollenbeck Division, which patrols Boyle Heights, had 97 homicides and about 57% of those were gang-related.”).

85. See, e.g., *infra* text following note 238 (describing the work of Defend Boyle Heights, the leading anti-gentrification group in the neighborhood).

86. See Boyle Heights Home Prices & Values, Zillow.com, <https://www.zillow.com/boyle-heights-los-angeles-ca/home-values/> [https://perma.cc/WZK7-5QLN] (reporting that median home value in the neighborhood increased 6.1% last year); Carolina Miranda, Auctions, Protests and Controversial Patrons: The Three Big Ways Art and Money Clashed in 2018, L.A. TIMES (Dec. 20, 2018, 3:55 AM), <https://www.latimes.com/entertainment/arts/miranda/la-et-cam-year-in-review-2018-art-and-money-clashes-20181220-story.html> [https://perma.cc/B3Y7-H5CK] (describing the response to the “art galleries that had begun to materialize in the area,” explaining “[g]alleries don’t cause development so much as mirror it.”)

87. Jennifer Medina, *Gentrification Protesters in Los Angeles Target Art Galleries*, N.Y. TIMES (Nov. 5, 2016), https://www.nytimes.com/2016/11/05/us/los-angeles-gentrification-art-galleries.html?_r=0 [https://nyti.ms/2eocVXS]; see also *infra* text accompanying notes 238–245. See also Miranda, *supra* note 86.

88. Medina, *supra* note 87; see also Miranda, *supra* note 86.

international⁸⁹ attention. However, resistance and grief also mounted in Boyle Heights' quieter quarters.⁹⁰ This dissent shows up everywhere from colorful wall murals⁹¹ to, as this Article recounts, the laments of the dislocated and those who are “with” them.⁹²

Though interviewees did not always speak in legal registers, the more the interviews delved into the problems of gentrification, the more their claims as stakeholders in Boyle Heights blossomed into legal rights-talk.⁹³ At the outset, it bears noting that this rights talk relates to a potentially wide body of law that deals with land and housing; for example, it could very well apply to the common law of trespass and the necessity defense, which hold significant power over poor people who seek to inhabit housing and other community spaces that are sites of conflict in Boyle Heights.⁹⁴ It could also energize calls to increase Section 8 housing voucher availability and subsidies,⁹⁵ inspire efforts to approve the building of larger housing complexes in order to increase supply,⁹⁶ and encourage the passing

89. Rory Carroll, *'Hope Everyone Pukes on Your Artisanal Treats': Fighting Gentrification, LA-Style*, THE GUARDIAN (Apr. 19, 2016), <https://www.theguardian.com/us-news/2016/apr/19/los-angeles-la-gentrification-resistance-boyle-heights> [<https://perma.cc/U5VL-BVAV>].

90. See Aldrete Interview, *supra* text accompanying note 63.

91. See *supra* picture accompanying note 58.

92. People who care about community, pay attention to it, and challenge their own perceptions are “with” the community. See Yxta Maya Murray, *Detroit Looks Toward A Massive, Unconstitutional Blight Condemnation: The Optics of Eminent Domain in Motor City*, 23 GEO. J. ON POVERTY L. & POL'Y 395, 449–55 (2016) [hereinafter Murray, *Motor City*].

93. See, e.g., Aldrete Interview, *supra* text accompanying notes 64–65 (reporting Aldrete's emphatic “Yes!” when the author asked if she believed that rights inherent to each person as a human being were more than aspirational).

94. See, e.g., *Com. v. Magadini*, 474 Mass. 593, 594, 52 N.E.3d 1041, 1045 (2016) (homeless man convicted of trespass entitled to jury instruction on the necessity defense).

95. See Memorandum from Seth Rogan, Executive Director Housing Authority of Los Angeles, to L.A. County Housing Comm'rs & Each Supervisor (Feb. 9, 2017), <https://www.hacola.org/docs/librariesprovider6/bos-memos/2017/reduction-in-funding-for-the-section-8-housing-choice-voucher-program.pdf?sfvrsn=2> [<https://perma.cc/SL2Q-2V8H>]; Elijan Chilan, *Renters Seeking Section 8 Vouchers Must Wait Up to 11 Years to Get One*, L.A. CURBED (Apr. 3, 2017), <https://la.curbed.com/2017/4/3/15167234/section-8-vouchers-los-angeles-renters-homeless> [<https://perma.cc/2PHB-BAED>].

96. See, e.g., Casey Tolan, *Most California Governor Candidates Oppose Bill That Would Override Zoning to Build Housing Near Transit*, O.C. REGISTER (Mar. 28, 2018), <https://www.oc-register.com/2018/03/28/most-california-governor-candidates-oppose-bill-that-would-override-zoning-to-build-housing-near-transit/> [<https://perma.cc/CN2H-H6RU>]. Further, rampant development could see greater supply and, as a result, lower prices, which could inure to the benefit of Boyle Heightsians. See, e.g., MAC TAYLOR, CAL. LEGISLATIVE ANALYST'S OFFICE, PERSPECTIVES ON HELPING LOW-INCOME CALIFORNIANS AFFORD HOUSING 1 (2016), <http://www.lao.ca.gov/Reports/2016/3345/Low-Income-Housing-020816.pdf> [<https://perma.cc/W6C3-MNAH>] (“Considerable evidence suggests that construction of market-rate housing reduces housing costs for low-income households . . .”). Note, however, that a call for greater development could *also* result in exclusion of poor residents of Boyle Heights, leading many to spiral into homelessness, which would violate the tenets of Boyle Heights takings jurisprudence. See Gonzalez Interview, *infra* text following note 319 (describing the situation faced by dislocated and potentially homeless residents as “absolutely bad”).

of living wage ordinances.⁹⁷ It could also penetrate other lofty areas of law, such as the Equal Protection Clause and due process, with arguments seeking the guarantee of a human right to housing.⁹⁸ This is only a small list of possible legal changes that could be inspired by the voices of the people I interviewed, and this Article in no way forecloses the validity of community development claims in those areas of law.⁹⁹

However, this Article asserts a “takings” claim, because the people I spoke to in Boyle Heights described their experience as one of necessary goods being *taken* from them.¹⁰⁰ In addition, as Aldrete’s email¹⁰¹ demonstrates, community rights-talk in Boyle Heights takes on constitutional dimensions because the loss implicates essential needs, such as the maintenance of life, health, personality, community, citizenship, and dignity.¹⁰² These necessitate a constitutionally protected status, such as how private property is given a modified protected status under the Fifth Amendment, rather than the fragile guardianship allowed by an ordinance that could be repealed, like Measure JJJ. This ambition to clarify the fundamental rights related to housing links to a larger effort in expanding constitutional protections to include marginalized and subordinated people. As scholars Catharine MacKinnon, Kimberlé Crenshaw, Gerald Torres, Lani Guinier, Larry Kramer, and Mark Tushnet have argued,¹⁰³ lay people and vulnerable people have their own comprehensions of the Constitution. As Judy Scales-Trent writes on Black women and their relation to the Constitution: “[t]he Constitution protects both the choice to turn inward to the cultural group, and the choice to use that group identity to participate fully in the institutions of the wider society.”¹⁰⁴

While this Article only sets forth preliminary articulations of Boyle Heights’ Takings jurisprudence, Boyle Heightsians’ discussions of the history, culture, and current conditions of the neighborhood contain lucid protests that constitutional

97. Clayton P. Gillette, *Local Redistribution, Living Wage Ordinances, and Judicial Intervention*, 101 NW. U. L. REV. 1057, 1058 (2007) (“The extensive acceptance of these ordinances is testimony to the efforts of activist groups, churches, and labor unions to enhance the earnings of the working poor.”).

98. See, e.g., W. Kent Davis, *Answering Justice Ginsburg’s Charge That the Constitution Is “Skimpy” in Comparison to Our International Neighbors: A Comparison of Fundamental Rights in American and Foreign Law*, 39 S. TEX. L. REV. 951, 952 (1998) (calling for a right to housing); Shelby D. Green, *Imagining A Right to Housing, Lying in the Interstices*, 19 GEO. J. ON POVERTY L. & POL’Y 393, 396 (2012) (same); Marc T. Smith & Ruth L. Steiner, *Affordable Housing as an Adequate Public Facility*, 36 VAL. U. L. REV. 443, 445 (2002) (“[I]n the view of some, housing is a fundamental right that should be provided or facilitated by society”).

99. I thank Joe Singer, Robin Williams, Andrew Coan, Stephen Lee, Aziz Huq, and Eduardo Peñalver for helping me make this point.

100. See, e.g., A. Interview, *infra* text accompanying notes 264–265 (“People are being evicted, and it’s a loss of home, and a loss of culture. It’s anxiety-inducing.”).

101. See *supra* text accompanying note 67.

102. See, e.g., Medina Interview, *infra* text following note 109 (“Housing is everything”).

103. See *infra* text accompanying notes 196–235.

104. Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place; Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9, 15 (1989).

law fails to recognize: they maintain that housing insecurity “takes” “property” that its poor residents should possess rights to. I call their legal thought a form of Community Constitutionalism, and in the following sections, seek to introduce it to mainstream constitutional thought.

III.

THE FIFTH AMENDMENT AND THE CONCEPT OF TAKINGS

A. *Interview with Aldo Medina*¹⁰⁵

Aldo Medina was a member of the East L.A. Community Corporation, which serves the business community of Boyle Heights. In this interview, he describes the neighborhood disintegration that can occur with gentrification, and the values upon which a just housing policy and jurisprudence should be built.

“Is the Boyle Heights boom, and the gentrification you’re seeing in the neighborhood, good for business, or is it just pricing locals out?” I ask Aldo Medina. Medina served as the Commercial Corridor Associate for the East L.A. Community Corporation [ELACC], which builds affordable housing and provides economic opportunities for the Latinx community in East Los Angeles and Boyle Heights.¹⁰⁶ A 27-year-old U.C. Santa Cruz graduate who emigrated to the U.S. from Mexico as a baby, Medina lived in El Monte. At the time of our interview, he was helping local entrepreneurs develop Boyle Heights’s small heritage businesses on 1st, Cesar Chavez Avenue and Soto Streets.¹⁰⁷

Medina pauses, then answers, “Gentrification—yeah, at first the businesses that I worked with *thought* that it would be a good thing—you know, more money. But it’s not. We’ve got an ecosystem here that people have been building for a long time. But the new residents, they want something different. That boom town excitement? It was a farce.”¹⁰⁸

“How so?”

“The businesses that have been built here have been tailored to the neighborhood needs. You’ve got the local printing shop, the hair salon, the middle kiosk

105. Medina Interview, *supra* note 12.

106. *About Us*, EAST L.A. CMTY. CORP., <http://elacc.org/about-us/> [<https://perma.cc/4F3N-ANXX>].

107. ARCHITECTURAL RESOURCES GROUP, HISTORIC RESOURCES SURVEY REPORT: BOYLE HEIGHTS COMMUNITY PLAN AREA 5 (2014), http://preservation.lacity.org/sites/default/files/Boyle%20Heights%20Report_HPLAEdit.pdf [<https://perma.cc/M7WS-44F9>] (describing Boyle Heights commercial corridors). In December of 2017, Mr. Medina moved to Portland, Oregon, to continue his work on community economic development there. Email from Aldo Medina, Community Corridor Associate, ELACC to Yxta Maya Murray, Professor of Law (Dec. 19, 2017 5:25 PM) (on file with author).

108. *See, e.g.,* Maga Miranda, *Opinion: Boyle Heights Families and Small Business Owners Fight Back Against Displacement, and are Winning*, BOYLE HEIGHTS BEAT (June 18, 2016), <http://www.uniondevecinos.org/index.php/opinion-boyle-heights-families-and-small-business-owners-fight-back-against-displacement-and-are-winning/> [<https://perma.cc/QR35-4773>] (describing local market struggles).

manufacturers, the music store. And the clientele is just not there anymore, because the rent's going up and people can't afford to be here. So, you have to adjust to the new clientele or wait until you close shop. If you don't own your property, there's no security, no tenant protections, unless they have a lease. And a lot of them don't. There's a lot of volatility."

"Well, what do you have to say to people who think that's just creative destruction?¹⁰⁹ And if tenants can't afford it, they don't have any rights to be there? I mean, they don't own the property. Can you really say that something's been taken from them when it's not really theirs?"

Medina coughs in shock at my question. "Uh, well. Um, ffffffft," he replies, stiff-sounding. "Housing is everything. It's your pillar. It's your stable place where you rest your head at night. So, yeah."

"I'm not trying to be rude," I say. "I think that an answer to this issue is developing in Boyle Heights, but I need to hear it."

"Well, when you ask me that question, it's phrased with the monetary benefit being first and foremost, ok?"

"Okay."

"And there's a lot of things that are beyond money here in Boyle Heights. The social networks that people have built here, the social aspects, the culture within the community. It's not monetarily quantified. I mean . . . caring for your neighbor, one for one—that doesn't translate into dollars and cents. It's more than money. God, I know it's all about money in a capitalist economy, but as human beings, there's more than money! It's a made-up conflict! Some people have more than others and—look, the privilege that goes into asking a question like that . . ." He takes a breath. "People build their lives and their social fabrics within a community and *that's* what makes it that community."

"Tell me more about the social fabric," I say.

"It's every day interactions amongst neighbors, looking out for each other, that's the community. You develop trust through that. And trust is a really big factor in that identity of people and the neighborhood. And for business: If I trust my neighbor, I trust their recommendation for a haircut place or little things. That's how business is run—through life and experience."

"Like, there's this music store. It's teetering. For a while it took in another store, a cell phone place that got displaced when their rent tripled. But then that went sour—there's not much meat left on the bones for people who grew this place up. There's a volume game and they're losing due to the new base. The cell phone place moved out. And then the owners of the music store, they used to live in the community, but they couldn't afford it any more. They had to move out. They're a family. And now there's a good chance they'll lose the shop, too. It's because

109. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 81-86 (1976) (arguing that economic innovation destroys old systems).

the property is being purchased and flipped at a much higher price, and there's a domino effect. Plus, you've got your absentee landlords."

"What should be driving the law here, in creating protections, Aldo?"

"You've got to fight the powers of the market," he insists. "The human aspect of things gets lost. I'm worried that everything is going downhill from here, but I'm still working here, and if we can do something about it—you've got to be an optimist, we're trying to build affordable housing and get people living in a dignified place. I know the world is unjust, but I'm passionate about this work. We have to hold onto our values."

I'm bashing his words into my keyboard. "Okay, got it. But what are the values of Boyle Heights, and how should they help drive property rights?"

He sighs, then laughs a little.

"Respect for people, Yxta. Respect no matter their education, their income, their background, their orientation. And you have to have perseverance, to fight."

"To fight," I repeat.

"Yes. Respect, fighting, hoping, helping—because you love your community. You know, all of that good stuff."

B. The Background of the Fifth Amendment and Its Values

Aldrete's and Medina's conceptions of property rights—formed out of mutual respect, trust, and human elements—do not align with recognized Fifth Amendment case law. Further, their assessments of housing as a "pillar" of human rights, one that should be guaranteed by the government, also bears a disconnect with Takings jurisprudence.

But their creed is not altogether alien to the legal tradition. The Fifth Amendment states that "No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."¹¹⁰ While the original purpose of the Takings Clause remains mysterious,¹¹¹ the Clause's initial sway was "limited."¹¹² The framers "did not desire substantive protection of all property interests because . . . republicanism . . . exert[ed] substantial influence on political discourse."¹¹³ And, according to Gregory Alexander, if republicanism enriched the Fifth Amendment, that worldview supports a property ideology that leverages people's capacities to participate in the community and develop the self.¹¹⁴ With his enlightened vision of republicanism,

110. U.S. CONST. amend. V.

111. See William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1793 (2013) (observing that there is "scant" evidence of the Clause's purpose).

112. *Id.*

113. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 783 (1995).

114. GREGORY S. ALEXANDER, *COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970*, at 30–31 (1997) ("[R]epublicans conceived of property as necessary to facilitate a publicly active, self-governing citizenry.").

Alexander creates a bridge between Aldrete, Medina, and the Founders' Fifth Amendment.¹¹⁵

The Clause reflects the tension between republican communitarianism and muscular (Anglo¹¹⁶) individualism: since the landmark SCOTUS decision in *Berman v. Parker* in 1954, states may confiscate private property for public rescue,¹¹⁷ a development that arguably turns courts into rubber stamps.¹¹⁸ In these Takings decisions, which permit the state to engage in blight cleansings¹¹⁹ and even property redistribution,¹²⁰ courts emphasize communitarian values.¹²¹ Even dissenting voices in these cases—as well as majority opinions in regulatory takings decisions—endorse property owners' rights of protection against state corruption and incursion.¹²²

In conflict with these communitarian values, however, the Fifth Amendment's Takings Clause has an exploitation problem. As many scholars have noted, exercises of eminent domain often harm poor people and people of color.¹²³ Further, those interested in anti-subordination may object that the Takings Clause protects a concept of property ownership that springs from the American history of conquest and enslavement.¹²⁴ In designating whose property may be taken, the Fifth Amendment enshrines *Pierson v. Post*,¹²⁵ the 19th century decision that

115. However, this is not the complete picture. The Founders, after all, had serious problems: Stephen Stohler and Charles Beard have noted connections between the Constitution's formation, or the Fifth Amendment specifically, and the "creation and protection of slave markets." Stephen Stohler, *Slavery and the Political Origins of the Fifth Amendment's Takings Clause* 4 (Oct. 6, 2010) (unpublished manuscript), available at https://www.sas.upenn.edu/dcc/sites/www.sas.upenn.edu.dcc/files/uploads/StohlerDCC_0.pdf [<https://perma.cc/W85V-X77L>] ("I . . . argue that the interests of slave-holders played a central—and often decisive—role in a larger coalition of interests formed around the idea that the state should compensate private individuals for the taking of property."). Cf. CHARLES A. BEARD, *THE SUPREME COURT AND THE CONSTITUTION* 92 (1912) (stating that delegates to the constitutional convention were anxious to ward off "propertyless masses").

116. Stohler, *supra* note 115, at 4. See generally sources cited *infra* note 123–124.

117. 348 U.S. 26, 33–34 (1954).

118. See *Kelo v. City of New London*, 545 U.S. 469, 494 (2005) (O'Connor, J., dissenting) (arguing the majority's holding renders the Takings Clause devoid of meaning).

119. *Id.*; *Berman*, at 33–34.

120. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 243 (1984).

121. See, e.g., *Kelo*, 545 U.S. at 483 (suggesting that economic development helps community); *Midkiff*, 467 U.S. at 232 (emphasizing the legislature's conclusion that "concentrated land ownership was responsible for . . . injuring the public tranquility and welfare").

122. *Kelo*, at 496 (O'Connor, J., dissenting). See also *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 596, 607 (2013) ("Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation.").

123. See, e.g., David A. Dana, *The Law and Expressive Meaning of Condemning the Poor After Kelo*, 101 Nw. U. L. Rev. 365, 365–366 (2007); Ilya Somin, *Blight, Pretext, and Eminent Domain in New York*, 39 FORD. URB. L.J. CITY SQUARE 57, 61–62 (2012); Murray, *Motor City*, *supra* note 92, at 439–440.

124. Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CAL. L. REV. 1511, 1523 (1991) (arguing that slavery is at the "heart" of property law).

125. 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

declined to create rights for people who put labor into property; rather, only the property's capturers own it.¹²⁶ And only these winners may sue for Takings compensation when the government interferes with their "private property" rights. Though the definition of "property" has certainly expanded under the Takings Clause¹²⁷ and perhaps found an exciting intervention in a recent Supreme Court decision in *Murr v. Wisconsin*,¹²⁸ "private" continues to mean that a person "owns"¹²⁹ the property. "Ownership" means legal title obtained via purchase or inheritance.¹³⁰ Furthermore, when a person finds themselves evicted because of gentrification fostered—but not imposed—by the state, an absence of state action will rout their Takings claim.¹³¹

In other words, while the Fifth Amendment's republican origins share values similar to those that Aldrete and Medina expressed,¹³² the Amendment does not ultimately do the work necessary to preserve those priorities in Boyle Heights. Specifically, Aldrete's homeless clientele could not sue for "takings" based on their gentrification-caused ouster from their leaseholds.¹³³ Similarly, market-created dislocation would not support standing for Medina's clients.¹³⁴ Boyle Heights landlords and developers, however, do qualify, because they purchased land in the winding, peeling-paint, but rapidly upcycling streets of the neighborhood.

126. *Id.* at 178.

127. See John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1009–1010 (2003) (describing regulatory takings as pushing the outer boundaries of the takings principle "in ways that could not have been contemplated by the founding generation").

128. *Murr v. Wisconsin*, 137 S.Ct. 1933, 1938 (2017) (determining that takings claims would necessarily be influenced by a conclusion of what parcel was taken; that conclusion, Justice Kennedy wrote, would be established in part by looking at "the surrounding human and ecological environment."). See also *supra* text accompanying notes 373–375.

129. See, e.g., *Textainer Equip. Mgmt Ltd. v. The United States*, 115 Fed.Cl. 708, 716 (2014) (holding that there is no standing without ownership); Bruce Ledewitz, *Establishing A Federal Constitutional Right to A Healthy Environment in Us and in Our Posterity*, 68 MISS. L.J. 565, 668 (1998) (setting forth the Supreme Court's "private property oriented viewpoint"). Takings Clause standing exists despite an owner's purchase post-restraint, but legal title remains required. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 629–630 (2001).

130. See, e.g., *St. Bernard Par. v. United States*, 88 Fed. Cl. 528, 548 (2009) ("The Second Amended Complaint alleges that Gwendolyn and Henry Adams . . . have standing because, prior to August 2005 and currently, they own property in the Lower Ninth Ward that has been 'appropriated by the MR–GO project.'") (analyzing a takings claim stemming from the Army Corps of Engineers' construction of water circuits that exacerbated flooding during Hurricane Katrina).

131. *Stop the Beach Renourishment, Inc. v. Florida Dep't of Env'tl. Prot.*, 560 U.S. 702, 713 (2010) (holding that Takings Clause actions requires state action).

132. See Aldrete Interview, *supra* text accompanying note 67 (describing housing as a human right); Medina Interview, *supra* text following note 109 (arguing for housing as a right and the importance of giving respect to people in the community).

133. See Aldrete Interview, *supra* text following note 62 (describing people losing their homes and becoming homeless).

134. See Medina Interview, *supra* text accompanying and following note 109 (describing the owners of a local music store on the verge of losing their storefront, after already being forced to move out of the neighborhood).

C. When Property Is “Taken”

Takings issues often arise when the state explicitly announces its intention to take property for a public purpose—for example, when it seeks to condemn land to build public amenities such as railroads or thoroughfares,¹³⁵ to achieve “blight” clearances,¹³⁶ to break oligopolies,¹³⁷ or for economic development.¹³⁸ However, under the much-criticized doctrine of regulatory takings,¹³⁹ courts have recognized that the government also takes property when it overburdens property owners with regulation: when the government, via legislation or other action, permanently occupies real property, it commits a per se taking under *Loretto v. Teleprompter Manhattan CATV Corp.*¹⁴⁰ Further, where a regulation abolishes a landowner’s economically beneficial use of their property, such as by permanently banning development, that is also a per se taking under *Lucas v. South Carolina Coastal Council*.¹⁴¹ Other regulations must comply with *Penn Cent. Transp. Co. v. City of New York*, which held that three factors must be analyzed: the regulation’s economic impact, its effect on investment-backed expectations, and its character.¹⁴² Regarding investment backed expectations, the Court there found that the “economic impact of [a] regulation on [a] claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations” are relevant to the takings inquiry.¹⁴³ The Court emphasized that, for a taking to be recognized, the harmed interests must be “sufficiently bound with the reasonable expectations of the claimant [so as] to constitute ‘property’ for Fifth Amendment purposes.”¹⁴⁴ In addition, if the government goes “too far,” then it will also be held to have taken property under *Pennsylvania Coal Co. v. Mahon*.¹⁴⁵

135. See, e.g., *Chicago Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897).

136. See *Berman v. Parker*, 348 U.S. 26 (1954).

137. See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 241–42 (1984).

138. See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 483 (2005).

139. See, e.g., Lee Anne Fennell & Eduardo M. Peñalver, *Exactions Creep*, 2013 SUP. CT. REV. 287, 292 (2013) (stating that Takings jurisprudence is “not a model of clarity or coherence”); John D. Echeverria, *The Costs of Koontz*, 39 VT. L. REV. 573, 576 (2015) (arguing that *Koontz* is incoherent).

140. 458 U.S. 419, 432–35 (1982). *Loretto* concerned a cable operators’ permission to load coaxial cables on a New York City apartment. *Id.* at 422. The Court held that a permanent physical occupation of property constituted a taking. *Id.* at 432 n. 9.

141. 505 U.S. 1003, 1015 (1992). *Lucas* involved a claimant who wanted to build a home on lots that the South Carolina Beachfront Management Act regulated, which prohibited the construction of any permanent structures on the lots. *Id.* at 1007. The Court held that this regulation was a categorical taking. *Id.* at 1018–19.

142. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). In this case, the appellants’ argued that New York’s Landmarks Law had deprived them of their property when it prevented their gainful use of air rights above the terminal that they owned. The Court disagreed. See *id.* at 130.

143. *Id.* at 124.

144. *Id.* at 125.

145. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). *Mahon* evaluated a law that forbade the mining of coal beneath someone else’s property in a way that caused surface sinking.

Other takings have been held to exist where the government confiscates goods in order to optimize markets,¹⁴⁶ or overburdens property owners with conditions during permitting processes' negotiations.¹⁴⁷ In this latter spin on regulatory takings, burdens will be held to constitute unconstitutional "exactions" when the government's conditions do not bear an essential nexus or rough proportionality between the property and the policy objectives the government seeks to fulfill through the conditions. In the decisions *Nollan v. California Coastal Comm'n*,¹⁴⁸ *Dolan v. City of Tigard*,¹⁴⁹ and *Koontz v. St. Johns River Water Mgmt. Dist.*,¹⁵⁰ the Supreme Court held that it must limit the government's ability to negotiate burdensome conditions during the permitting process in order to guard against corruption.¹⁵¹ Corruption exists as government "favoritism" and deliverance of "private benefit[s]."¹⁵² Though the Court has not made this clear in its decisions, the weight of scholarly opinion posits that takings are best found in the imposition of burdens executed in an ad hoc permitting process.¹⁵³ Legislative enactments appear less hazardous and theoretically create an equal playing field,¹⁵⁴ in part because property owners may be able to better protect themselves in the legislative process.¹⁵⁵

The Court held that this statute was a taking because it made mining commercially impracticable, the effective equivalent of appropriating or destroying that property right. *Id.* at 414–415.

146. *Horne v. U.S. Dep't of Agric.*, 135 S. Ct. 2419, 2427–28 (2015) (holding that a federal law requiring certain raising growers to title over a portion of their raising crop to the Department of Agriculture in order to further the aim of market stabilization was a taking).

147. *See infra* notes 148–150.

148. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). *Nollan* involved a California commission, which conditioned approval of a landowner's request for a building permit on the owners' grant of an easement on their land to allow the public to walk across their property to the beach. *Id.* at 827. The Court held that decision violated the Takings Clause because there was an insufficient nexus between the policy the commission sought to advance and the easement it required of the plaintiff. *Id.* at 838.

149. *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). In *Dolan*, a hardware store owner who wanted to build a larger building, but the local government would not permit it unless the owner agreed to dedicate part of the land to a flood plain, a bicycle path, and an easement. *Id.* at 379–81. The Court added a "rough proportionality" test to the *Nollan* "essential nexus" test. *Id.* at 391.

150. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2597 (2013). The Court held that a local government's decision to prevent the development of a wetland until the owner paid money for remediation of unrelated land violated the *Nollan/Dolan* tests. *Id.* at 2595–96.

151. For critiques of *Nollan*, *Dolan*, and *Koontz*, see, for example, Fennell & Peñalver, *supra* note 139, at 292; Echeverria, *supra* note 139, at 576.

152. Fennell & Peñalver, *supra* note 139, at 310.

153. *Id.* at 341. ("[L]egislatively enacted bargains do not implicate concerns with the rule of law to the same degree as [other] bargains.").

154. *Id.* at 341 ("[P]olitical checks attend legislative enactments, and these arguably make it less necessary (and indeed, inappropriate) to add intrusive judicial checks.").

155. *See San Remo Hotel L.P. v. City & Cnty. of San Francisco*, 41 P.3d 87, 105 (2002).

What we find in takings jurisprudence, then, is a judicial sensitivity to governmental occupation of land,¹⁵⁶ destruction of land's beneficial use,¹⁵⁷ betrayal of reasonable investment-backed expectations,¹⁵⁸ and corruption.¹⁵⁹

As we have already seen, Aldrete and Medina complain that governmental support of neoliberalism destroys Boyle Heightsians' *beneficial use* of their neighborhood, which belongs to them.¹⁶⁰ They also emphasize that political and social forces go *too far* by permitting evictions and homelessness because of ignoble value systems¹⁶¹ and a "made up conflict."¹⁶² These critiques additionally accuse the government of a kind of *corruption* because of its bad "priorities"¹⁶³ and placing "the monetary benefit first and foremost."¹⁶⁴ In future interviews, we will hear from other Boyle Heightsians who accuse the government of permitting occupation and other per se types of takings,¹⁶⁵ as well as taking property rights that have been accrued through investment-backed expectations.¹⁶⁶

While this Article does not, and cannot, provide the entire spectrum of Boyle Heights takings jurisprudence, interviewees articulated a theory of "takings" that resembles the Supreme Court's own jurisprudence, but their insights regarding "property" fall far beyond the Court's interest.

The question this Article asks, then, is what import the interviewees' demands for rights might have in the development of a Boyle Heights Takings Clause, and how these voices might impress themselves upon the law.

IV.

WHEN ARE COMMUNITY VOICES HEARD BY LEGAL DECISION-MAKERS?

A. Interview with Irene Peña¹⁶⁷

Irene Peña directed an urban farm at Boyle Heights' White Memorial Hospital for ten years until she was asked to leave. In this interview conducted at Echo Park's Café and Stories, she describes the injustice of gentrification and the pain

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

157. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

158. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

159. See *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

160. See Aldrete Interview, *supra* text accompanying note 67; Medina Interview, *supra* text accompanying and following note 109.

161. See Aldrete Interview, *supra* text accompanying notes 66–67.

162. Medina Interview, *supra* text following note 109.

163. See Aldrete Interview, *supra* text accompanying note 67.

164. Medina Interview, *supra* text accompanying and following note 109.

165. See A. Interview, *infra* text preceding note 262 ("We are surrounded.").

166. See Gonzalez Interview, *infra* text following notes 320 ("L-I-look, we want to preserve our history, our culture. In Boyle Heights, we have generations of families, and we want to preserve what's right.").

167. Peña Interview, *supra* note 9.

that it has caused her and her fellow farmers. She also talks about the kinds of community interconnection that gentrification can undo.

“What they wanted was a new management that would be more respected than we were, especially when property values started rising here,” says Irene Peña, as we sit in an Echo Park café. Peña, who once lived in Boyle Heights and now struggles to make rent in Echo Park, tells me about her work directing Proyecto Jardín. This garden-farm grows on a patch behind the Seventh Day Adventist White Memorial Hospital in Boyle Heights.¹⁶⁸ Several weeks before our meeting, I read that White Memorial declined to renew Proyecto Jardín’s lease¹⁶⁹ to work the garden, though the garden had existed there since 1999,¹⁷⁰ with Peña serving as Director for over ten years.¹⁷¹

“But why did they want you out?” I ask Peña, a medium-tall woman with striking brown eyes and a fall of dark hair.

“They couldn’t see what we were doing,” she replies, waving her hands. “The value we create. They care about the money and the looks of things more than seeing the community get well. Their corporate principles are so much more powerful than our spiritual principles. We tried to appeal to their spiritual principles, but it didn’t matter.”

Proyecto Jardín existed as a communal urban farm developed in order to “lovingly reclaim and repurpose a blighted residential lot and build a healing space for all.”¹⁷² To tackle Boyle Heights’s problems with diabetes, stroke, and street violence,¹⁷³ Peña and co-workers applied for grants, built 43 plots, an outhouse, a kitchen area, and decorated the space with art.¹⁷⁴ The Jardín also staged cultural rituals.¹⁷⁵ It hosted about thirty urban farmers a year, according to Peña.

168. Sahra Sulaiman, *Proyecto Jardín Evicted from Community Garden at White Memorial; Protest Planned for Saturday*, L.A. STREETS BLOG (Jan. 29, 2016), <https://la.streetsblog.org/2016/01/29/proyecto-jardin-evicted-from-community-garden-at-white-memorial-protest-planned-for-saturday/> [<https://perma.cc/3JD3-NZUP>] (mentioning the garden space behind White Memorial Medical Center).

169. Antonio Mejías-Rentas, *Proyecto Jardín and White Memorial in Dispute Over Garden*, BOYLE HEIGHTS BEAT (Jan. 30, 2016), <https://boyleheightsbeat.com/proyecto-jardin-and-white-memorial-in-dispute-over-garden/> [<https://perma.cc/A39L-VAJD>].

170. Regarding the existence of the garden and its operation since 1999, see Sulaiman, *supra* note 168; regarding Peña’s tenure, see *Meet Our Founder: Irene Peña*, Sacred Earth Farms, <https://sacredearthfarm.com/pages/meet-irene> [<https://perma.cc/D4B6-6XRL>] (“As the Executive Director of Proyecto Jardín for 10 years, she managed five site improvement projects on a communal farm that included public art installations, rebuilding medicinal herb spirals, construction of a rain harvesting system, bio-remediation of lead in soil, and construction of an aerobic composting system.”).

171. *Meet Our Founder*, *supra* note 170.

172. Proyecto Jardín, *The Place*, <http://www.proyectojardin.org/place/#place-1> [<https://perma.cc/T5TH-GE7B>].

173. See Peña Interview, *infra* text accompanying notes 180–184.

174. Jason Song, *Group Rallies to Secure Stake in Community Garden After Lease Talks Falter*, L.A. Times, (Jan. 31, 2016) <http://www.latimes.com/local/california/la-me-proyecto-Jardín-20160131-story.html> [<https://perma.cc/Z3DV-QWAA>].

175. *Id.*

According to reports, hospital officials refused to renew the lease in April of 2016 after complaining about garden disrepair and “waist high weeds.”¹⁷⁶ Peña, however, says that White Memorial officials ignored the valuable work she and her colleagues accomplished and, despite her grant-writing and labor, replaced them with the relatively wealthier Roybal Foundation once Boyle Heights’s fortunes began to ascend.¹⁷⁷

“White Memorial said that we were not being effective and growing enough produce,” she tells me. “They found a partner who was going to grow more and faster, and because we weren’t up to par with production capacity, they said that they were going to take matters into their own hands and get other partners. They just refused to see how we sustained the community!”

“How did the garden sustain the community?” I ask.

Peña grips onto her soda bottle. “So, we were a garden adjacent to a hospital in Boyle Heights. And the health crises that we faced are these: diabetes is a killer in the community,¹⁷⁸ it determined the health goals we set. We planted herbs in the garden that could be used for healing the community. There are a lot of herbs that most people versed in traditional foods will know. They might be considered weeds here, but folks know that they’re useful for dealing with health issues. I’ll show up at community meetings with plants and we’ll talk about them, how these herbs cure anemia or other diseases. We planted hoja santa,¹⁷⁹ things like that.”

“But it’s not just about how we planted this herb or that herb. It’s the process, the relationship, between the community and the garden. I mean, there’s police violence and other forms of violence and gang violence.”

I raise my eyebrows. “Well, what does police violence have to do with White Memorial’s garden, or with diabetes?”

176. Song, *supra* note 174.

177. In 2016, the Roybal Foundation reported spending \$246,508. See IRS Form 990-PF, Return of Private Foundation for The Lucille and Edward Roybal Foundation, <https://www.guidestar.org/FinDocuments/2016/954/031/2016-954031228-0eca50ba-F.pdf> [<https://perma.cc/48VW-PAL6>]. According to its sponsor Community Partners, in fiscal year 2015-2016, Proyecto Jardín spent just \$51,472. COMMUNITY PARTNERS, FINANCIAL STATEMENTS AND SUPPLEMENTAL INFORMATION FOR THE YEAR ENDED JUNE 30, 2016, <https://communitypartners.org/sites/default/files/documents/Finance/audits/Community%20Partners%20FY%202016%20Audit.pdf> [<https://perma.cc/2NCS-NX95>]. Grants that Peña secured covered about \$31,000 of these expenses, though some of them were later suspended once White Memorial refused to renew the lease. Jacqueline Garcia, *Proyecto Jardín Out: Gardeners Can Stay*, EGP NEWS (Apr. 14, 2016), <http://egpnews.com/2016/04/proyecto-jardin-out-gardeners-can-stay/> [<https://perma.cc/R5S8-3YF2>].

178. Soumya Karlamangla, *The Amputation Rate for Diabetics in Poor Areas is High. This Boyle Heights Clinic is Trying to Change That*, L.A. TIMES. (May 1, 2017, 3:00 AM), <http://www.latimes.com/local/california/la-me-ln-amputation-clinic-20170501-story.html> [<https://perma.cc/8E83-THYA>].

179. *La Hoja Santa y Sus Propiedades Medicinales*, MEXICO DESCONOCIDO <https://www.mexicodesconocido.com.mx/hoja-santa1.html> [<https://perma.cc/NY4J-EKP6>] (describing medicinal uses of hoja santa).

“The garden protected against those risks, which are health risks!”¹⁸⁰ Peña exclaims. “It’s a safe space where families can come with their children and feel comfortable with their children to walk across the street. There are some families who refuse to let their kids hang out at [nearby] Prospect Park, but they could do that here. And what people have to understand is that something like diabetes or high blood pressures, which kills in this community, is connected to fears of violence.¹⁸¹ Why do we make the choices we do? Because there’s all this garbage on the supermarket shelves, saying come and get me.¹⁸² And, we also get diabetes because of the effect that certain foods have on our neobiochemistry and our neurochemistry, which needs to be soothed—and so sugar and alcohol and over-processed carbs, they make you feel temporarily better.¹⁸³ The stress helps create food addictions, and it’s cheaper—corn is subsidized.”¹⁸⁴

“And it’s not just violence. In planting the herbs that we did, we created a cultural practice. We would have education on indigenous herbs, and then have indigenous ceremonies related to those things that taught the kids a pride of heritage and of culture. We had things like Aztec dance and drumming, and basic education about the beliefs. And some of the cultural traditions are very empowering for immigrant families that feel disconnected to their roots. And when you have that empowerment, that can feed into the health practices of the community, too. Everything strengthens everything else.”¹⁸⁵

“Do you see? The whole project is connected. The hospital and the garden were connected to entire systems that impact Latino health in Boyle Heights. And then, they just forced us out. I was willing to work with Roybal.¹⁸⁶ But no. We

180. See Justin Feldman, *Public Health and the Policing of Black Lives*, HARV. PUB. HEALTH REV. (2015), <http://harvardpublichealthreview.org/public-health-and-the-policing-of-black-lives/> [<https://perma.cc/F3WT-5328>] (tracing the connection between police violence and negative health outcomes).

181. Alex Zielinski, *Police Violence Is a Public Health Issue*, THINKPROGRESS (July 14, 2016), <https://thinkprogress.org/police-violence-is-a-public-health-issue-1de39be33bda> [<https://perma.cc/X6DD-BKPB>] (linking police violence to high blood pressure).

182. See Katherine Pratt, *A Constructive Critique of Public Health Arguments for Antiobesity Soda Taxes and Food Taxes*, 87 TUL. L. REV. 73, 133 (2012) (describing how food producers’ behavior affects consumer health).

183. Yvonne H. C. Yau & Marc N. Potenza, *Stress and Eating Behaviors* 3 (2013) (unpublished manuscript), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4214609/pdf/nihms-630893.pdf> [<https://perma.cc/J8YT-8YYP>] (describing health effects of emotional eating).

184. Scott Fields, *The Fat of the Land: Do Agricultural Subsidies Foster Poor Health?* 112 ENVTL. HEALTH PERSP. a820, a823 (2004) (acknowledging that there is some connection between subsidies of high fructose corn syrup and poor health, while noting that eliminating subsidies wouldn’t affect people’s eating habits).

185. See, e.g., *Community Empowerment*, WORLD HEALTH ORG. (2009) <http://www.who.int/healthpromotion/conferences/7gchp/track1/en/> [<https://perma.cc/NSU4-MJ93>] (finding that social, cultural, political and economic determinants underpin health).

186. See generally Antonio Mejias-Rentas, *White Memorial Says Roybal Foundation Will Operate Community Garden*, BOYLE HEIGHTS BEAT (Apr. 1, 2016), <https://boyleheightsbeat.com/white-memorial-says-roybal-foundation-will-operate-community-garden/> [<https://perma.cc/5Q87-FK4N>] (“In the interview, [Irene] Peña said . . . ‘[w]e feel Roybal has a lot to offer to Proyecto Jardín’”).

had thirty farmers, and I had given ten years of my life to this project, and then they threw us out. And now they'll just take over what we made. I call it 'unjust enrichment.'"¹⁸⁷

I nod, knowing that Peña is describing a great personal and community trauma. In my research previous to our interview, I learned that after White Memorials' officials announced their plan to oust Peña and the Jardín's leadership, 200 people marched in July 2016.¹⁸⁸ Locals such as Nancy Aragon called the garden a "community treasure," and resident Monica Okita talked about her son marrying at the garden and the satisfaction she received from "work[ing] with [her] hands" there.¹⁸⁹ Peña complained of enduring misuse by White Memorial: during an occupation of the garden,¹⁹⁰ or what reporters described Peña as characterizing as a "standoff,"¹⁹¹ she asserted her authority as one of the "caretakers" of the land¹⁹²—a status that neither White Memorial officials nor Roybal could muster.¹⁹³

In the Echo Park café, I listen to Peña talk about interconnectivity and community healing. Then I take a deep inhale and ask: "Why should you be allowed to stay in your position at White Memorial when they own the land, and you don't?"

Peña does not flinch, at first. She bites her lip and nods. "I know. We don't have any legal rights. But we cleared the lead in the soil, *they* didn't do that!"

I tilt my head at her. "You cleared the lead? What happened?"

"We cleaned up the lead. It was all in the ground, in the earth. White Memorial gave me \$3,000 to do it. We didn't have a hazmat unit, or anything. I looked up how to detoxify the earth and someone told me to work all this compost into the soil, it'll create decomposition of the lead, so we did it. The following year we started composting. And we got rid of the lead.¹⁹⁴ We tested it and it was gone. And we did all this—the planting, getting the farmers, making fliers, organizing events . . ." She trails off.

I ask, "Well, after doing all of that, do you feel like you have some rights to that land and that they have been taken from you?"

187. Roybal official Crystal Torres said she was willing to work with the Jardín's gardeners and that Roybal's work on the garden would not commence until June or July 2017. *See* Garcia, *supra* note 177.

188. Lucy Guanuna, *On the Verge of Eviction, a Community Rallies to Save Local Garden*, KCET (Jul. 11, 2016), <https://www.kcet.org/shows/departures/on-the-verge-of-eviction-a-community-rallies-to-save-local-garden> [<https://perma.cc/9L9L-CJUT>] (reporting that more than 200 people marched).

189. Song, *supra* note 174.

190. Antonio Mejías-Rentas, *Proyecto Jardín Refuses to Give Up BH Garden*, BOYLE HEIGHTS BEAT (Feb. 1, 2016), <https://boyleheightsbeat.com/proyecto-jardin-refuses-to-give-up-bh-garden/> [<https://perma.cc/98KX-CRWE>].

191. *See* Mejías-Rentas, *supra* note 186.

192. *Id.*

193. *Id.*

194. *See Meet Our Founder*, *supra* note 170.

Peña looks at me and does not say anything.

I say, gently but insistently, “Do you think, because of what you did, that you earned some rights to that land and that those rights have been taken from you?”

Peña’s eyes begin misting.

“I—” she says. She goes silent.

I put my hands on my face. “Irene, I’m sorry. We don’t have to do this. We can leave. We don’t have to talk anymore. I’m really sorry.”

Peña begins crying. She shakes and weeps. I hold her hand and don’t say anything.

“They have me by the throat,” she says. After another pause, she explains, “There’s this spiritual thing that I experience and that other people experience, when we talk about what the garden means to them. But, you know, my left brain is saying I can’t sit here and ignore the fact that there’s a corporate power that cares very little, but they have the power and the politicians. *But we did earn it.* Except, to say that we have rights to be there because we need it and earned it . . .” She is talking and crying at the same time. “It takes a lot of education and a lot of empowerment to think like that. What you’re willing to tolerate—your tolerance level [to injustice] is much greater because you don’t feel like you have the power to change things. When I told some of our staff that we were getting evicted and we had to fight, some of them just gave up. They said, ‘We’re all going to die anyway, what’s the use.’”

“But we do have a right. We got neglected, redlined, and shoved into this neighborhood, because Jews, and Japanese and Mexicans weren’t welcome in L.A.¹⁹⁵ We go to these places where we are not welcome, and we create the community. And then a few investors from New York have decided that L.A. could be the new hip New York, so now Boyle Heights is going to be the new suburb for downtown. But we were here. We have made something here.”

Peña wipes her face and looks at me.

“And now they’re destroying it,” she says.

B. Theories of Popular and Community Constitutionalism

We have thus far heard from Monica Aldrete, Aldo Medina, and Irene Peña on property rights and takings as they are understood in Boyle Heights. As I will detail in the next section, they, and other residents that I spoke to, believe property belongs to community members, and may be considered taken from them, when

195. See Ryan White, *Boyle Heights Bears the Scars and Promise of L.A.*, CTR. FOR HEALTH JOURNALISM: FELLOWSHIPS BLOG (Mar. 1, 2013), <https://www.centerforhealthjournalism.org/2013/03/01/boyle-heights-bears-scars-and-promise-la?copypaste=1> [https://perma.cc/HLR2-L3LF] (describing how the city’s policy of redlining kept minorities in Boyle Heights); see also Avishay Artsy, *Boyle Heights, the Land of Freeways*, KCRW (Oct. 6, 2015), <http://blogs.kcrw.com/dna/boyle-heights-the-land-of-freeways> [https://perma.cc/FV8F-JAZ5] (discussing restrictive covenants in Los Angeles).

it has been earned by labor and where it nourishes the community connections necessary to survive and flourish.

But how do these voices relate to the law?

Social movement scholars, legal anthropologists, close observers of property “outlaws,”¹⁹⁶ and marginalized or subordinated people incorporate alternative understandings into legal discourse. For example, renowned popular constitutionalism theorists Jack Balkin¹⁹⁷ and Reva Siegel¹⁹⁸ demonstrate how social movements—for example, the suffragist movement of the 19th century and the 20th century’s National Organization of Women’s ERA activists—changed interpretations of the Establishment and Equal Protection clauses.¹⁹⁹ Proponents succeeded particularly where they possessed friends in high places and their claims did not seem too “off the wall,” in Balkin’s famous phrasing.²⁰⁰ Building upon Siegel and Balkin’s work, Douglas NeJaime studied how the Christian Right Thomas More Law Center creates constitutional meaning by building on both litigation victories and losses.²⁰¹

Relatedly, Lani Guinier and Gerald Torres study “demosprudence,” a term they designed to describe how social mobilizations can make formal legal institutions “more democratic,” and “contribute to the meaning of law.”²⁰² In Guinier’s

196. See *infra* note 221–224 and accompanying text.

197. Professor Balkin is known for his theories of popular constitutionalism:

According to Balkin, fidelity to the Constitution requires interpreters to adhere to its text’s original meaning and the principles underlying that meaning. However, the Constitution’s original meaning and principles will regularly not determine the outcome of constitutional issues, making them subject to constitutional construction. It is in this zone of construction that popular constitutionalism takes over and constructs meaning.

See, e.g., Lee J. Strang, *Originalism As Popular Constitutionalism?: Theoretical Possibilities and Practical Differences*, 87 NOTRE DAME L. REV. 253, 261 (2011) (footnote omitted).

198. In her work with Robert Post, Siegel helps define democratic constitutionalism, which affirms the role of “representative government and mobilized citizens in enforcing the Constitution at the same time as it affirms the role of courts in using professional legal reason to interpret the Constitution.” Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 379 (2007).

199. Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27, 53–54 (2005); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de Facto ERA*, 94 CALIF. L. REV. 1323, 1331 (2006) (“Understandings consolidated in the ERA debate guided the Court. . .”).

200. Cf. Jack M. Balkin, ‘*Wrong the Day it Was Decided*’: *Lochner and Constitutional Historicism*, 85 B.U. L. REV. 677, 679 (2005) (suggesting that “conventions determining what is a good or bad legal argument about the Constitution, what is a plausible legal claim, and what is ‘off-the-wall’ change over time in response to changing social, political, and historical conditions.”).

201. Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 943–44, 975–76 (2011). Professor NeJaime writes about the complexities of social mobilization and its interaction with the development of legal rights. See, e.g., Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 665 (2012).

202. Lani Guinier, *Beyond Legislatures: Social Movements, Social Change, and the Possibilities of Demosprudence—Courting the People: Demosprudence and the Law/Politics*, 89 B.U. L. REV. 539, 545 (2009).

Courting the People: Demosprudence and the Law/Politics Divide, Guinier cites the importance of “role-literate participants,” such as Marcia Greenberg of the National Women’s Law Center, in the re-making of equal pay law.²⁰³ Guinier and Torres also recognize that civil and constitutional rights grow out of the actions of “ordinary men and women on the ground,” such as the people who “mobilized across the South and North,” including participants in the Freedom Summer.²⁰⁴ Other scholars also root constitutional interpretation in the people: Catharine A. MacKinnon’s work highlights the rights-making roles of abused women who are “heard,”²⁰⁵ Mark Tushnet imagines a “populist constitutionalism” that would “distribute constitutional responsibility throughout the population,”²⁰⁶ and Larry Kramer promotes popular resistance to an “overly assertive” Court.²⁰⁷

Boyle Heights’s anti-art gallery protesters’ hostility²⁰⁸ may differentiate some Boyle Heightsians from the largely nonviolent and role-literate advocates described by many popular constitutionalists.²⁰⁹ However, scholarship on popular constitutionalism and rights-development that grows out of witnessing lived

203. *Id.* at 543 (citing Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de Facto ERA*, 94 CAL. L. REV. 1323, 1339–48 (2006)). In her groundbreaking work on dissenting opinions and demosprudence, Professor Guinier “offers concrete examples in which oral dissents apparently mobilized citizens and lent authority to their efforts at social change and law reform.” Linda C. McClain, *Supreme Court Justices, Empathy, and Social Change: A Comment on Lani Guinier’s Demosprudence Through Dissent*, 89 B.U. L. REV. 589, 590 (2009) (footnote omitted).

204. Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2799 (2014). Professor Torres is recognized as co-creating the language required to recognize democratic constitutionalism. See Stacey L. Sobel, *Culture Shifting at Warp Speed: How the Law, Public Engagement, and Will & Grace Led to Social Change for LGBT People*, 89 ST. JOHN’S L. REV. 143, 152 (2015) (“Torres and Guinier developed the concept of demosprudence, or the jurisprudence of social movements”).

205. See CATHARINE A. MACKINNON, ONLY WORDS 9 (1996) (“Once abused women are heard and . . . become real . . . [t]his changes everything, or should.”). Professor MacKinnon is recognized as one of the leading lights of radical legal feminism, which she premises on a detailed focus on the lived experiences of women. Lisa R. Pruitt, *A Survey of Feminist Jurisprudence*, 16 U. ARK. LITTLE ROCK L.J. 183, 197 (1994) (“Catharine MacKinnon, radical feminism’s best-known proponent, has called radical feminism the only true feminism--feminism unmodified.”); Catherine A. MacKinnon, *Rape Redefined*, 10 HARV. L. & POL’Y REV. 431, 465 (2016) (“[T]he existing legal definitions of sexual assault do not appear to have described the criminalized experience in a way most victims or perpetrators recognize from their lived experience.”).

206. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 174 (1999). Professor Tushnet is celebrated as a populist and an interdisciplinary scholar. See Mark A. Graber, *Thick and Thin: Interdisciplinary Conversations on Populism, Law, Political Science, and Constitutional Change*, 90 GEO. L.J. 233, 235 (2001) (“Professor Tushnet is celebrated in the portion of the academic universe inhabited by PhDs interested in constitutional development as the most distinguished law professor actively promoting conversations between law professors and members of other academic disciplines.”) (footnote omitted).

207. LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 249 (2004). Professor Kramer is one of the most influential theorists of popular constitutionalism. See Michael Serota, *Popular Constitutional Interpretation*, 44 CONN. L. REV. 1637, 1644 (2012) (“Arguably, no theorist has been more influential in guiding the debate than Larry Kramer.”).

208. See, e.g., *supra* text accompanying 87–92.

209. See, e.g., *supra* notes 198–207.

experiences does not always require that the law's re-imaginings be famous or even have particularly elevated platforms in order to articulate the "right to have rights."²¹⁰ MacKinnon and Kimberlé Crenshaw detail the sufferings and resistances of abused women.²¹¹ Deborah Weissman interviewed a domestic violence survivor, and considered community response when engaging ideas for reform.²¹² Annelise Riles recounts the workings of women's non-governmental organizations in Fiji as well as a Fiji family in her study of transnational issue networks²¹³ that "generate" social and legal "realities."²¹⁴ Peggy Levitt and Sally Engle Merry study how "marginal actors" and other cultural players "vernacularize" ideas about women's human rights.²¹⁵ Guinier and Torres also describe interactions among Latino farmworkers in 1960's California that demonstrate the birth and development of rights-thought.²¹⁶

Honing in on property law, Charles Reich's comprehension of how poor people organized their lives around governmental largesse led him to articulate the *New Property*,²¹⁷ and Cheryl I. Harris's recognition of Black people's endurances led to her account of *Whiteness as Property*.²¹⁸ International property law scholar

210. "[W]e became aware of the existence of a right to have rights (and that means to live in a framework where one is judged by one's actions and opinions) and a right to belong to some kind of organized community, only when millions of people emerged who had lost and could not regain these rights because of the new global political situation."

HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 296 (1951). See also Frank Michelman, *Parsing a "Right to Have Rights,"* in 3 *CONSTELLATIONS* 200, 203 (1996) ("[T]he having of rights depends on receipt of a special sort of social recognition and acceptance – that is, of one's juridical status within some particular concrete political community."). Thank you to Aziz Huq for discussing Arendt's concept with me.

211. See MacKinnon, *Rape Redefined*, *supra* note 205, at 446-447 (2016) (detailing cases of abuse) and Crenshaw, *supra* note 14. Professor Crenshaw is famous for her theory of intersectionality. See Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 *UMKC L. REV.* 251, 277 (2002) ("Kimberlé Crenshaw's famous intersection, of course, spawned the term 'intersectionality.'").

212. Deborah M. Weissman, *The Community Politics of Domestic Violence*, 82 *Brook. L. Rev.* 1479, 1508 (2017). Professor Weissman writes widely about the roles of culture, politics, and neoliberalism in her powerful and influential articles on domestic violence and social justice. See, e.g., Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 *Tex. Tech L. Rev.* 147, 158 (2016) ("As Deborah Weissman notes, the influence of neoliberalism 'is not just economics; it is politics and culture. It shapes . . . and mediates the meaning of law and social justice reform.'").

213. ANNELISE RILES, *THE NETWORK INSIDE OUT* 3 (2000).

214. *Id.* at 4.

215. Peggy Levitt & Sally Engle Merry, *Vernacularization on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States*, 9 *GLOBAL NETWORKS* 441, 444 (2009).

216. See *Changing the Wind*, *supra* note 204, for the author's description of "audience participation" in political theater that gave workers a "sense of agency." *Id.* at 2793. This participation appears to be a personal processing of rights understanding.

217. Charles Reich, *The New Property*, 73 *YALE L.J.* 733, 738 (1964); *Goldberg v. Kelly*, 397 U.S. 254, 263 n.8 (1970).

218. Cheryl I. Harris, *Whiteness as Property*, 106 *HARV. L. REV.* 1709, 1736 (1993). Harris's article was a blockbuster innovation on the relationship between property and race. See, e.g., Bela August Walker, *Privilege as Property*, 42 *WASH. U. J.L. & POL'Y* 47, 48 (2013) ("Harris's germinal

Bernadette Atuahene conducted interviews in South Africa in her study of “dignity takings,” which are those state confiscations of property from individuals designated as “sub persons” without compensation.²¹⁹ Lisa T. Alexander recognizes how contemporary U.S. protesters reform constitutional rights by squatting.²²⁰ And Sonia K. Katyal and Eduardo Peñalver²²¹ show not only how famous, role-literate 20th century civil rights protesters violated property laws to reframe equal protection,²²² but also how 21st century intellectual property “pirates” challenged copyright laws with alternative views of property rights,²²³ and little-known on-the-ground 19th century squatters reconstituted understandings of the rights owned by absentee owners and speculators on the American frontier.²²⁴

Other scholars who have written about alternative conceptions of property rights that grow out of the lived experiences and perceptions of laypeople and people of color include Kristen A. Carpenter, Sonia Katyal, and Angela R. Riley, who considered community spiritual offense in their advocacy of property law that supports *peoplehood*.²²⁵ Their observation that the Navajo Nation cherishes a sacred and cultural connection with the San Francisco Peaks Mountains nourishes their argument for a peoplehood-fostering property law²²⁶ that would entitle the tribe to a stick in the Mountains’ owners’ bundle of rights.²²⁷ In addition, sociologist Matthew Desmond’s *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* advocates for greater housing rights based on his close engagement with Milwaukee’s poor and evicted population.²²⁸

In Boyle Heights, I documented a community constitutionalism particular to the neighborhood, which required my engagement with residents, my interviews with them, and my study of neighborhood culture and history. This Boyle Heights community constitutionalism is based on alternative perceptions of property rights

work exposes the tangible property implications of whiteness, ones created from legal texts and embedded in legal actions.”).

219. BERNADETTE ATUAHENE, *WE WANT WHAT'S OURS: LEARNING FROM SOUTH AFRICA'S LAND RESTITUTION PROGRAM* 3 (2014).

220. Lisa T. Alexander, *Occupying the Constitutional Right to Housing*, 94 NEB. L. REV. 245, 266–67 (2015) (“[By] forcing local . . . decision-makers . . . [to] choose between their vision of housing rights and the official legal version . . . these protestors[] forg[e] gradual shifts in values at the local level.”).

221. EDUARDO M. PEÑALVER & SONIA K. KATYAL, *PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP* 64–70 (2010).

222. *Id.* at 64–67.

223. *Id.* at 109–20. For the role of avant-garde players, see Tomiko Brown-Nagin, *The Civil Rights Canon: Above and Below*, 123 YALE L.J. 2698, 2711 (2014).

224. PEÑALVER & KATYAL, *supra* note 221, at 60.

225. Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1028 (2009).

226. *Id.* at 1064.

227. *Id.* at 1066 (arguing for “a bundle of relative, rather than absolute, entitlements.”).

228. DESMOND, *supra* note 7, at 195.

expressed by on-the-ground protesters (like Peña, and, as we will see, “A.”),²²⁹ who resemble the high profile social movement law-changers written about by the likes of Balkin, Siegel, Guinier, Torres, and others.²³⁰ I also had the privilege of speaking to people who disclosed their more privately-held, yet still legally “generat[ive]”²³¹ ideas about an alternative system of property rights in Boyle Heights (like ELACC’s Medina and The Haven’s Aldrete, as well as Beth Gonzalez, interviewed later in this Article²³²), which parallel the revelations described by MacKinnon, Crenshaw, Riles, Atuahene, Carpenter, Katyal, and Riley.²³³

To the extent that people in Boyle Heights did not broadcast their visions of takings and constitutional rights in advertised actions, but rather lived out these principles in their minds and in their everyday lives, their contributions differ from the protest models described by some of the most famous constitutionalists and demosprudes, such as Siegel, Balkin, NeJaime, Guinier and Torres.²³⁴ A different idiom may describe this form of community constitutionalism. Since these more private, lived understandings of “Takings” are forged by people who often inaudibly confront existential questions that dispossessions raise—what is mine? When is it taken? When is that in violation of the rights that help constitute me?—I see them as examples of an existential constitutionalism. This existential aspect of community constitutionalism puts a particular responsibility on the legal scholar to seek out and interact with community members to hear about their alternative legal paradigms, and then to describe them in law reviews or other media.

The ways these alternative visions fit into the Fifth Amendment and property theory will be addressed in Part V. For now, we may acknowledge that all of these voices—press-generating, on-the-wall, and also quieter and more radical—may serve as change-agents of law within this body of theory, which builds pathways between the people and the Constitution.²³⁵

Still, once we begin to listen to these voices, ethical problems present themselves: perhaps not every dissident opinion should receive equal time in generating a new vision of the Fifth Amendment.

229. See, e.g., Peña Interview, *supra* text accompanying notes 190–193; A. Interview, *infra* text accompanying notes 237–254.

230. See *supra* notes 198–207 and accompanying text.

231. RILES, *supra* note 213, at 4.

232. See Gonzalez Interview, *infra* text accompanying notes 310–320.

233. See generally discussion *supra* notes 205–227 and accompanying text.

234. See *supra* discussion accompanying notes 198–207.

235. For other accounts of how under-the-radar individuals, not courts, created rights, see Sara Mayeux, *What Gideon Did*, 116 COLUM. L. REV. 15, 32 (2016); Ernst Allison Day, *Guiding Griswold: Reevaluating National Organizations’ Role in the Connecticut Birth Control Cases*, 22 CARDOZO J.L. & GENDER 191, 198 (2016). Moreover, this approach also finds encouragement in the work of Richard Re. Re wrote that federal judges, upon their taking of their oath, enter a promissory obligation to do equal right to the poor, a principle that allows them to “consider substantive economic equality when implementing undetermined sources of law.” See Richard Re, *Equal Right to the Poor*, 84 U. Chi. L. Rev. 1149 (2017). Re’s identification of this obligation may also encourage federal judges to embrace international human rights/housing norms. This pledge may thus obligate federal judges to consider the legal thought of marginalized communities.

C. Peering

1. Interview with A.²³⁶

“A” is a member of the anti-gentrification group: *Defend Boyle Heights*. In this interview at *El Tepeyac Café* in Boyle Heights, he talks about his philosophies of race, belonging, and gentrification. A. believes that white “gentrifiers” should get “out” of Boyle Heights.

“They’re not investing in things that we really need,” A. tells me during our meeting at *El Tepeyac*, a café with a rose-bedecked shrine to the Virgin Mary, colorful paper banners, and ten tables, which presides over Boyle Height’s Evergreen Street.²³⁷ He shakes his head, leaving his lunchtime burrito largely untouched, while I sip my decaf and listen. “I mean, what the fuck? I am at a loss for words, because, is this really what gentrification looks like? This superficial display of, like, affection and care for the community, and ‘your streets are going to look great,’ but the reality is we can barely afford to live here?”

A. is a slim, young, self-proclaimed Latino revolutionary with a hair bun and Elvis Costello spectacles. I had contacted him the week before when reaching out to *Defend Boyle Heights* (DBH), the self-described “[a]nti-gentrification collective devoted to community and our hood.”²³⁸ DBH flashed onto my radar when I read of a nerve-rattling demonstration that its members conducted on September 17, 2015 against the Venus and Nicodim art galleries on Anderson Street.²³⁹ I watched videos revealing DBH-ers, some wearing bandanas over their faces, massing in front of the storefronts.²⁴⁰ The protesters yelled *Fuera Fuera Fuera!* (that is, “get out”), or, in English, “Get the fuck out,” while art patrons peered at them skittishly through the storefront’s plate glass.²⁴¹ Delving further into DBH’s promotional materials, I found its postings of posters showing a Latino beating an

236. A. Interview, *supra* note 2.

237. *About Us*, EL TEPEYAC, <http://eltepeyaccafe.com/our-history/> [<https://perma.cc/8TSS-3R6Z>].

238. *Defend Boyle Heights*, *About*, FACEBOOK.COM, https://www.facebook.com/pg/defend-boyleheights/about/?ref=page_internal [<https://perma.cc/X5TJ-J5HF>].

239. *See* *Defend Boyle Heights*, *They are SWARMING ON ANDERSON. FUCK THEM!!!! Come through!!*, FACEBOOK.COM (Sept. 17, 2016), <https://www.facebook.com/defendboyleheights/videos/vb.930020650448263/1039145962869064/?type=2&theater> [<https://perma.cc/337P-84S8>]; *see also* John Kawakami, *Defending Boyle Heights Protest*, YOUTUBE.COM, Sept. 18, 2016, <https://www.youtube.com/watch?v=stnYkDCHAsA> [<https://perma.cc/4AVN-X8SM>]; “*We Want You to Get Out of Our Neighborhood*”—*Anti-Gentrification Demonstrators Take to the Streets During Boyle Heights Art Openings*, THE EASTSIDER (Sept. 21, 2016), <https://www.theeastsiderla.com/2016/09/we-want-you-to-get-out-of-our-neighborhood-anti-gentrification-demonstrators-take-to-the-streets-during-boyle-heights-art-openings/> [<https://perma.cc/86N4-YE5G>]. Nicodim also sits on Anderson Street, and faced DBH criticism. *See* *Boycott the Art Galleries in Boyle Heights! Boycott Self Help Graphics & Art! Side with the People, Not the Pigs, Not the Apologists, not the Gentrifiers!* DEFEND BOYLE HEIGHTS, <http://defendboyleheights.blogspot.com/2016/12/boycott-art-galleries-in-boyle-heights.html> [<https://perma.cc/C2KR-6RYN>].

240. *See, e.g.*, Kawakami, *supra* note 239, at 1:00–1:22.

241. *See id.* at 1:25.

Anglo “hipster,”²⁴² a black panther murderously stalking a white rat wearing an Uncle Sam hat,²⁴³ an image of a fist bashing into the face of Donald Trump,²⁴⁴ and an image of Donald Trump wearing an Adolf Hitler mustache.²⁴⁵

Stimulated by these visuals, I did not know what to expect when A. agreed to meet with me to discuss property rights in Boyle Heights. As a Latina law professor, would I represent fascism to A., or any kind of traitor, or “rat?” I calmed myself down with a reminder that having studied these kinds of images in the context of immigration-rights battles before, I knew that they conveyed just as much pain as rage and hate.²⁴⁶ And indeed, during our warm and impassioned conversation at El Tepeyac, A. reveals to me the agonized sensation of encroachment, invasion, and corrosive hostility that comes from living as a Latinx tenant in a rapidly gentrifying and Anglicizing part of Los Angeles.

“[DBH] got started in November of 2015,” A. says, staring at me with huge, earnest eyes from behind his lenses. “There was an action against [an arts organization called] Hopscotch. It’s an [majority Anglo] opera or theater [troupe], and they showed up in Hollenbeck Park.²⁴⁷ An organization called Serve the People of L.A.,²⁴⁸ which does food distribution, or whatever community members need, sets up at the park every Sunday and [on one of those days] Hopscotch was practicing [for an upcoming concert they would hold in Boyle Heights]. [Serve the People] saw them and thought: ‘This is an obvious project for gentrification. You’re a bunch of fucking gentrifiers, and we want you to leave.’ . . . We had already realized that gentrification was happening in Boyle Heights,²⁴⁹ but that’s

242. See Defend Boyle Heights, *Chinga Tu Hipster by Nico Avina*, FACEBOOK.COM (Jan. 11, 2017), <https://www.facebook.com/defendourhoodz/photos/a.1737753079777082.1073741828.1736751846543872/1878664839019238/?type=3&theater> [<https://perma.cc/DUV3-VN7Z>].

243. See Defend Boyle Heights, *The Black Panther Party Taught Us: The Young Lords Taught Us: The Zapatistas Taught Us: Las Hermanas Mirabales Taught Us: Defend Your Hood*, FACEBOOK.COM (JAN. 19, 2016), <https://www.facebook.com/defendboyleheights/photos/a.938615952922066.1073741828.930020650448263/1167029166747409/?type=3&theater> [<https://perma.cc/VP4R-RS9Z>].

244. See Servir al Pueblo—Los Angeles/Serve the People—Los Angeles, *Smash Fascism Los Angeles*, FACEBOOK.COM (Jan. 20, 2017), <https://www.facebook.com/ServirAlPuebloLA/photos/a.1572364383028512/1797030520561896/?type=3&theater> [<https://perma.cc/67MQ-2NGJ>] for the original images that the author saw DBH share on its Facebook pages, but have since been removed.

245. See Defend Boyle Heights, *Twitter: Fuck Donald Trump*, FACEBOOK.COM (Jan. 21, 2017), <https://www.facebook.com/defendboyleheights/photos/a.938615952922066.1073741828.930020650448263/1169074999876159/?type=3&theater> [<https://perma.cc/2W8B-BDJQ>].

246. Murray, *Inflammatory Statehood*, *supra* note 50, at 229.

247. See Jessica Gelt, ‘Hopscotch,’ *The World’s First Mobile Opera, Will Take to L.A. Streets in 24 Cars*, L.A. TIMES (Sept. 9, 2015), <http://www.latimes.com/entertainment/arts/la-ca-cm-fall-arts-hopscotch-opera-la-20150913-story.html> [<https://perma.cc/5EMS-QEWH>].

248. See *About*, SERVE THE PEOPLE—LA, <http://servethepeoplela.org/about> [<https://perma.cc/YHF6-SZGZ>]. On its website, Serve the People describes its mission as “build[ing] up the masses of . . . Boyle Heights [] toward revolution by becoming autonomous and militant.”

249. See, e.g., Abe Flores, *Promise, Pitfalls and the Boyle Heights Arts District*, KCET (Sept. 16, 2012), <https://www.kcet.org/shows/artbound/promise-pitfalls-and-the-boyle-heights-arts->

when we realized that we needed to move against arts organizations, the galleries.”²⁵⁰

DBH, A. explains, grew out of that action: It now acts as a coalition with Serve the People, Union de Vecinos, Ovarian Psycos [original spelling], the Brown Berets and Backyard Brigade.²⁵¹ Together, they form the Boyle Heights Alliance Against Artwashing and Displacement (BHAAAD), which targets art galleries’ “artwashing” of gentrification.²⁵² In pushing back against galleries, Defend Boyle Heights responds to a received wisdom that arts institutions create gentrification,²⁵³ though this cause-and-effect may not hold up to closer scrutiny—other forces may originate property value ascensions, and art galleries freeride.²⁵⁴

Nevertheless, with Boyle Heights’ property values rising 5.7% in 2018,²⁵⁵ it is seeing gentrification, and A. emphasizes that DBH and BHAAAD’s activism against art galleries reacts against locals’ sensation of getting overtaken by wealthy speculators and white “hipsters” who invade the community.

district [<https://perma.cc/W9FW-B6TG>] (arguing that “the arrival of the Metro has begun gentrification.”).

250. This account is also shared in *Defend Boyle Heights Statement About the Self Help Graphics Action Accountability Session and Beyond*, DEFEND BOYLE HEIGHTS (July 6, 2016), http://defendboyleheights.blogspot.com/2016/07/defend-boyle-heights-statement-about_6.html [<https://perma.cc/M2CQ-2EFP>] (“[Hopscotch] brought in predominately white and affluent people into Boyle Heights.”). Serve the People Los Angeles’s description of the conflict proves more distressing, see *Against Gentrification, Against Bourgeois Art*, SERVE THE PEOPLE – LA, Oct. 4, 2015, <https://servethepeoplela.wordpress.com/2015/10/04/against-gentrification-against-bourgeois-art/> [<https://perma.cc/L54Y-RMU5>] (“We told [the Hopscotch performers and crew] that . . . that they are . . . in danger, that they will get physically hurt. Not by us. But by the people.”)

251. Julia Wick, *Boyle Heights Activists Take Aim at Art Galleries in Fight Against Gentrification*, LAIST (Jul. 14, 2016) http://laist.com/2016/07/14/boyle_heights.php [<https://perma.cc/PA6C-KBXX>].

252. See BOYLE HEIGHTS ALL. AGAINST ARTWASHING & DISPLACEMENT, <http://alianzacontraartwashing.org/en/bhaaad/> [<https://perma.cc/7URZ-CRTW>] (opposing the role that art galleries play in gentrification).

253. See, e.g., Caribbean Fragoza, *Art and Complicity: How the Fight Against Gentrification in Boyle Heights Questions the Role of Artists*, KCET (July 20, 2016), <https://www.kcet.org/shows/artbound/boyle-heights-gentrification-art-galleries-pssst> [<https://perma.cc/YMS2-DRDF>] (noting that, for local businesses and housing tenants, “[t]he proliferation of artist studios and galleries . . . eventually result[s] in their displacement.”).

254. Jenny Schuetz, *Causal Agents or Canaries in the Coal Mine? Art Galleries and Neighborhood Change*, in CREATIVE COMMUNITIES: ART WORKS IN ECONOMIC DEVELOPMENT 12, 23 (Michael Rushton ed., 2013) (2013) (arguing that the case for art galleries being the first movers is “somewhat unlikely”).

255. See *Boyle Heights Home Prices & Values*, Zillow.com, <https://www.zillow.com/boyle-heights-los-angeles-ca/home-values/> [<https://perma.cc/W7ZB-HX2Z>] (“The median home value in Boyle Heights is \$426,700. Boyle Heights home values have gone up 5.7% over the past year and Zillow predicts they will rise 6.5% within the next year.”).

“Boyle Heights is a very historic place, it’s culturally rich. A lot of us know the history of Japanese,²⁵⁶ Russian,²⁵⁷ Jewish²⁵⁸ and Mexican²⁵⁹ immigrants coming here and creating our community. We consider ourselves part of that legacy of immigrant or children of immigrants who came here seeking a refuge, that’s our identity. And to see something like that threatened economically, that is anxiety-inducing and hurtful. Every time I walk past these houses getting bulldozed or painted up and fixed up—*aaagh!* Seriously. I wonder: are we going to go through what Echo Park²⁶⁰ and Highland Park²⁶¹ did? Because . . . the [neighborhoods are] completely changed. I don’t recognize them anymore, and [I don’t want to feel like] I don’t belong *here* anymore, because of these rich white hipsters.”

“So, it’s seeing wealthier white people move in and colonize the neighborhood that’s motivating you?” I ask.

A. nods, frowning his brow. “We have problems with these performers and this extravagant clothing—I mean, a skinny blonde girl with a pink tutu performing in Boyle Heights, around working-class families? And then you walk down the warehouses and you see these very nice, very conspicuous art galleries? This is *our* neighborhood, *we* were raised here. *We* have a stake in it, and we tell them—you are not going to build this art gallery here. Get the fuck out! Private property be damned! We don’t care if you own it, we just want you to get out.”

“It sounds like you’re afraid that ‘white hipsters’ are going to ruin Boyle Heights,” I offer.

A. stares at his food without eating it. “On a Friday or Saturday night, in the arts district, we are *surrounded*. The visual aspect of gentrification is really difficult to take. It induces a lot of anxiety. *We know* property value goes up and people can’t afford [what’s coming.] I used to live in this apartment on Stone Street and Ganahl—1102 Stone Street, L.A., California, 90063.²⁶² When I was there it was

256. See Teresa Watanabe, *Boyle Heights Celebrates its Ethnic Diversity*, L.A. TIMES (Feb. 22, 2010), <http://articles.latimes.com/2010/feb/22/local/la-me-boyle-heights22-2010feb22> [https://perma.cc/9DBS-4WWE].

257. *Id.*

258. See Mary Ann Perez, *Jews of East L.A.: The Boyle Heights Project Will Include a Documentary and Interviews with More Than 100 Former Residents, as Well as Photographs and Yearbooks From the 1920s to the 1950s*, L.A. TIMES (Jan. 3, 1993), http://articles.latimes.com/1993-01-03/news/ci-1061_1_boyle-heights [https://perma.cc/2RP6-6PFH].

259. See, e.g., Watanabe, *supra* note 256 (“In the early 20th century . . . Mexicans, who had always been in the area, increased their numbers as migrants escaped the turmoil of revolution in their homeland.”).

260. See Steve Lopez, *After 31 Years in Echo Park, Victims of Displacement by Gentrification*, L.A. TIMES (Mar. 14, 2015, 12:00 PM), <http://www.latimes.com/local/california/la-me-0315-lopez-echo-20150313-column.html> [https://perma.cc/KME6-XBWV].

261. Doug Smith, *Protesting Tenants of a Highland Park Apartment Complex Face a Mass Eviction*, L.A. TIMES (Oct. 9, 2016, 4:00 AM), <http://www.latimes.com/local/lanow/la-me-ln-marmion-royal-dispute-20160829-snap-story.html> [https://perma.cc/LGF7-PHN8] (“rents and real estate prices rising dramatically in recent years”).

262. See *1102 Stone Street*, REDFIN.COM, <https://www.redfin.com/CA/Los-Angeles/1102-Stone-St-90063/home/6957081> [https://perma.cc/Y3S7-YV48] (estimating taxable value at \$1,110,000); see also *1102 Stone St, Los Angeles, CA 90063—Boyle Heights*, APARTMENTS.COM,

\$600 a month and a family of six lived there, too. Now, it's \$1,900 dollars a month for a 2-bedroom loft. I mean, it's *frightening*. Look at what happened on 6th Street,²⁶³ and 1st Street.²⁶⁴ People are being evicted, and it's a loss of home, and a loss of culture. It's anxiety-inducing."

"That word again," I said.

"What?"

"Anxiety," I tell him.²⁶⁵

"Yeah. Where am I going to live? And it's not just that, [housing] connects with a lot of stuff. Boyle Heights lacks so many crucial resources—how many of my friends and colleagues dropped out of Roosevelt High School? It's a terribly corrupted underfunded school that fails its students.²⁶⁶ And we are extremely over-policed. In 2016, 5 or 6 Latinos were killed by police—Jesse Romero's killing got the most attention.²⁶⁷ But Chavez Street—Jesus, you name the street and someone got killed there."²⁶⁸

"And so you protest the art galleries in a way that is not exactly nonviolent?" I ask. "The LAPD said it was investigating you for hate crimes. For when 'Fuck White Art' was tagged on the Nicodim?"²⁶⁹

<https://www.apartments.com/boyle-heights-los-angeles-ca/> [<https://perma.cc/CL6H-J6G4>] (similar nearby apartments go from \$1,003-\$1710).

263. Martha C. Daniel, *6th Street Bridge Project Brings Development, Rising Rents to Boyle Heights*, KPCC (May 16, 2016), <https://www.scpr.org/news/2016/05/26/61035/sixth-street-bridge-project-brings-development-ris/> [<https://perma.cc/9M7E-SKAP>].

264. *Boyle Heights Anti-Gentrification Crusader Criticized Over Evictions*, THE EASTSIDER LA (Sept. 11, 2015), <https://www.theeastsiderla.com/2015/09/boyle-heights-anti-gentrification-crusader-criticized-over-evictions/> [<https://perma.cc/SW7V-TGW7>] (covering the demolition of housing on 1st Street).

265. Nestor Davidson's work suggests that A.'s anxiety may result from loss of status caused by displacement. See Nestor M. Davidson, *Property and Relative Status*, 107 Mich. L. Rev. 757, 810 (2009) ("One explanation for the tenacity of some opponents to the redevelopment plan that has not gotten attention might be that dispossession risks (and often results in) not simply the loss of the personal attachment that has accrued to property—to the home—but also relocation to a place of relatively lower (or at least less certain) status.").

266. See generally Len Isenberg, *The New Crisis at Roosevelt High School: A Call to Action by John Fernandez*, Ph.D., PERDAILY.COM (July 27, 2016), <http://www.perdaily.com/2015/07/the-new-crisis-at-roosevelt-high-school-a-call-to-action-by-john-fernandez-phd.html> [<https://perma.cc/L34C-U3LK>] (discussing Roosevelt High School's lack of core programs and funding).

267. See, e.g., Rocha & Mejia, *supra* note 80.

268. Veronica Rocha & Brittany Mejia, *Jesse James Romero, 14*, L.A. TIMES. HOMICIDE BLOG (Aug. 11, 2016), <http://homicide.latimes.com/post/jesse-james-romero/> [<https://perma.cc/WHQ3-8C52>] (reporting on Jesse James Romero's killing on East Cesar Chavez Avenue).

269. Julia Wick, *Boyle Heights Activists Say Gentrification Is The Real Hate Crime*, LALIST.COM (Oct. 4, 2016), http://laist.com/2016/11/04/bh_hate_crime.php [<https://perma.cc/ZJ3K-JSDC>] ("[T]he LAPD is treating three recent acts of vandalism against galleries as 'possible hate crimes'").

“We didn’t do that,” A. says abruptly. “We don’t condemn it, but we didn’t do it.²⁷⁰ And for the LAPD to investigate *us* for hate crimes after they murdered Jesse Romero for tagging²⁷¹—I don’t have any words for that.”

“But, you still might be frightening people. Is that what you want?”

A. looks at me for several seconds. “Our methods are something that we have to have a discussion about.”

I begin to push him, Socratic-method style, about the violence DBH could find itself escalating into. A. looks down at the table again, and we discuss Malcolm X, Martin Luther King, and the Black Panthers.

“The Black Panthers were dope,” he said. He clenches his jaw. All at once his tone grows softer, less sure, “What do you think we should do?”

“I’m an advocate of nonviolence, A.,” I said. “I could never counsel you to use force.”

A. nods, but doesn’t look at me.

“Also,” I go on, “I think it’s a great way for you to get dead in this town.”

A. picks a little bit at his burrito. Around us, the servers balance trays on their shoulders, and the lunch crowd clatters its cutlery and fills the air with chatter. He slumps a little and still doesn’t look up.

“Yeah,” he says.

2. *Inflammatory Property Theory*

If some Boyle Heights legal thought traffics in race hate, it needs to be considered very carefully as a source material for interpreting the Fifth Amendment.

In *Changing the Wind: Notes Toward A Demosprudence of Law and Social Movements*, Lani Guinier and Gerald Torres write about how social movements “by ordinary people” can alter democratic practices by “changing the people who make the law and the landscape in which that law is made.”²⁷² They observe that demosprudence is “not a philosophy of the left or the right,” studying both the conservative social movements of the 1980s and 1990s and the civil rights and women’s movements of the 1960s and 1970’s.²⁷³ Yet their affirmation of demosprudence does value social movements that prove “democracy enhancing.”²⁷⁴ Similarly, the priorities of Lisa T. Alexander’s property dissidents “align” with core Constitutional values like autonomy, self-determination, and the “social

270. Defend Boyle Heights, *Gentrification Is the True, Highest Form of Hate Crime!*, DEFEND BOYLE HEIGHTS (Nov. 3, 2016), <http://defendboyleheights.blogspot.com/2016/11/gentrification-is-true-highest-form-of.html> [<https://perma.cc/ZDG3-BSKR>] (“We don’t know who tagged up these galleries, but we certainly don’t condemn it. It is right to rebel!”).

271. See *supra* note 267 and accompanying text.

272. Guinier & Torres, *supra* note 204, at 2750.

273. *Id.* at 2751.

274. *Id.* Guinier and Torres also analyze the fouler aspects of demosprudence, discussing how conservative lawyers in the 1980s and 1990s “waged their battles against . . . ‘lazy’ poor people (generally of color).” *Id.* at 2802 (2014).

dimensions of property law's ends."²⁷⁵ Katyal and Peñalver, in their PROPERTY OUTLAWS, maintain that they "will not pretend to decide, in each instance, whether . . . property disobedience is defensible," but emphasize its inspiration of legal innovation and its strengthening of the rule of law.²⁷⁶

Legal scholars who study the lives of others, such as legal anthropologist Riles, do not typically reject their subjects' ideas as inappropriate. Riles, instead, analyzes contemporary institutional knowledge, and contemplates information's transformation into an anthropological subject.²⁷⁷ And in *In Defense of Property*, Katyal, Carpenter, and Riley study Native spiritual views, which they support through a property theory that protects peoplehood.²⁷⁸ Douglas NeJaime does dwell on social activism's less auspicious dynamics. In *Winning Through Losing*, he tracks the successes of the Thomas More Law Society (TMLC), the legal arm of a religious fundamentalist movement taking aim at progressive school programming.²⁷⁹ Still, though NeJaime describes TMLC's efforts as anti-"progressive,"²⁸⁰ and quotes TMLC's apocalyptic warnings about Islam,²⁸¹ he devotes most of his energy diagnosing, not condemning, the popular constitutionalism effected through doomed litigation battles.

Yet in the case of Boyle Heights, we require clarification of the kinds of popular constitutionalism that should drive Fifth Amendment progress. A people's constitution that depends upon hate ideology should have no place in the evolution of constitutional values because it promotes violence.²⁸² At the very least, hate ideology possesses no rightful place in my advocacy²⁸³ of a popularly enhanced Fifth Amendment, nor would it cohere with the nonviolence commitments of the Constitutional scholars whose work is highlighted in this Article.²⁸⁴ In reading the accounts of the people of Boyle Heights, as well as housing activists in the larger Los Angeles area, readers will have encountered four occasions where advocates use distressing metaphors and racial slurs to describe antagonists: Measure JJJ advocates who, for example, associate the worldview of conservative developers (such as Donald Trump) with "cancer[s];"²⁸⁵ tenants' rights advocates who say developers commit "urban cleansing"—and so analogize them to ethnic cleansing

275. Lisa T. Alexander, *Occupying the Constitutional Right to Housing*, 94 NEB. L. REV. 245, 267 (2015).

276. PROPERTY OUTLAWS, *supra* note 221, at ix.

277. RILES, *supra* note 213, at 16.

278. *See supra* note 225 and accompanying text.

279. NeJaime *Winning Through Losing*, *supra* note 201, at 975–78.

280. *Id.* at 977.

281. *Id.* at 981–82.

282. *Cf.* Yxta Maya Murray, *A Jurisprudence of Nonviolence*, 9 CONN. PUB. INT. L.J. 65, 159 (2009) (arguing that "nonviolence [should be] a specific, visible aim in constitutionalism.").

283. *Id.*

284. For one scholar who introduces the ideals of nonviolence into legal discourse, see Carrie Menkel-Meadow, *Toward a Jurisprudence of Law, Peace, Justice, and a Tilt Toward Non-Violent and Empathic Means of Human Problem Solving*, 8 UNBOUND: HARV. J. LEGAL LEFT 79, 108 (2013).

285. *See supra* note 49 and accompanying text.

war criminals;²⁸⁶ A., who relentlessly attacks “white hipsters;”²⁸⁷ and DBH propaganda, which shows pictures of such “hipsters” being physically beaten.²⁸⁸

I have engaged with inflammatory language like this before—language used both by racial minorities when suffering under the pressure of tyrannical regimes,²⁸⁹ and rhetoric used by Arizona officials when implementing petty versions of such regimes.²⁹⁰ When racial minorities assail racist and oppressive governmental actors by accusing them of being subhuman, or being like “Hitler,” or being “fascist,” I treat these difficult and controversial uses of language as signs of the extreme stress caused by racist government policies.²⁹¹

However, when the *government* uses language that depicts “the other” as subhuman, or as evil, I condemn it. In my work on immigration law and the Latinx community, I showed the connections between the uses of such state-supported language and violent governmental oppression of minorities.²⁹² In that work, I called this phenomenon “inflammatory statehood.”²⁹³ In my work on the Fifth Amendment, I excoriated this language, as it links to eminent domain policies that dislocate poor people of color.²⁹⁴ In these property law articles, I characterized these state (often judicial) depictions of people as dangerous optical practices, and called them forms of “peering.”²⁹⁵ Peering offers a double entendre, as it describes how legal elites look at—“peer”—at legal subjects, and simultaneously ask whether those legal subjects are the elites’ “peers.”²⁹⁶ Where elites find these subjects wanting in status—that is, see them as subhuman—this determination leads to their eviction,²⁹⁷ injuries I also characterize as violent in the spirit of Robert Cover and Johann Galtung.²⁹⁸

When contemplating which Boyle Heights property ideologies might be applied to the Fifth Amendment, we should consider whether they support peace or violence.²⁹⁹ A nonviolent Fifth Amendment jurisprudence harmonizes with extant

286. Murray, *Inflammatory Statehood*, *supra* note 50, at 245.

287. *See supra* text accompanying and following note 261.

288. *See supra* text accompanying note 242.

289. Murray, *Inflammatory Statehood*, *supra* note 50, at 249.

290. *Id.*

291. *Id.* at 228–29. Such language should not get an all-inclusive pass. It often trivializes the Holocaust. Tom Chivers, *Internet Rules and Laws: The Top 10, From Godwin to Poe*, TELEGRAPH (Oct. 23, 2009), <http://www.telegraph.co.uk/technology/news/6408927/Internet-rules-and-laws-the-top-10-from-Godwin-to-Poe.html> [<https://perma.cc/5LPN-DKFC>].

292. Murray, *Inflammatory Statehood*, *supra* note 50, at 263.

293. *Id.* at 231.

294. Yxta Maya Murray, *Peering*, 22 GEO. J. ON POVERTY L. & POL’Y 249, 250–51 (2015).

295. *Id.* at 250.

296. *Id.*

297. *Id.* at 251.

298. *Id.* at 253, 293. *See also* Murray, *Motor City*, *supra* note 92, at 443 (citing Robert Cover, *Violence and the Word*, 95 YALE L.J. 1061, 1061 (1986)).

299. *See* Murray, *Motor City*, *supra* note 92, at 443.

takings analyses that tout progressive communitarian values.³⁰⁰ But where advocates describe their antagonists³⁰¹ as evil or monstrous beings deserving of hurt, or use racist language, we should take care to avoid elevating their hate advocacy into constitutional discourse, while also salvaging their more productive observations.

In the case of A., then, his articulation of fear and dread caused by his reasonable fears of eviction, and his observations that property law connects to so many other rights, remain valuable insights for popular property constitutionalism. But his assertion of rights based on the inhumanity of “white hipsters,” in my calculation, is not.

In any event, because of the mechanics of popular constitutionalism, we need not fear courts interpreting the Fifth Amendment as casting from its protections developers because they are like war criminals,³⁰² or white Millennials because they wear colorful garb.³⁰³ Such opinions are far too—in the words, again, of Balkin—“off the wall.”³⁰⁴

But a far greater hazard exists: that poor people and people of color will find themselves overlooked when courts distribute property rights under the Fifth and Fourteenth Amendments.³⁰⁵ As noted above, this danger looms large because the lived experience of poor people veers beyond legal elites’ ken,³⁰⁶ and also because poor people have difficulty obtaining threshold rights—“private property ownership”—to begin with, much less coming up with the funds to litigate them.³⁰⁷

And that is where the nascent, developing, yet emerging Takings Clause of Boyle Heights can come in.

V.

TOWARD THE TAKINGS CLAUSE OF BOYLE HEIGHTS

In this section, I sketch out the first slim contours of a Takings Clause of Boyle Heights, and issue some tentative suggestions for what kinds of anti-poverty change that Clause might eventually create for poor victims of gentrification.

300. *See, e.g.*, *Kelo v. City of New London*, 545 U.S. 469, 483 (discussing how economic development helps communities).

301. That is, those beneficiaries of the Ellis Act, Costa-Hawkins, or neoliberalism generally.

302. *See supra* text accompanying note 50.

303. *See supra* text following note 261 (reporting an interviewee’s description of “a skinny blond girl with a pink tutu performing in Boyle Heights” as a sign of gentrification).

304. *See supra* note 200 and accompanying text.

305. *See Textainer Equip. Mgmt. Ltd. v. United States*, 115 Fed. Cl. 708, 716 (holding that plaintiff had no standing without ownership).

306. *See* Richard Delgado & Jean Stefancic, *The Racial Double Helix: Watson, Crick, and Brown v. Board of Education (Our No-Bell Prize Award Speech)*, 47 *How. L.J.* 473, 484 (2004).

307. *Id.*

Further, in order to counter the “off the wall”³⁰⁸ charge, I also analyze how Boyle Heights property jurisprudence connects with existing legal thought.³⁰⁹

A. Toward an Understanding of the Text and Content of the Boyle Heights Takings Clause

*1. Interview with Beth Gonzalez*³¹⁰

Beth Gonzalez is the alias of a longtime resident of Boyle Heights who has worked in the field of housing. In this interview, she describes her desires for a healthy Boyle Heights tax base, her disagreement with “A’s” race-based housing analysis, her philosophy of inclusion, and some of the more painful and devastating aspects of gentrification. Along with other interviewees, the experiences and values that she describes will be incorporated into the Boyle Heights Takings Clause.

“One of the biggest problems that we have right now is gentrification—though I don’t think it’s going to be massive,” Beth Gonzalez tells me on the phone. I contacted Gonzalez when I learned of her involvement with a local neighborhood organization. Gonzalez worked for a long period for the City of Los Angeles, focusing on the redevelopment of Pico-Aliso village, before she moved to Boyle Heights. In her position with a local neighborhood organization, she takes public comments on local issues.

“Why won’t it be massive?” I ask. “Some demonstrators say otherwise.”

“Well, yes, but Boyle Heights has a lot of affordable housing projects—I think we have the most in the whole city.”³¹¹ Gonzalez pauses. “Though that doesn’t guarantee that people get affordable [housing]. Developers can’t give evicted people first dibs under the Fair Housing Act, so there’s not that protection.³¹² The thing is, 90 percent of landlords here are absentee,³¹³ and what’s

308. See Balkin, *supra* note 200 and accompanying text.

309. See *supra* Section III.B.

310. Gonzalez Interview, *supra* note 4.

311. Cf. Yasmin Nunez, *New Sears Tower Owner Plans to Seek Community Input for Development*, BOYLE HEIGHTS BEAT (Mar. 31, 2014), <https://boyleheightsbeat.com/new-sears-tower-owner-plans-to-seek-community-input-for-development/> [<https://perma.cc/3GJZ-ERLW>] (“[t]here is a lot of affordable housing within the immediate area”).

312. In *Texas Dept. of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507, 2525 (2015), the United States Supreme Court held that disparate impact claims are cognizable under the Fair Housing Act. Under this precedent, “first dibs,” or neighborhood-based preference, offered by developers could create an impermissible residential racial imbalance. Also, in 2012, Yorktown, New York signed a consent decree in response to Section 8 residency preferences. See *FHJC and Yorktown Settle Housing Discrimination Case Town Eliminates Residency Preference*, FAIR HOUSING JUSTICE CENTER (Feb. 27, 2012), <http://www.fairhousingjustice.org/newsletters/opening-acts-newsletter-february-27-2012/> [<https://perma.cc/W69M-C2TU>].

313. I only found anecdotal confirmation that most of the neighborhood’s landlords are absentee. See, e.g., *A Walk in East L.A. With Sesshu Foster*, EAST LOS ANGELES DIRIGIBLE AIR TRANSPORT LINES (June 25, 2013), <https://atomikaztex.wordpress.com/2013/06/25/a-walk-in-east-l-a-with->

happening is that they're realizing that people can get more money by pricing people out. There *is* rent control—you can't just evict someone—but, at the end of the day you just can't force a landlord to keep a tenant. They'll just pay the tenant relocation costs [owed to tenants evicted for no fault of their own]."³¹⁴

"Protesters in Boyle Heights say that the set-up is wrong, that it's pushing them out," I respond.

"You're talking about Defend Boyle Heights," she says. "They have been doing it the wrong way—they're like gang members, they're trying to use a gang mentality and go out and intimidate and vandalize properties around here, and it's a shame. They're anti-change. That's not the majority of the representation of the community here. There are other ways to come to the table. I don't agree that the battle is with white people. Race is irrelevant. And I'm all about change—change is good. There has to be a balance of economics, and not all poor people here. The city needs tax revenue!"

"But it sounds from what you just said that there are problems—"

"Well, you know—yes. Besides the [absentee] landlords, there's Ellis—we actually haven't seen that much of it.³¹⁵ Right now one of the biggest problems is cash-for-keys.³¹⁶ A lot of people are starting to flip their properties, and that's where the gentrification is coming from. Outsiders are now insane for Boyle Heights, price-wise. You're now talking about five hundred thousand [dollars] for a home that you've got to put money into—but people are buying them. They see income once the Sixth Street Bridge³¹⁷ here opens, because there's proximity to downtown, access to public transportation—we're the heart of L.A. And now people are paying \$2,700 rent for a two-bedroom apartment."

"The issue is, there's no guarantee for people who have been in the neighborhood for a long time. The landlords are willing to pay the relocation costs because they can get three or four times that amount if they kick people out. And then tenants, at first, they think it's a good deal. But then, when you add it up, it tops

sesshu-foster/ [https://perma.cc/4NNE-3H7M] ("most of the housing that does exist is owned by absentee landlords").

314. At the time of the author's interview with Gonzalez, the statutory relocation costs payable to tenants could reach \$18,300. L.A., CAL., MUN. CODE § 151.09G (2017), available at <https://planning.lacity.org/eir/CrossroadsHwd/deir/files/references/J203.pdf> [https://perma.cc/4VJK-FT2J]. Since then, that amount has increased to \$19,700. City of L.A. Ordinance No. 184822 (codified as L.A., MUN. CODE § 151.09G (2018)), available at http://clkrep.lacity.org/onlinedocs/2014/14-0268-s1_ORD_184822_3-17-17.pdf [https://perma.cc/677W-UYMM].

315. Gonzalez seemed blasé about Ellis, but interviews with other Boyle Heights residents, and web gossip, revealed Ellis anxiety. See Blaney Interview, *supra* note 40; see also, e.g., CityTerrace65, Comment to *Boyle Heights is Battling Fiercely Against Gentrification*, CURBED L.A. (Apr. 19, 2016), <http://la.curbed.com/2016/4/19/11463010/boyle-heights-gentrification> [https://perma.cc/6XQP-LWX7] ("Wait until the Ellis Act evictions start.") [hereinafter CityTerrace65, Comment].

316. See *supra* note 41–42 and accompanying text.

317. See *supra* text accompanying note 69 (describing the demolition of the Sixth Street Bridge to make way for a new one).

out at about \$18,000,³¹⁸ which is nothing. [After you're kicked out] you've got to now find a place fast, you've got to pay first and last month's rent and deposit, and then, out here people's credit is not the greatest with the crisis in 2009,³¹⁹ and the economy, and so, yeah—people in that situation, they're going to . . .”

Gonzalez lets out a long breath, and I ask, “What's going to happen to them?”

“They're going to become homeless,” she says, after a second. “It's absolutely bad.”

When Gonzalez and I began this phone conversation, and she had mentioned the neighborhood's plentiful affordable housing, I thought that she would provide more of a counterweight to the dire predictions of A., Monica Aldrete, Aldo Medina, and Irene Peña. Gonzalez is not a radical—she had worked with government agencies.³²⁰ But the more she explains the situation, the more her assessment aligns with every other interviewee, even A., whom she rejects on ideological grounds. As she describes it, economics push out the Heights's long-term residents, obliterating their chance of getting back in—or even of regaining their foothold in housing at all. And the more she talks, the more she expressed defiance of that exclusion.

“Why should people who don't own property in Boyle Heights be allowed to stay there?” I finally ask her. “Or, should they?”

Gonzalez struggles with this question. “L-l-look, we want to preserve our history, our culture. In Boyle Heights, we have generations of families, and we want to preserve what's *right*.”

“What's ‘right’?”

“Someone who has been here for twenty or thirty years and raised their family here? They should be able to stay. People have a right to stay in our community that they help create—they helped make what Boyle Heights is—the culture, the history, the traditions. And also, now it's just all about money. It shouldn't be! I know that for a senior [citizen] here for 30, 40 years—you give him relocation? Let's be realistic. They can't afford to move on that. And it's not just, like I said, the money: Our senior residents pass away when we relocate them because they're comfortable with their surroundings. And when you uplift them, and move them, they get sad. We have at least five of our tenants who passed away because of the transition, it just didn't work out for them. They were missing the community that they came from. Here, everybody knows everybody. You see each other at ball-games, the market, you know people by name. It's different.”

“And I saw it before, in Pico Aliso, when we had redevelopment there.” Gonzalez makes an awkward coughing sound. “I mean, my mom passed away when she had to move, because she missed the neighbors, missed the kids, she missed going to the local store.”

318. See L.A. MUN. CODE § 151.09G.

319. See *supra* note 62 and accompanying text (providing further context for the impact of the 2008 Recession).

320. See *supra* text accompanying notes 310–311.

I stare down at my iPhone, shocked. “I’m sorry, Beth.”

For a moment, there is a space of silence on the line, and then emotion suddenly scuffs Gonzalez’s voice.

“You know,” she manages to say. “It was just one of those situations.”

B. A Sketch of the Takings Clause of Boyle Heights

In this Article, I begin the long, and probably never-ending work of understanding the substance of an alternative Takings Clause of Boyle Heights based on the interviews that I conducted in the winter and spring of 2017. I present limited findings: I cite only five interviews in these pages.³²¹ Still, my interviewees persuaded me that a Takings Clause is being written in Boyle Heights, and that they are good sources of its content because they are vested in the community and also connect to larger sub-communities within Boyle Heights: Aldrete works with hundreds of people in her shelters,³²² Martinez works with the business owners,³²³ Peña works with her farmers and gained the support of two hundred marchers,³²⁴ A. works with a large collection of local dissidents,³²⁵ and Gonzalez relates to the entire neighborhood with her work in the community.³²⁶

Another complexity exists in the fact that Aldrete, Medina, Peña, A., and Gonzalez confront the reader with a dazzling array of seemingly insoluble problems, and also do not find consensus on many issues. Some (like Gonzalez³²⁷) had housing in Boyle Heights, while others had trouble maintaining the finances needed for their essentials (like Proyecto Jardín’s Peña and DBH’s A.).³²⁸ Some sought to force gentrifiers out of the community (like A.),³²⁹ while others condemned that agenda (like Gonzalez³³⁰). Some had public profiles (like A. does through Defend Boyle Heights, and as Peña also possesses on her own³³¹), while

321. I interviewed several other folks whose words did not make it into the body of these pages, including: Elizabeth Blaney, *see supra* note 40 and accompanying text; Mihai Nicodim, owner of Nicodim Gallery; and a man who would allow me to name him only as Timothy, but who did not want to give his last name or be quoted in this project.

322. *See* Aldrete Interview, *supra* text following note 59.

323. *See* Medina Interview, *supra* text following note 105.

324. *See* Peña Interview, *supra* text accompanying notes 186–193.

325. *See* A. Interview, *supra* text accompanying notes 251–254.

326. *See* Gonzalez Interview, *supra* text accompanying notes 310–311.

327. In a portion of my interview with Gonzalez not recited above, she explained that she lived in the community. Gonzalez Interview, *supra* note 4.

328. In my interview with Peña, money concerns arose. Peña Interview, *supra* text accompanying note 167–168; *see also* A. Interview, *supra* text following note 237 (“we can barely afford to live here”).

329. *See* A. Interview, *supra* text following note 261 (saying “get the fuck out”).

330. *See*, Gonzalez Interview, *supra* text following note 314 (describing DBH as “anti-change”).

331. *See, e.g.*, Antonio Mejías-Rentas, *White Memorial Says Roybal Foundation Will Operate Community Garden; Dispute with Proyecto Jardín Unresolved*, Boyle Heights Beat (Apr. 1, 2016), <https://boyleheightsbeat.com/white-memorial-says-roybal-foundation-will-operate-community-garden/> [https://perma.cc/5Q87-FK4N].

others worked in quieter ways (like The Haven's Aldrete³³²). Some tried to help Boyle Heights by cultivating capitalist connections (like ELACC's Medina³³³), while others sought to cultivate community in ways less connected to the economy (like Peña³³⁴ and Aldrete³³⁵). Some were residents (like Peña had been,³³⁶ like Gonzalez³³⁷ and A.³³⁸ are), while one lived outside and worked with residents (Medina³³⁹).

Despite their differences, and the huge magnitude of the social problems they described, they agreed on this: they demanded that some people in Boyle Heights earned their rights to stay in the community on account of their status as human beings and because of their investments in the neighborhood. I depend on this commonality in making these first penciled sketches of The Takings Clause of Boyle Heights. While it remains certain that further research will yield new iterations of this Clause, that does not defeat my method, which is grounded upon the conviction that communities possess their own legal thought, and on a vision of constitutional law that may be influenced by social movements and more private lives.³⁴⁰ Neither of those things is static.³⁴¹

To the law, and the "law," then:

1. Key Elements of the Clause and Their Application

The Takings Clause of the Fifth Amendment of the U.S. Constitution reads: "[P]rivate property [shall not] be taken for public use, without just compensation."³⁴²

In Boyle Heights, the Takings Clause's first impressions move toward a fairly coherent position: Housing, workplace, and community are human and property rights, which are earned by virtue of being human and through investment. These rights should not be taken in the course of gentrification, which does not constitute

332. See Aldrete Interview, *supra* text following note 60 (describing trying to place people into shelters, not marching or getting interviewed by the media).

333. See Medina Interview, *supra* text accompanying note 106 (describing how Medina works for ELACC).

334. See Peña Interview, *supra* text accompanying notes 184–185 (describing hosting Aztec dancing events for the community).

335. See Aldrete Interview, *supra* text following note 60 (asserting that "[w]e just do what we can. We have art therapy and case management. We have different community activities.").

336. In the interview, Peña told me that she had lived in Boyle Heights, but now was staying in Echo Park. Peña Interview, *supra* note 9.

337. In my interview with her, Gonzalez explained that she lived in Boyle Heights, but did not want to specify exactly where. Gonzalez Interview, *supra* note 4.

338. See A. Interview, *supra* text accompanying note 262 (stating that A. used to live on Ganahl).

339. See Medina Interview *supra* text following note 106.

340. See *supra* text accompanying notes 197–228.

341. See Christopher Serkin, *Passive Takings: The State's Affirmative Duty to Protect Property*, 113 MICH. L. REV. 345, 369 (2014) ("[C]ommunity needs can change").

342. U.S. CONST. amend. V.

a public use or purpose. If such property is taken, “just compensation” requires that the victim be made whole by gaining another residence in the community and also payment of enough money to avoid sliding into homelessness.

a. The Boyle Heights Conception of the Property Implicated by the Clause

In Boyle Heights, we learn that residents cherish the conviction that the “private property” upon which the Fifth Amendment pivots means one’s place in the world, one’s home. As Aldrete of The Haven explained to me, people deserve housing as a “human right,”³⁴³ and it should support human essentials: Housing should safeguard families, not split them apart (as in the case of gender-specific shelters³⁴⁴). It should also not hazard resident malnutrition (which can happen in unstable housing³⁴⁵), or depression and anxiety (as in the case of the shelter resident who had chest pains upon winding up in The Haven³⁴⁶). To Aldrete, vulnerable human beings who suffer possess fundamental property rights in stable, non-stigmatized housing.³⁴⁷

Each of the other interviewees agreed with Aldrete that housing, work, and community exist as fundamental human property rights. ELACC’s Medina,³⁴⁸ like Peña³⁴⁹ and Gonzalez,³⁵⁰ railed against a system of worth that puts profit above people. As Gonzalez said: “[N]ow it’s just all about money. It shouldn’t be!”³⁵¹ They also demonstrated how housing rights were central enough to

343. Aldrete Email, *supra* note 67.

344. *See supra* text accompanying note 63.

345. *See, e.g.*, Aldrete Interview, *supra* text accompanying notes 62-63 (describing how shelter residents often have to eat unhealthy food).

346. *Id.*

347. *Id.*

348. *See* Medina Interview, *supra* text following note 109 (“God, I know . . .”).

349. *See* Peña Interview, *supra* text following note 171 (“Their corporate principles are so much more powerful than our spiritual principles.”).

350. *See* Gonzalez Interview, *supra* text following note 320.

351. *Id.*

constitute “everything”³⁵²—they connect to health,³⁵³ street violence,³⁵⁴ education,³⁵⁵ community,³⁵⁶ freedom,³⁵⁷ business,³⁵⁸ life,³⁵⁹ and death.³⁶⁰

Like Aldrete—A., Peña, and Gonzalez argued that residents own property rights in their homes and places of work because of their capacity to suffer when “everything” was taken away.³⁶¹ Peña wept when discussing the strangling effect of the loss of place at Proyecto Jardín,³⁶² and Gonzalez described how people, such as her mother, risked early mortality when ripped from their communities.³⁶³ A. recounted the anxiety he experienced at the prospect of being pushed out of his community.³⁶⁴

A.’s identification of values that entitled residents to local housing rights, however, differed from the rest. While Defend Boyle Heights sometimes denies that it follows a racial agenda,³⁶⁵ it contradicts itself.³⁶⁶ Moreover, A. emphasized that he battled “white hipsters” in his fight against gentrification.³⁶⁷ His values rested in some ideal of advanced Brownness—a path that Gonzalez rejects,³⁶⁸ as does this Article.³⁶⁹

352. See Medina Interview, *supra* text accompanying note 109.

353. See Aldrete Interview, *supra* text following note 62 (describing problems with depression and diabetes).

354. See Peña Interview, *supra* text accompanying notes 180–184.

355. See A. Interview, *supra* text accompanying note 266 (discussing underfunding and a lack of programming at Roosevelt High School).

356. See, e.g., Medina Interview, *supra* text accompanying note 109.

357. See *supra* Peña Interview. *supra* text following note 194 (“They have me by the throat.”).

358. See *supra* Medina Interview, *supra* text accompanying note 109.

359. See *supra* Gonzalez Interview, *supra* text accompanying note 320–321 (describing mother living in a community and then dying outside of it).

360. See *id.* See also A. Interview, *supra* text accompanying note 271 (describing how “they murdered Jesse Romero for tagging”).

361. See, e.g., Medina Interview, *supra* text following note 109 (“Housing is everything.”).

362. See Peña Interview, *supra* text following note 194 (reflecting on how “Peña begins crying. She shakes and weeps. I hold her hand and don’t say anything.”).

363. See Gonzalez Interview, *supra* text following note 320 (describing death of her mother).

364. See A. Interview, *supra* text accompanying and following note 262.

365. *Barbara Kruger Breaks the Boycott*, DEFEND BOYLE HEIGHTS FACEBOOK PAGE, <https://www.facebook.com/defendboyleheights/photos/a.938615952922066.1073741828.930020650448263/1236974146419577/?type=3&theater> [<https://perma.cc/Y9H4-RQVD>] (“Let’s continue to call out all gentrifiers, high or low, black, white or brown, by any means. Have a good weekend everyone! (In case you don’t know, that’s UCLA Arts professor Barbara Kruger, VERY important white feminist artist. White feminist artist... enough said”).

366. See *id.* (publishing BDH statements emphasizing the race of a target of their actions).

367. See A. Interview, *supra* text accompanying notes 261–262.

368. See *supra* text following note 314 (“[BDS is] anti-change. That’s not the majority of the representation of the community here. There are other ways to come to the table. I don’t agree that the battle is with white people. Race is irrelevant.”).

369. See *supra* text accompanying note 284. (“At the very least, hate ideology possesses no rightful place in my advocacy of a popularly enhanced Fifth Amendment.”).

But my interviewees did not just assert that Boyle Heightsians deserve human rights in property because they were human beings (or Latinx) or that they endured hurt. They claimed that Latinx people in Boyle Heights earned their rights by the investments they made in the neighborhood, and so cohered with *Penn Central's* confirmation that property rights may be violated where there are destructions of reasonable investment-backed expectations.³⁷⁰ Medina emphasized that residents developed, through the investment of social, emotional, labor, and financial capital, the culture that makes Boyle Heights so attractive to gentrifiers.³⁷¹ While the identity of all of the people entitled to these rights remains unclear,³⁷² Peña offered excellent exemplars: she discussed how she and fellow farmers took the lead out of the Jardín's soil, her applications for grants,³⁷³ and her capitalization on knowledge of indigenous herbs to create a protective cultural community.³⁷⁴ Gonzalez described how “[p]eople have a right to stay in our community that they help create—they helped make what Boyle Heights is—the culture, the history, the traditions.”³⁷⁵

In these assessments, the interviewees appear to possess a radical take on private property that expands upon the exciting interventions of Justice Kennedy's majority opinion in the recent Fifth Amendment case of *Murr v. Wisconsin*.³⁷⁶ There, Justice Kennedy determined that, in a regulatory takings context, the determination of the lineaments of “private property” had to be determined in part by an ad hoc, contextual analysis³⁷⁷ that considers the property's “surrounding human . . . environment.”³⁷⁸ Boyle Heights interviewees insisted that the “private property” supposedly belonging only to developers also belongs to Boyle Heightsians who constitute that “human environment,” and that their co-ownership may be discerned through ad hoc investigations, such as those engaged in this Article. They, not only state governments and purchasers, define the boundaries of this private property, which are informed by Boyle Heightsians' human qualities, history, and investment.³⁷⁹

370. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

371. See Medina Interview, *supra* text following note 109.

372. How long do you have to have lived there? How much do you need to suffer? Is it a case-by-case test? Is it subjective, or objective? How much do you need to have invested? On the question of who is entitled to rights under Boyle Heights' conception of social relations, see the original work on social relations theory espoused by Joseph William Singer, who asks about the length and strength of the relationship to the property and the degree of social need for legal protection. Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 739 (1988).

373. See Peña Interview *supra* text accompanying notes 174, 194.

374. See Peña Interview *supra* text accompanying note 179.

375. See Gonzalez Interview *supra* text following note 320.

376. *Murr v. Wisconsin*, 137 S.Ct. 1933 (2017).

377. *Id.* at 1945

378. *Id.*

379. See discussion *infra* note 450 and accompanying text (describing Christopher Serkin's argument of how local governments are in the best position to delineate property boundaries).

b. The Boyle Heights Conception of When Property Is Taken in Violation of “the Law” and the Meaning of Just Compensation

According to all of the interviewees, these property rights are “taken” when people are evicted in the course of gentrification, through the Ellis Act (though there was disagreement on the extent of this phenomenon³⁸⁰) cash-for-keys,³⁸¹ or other methods. They used the language both of total physical takings as well as regulatory takings: Gonzalez described everything (including life) being bodily taken away through eviction and dislocation,³⁸² and Aldrete, Peña, and Medina recounted homes and safety that were spirited away.³⁸³ Also, just as regulatory takings jurisprudence alerts to “corruption,”³⁸⁴ they objected to the government corruptly indulging in bad priorities and greed.³⁸⁵ In the same way that *Lucas* designated per se takings as existing when beneficial use of property is destroyed, interviewees complained of the decimation of inhabitants’ beneficial use of the neighborhood when they found themselves desolate in shelters.³⁸⁶ In addition, just as *Pennsylvania Coal Co. v. Mahon* cautioned that takings would exist when the government goes “too far,” they complained of the government crossing the line in its pursuit of a “made up conflict.”³⁸⁷

State action for these takings is either not required,³⁸⁸ or interviewees perceived such action as the state’s failure to protect people against the depredations of capitalism.³⁸⁹ They might also see it in the passing of laws such as Ellis,³⁹⁰ and, particularly, Costa-Hawkins, which abolished certain rent controls.³⁹¹ As Aldrete said: “Yes, food, shelter and good quality education are basic human rights that everyone should have access to, the fact that not everyone does is inhumane and it definitely makes it very clear as to what are our local and national governments

380. See *supra* note 315.

381. See *supra* text accompanying note 41–46.

382. See Gonzalez Interview, *supra* following 320 (describing her mother dying after being moved).

383. See Aldrete Interview, *supra* text following note 62 (describing “stages of grief”); Medina Interview, *supra* text following note 109 (describing a shop that was “teetering”); Peña Interview, *supra* text preceding note 194–195 (describing how she felt the community had been taken away).

384. See *supra* note 152 and accompanying text.

385. See Aldrete Email, *supra* text accompanying note 67.

386. See Gonzalez Interview, *supra* text preceding note 319 (describing the situation faced by dislocated residents as “absolutely bad”).

387. See Medina Interview, *supra* text accompanying note 109.

388. Connection between this Boyle Heightsian theory and that of renown constitutional theorists will be developed *infra* notes 479–481 and accompanying text. This position also resembles some feminist legal theory. See, e.g., Tracy Higgins, *Reviving the Public/Private Distinction in Feminist Theorizing*, 75 CHI.-KENT L. REV. 847, 857–58 (2000).

389. Cf. *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 195 (1989) (no substantive due process right for protection against private person).

390. See *supra* text accompanying note 30–40.

391. See *supra* text accompanying note 24–30.

priorities.”³⁹² And, as A. railed against the state and its foundational principles: “Private property be damned!”³⁹³

Moreover, Boyle Heights is no rubber-stamper.³⁹⁴ Under the Fifth Amendment, private property may be taken for a public purpose with just compensation,³⁹⁵ but for the interviewees, Ellis’s and Costa-Hawkins’s protections of landlords do not constitute public purposes due to the asymmetry of privilege and power. While landlords conceivably could still survive in dignity absent Ellis and Costa-Hawkins, poor residents of Boyle Heights may wind up damaged in a shelter. Aldrete clarified this last point, after describing how even modest rent hikes in Boyle Heights could “make[] all the difference.”³⁹⁶ Gonzalez echoed similar sentiments when she spoke of gentrification’s spurring of evictions that were “absolutely bad” because people would become homeless.³⁹⁷ Moreover, the argument that unconstrained development, and its concomitant evictions, would eventually lead to cheaper housing³⁹⁸ was unconvincing as a “public purpose” to the interviewees; Gonzalez, Aldrete, Medina, Peña, and A. all focused on the cascades of harm that were visited upon particular, evicted people who might otherwise be deemed collateral damage, flattened on the road to market correction.³⁹⁹

These grievances relate to yet another complaint about governmental corruption and takings. As previously noted, in regulatory takings jurisprudence, the courts will alert to takings particularly where they identify a danger of venality, and place special emphasis on burdens that are imposed in an ad hoc permitting process.⁴⁰⁰ In Boyle Heights, there were plenty of generalized claims of governmental vice,⁴⁰¹ but there were also finer-grained accusations that the government was corrupt because it did not care about the particular lives of people who were evicted in an *unregulated* real estate landscape.⁴⁰² In their world, ad hoc as opposed to legislative “corruption” skews in the opposite direction: Boyle Heightsians find “corruption” where ad hoc considerations do *not* get attention. That is, corruption spreads where the government allows free market forces to cause the evictions of residents without individualized considerations of their investments

392. See Aldrete Email, *supra* text accompanying note 67.

393. A. Interview, *supra* text preceding note 262.

394. See *supra* text accompanying note 118.

395. U.S. CONST. amend. V.

396. Aldrete Interview, *supra* text following note 62.

397. See Gonzalez Interview, *supra* text following note 319 (describing the situation faced by dislocated residents as “absolutely bad”).

398. See, e.g., Taylor, *supra* note 96 (“Considerable evidence suggests that construction of market-rate housing reduces housing costs for low-income . . .”).

399. See, e.g., Gonzalez Interview, *supra* text following note 320 (describing mother dying after being removed from her home because her complex was being developed).

400. See *supra* text accompanying note 153.

401. See Aldrete Interview, *supra* note 67 and accompanying text (describing the inhumanity of government priorities).

402. See, e.g., *id.*

and their particular suffering in dislocation.⁴⁰³ Gonzalez, Medina, Peña, Aldrete, and A. each emphasized the specific stories of people who were evicted and agonized, and did not deserve such treatment.⁴⁰⁴ Their finding of corruption in across-the-board legislative, rather than (necessarily) ad hoc affordable housing mandates, intriguingly agrees with Timothy Mulvaney, who argues that the legislative/adjudicative distinction may hinder progressive property agendas.⁴⁰⁵

A. also detected takings that occurred *before* eviction: His description of anxieties over gentrification that exist pre-dislocation resembles the language of *per se* takings, as delineated by the U.S. Supreme Court's *Loretto*⁴⁰⁶ and *Lucas*⁴⁰⁷ decisions. A. asserted that he felt anxiety when he saw gentrification "visual[s]"⁴⁰⁸—the painting of houses vs. the infusion of moneys into Boyle Heights infrastructure.⁴⁰⁹ This spoke to Boyle Heights as ruined for him, psychologically, long before any eviction comes to pass. His description resembles *Lucas*'s finding of takings where state regulation deprives owners of all beneficial (there, economic) uses of property.⁴¹⁰ A.'s feeling of Boyle Heights' value being destroyed for him indicates that gentrification deprives him of Boyle Heights' beneficial use.

Furthermore, his sensation that "we" are "surrounded"⁴¹¹ by gentrifiers also resembles *Loretto*, where the U.S. Supreme Court found that a regulation that requires a permanent physical occupation of land creates a *per se* taking.⁴¹² A.'s description of being "surrounded"⁴¹³ speaks of a fear of incipient invasion—that is, occupation. It may also qualify as a *de facto* psychological occupation of land, where the specter of gentrifiers proves so anxiety-producing that its influence floods into Boyle Heights and permanently invades it. A. would reject a ripeness challenge because the deprivation and/or occupation was sufficiently immediate to trigger rights.⁴¹⁴

403. See, e.g., Aldrete Interview, *supra* text following note 62 (discussing chest pains of client); Gonzalez Interview, *supra* text following note 320 (describing mother dying upon being dislocated).

404. See, e.g., *id.* Aldrete Interview, *supra* text accompanying note 62–63; Gonzalez Interview, *supra* text following note 320.

405. Timothy M. Mulvaney, *Legislative Exactions and Progressive Property*, 40 HARV. ENVTL. L. REV. 137, 152 (2016). Further, on *Nollan/Dolan* possibly dooming the role of Community Benefits Agreements used to derive anti-poverty concessions out of developers, see Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5, 27 (2010).

406. 458 U.S. 419, 432 n. 9 (1982).

407. 505 U.S. 1003, 1018-1019 (1992).

408. See A. Interview, *supra* text accompanying notes 260- 265.

409. *Id.*

410. See *supra* text accompanying note 141.

411. A. Interview, *supra* text preceding note 262.

412. See *supra* text accompanying note 141.

413. See A. Interview, *supra* text preceding note 263.

414. They would fail federal ripeness tests under *Williamson County Planning Commission v. Hamilton Bank*, 473 U.S. 172, 186 (1985) (finding that a taking claim requires the government to have reached a final decision). However, prudential ripeness might exist. See *Horne v. Dep't of Agric.*, 569 U.S. 513, 525-36 (2013) ("A Fifth Amendment claim is premature until it is clear that the Government has both taken property and denied just compensation.").

Finally, Peña, Medina, A. and Gonzalez all had similar thoughts about “just compensation.” They emphasized that people with Boyle Heights roots should be allowed to stay. They find poor Boyle Heightsians’ property taken, requiring just compensation under the Fifth Amendment.⁴¹⁵ In Boyle Heights, that “compensation” would require rehousing in the neighborhood. Gonzalez spoke the most about cash values: she asserted that \$18 thousand dollars would not be enough for older residents to relocate and cover basic costs,⁴¹⁶ so more would be needed to qualify as just.

c. Strong and Softer Versions of the Clause, and Practical Applications

In the end, strong and softer versions of the Heights’s Clause exist. The strong version could snowball into a radical property constitutionalism that would strike down all neoliberal systems that deny poor people housing, regardless of state action. A softer, more likely, version could help build toward fuller housing rights, the dream cherished of so many constitutional scholars and community members, who hope of the day when housing rights will climb to fundamental status.⁴¹⁷

Moreover, the Boyle Heights Takings Clause contains practical recommendations for future administrations of tenant-based property law challenges. Regarding potential claims on laws that particularly impact Boyle Heightsians, for example, litigators could engage the Boyle Heights clause to make Costa-Hawkins vulnerable to legal challenge to the extent that its suppression of rent control causes evictions of poor people,⁴¹⁸ on the grounds that poor peoples’ ousters constitute the illegal takings of property. Takings might also be identified in Ellis and JJJ’s encouragement of new developments that are built without guarantees of rehousing for poor tenants who once lived in that space.⁴¹⁹ The Boyle Heights Takings Clause could also be used to *defend* JJJ, insofar as people are interested in securing its minimal guarantees of some affordable housing.⁴²⁰ Based on the current landscape of exactions law, it is conceivable that JJJ could be regarded an exaction that does not meet the rough proportionality and essential nexus tests of *Nollan*, *Dolan*, and *Koontz*, which require that a landowner pay for problems connected to her development.⁴²¹ If JJJ creates exactions, and developers did not

415. U.S. CONST. amend. V.

416. See Gonzalez Interview, *supra* text accompanying and following note 318 for reference to the statutory requirement that relocation fees up to \$18,000 be awarded. See also L.A. MUN. CODE. § 151.09G. For a federal judicial rejection of a similar claim, see *Levin v. City & Cty. of San Francisco*, 71 F. Supp. 3d 1072, 1084 (N.D. Cal. 2014), *appeal dismissed and remanded*, No. 14-17283, 2017 WL 957211 (9th Cir. Mar. 13, 2017) (rejecting a San Francisco ordinance that required Ellis withdrawers to pay the difference between the tenant’s existing, rent-controlled rate and the cost of acquiring comparable housing at market rate for two years).

417. See Davis, *supra* note 98; Green *supra*, note 98; Smith & Steiner, *supra* note 98.

418. See *supra* note 10 and accompanying text.

419. See CAL. GOV’T CODE § 7060. See also *infra* text accompanying notes 494–497. (discussing segregation).

420. See *supra* notes 47–56.

421. See *supra* notes 148–153

cause poverty or the housing crunch, then they could argue that the set-asides do not satisfy the constitutional requirements. But if, as the Boyle Heights Takings Clause teaches us, the developers do not own as much of their developments as they would like (but must share with its other owners: local residents), then their claim diminishes in power.⁴²²

Finally, the Boyle Heights Takings Clause may have a political dimension and supports calls for the state to use its power of eminent domain to alleviate poverty.⁴²³

VI.

IS THIS OFF THE WALL, OR ON THE WALL? THE RELATIONSHIP OF THE NASCENT BOYLE HEIGHTS TAKINGS CLAUSE TO EXISTING PROGRESSIVE PROPERTY LAW THEORY

Social movements⁴²⁴ in Boyle Heights, as well as voices of its less public inhabitants,⁴²⁵ can influence constitutional law, as long as their messages are not “off the wall.”⁴²⁶

We now know that in Boyle Heights there exists a vision of local housing and workplace rights that blooms from community networks, human suffering, human transcendence, and investment. Should this shared conviction later grow into a systematic alternative of property rights, it would offer (an, as of now, unspecified⁴²⁷ quantum of) residents a right to a “home” and (by the lights of Peña⁴²⁸ and Medina⁴²⁹) a place of work.

422. See *supra* text following note 342 (“In Boyle Heights, the Takings Clause’s first impressions move toward a fairly coherent position: Housing, workplace, and community are human and property rights, which are earned by virtue of being human and through investment.”). This argument that people other than those who have paid for or inherited property also have some stake in it or influence it resembles the California Supreme Court case of *California Bldg. Indus. Ass’n v. City of San Jose*, 351 P.3d 974 (2015), *cert. denied sub nom. California Bldg. Indus. Ass’n v. City of San Jose*, Calif., 136 S. Ct. 928 (2016) [hereinafter *CBLA*]. *CBLA* recognized that inclusionary housing mandates were constitutional exercises of the police power, and satisfied rationality review. *Id.* at 988. Placing inclusionary housing mandates within the realm of the police power recognizes that privately owned property affects the health, safety and welfare of the community, which is a de facto acknowledgment of residents’ stakes in the community as a whole.

423. Cf. Joseph William Singer, *The Reliance Interest in Property*, 40 *Stan. L. Rev.* 611, 737 (1988) (“Communities faced with major plant closings need not wait for legislation, or even changes in common law, to protect themselves. Cities and public authorities should consider using their eminent domain powers to take plants that can be operated profitably and transfer them either to the workers themselves or to third parties who will keep them open.”); Murray, *Motor City*, *supra* note 92, at 424 (“Detroit should . . . exercise eminent domain for the purpose of alleviating poverty.”).

424. See *supra* text accompanying notes 251–254.

425. *Id.*

426. See *supra* note 200 and accompanying text.

427. See *supra* text accompanying note 375.

428. See Peña Interview, *supra* text accompanying note 187.

429. See Medina Interview, *supra* text accompanying note 106.

While some observers might object that constitutional property rights based in community constitutionalism is devoid of foundation and consistency,⁴³⁰ a review of prestigious constitutional property theory reveals that these commitments are sufficiently resonant with a respected tradition that they are definitely *on* the wall. The Boyle Heights case that a non-landowner should possess this property finds co-counsel, first off, in the property theory of Charles Reich, who stumped for a “new” conception of property that consist of “rights or status,”⁴³¹ such as *largesse*.⁴³² Reich’s conception of property aided the Supreme Court’s determination that welfare recipients owned property in their welfare rights such that only due processes could terminate them.⁴³³ If this remains true, then Boyle Heights residents may also claim rights here, since they do not assert priority based on *largesse*, but through active personal investment. Moreover, they learned to build their lives around their communities in the ways that Reich found meaningful for the development of property rights.⁴³⁴

Boyle Heights residents’ emphasis on their personal connections with community, moreover, meshes with the renown work of Margaret Jane Radin, who argues for greater protections of property connected to human personality:⁴³⁵ she would strengthen rights for property that helps “fully develop[.]”⁴³⁶ people and also connects to group status, and finds that these values can become critical when it comes to securing housing for people deeply rooted in community.⁴³⁷ Her

430. Sean Beienburg & Paul Frymer, *The People Against Themselves: Rethinking Popular Constitutionalism*, 41 LAW & SOC. INQUIRY 242, 243 (2016) (“Today, popular constitutionalism remains a contested notion, particularly within the legal academy. On one side, some judicial scholars invoke the importance of the rule of law, the meaning of the Constitution as a longstanding document, and the necessity of procedure and constitutional consistency.”).

431. Reich, *supra* note 217 at 738 (1964). *See also* *Goldberg v. Kelly*, 397 U.S. 254, 262 n. 8 (1970) (“It may be realistic today to regard welfare entitlements as more like ‘property’ than a ‘gratuity.’”) (citing Charles Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965)).

432. Reich, *supra* note 217, at 733.

433. *Goldberg*, 397 U.S. at 263–64; *see also id.* 262 n.8 (citing Reich).

434. Reich, *supra* note 217, at 733 (explaining that *largesse* is “creat[ing] a new society”). Engaging the new property as a lever for the Takings Clause of Boyle Heights is not a wild extrapolation of Reich. In *The New New Property*, David A. Super argues for “[p]reserving low-income people’s interests in community ties when those communities cannot stay where they are” under Reichian principles. David A. Super, *A New New Property*, 113 COLUM. L. REV. 1773, 1831–32 (2013). *But see id.* at 1830–1831 (examining the potentially too-high costs of a property right in tenancy).

435. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 1014–15 (1982) (“Where we can ascertain that a given property right is personal, there is a *prima facie* case that that right should be protected. . . and probably also where the personal property rights [connect with] . . . group identity.”).

436. *Id.*

437. Margaret Jane Radin, *Residential Rent Control*, in REINTERPRETING PROPERTY 79 (2009) (“Most of us, I think, feel that a tenant’s interest in continuing to live in an apartment that she has made home for some time seems somehow a stronger or more exigent claim than a commercial landlord’s interest in maintaining the same scope of freedom of choice regarding lease terms and in maintaining a high profit margin.”).

writings thus agree with Gonzalez, Peña, Medina, A.'s, and Aldrete's anchoring of rights in human suffering and connectivity in Boyle Heights.⁴³⁸

Similarities between (some versions of) the Boyle Heights vision of property rights and Eduardo Peñalver's philosophy also exist. Peñalver argues for the protections of property rights that feed people's community engagement, that is, his conception of "property as entrance."⁴³⁹ "Property as entrance," Peñalver writes, "facilitat[es] the formation and maintenance of strong communities whose values differ dramatically from the mainstream and as empowering individuals to opt into those communities."⁴⁴⁰ Peña and Gonzalez, particularly, aligned with this view: while all interviewees emphasized their strong affiliation with Boyle Heights community,⁴⁴¹ Peña of Proyecto Jardín expressed a willingness to share with the Roybal Foundation,⁴⁴² and the Neighborhood Council's Gonzalez welcomed new people and "change" into that community.⁴⁴³ DBH's A., however, departed from this compact: he, too, had a sense of the specialness of the Boyle Heights culture, but he sought to exclude people from it, using criteria that would permit no opportunity for entrance—race and class.⁴⁴⁴

The interviewees' persistent description of the non-fungible value of Boyle Heights' sustaining and self-crafted culture,⁴⁴⁵ moreover, connects with Gregory Alexander's work. Alexander writes of the civic republican conception of property as a promoter of belonging and self-governance,⁴⁴⁶ values that are more than "about money:" the "right of property is not simply an economic right . . . property

438. See e.g., Aldrete Interview, *supra* text following note 62 (describing chest pains of shelter client); Medina Interview, *supra* text accompanying note 108 (describing the Boyle Heights "ecosystem"); Peña Interview, *supra* text accompanying note 186 (describing how "the whole project is connected"); A. Interview, *supra* text accompanying note 256–261 (describing Boyle Heights as a refuge for people connected with a long history of excluded people, as well as his anxiety); Gonzalez Interview, *supra* text following note 320 (describing how elderly people who built the community suffer when they are excluded).

439. Eduardo Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1943 (2005).

440. *Id.* at 1943–44.

441. See, e.g., Medina Interview, *supra* text following note 109 (saying how "we're trying to build affordable housing and get people living in a dignified place. I know the world is unjust, but I'm passionate about this work.").

442. See Peña Interview, *supra* text accompanying note 186 (describing her willingness to work with Roybal).

443. See Gonzalez Interview, *supra* text accompanying note 314 (describing how DBS is "anti-change" and welcoming newcomers).

444. See A. Interview, *supra* text accompanying note 261 (complaining about a white woman in a tutu performing in Boyle Heights and indicating that he wanted white people out of the neighborhood).

445. See, e.g., Gonzalez Interview, *supra* text following note 320 (describing how elderly residents built the community).

446. GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE* 67 (2006) (The "right of property is not simply an economic right . . . property rights are also about self-expression, self-governance, belonging, and civic participation."). See also ALEXANDER, *COMMODITY AND PROPRIETY*, *supra* note 114, at 30–31 ("Republicans believed that ownership of property provides the necessary foundation for virtue, enabling citizens to pursue the common welfare.").

rights are also about self-expression, self-governance, belonging, and civic participation.”⁴⁴⁷

Boyle Heights’s property jurisprudence, which emphasizes communal culture and investment, also resembles the arguments of several scholars who prioritize local resident engagement with property. Recall, for example, Carpenter, Katyal, and Riley’s “property and peoplehood” account that recognizes “group-oriented legal claims:”⁴⁴⁸ This awareness extends to indigenous cultural property because of its support of collective identity and experience, and the fact that indigenous people, such as Navajo Nation members, exercised custodial duties over lands not formally owned and thus earned “real cultural property” interests.⁴⁴⁹ Relatedly, Christopher Serkin argues that localities (for him, governments) should possess a central role in determining property protections, because on-the-ground observers or groups know best how to allocate incentives (such as, perhaps, the exercise of custodianship).⁴⁵⁰ Perhaps most famous of these accounts of property is the “social relation” model originated by Joseph William Singer, which re-conceptualizes property as a social system composed of “entitlements . . . involv[ing] . . . relations between people.”⁴⁵¹

The idea of relational property observed by Shitong Qiao and Frank Upham is also at stake.⁴⁵² A recent, and exciting, development of Singer’s, Qiao’s, and Upham’s theories, which resonate with Boyle Heights constitutionalism, is revealed additionally in contemporary South African property law. Of particular relevance is the concurring opinion of Justice Johan Froneman in 2017’s *Daniels v*

447. Alexander, *THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY*, *supra* note 446, at 67.

448. Carpenter, Katyal & Riley, *supra* note 225, at 1028–29 (2009). *See also id.* at 1053–54 (“peoplehood refers to the qualities that constitutively define a group and that inspire individuals to identify with and participate in the collective.”).

449. *Id.* at 1112. *See also id.* at 1073–74 (observing that Navajo “stewardship” of land increases rights).

450. Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883, 886 (2007) (“A local solution to the takings problem is particularly appropriate because of competition between local governments. . . . local governments compete for residents who, in effect, vote with their feet by moving to—or investing in—a particular municipality.”).

451. Joseph William Singer, *Property and Social Relations: From Title to Entitlement*, in *PROPERTY AND VALUES ALTERNATIVES TO PUBLIC AND PRIVATE OWNERSHIP* 8 (2000) [hereinafter Singer, *Property and Social Relations*]; *see also* Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 623 (1988) (“At crucial points in the development of these relationships—often, but not always, when they break up—the legal system requires a sharing or shifting of property interests from the ‘owner’ to the ‘non-owner’ to protect the more vulnerable party to the relationship.”).

452. Shitong Qiao & Frank Upham, *THE EVOLUTION OF RELATIONAL PROPERTY RIGHTS: A CASE OF CHINESE RURAL LAND REFORM*, 100 IOWA L. REV. 101, 112 (2015) (“[A]sking who owns the property to understand[] who has what rights to the property and [] examining the social relationships around a piece of property that is beset by conflicting values and competing interests.”) (internal quotes omitted). A related encouragement will be found in Gregory S. Alexander’s social obligation theory of property. *See* Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 818–19 (2009) (arguing that owners have obligations to others). Here, the social obligation would be created in part by “non-owners’” labor.

Scribante and Another.⁴⁵³ In *Daniels*, Justice Froneman affirmed the right of an occupant to improve her home on the basis that “opposed [property] claims” must be “balance[d] out and reconcile[d],” with reference to “factors relevant in each particular case,”⁴⁵⁴ which appears to stake out a relational position. Further, Froneman’s opinion in 2015’s *Shoprite Checkers v. MEC*⁴⁵⁵ emphasized that property rights must be interpreted in light of the South African Constitution’s objective of “recogniz[ing] . . . the dignity of others.”⁴⁵⁶

Of all of the interviewees, Peña, who described herself as the land’s “caretaker[]” and grasped its spiritual dimensions, and Aldo Medina, who emphasized the role of “respect” in the construction of property concerns, align most closely with these visions of a “people’s property” and relational property informed by respect for and recognition of the humanity of others.⁴⁵⁷

Similarly, Boyle Heights’ residents’ advocacy mirrors that of the activists described by Katyal and Peñalver in *PROPERTY OUTLAWS*. There, we found a rebellious ethic of property disobedience—squatting, sitting-in, and pirating—inspired by an ethics of “human dignity,”⁴⁵⁸ which resembles the values articulated by all of the interviewees, particularly ELACC’s Medina.⁴⁵⁹ Boyle Heights’ residents’

453. 2017 (4) SA 341 (CC) (S. Afr.) (deciding a case where a domestic worker lived on property owned by another and the owner attempted to oust the petitioner by tampering with her door).

454. *Id.* at para. 135, citing *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC) para. 23 (S. Afr.).

455. *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 (6) SA 125 (CC) (S. Afr.).

456. *Id.* at paras. 4, 36, 50. For an analysis of these cases, see Frank Michelman & Robert Walmsley, *A Constitutional Vision for Property: Shoprite Checkers and Beyond* 3, 25 (unpublished manuscript) (on file with author).

For all of the encouraging language of these cases, it needs to be noted, however, that South Africa constitutionalism’s heed of human dignity and non-hierarchical values may not extend as far as the ideologies of Boyle Heightsians. *See id.* at 20 (“We are perhaps not yet past a stage where South African lawyers and jurists might still be induced by old-order private-law categories or traces thereof to doubt or question whether these infra-patrimonial positions [such as occupancy rights] count as ‘property’ in South African constitutional legal lingo.”). Many, many thanks to Frank Michelman for his teachings on South African property constitutionalism and also to Carrie Menkel-Meadow for her citations to South African property law cases that emphasize communitarianism.

457. Mejías-Rentas, *supra* note 331 (where Peña describes herself as one of the land’s caretakers); Medina Interview *supra* text following note 109.

Regarding the argument that Peña earned a stake in Boyle Heights by virtue of her caretaking and work with the people, *see* STEPHEN R. MUNZER, *A THEORY OF PROPERTY* 260 (1990) (“[A]s a partial foundation for an institution of private property, labor is more plausible than any other desert basis.”). Munzer also argues for a property law premised in justice and equality, which would only permit unequal holdings “so long as the inequalities do not undermine a fully human life in society.” *Id.* at 227. Regarding Medina’s argument that Boyle Heightsians should own rights in Boyle Heights because their humanity and connection to the community should be respected, *see* Singer, *Property and Social Relations*, *supra* note 451, at 8 (re-conceptualizing property as a social system composed of “entitlements . . . involv[ing] . . . relations between people”).

458. PEÑALVER & KATYAL, *supra* note 221, at 6.

459. *See* Medina Interview, *supra* text following note 109 (describing the ethic of respect).

jurisprudence (especially Gonzalez's⁴⁶⁰ and Aldrete's⁴⁶¹) also have consonance with Lisa T. Alexander's writings, which describe Occupiers who press the state to do what is "right,"⁴⁶² and agree with international principles espoused in the Universal Declaration of Human Rights that housing is a "human right."⁴⁶³

This sense of "rightness" attaches to the idea of property rights being so critical that they constitute "everything," a value expressed by Aldrete,⁴⁶⁴ A.,⁴⁶⁵ and Medina.⁴⁶⁶ As it happens, a philosophy of "property as everything" resonates in the work of scholars Laura Underkuffler, who argues that property should be understood as a part of the foundational human conflict between I and thee (or we),⁴⁶⁷ and, again, Joseph William Singer, who maintains that property is about our way of life.⁴⁶⁸ As Matthew Desmond writes in his advocacy of a fundamental right to housing, "[W]ithout stable shelter, everything else falls apart."⁴⁶⁹

In addition, the people I spoke to labored to reconstitute property rights through informal practices such as those recognized by Robert Ellickson,⁴⁷⁰ including vandalism⁴⁷¹ and gossip (in the form of giving press interviews,⁴⁷² making noise in web commentary,⁴⁷³ and painting murals⁴⁷⁴), the latter of which also presents a form of storytelling. Carole Rose notes that such tale-weaving

460. See Gonzalez Interview, *supra* text following note 320 (saying "we want to preserve what's right.").

461. See Aldrete Interview, *supra* text accompanying note 67 (describing "priorities").

462. Lisa T. Alexander, *Occupying the Constitutional Right to Housing*, 94 NEB. L. REV. 245, 269 (2015).

463. Alexander, *supra* note 462, at 269; Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. Doc. A/810 at 71 (1948).

464. See Aldrete Interview, *supra* text accompanying and following note 62 ("They don't have a refrigerator! They don't have fresh food! It's not good. And it's not just the food—it's everything, everything's bad—the families get separated.").

465. See A. Interview, *supra* text accompanying and following note 266 (discussing Roosevelt High School).

466. See Medina Interview, *supra* text accompanying and following note 109.

467. LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* 5 (2003) (the conception of property that we choose can affect our understanding of the relationship between the individual and the collective); Laura S. Underkuffler, *Property and Change: The Constitutional Conundrum*, 91 TEX. L. REV. 2015, 2036 (2013) (noting that property claims are inherently rivalrous).

468. Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1299 (2014) ("[Property] is about our way of life."). See also Gregory S. Alexander, Eduardo M. Peñalver, Joseph William Singer, Laura Underkuffler, *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 743 (2009).

469. DESMOND, *supra* note 7, at 300.

470. See ROBERT C. ELICKSON, *ORDER WITHOUT LAW* 79–81 (1991) (discussing negative gossip and physical retaliation in trespass disputes).

471. See A. Interview, *supra* text accompanying note 270 (supporting the taggers who painted an obscenity on the Nicodim gallery).

472. See Peña Interview, *supra* text accompanying note 191 (recounting how reporters quoted her characterization of her resistance to White Memorial as a "standoff").

473. See CityTerrace65, Comment, *supra* note 315 ("Wait until the Ellis Act evictions start.").

474. See *supra* image accompanying note 58.

“change[s] our minds, and give us an opportunity to reconsider and reorder our approach to events.”⁴⁷⁵

Finally, to the extent that the interviewees found that their rights had been violated in the absence of explicit state action, that construction of rights also finds some support in the writings of Christopher Serkin. Serkin observes potential Takings Clause violations in the absence of state action where “[t]he state has rendered the property especially susceptible to adverse changes in the world.”⁴⁷⁶ Scholars such as Robert Hale in the 1920’s and 1930’s,⁴⁷⁷ and Michael Seidman and Mark Tushnet in the 1990’s,⁴⁷⁸ also recognize that background or private distributions of property and other social forces create coercion or permit meaningful imbalances of life chances that call state action requirements into question. We might also find positive state action in the fact that governments, and their courts, facilitate these private takings that cause evictions.⁴⁷⁹

Together, these connections between Boyle Heights property jurisprudence and the scholarship of Reich, Super, Radin, Peñalver, Alexander, Carpenter, Katyal, Riley, Ellickson, Rose, Serkin, Underkuffler and Singer, and the activism of the Navajo Nation, and the Occupiers described by Lisa Alexander, show that the Boyle Heights Takings Clause is not “off the wall” at all. Thus, it may, via the techniques described by social movement scholars and utilized by law’s close observers,⁴⁸⁰ find its place in Takings Clause analysis.

475. Carole M. Rose, *Property as Storytelling*, in PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 41 (1994).

476. Serkin, *Passive Takings*, *supra* note 341, at 378 (2014). Admittedly, this “pushes [Serkin’s] limits.” *Id.* See also Timothy Mulvaney & Joseph William Singer, *Move Along to Where? Property in Service of Democracy* 16 (2017) (unpublished manuscript) (on file with author) (describing state obligation regarding unfair eviction). Further, Tim Mulvaney has written an exciting new article contesting the logic of the state action requirement. See Timothy Mulvaney, *Non-Enforcement Takings*, 59 B. C. L. REV. 145 (2018).

477. See Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 471 (1923) (“What is the government doing when it ‘protects a property right’? Passively, it is abstaining from interference with the owner when he deals with the thing owned; actively, it is forcing the non-owner to desist from handling it, unless the owner consents.”); Robert L. Hale, *Force and the State: A Comparison of ‘Political’ and ‘Economic’ Compulsion*, 35 COLUM. L. REV. 149, 197–98 (1935) (“If the power to set judicial machinery in motion for the enforcement of legal duties be recognized as a delegation of state power, it would be immaterial that those who have that power are not ‘acting in matters of high public interest.’”).

478. We [legal realists and progressives] want to repudiate state action rhetoric because we know that it blinds us to human suffering that the state might otherwise ameliorate. Yet we also want to embrace the concept of a private sphere because we know that it preserves a space for individual flourishing that the state might otherwise destroy.

LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES 70 (1996). Thank you to Aziz Huq for the Hale and Seidman sources.

479. *Shelley v. Kraemer*, 334 U.S. 1, 19, (1948) (“We have no doubt that there has been state action . . . but for the active intervention of the state courts . . . petitioners would have been free to occupy the properties in question without restraint.”). Thank you to Carrie Menkel-Meadow for talking with me about these issues.

480. See *supra* text accompanying notes 211–216 (describing scholars such as MacKinnon, Weissman, Riles, and Crenshaw, who root their theory in the experiences of women).

One, possibly two, caveats exist: Some of the strongest, and most violent⁴⁸¹ claims of property rights—those made by Defend Boyle Heights—relate to the concept of race property first articulated by Cheryl Harris,⁴⁸² and before her, Derrick Bell.⁴⁸³ Harris resists a system of racism termed “whiteness as property.”⁴⁸⁴ In so doing, she manifests the way that racism allows white people to exclude others from property,⁴⁸⁵ and make people into property.⁴⁸⁶

In Boyle Heights, DBH vociferously urges rights in Boyle Heights based on race and class—here, low-income Latinx—supremacy. Is this “brownness as property?”⁴⁸⁷ To conclude that DBH effects a neat reversal of Harris’s theory would ignore how Raza⁴⁸⁸ identity does not possess the same totalizing destructive force of white supremacy. Further, property conflicts that can erupt between different outsider social groups—such as queer white people and (cisgender? straight?) people of color—emerge from the overlapping oppressions of structural racism, classism, homophobia, and sexism.⁴⁸⁹ Yet, in DBH’s hands, the ideology of Raza supremacy has introduced some of the same agonies as has heterocentrism and white racism as it has already hurt people based on their identity.⁴⁹⁰

This foundation for property rights proves illegitimate based on Harris’s theory, as it creates and threatens private violence on account of a “refusal to acknowledge the negotiated quality of identity.”⁴⁹¹ DBH’s ideology also presents as illicit because if the state adopted it, it would wreak official violence and havoc.

481. See *supra* text following note 269 (discussing with A. the violence of DBH protests).

482. Harris, *supra* note 218, at 1736.

483. Derrick Bell, *Xerxes and the Affirmative Action Mystique*, 57 GEO. WASH. L. REV. 1595, 1602, 1608 (1989), cited in Harris, *supra* note 218, at 1713 n.9.

484. See Harris, *supra* note 218, at 1714 (“I examine the emergence of whiteness as property.”).

485. See *id.*

486. See *id.* at 1716.

487. Cf. *id.* at 1724–37 (laying out the vast illegitimate property rights created in and conveyed by whiteness).

488. YOLANDA ALANIZ & MEGAN CORNISH, *VIVA LA RAZA: A HISTORY OF CHICANO IDENTITY AND RESISTANCE* 25 (2008) (“La Raza, meaning ‘the race,’ may also be used as a synonym for the Chicana/o people.”).

489. An apt treatment of this conflict will be found in the PBS documentary *Flag Wars* (2003), showing gentrification strains in a Black community in Columbus Ohio that sees an influx of white, LGBT newcomers. See, e.g., *Talking Back: Doug & Vivian—Flag Wars—POV/PBS*, <http://www.pbs.org/pov/flagwars/video/flag-wars-talking-back-clip-1-of-7/> [https://perma.cc/HAS6-AW7M]. South Los Angeles also saw a wave of Latinx immigration into the historically Black community, which created tensions. See Jennifer Medina, *In Years Since the Riots, a Changed Complexion in South Central*, N.Y. TIMES (Apr. 24, 2012) <http://www.nytimes.com/2012/04/25/us/in-south-los-angeles-a-changed-complexion-since-the-riots.html> [https://perma.cc/W85R-B7FK]. Kirkwood, a neighborhood in Atlanta, also has seen Black-White queer tensions caused by gentrification. See Lesley Williams Reid & Robert M. Adelman, *The Double-edged Sword of Gentrification in Atlanta*, FOOTNOTES, Apr. 2003, <http://www.asanet.org/sites/default/files/savvy/footnotes/apr03/indexthree.html> [https://perma.cc/97W9-KGEM].

490. See *supra* note 503 (describing the harassment of employees of PSSST! gallery and its subsequent closure).

491. Harris, *supra* note 218, at 1766.

As I described in the section on demosprudence and popular constitutionalism, while incendiary language used by minorities can help us understand the harm they experience when exposed to oppression, when the *state* (such as a court interpreting the Constitution) embraces racist and classist mores, violent exclusions and also appalling, retributive, deeply unjust punishments can ensue.⁴⁹² This is “off the wall”⁴⁹³ and deserves to be removed from constitutional care.

A more complicated problem exists, as well: the Takings Clause limned by all of the interviewees *could* entrench racial segregation, and thus perpetuate structural violence that finds condemnation not only from Harris’s theory, but also the anti-violence mores of the above-mentioned scholars Carrie Menkel-Meadow, Robert Cover, and Johann Galtung.⁴⁹⁴ Recall that Gonzalez, who rejects racist values,⁴⁹⁵ emphasized the injustice associated with developers creating housing that goes to people who are not deeply rooted in the community.⁴⁹⁶ The reason why developers do not give residents “first dibs” is because such a scheme may violate the Fair Housing Act, by protracting the racial makeup of communities.⁴⁹⁷ The resulting conflict between Boyle Heights “takings” and the law’s insistence on race neutrality is one that Boyle Heightsians resolve in favor of longstanding residents. Except for A., however, they appear to rely on the tenets of anti-subordination, not “brownness as property”: Gonzalez mentioned the death of her mother, Medina discussed the heartbreaking failures of businesses, Peña described at great length the destructive power abuses that she encountered with White Memorial, and Aldrete explained how residents suffered in the shelters.⁴⁹⁸ Nevertheless, Harris does not require racist purpose for racist property to exist,⁴⁹⁹ and anti-violence scholars also recognize that seemingly benign arrangements can effect

492. See Murray, *supra* note 50, at 245-46 (describing the torture and killings of ethnic minorities in former Yugoslavia that the government justified as a form of ethnic cleansing).

493. See *supra* text accompanying note 200.

494. Johan Galtung, *Violence, Peace, and Peace Research*, 6 J. Peace Res. 167, 175 (1969) (“[T]he general formula behind structural violence is inequality, above all in the distribution of power”).

495. See Gonzalez Interview, *supra* text accompanying note 314 (describing how DBH is “anti-change”).

496. See Gonzalez Interview, *supra* text following note 320 (“And also, now it’s just all about money. It shouldn’t be! I know that for a senior [citizen] here for 30, 40 years—you give him relocation? Let’s be realistic. They can’t afford to move on that.”).

497. *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2507 (2015) held that disparate impact claims are cognizable under the Fair Housing Act. First dibs have been frowned upon on that basis for years before that decision.

498. See Aldrete Interview, *supra* text accompanying note 62 (describing shelter client suffering from chest pains); Medina Interview, *supra* text accompanying note 109 (describing “teetering” business); Peña Interview, *supra* text accompanying note 186 (describing how “And then, they just forced us out”); Gonzalez Interview, *supra* text following note 320 (describing mother dying after being uprooted upon her complex’s development).

499. See Harris, *supra* note 218, at 1715 (discussing “neutral baseline[s]” that “mask[] the maintenance of white privilege and domination”).

terrible violence.⁵⁰⁰ If the Boyle Heights Takings Clause sees greater refinement, then this complexity will have to be addressed when determining which of its aspects remain “on the wall.”

Thus, as it develops, the Takings Clause of Boyle Heights should protect property rights based on communitarian values, personhood, human dignity, and locals’ investments, but not on racist privilege or racial injustice.

VII. CONCLUSION

Local communities like Boyle Heights possess their own jurisprudence. When poor people and people of color fill these communities, their conceptions of constitutionalism offer perspectives that wander far outside of the legal doctrine enshrined by courts. However, they remain possible, and valuable sources of influence on U.S. constitutional law. Poor people and people of color, like the Latinx inhabitants and social workers of Boyle Heights, express property values that align with the arguments of progressive property scholars and nationally recognized activists. Thus, their legal thought is not “off the wall,” but rather additional proof of a growing consensus. The writings of social movement scholars, legal anthropologists, and those who promote the goings-on of property outlaws and poor people of color as sources of legal change, create a foundation for introducing a Boyle Heights Takings Clause to the Fifth Amendment.

In Boyle Heights today, the gentrification wars still rage, and its residents resist as best they can. Aldo Medina continued his work in the Commercial Corridor, planning a food festival in May of 2017.⁵⁰¹ Irene Peña studies new opportunities in Boyle Heights, and has opened up her own operation, called Sacred Earth Farms.⁵⁰² Tragically, in April, Defend Boyle Heights succeeded in harassing a queer, Latinx-friendly gallery called PSSST! out of Boyle Heights, and exulted when this occurred.⁵⁰³ Beth Gonzalez still helps community organizations. Monica Aldrete reports that The Haven’s shelters remain at capacity and, as far as I can tell, those new beds worked out just fine.⁵⁰⁴

500. See, e.g., Cover, *supra* note 298, at 1614–15 (analogizing judges who effect violence to psychological experiment subjects who accomplish violence because they were ordered to do so).

501. In May of 2017, ELACC will host its 6th Annual Taste of Boyle Heights festival. See *6th Annual Taste of Boyle Heights*, ELACC, https://elacc.ticketleap.com/6th-annual-taste-of-boyle-heights/dates/May-25-2017_at_0600PM [<https://perma.cc/QE3B-PDUG>].

502. Sacred Earth Farms, FACEBOOK.COM, <https://www.facebook.com/sacredearthfoodscape/> [<https://perma.cc/Z95V-R4UN>].

503. *Statement from Defend Boyle Heights and BHAAAD on PSSST Closing*, BOYLE HEIGHTS ALLIANCE AGAINST ARTWASHING AND DISPLACEMENT, <http://alianzacontraartwashing.org/en/coalition-statements/statement-from-defend-boyle-heights-and-bhaaad-on-pssst-closing/> [<https://perma.cc/5ZWN-X3ZP>] (expressing “great joy” that the gallery had closed up shop, emphasizing the rectitude of the “fight” against gentrification, and complaining that the gallery had not listened to their voices).

504. Email from Monica Aldrete, Director of “The Haven” to Yxta Maya Murray, Professor of Law, Loyola Law School (May 19, 2017 3:50 PM) (on file with author).

In April of 2016, a family of six complained of being pressured to leave their apartment because of having “too many children.”⁵⁰⁵ A year later, similar stories continued to show up in the news: In April of 2017, a group of Mariachis threatened to protest Boyle Heights rent hikes, saying they’ll be forced out of their homes.⁵⁰⁶ Also in April, the Los Angeles Times reported that progress on a Boyle Heights homeless shelter encountered protracted delays.⁵⁰⁷ In July of 2018, tenants who live near Boyle Heights’s Mariachi Plaza went to court when faced with rent increases that escalated to \$800 a month.⁵⁰⁸

Within the neighborhood, however, there exists an intellectual, existential, and political awakening. This burgeoning community jurisprudence pushes back against unrestrained neoliberalism and the homelessness and eviction freewheeling capitalism imposes upon its residents. The philosophy of law that is being written in Boyle Heights protests, shelters, civic exchanges, and private conversations claims property rights and resists when those rights are taken.

For now, this Article traces the outer edges of this legal thought, in the hopes that someday it will find recognition within the legal community, and far fuller expression in the law.

505. *Boyle Heights Family of Six Claim They Are Facing Eviction for Having Too Many Children*, UNION DE VECINOS (Apr. 19, 2016), <http://www.uniondevecinos.org/index.php/boyle-heights-family-of-six-claim-they-are-facing-eviction-for-having-too-many-children/> [https://perma.cc/L67G-PT5A].

506. Jonny Coleman, *Mariachis Are Protesting Rent Hikes in Boyle Heights*, CURBEDLA (Apr. 25, 2017), <http://la.curbed.com/2017/4/25/15425136/rent-increase-mariachis-boyle-heights-protest> [https://perma.cc/6R9R-FHD9].

507. Doug Smith, *Delay for Boyle Heights Homeless Project Shows Challenge of Building Thousands of Units in L.A.*, L.A. TIMES (Apr. 14, 2017), <http://www.latimes.com/local/lanow/la-me-ln-homeless-housing-stalled-20170414-story.html> [https://perma.cc/397V-CVM4].

508. *Boyle Heights Tenants Challenge Eviction in Court; East L.A. Shooting Victim ID'd; Christmas Tree Recycling*, THE EASTSIDER (Jan. 2, 2018), <https://www.theeastsiderla.com/2018/01/boyle-heights-tenants-challenge-eviction-in-court-east-l-a-shooting-victim-idd-christmas-tree-recycling/> [https://perma.cc/NTC5-K3GF].