

# HOUSING AS A RIGHT IN THE UNITED STATES: MITIGATING THE AFFORDABLE HOUSING CRISIS USING AN INTERNATIONAL HUMAN RIGHTS LAW APPROACH

**Abstract:** Throughout its history, the United States has perpetuated a double standard in regard to international human rights by urging other nations to protect and promote these rights, while simultaneously forgoing international human rights treaties in favor of its own Constitution and domestic human rights laws. Notably, the United States does not recognize one of the fundamental rights introduced by the Universal Declaration of Human Rights in 1948 and contained in the International Covenant on Economic, Social and Cultural Rights: The right to adequate housing. Failure to recognize housing as a human or constitutional right has led to a worsening affordable housing crisis in the United States. Domestic policy has proven insufficient to combat this crisis, and the United States must adopt a different approach for resolution. This Note argues that state governments should borrow from international human rights treaties and foreign housing law, and recognize housing as a justiciable right in an attempt to mitigate the affordable housing crisis. States can best ensure a right to housing by including housing as a right in their respective constitutions and creating oversight bodies to promote and protect this new constitutional right.

## INTRODUCTION

An escalating affordable housing crisis in the United States, exacerbated by the COVID-19 pandemic and growing inequality, has severely impacted millions of Americans.<sup>1</sup> A lethal combination of enduring unemployment and a decreasing supply of affordable housing has hit lower-income Americans par-

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<sup>1</sup> Isabel Solange Muñoz, *The Coronavirus Pandemic Is Making the US Housing Crisis Even Worse*, THE CONVERSATION (Apr. 17, 2020), <https://theconversation.com/the-coronavirus-pandemic-is-making-the-us-housing-crisis-even-worse-136025> [<https://perma.cc/E78B-UEYS>]; Katherine Schaeffer, *6 Facts About Economic Inequality in the U.S.*, PEW RSCH. (Feb. 7, 2020), <https://www.pewresearch.org/fact-tank/2020/02/07/6-facts-about-economic-inequality-in-the-u-s/> [<https://perma.cc/4SU7-EUJQ>]; Glenn Thrush, *As Affordable Housing Crisis Grows, HUD Sits on the Sideline*, N.Y. TIMES (July 27, 2018), <https://www.nytimes.com/2018/07/27/us/politics/hud-affordable-housing-crisis.html> [<https://perma.cc/65KA-9MTS>]. Local activists have taken action to reduce the homeless population of cities like Oakland, California, in part by fighting to convert vacant homes into housing for needy families. Brentin Mock & Sarah Holder, *A Group of Mothers, a Vacant Home, and a Win for Fair Housing*, BLOOMBERG CITYLAB (Jan. 28, 2020), <https://www.bloomberg.com/news/articles/2020-01-28/the-oakland-moms-who-launched-a-housing-movement> [<https://perma.cc/BR4D-WDW5>]; *About*, MOMS 4 HOUSING, <https://moms4housing.org/aboutm4h> [<https://perma.cc/4QT2-32P7>] (providing an overview of the mission of the “Moms 4 Housing” movement).

ticularly hard.<sup>2</sup> In recent years, a growing number of renters in this country have spent more than half of their income on rent, and the number of low-rent units has shrunk by approximately four million units, or seventeen percent, since 2011.<sup>3</sup>

In the United States, housing is treated as a commodity or investment, rather than as a human right.<sup>4</sup> The United Nations (U.N.) Special Rapporteur condemns this practice and advocates for national governments to focus their efforts on ensuring all citizens have adequate housing, regardless of their ability to pay rent.<sup>5</sup> Though the United States is quick to recommend sanctions on other countries for failing to protect human rights,<sup>6</sup> it does not recognize the

<sup>2</sup> Kim Parker et al., *Economic Fallout of COVID-19 Continues to Hit Lower-Income Americans the Hardest*, PEW RSCH. CTR. (Sept. 24, 2020), <https://www.pewsocialtrends.org/2020/09/24/economic-fallout-from-covid-19-continues-to-hit-lower-income-americans-the-hardest/> [<https://perma.cc/W6ZK-GTE2>]; see Thrush, *supra* note 1 (discussing the shortage of affordable housing in the United States). Approximately 25% of Americans either became unemployed themselves, or had someone in their household become unemployed due to the COVID-19 outbreak. Parker et al., *supra*. For lower-income Americans, this percentage increases to 33%. *Id.* Additionally, approximately 32% of lower-income individuals reported struggling to make rent or mortgage payments as a result of the pandemic. *Id.*

<sup>3</sup> JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV., *THE STATE OF THE NATION'S HOUSING 2019*, at 4 (2019); Jacob Passy, *More Americans Are Spending Over Half Their Income on Housing*, N.Y. POST (Feb. 4, 2020), <https://nypost.com/2020/02/04/more-americans-are-spending-over-half-their-income-on-housing/> [<https://perma.cc/4bAW-XZ57>]. To live comfortably and within one's means in the United States, financial experts recommend spending no more than 30% of one's income on housing. See *How Much Should You Spend on Rent?*, INTUIT MINT (Oct. 2, 2020), <https://blog.mint.com/housing/how-much-should-you-spend-on-rent> [<https://perma.cc/EF3D-bJB6>].

<sup>4</sup> *Financialization of Housing*, U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., <https://www.ohchr.org/EN/Issues/Housing/Pages/FinancializationHousing.aspx> [<https://perma.cc/N9CQ-E7HS>] (summarizing a report prepared by the Special Rapporteur on the commodification of housing and its negative impact on society and human rights). This concept is referred to as the “financialization of housing” and often occurs in countries where the interests of wealthy citizens and development companies are placed above those of the average citizen seeking housing. See *id.* Financialization of housing occurs when financial markets and corporations exercise significant power and dominate housing markets. Ingrid Leijten & Kaisa de Bel, *Facing Financialization in the Housing Sector: A Human Right to Adequate Housing for All*, 38 NETH. Q. HUM. RTS. 94, 96, 104 (2020). This in turn makes housing less affordable, because these actors prioritize their return on investment and profit over providing affordable housing. See *id.* at 104.

<sup>5</sup> U.N. Special Rapporteur, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in This Context*, ¶ 1, U.N. Doc. A/HRC/34/51 (Jan. 18, 2017) [hereinafter *Report on Adequate Housing 2017*]; see U.N. Special Rapporteur, *Report of The Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in This Context*, ¶ 53, U.N. Doc. A/HRC/40/61 (Jan. 15, 2019) [hereinafter *Report on Adequate Housing 2019*] (explaining that the commodification of housing has created a shortage of affordable housing and worsened social and racial inequality). The Special Rapporteur proposed that governments should provide adequate housing for those unable to afford the housing that is currently available and to decrease incentives that bolster the financialization of housing, such as tax breaks for investors and bailouts for financial institutions. *Report on Adequate Housing 2017, supra*, ¶¶ 6, 21.

<sup>6</sup> See Gerry Shih, *U.S. Report Calls for Sanctions on China for Human Rights Abuses, Influence Operations*, WASH. POST (Jan. 8, 2020), [https://www.washingtonpost.com/world/asia\\_pacific/us-](https://www.washingtonpost.com/world/asia_pacific/us-)

right to housing that is contained in several foundational international human rights treaties for its own citizens.<sup>7</sup>

The United States has historically demonstrated reluctance to ratify international human rights treaties, and instead considers its own domestic human rights protections adequate to promote the rights of citizens.<sup>8</sup> The disconnect between the United States and international human rights law is readily apparent in the context of the right to adequate housing—many nations have codified a right to housing, but the United States has not.<sup>9</sup> The right to housing is included in the Universal Declaration of Human Rights (U.D.H.R.), a nonbinding treaty signed by the United States and all other U.N. member states, and the International Covenant on Economic, Social and Cultural Rights (the Covenant).<sup>10</sup>

Though some may not consider housing a fundamental human right on par with rights such as life and liberty, it is vital to citizens and touches many rights that the U.S. Constitution recognizes as fundamental.<sup>11</sup> Additionally, the

report-calls-for-sanctions-on-china-for-human-rights-abuses-influence-operations/2020/01/08/08b75596-31be-11ea-971b-43bec3ff9860\_story.html [https://perma.cc/RCD8-FCGQ] (describing the United States' recommendation for sanctions on China following an increase in censorship and authoritarian policies); see also Jack Goldsmith, *International Human Rights Law & the United States Double Standard*, 1 GREEN BAG 2d 365, 366 (1998) (explaining that the United States encourages other countries to comply with international human rights law using economic and military measures).

<sup>7</sup> G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, (Dec. 16, 1966) [hereinafter Covenant]; G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter U.D.H.R.].

<sup>8</sup> See Goldsmith, *supra* note 6, at 366 (explaining that the United States is a leading proponent for the protection of human rights but does not comply with the human rights obligations it encourages other nations to follow). The ideology behind this behavior is referred to as “American exceptionalism” and will be discussed further in Part II.A of this Note. See *infra* notes 124–125 and accompanying text.

<sup>9</sup> See Goldsmith, *supra* note 6, at 367 (listing international human rights treaties that have no legal force in domestic courts). Several of the foundational human rights treaties that the United States helped draft contain a right to housing, but the United States is not legally bound to abide by these treaties. See Michelle S. Friedman, *The Uneasy U.S. Relationship with Human Rights Treaties: The Constitutional Treaty System and Nonself-Execution Declarations*, 17 FLA. J. INT'L L. 187, 190–91 (2005) (explaining that the United States undertakes measures to prevent imposing legal obligations on itself to comply with international agreements); see also G.A. Res. 44/25, Convention on the Rights of the Child, ¶ 27 (Nov. 20, 1989) [hereinafter C.R.C.]; Covenant, *supra* note 7, ¶ 11.1; G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, ¶ 5 (Dec. 21, 1965) [hereinafter I.C.E.R.D.]; U.D.H.R., *supra* note 7, ¶ 25.

<sup>10</sup> Covenant, *supra* note 7, ¶ 11.1; U.D.H.R., *supra* note 7, ¶ 25; see also *UN Housing Rights*, HOUS. RTS. WATCH (Oct. 10, 2013), <http://www.housingrightswatch.org/page/un-housing-rights> [https://perma.cc/55XZ-UB99] (providing a comprehensive overview of international agreements that contain a right to housing).

<sup>11</sup> See U.N. Off. of the High Comm’r on Hum. Rts., *The Right to Adequate Housing: U.N. Fact Sheet No. 21/Rev. 1*, 9 (Nov. 2009) [hereinafter *The Right to Adequate Housing*] (discussing how human rights are interdependent and related to each other, and that the right to housing relates to the right to work and privacy rights, to name a few). Housing is an integral component of the right to an adequate “standard of living” contained in the U.D.H.R., along with medical care and needed social services. *Id.* at 10; see U.D.H.R., *supra* note 7, ¶ 25.1.

failure to recognize housing as a right perpetuates social and income inequality in the United States.<sup>12</sup> Housing is recognized as a human right elsewhere in the world and the United States can dramatically improve its efforts to provide adequate housing for more Americans.<sup>13</sup>

This Note argues that adequate housing is a human right that should be enforced as such in the United States and uses international human rights law to explore possible solutions for the ongoing affordable housing crisis.<sup>14</sup> Part I of this Note provides a brief overview of international human rights law, the right to adequate housing recognized in many international treaties, and housing rights in the United States.<sup>15</sup> Part II explains how federal policy has prevented the recognition of housing as a right and the full adoption of international human rights treaties in the United States.<sup>16</sup> In addition, Part II describes the right to housing in other nations.<sup>17</sup> Part III argues that states should borrow from international human rights law to create their own right to housing and thereby begin to ease the affordable housing crisis.<sup>18</sup>

## I. A BRIEF HISTORY OF INTERNATIONAL HUMAN RIGHTS, THE RIGHT TO ADEQUATE HOUSING, AND THE STATE OF HOUSING IN THE UNITED STATES

### *A. International Human Rights Law and the Right to Adequate Housing*

The body of international human rights law has evolved since its inception in the mid-twentieth century, and has been shaped by institutional and governmental actors as well as changing norms on human rights.<sup>19</sup> The following subsections will discuss the evolution of international human rights law, fundamental human rights treaties, and the right to adequate housing as defined by the U.N.<sup>20</sup>

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<sup>12</sup> See Emily Bergeron, *Adequate Housing Is a Human Right*, 44 HUM. RTS. 2019, at 1, 5–6 (describing adverse consequences flowing from a lack of adequate housing); Richard Florida, *Is Housing Inequality the Main Driver of Economic Inequality?*, BLOOMBERG CITYLAB (Apr. 13, 2018), <https://www.bloomberg.com/news/articles/2018-04-13/economic-inequality-largely-boils-down-to-housing-inequality> [<https://perma.cc/9NTB-F5ZP>] (discussing the connection between housing inequality and economic inequality and how the rising cost of land can exacerbate income inequality).

<sup>13</sup> See Eric Tars, *Housing as a Human Right*, in 2017 ADVOCATES' GUIDE, at 1-13 to -14 (Nat'l Low Income Hous. Coal. ed., 2016) (discussing the fact that housing is recognized as a right in many countries including France and South Africa and the United States has the ability to frame housing as a human right with international law support).

<sup>14</sup> See *infra* notes 21–196 and accompanying text.

<sup>15</sup> See *infra* notes 21–109 and accompanying text.

<sup>16</sup> See *infra* notes 110–137 and accompanying text.

<sup>17</sup> See *infra* notes 138–160 and accompanying text.

<sup>18</sup> See *infra* notes 161–196 and accompanying text.

<sup>19</sup> See *infra* notes 27–42 and accompanying text.

<sup>20</sup> See *infra* notes 21–64 and accompanying text.

## 1. Human Rights Defined by the U.N.

Human rights are those rights enjoyed and shared by all individuals globally, regardless of their characteristics or identity traits.<sup>21</sup> These rights shall not be suspended or restricted, are connected and therefore must be protected as a group, and are enforced without regard to gender, race, age, religion, or other individual characteristics.<sup>22</sup> Many human rights must be included in international or domestic legal instruments in order for judicial bodies to enforce them against governments and state actors.<sup>23</sup> Human rights are distinct from constitutional rights, which are found in constitutions and granted to individuals based on citizenship or residence that do not apply universally.<sup>24</sup> Nations

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<sup>21</sup> *Your Human Rights*, U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., <https://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> [<https://perma.cc/BG7P-YMU8>]. Fundamental human rights include the right to life and liberty, the right to be free from slavery, freedom to express oneself, and the right to work and be educated. *Id.*

<sup>22</sup> *Id.* The U.N. defines these rights as “[u]niversal and inalienable,” “indivisible and interdependent,” and “[e]qual and non-discriminatory.” *Id.* Article 1 of the U.D.H.R. states that all people shall be treated equal because they are born with the same dignity. U.D.H.R., *supra* note 7, ¶ 1. Human rights are divided into two main categories: civil and political, and economic and social. *Your Human Rights*, *supra* note 21.

<sup>23</sup> JAMIE MAYERFELD, *THE PROMISE OF HUMAN RIGHTS IN CONSTITUTIONAL GOVERNMENT* 20 (2016) (describing the relationship between human rights and the rule of law); Gerald L. Neuman, *Human Rights and Constitutions in a Complex World*, 50 *IRISH JURIST* 1, 5 (2013) (explaining that national constitutions are only one source of human rights and that many rights not contained in constitutions exist in international human rights treaties); *Rule of Law and Human Rights*, U.N., <https://www.un.org/ruleoflaw/rule-of-law-and-human-rights/> [<https://perma.cc/F7QZ-MN2U>] (summarizing how the rule of law supports human rights and the importance of international human rights agreements). The U.N. acknowledged that human rights could not exist in societies without the rule of law and member states emphasized this principle in the Declaration of the High-Level Meeting on the Rule of Law. *Rule of Law and Human Rights*, *supra*; see G.A. Res. 67/1, Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels, ¶¶ 5, 7 (Nov. 30, 2012) (recognizing the importance of the rule of law in promoting human rights).

<sup>24</sup> *Constitutional Right (Civil Right)*, *BOUVIER LAW DICTIONARY* (desk ed. 2012); MAYERFELD, *supra* note 23, at 20 (explaining that human rights and legal rights are different categories of rights and describing how the rule of law can provide support for enforcing human rights). The body of human rights includes more rights than those contained in laws and constitutions, and enforcement of human rights requires an affirmative commitment by government actors to provide these rights. See MAYERFELD, *supra* note 23, at 29 (discussing how human rights violations signify that an actor has violated an obligation owed to an individual). One variation upon legal rights is justiciable rights. Rotem Litinski, *Economic Rights: Are They Justiciable, and Should They Be?*, 44 *HUM. RTS.* 2019, at 23, 23. Justiciable rights are rights for which a violation may result in a judicial body granting a remedy in the form of ordering a government response and possibly declaring an action unconstitutional. *Id.*

Within the umbrella of legal rights, both positive entitlements and negative rights exist. Ran Hirschl, “Negative” Rights vs. “Positive” Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order, 22 *HUM. RTS. Q.* 1060, 1071 (2000) (defining positive entitlements and negative rights). *But see* David Currie, *Positive and Negative Constitutional Rights*, 53 *U. CHI. L. REV.* 864, 864 (1986) (discussing Judge Posner’s view that the federal government does not owe citizens positive rights or affirmative duties). Positive rights involve a claim to something and require governments to act, whereas negative rights traditionally require the gov-

assume the obligation to protect and promote these rights when they sign or ratify treaties such as the U.D.H.R.<sup>25</sup> The U.N. facilitated the creation of international human rights law to enforce these essential human rights against national governments and implemented internal branches dedicated to monitoring the promotion and preservation of human rights.<sup>26</sup>

The creation of international human rights law followed the conclusion of World War II, during a time when only *national* governments protected rights, and the *international* community had little to no involvement with human rights.<sup>27</sup> The U.N. General Assembly, in 1948, unanimously adopted the U.D.H.R., a landmark treaty asserting thirty fundamental human rights, which served as the basis of modern human rights law.<sup>28</sup> Another foundational human rights instrument is the Covenant, which ensures the protection of economic, social, and cultural rights.<sup>29</sup> Unlike the Covenant, which is a binding

ernment to refrain from interfering with others or performing some prohibited action. Hirschl, *supra*, at 1071. Classic examples of positive rights include claims to social services and programs, and negative rights include freedom of expression and freedom of religion. *Id.*

<sup>25</sup> *Human Rights Bodies*, U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., <https://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> [<https://perma.cc/SX4Q-L4FN>] (explaining organs of the U.N. charged with enforcement of international human rights treaties); *International Human Rights Law*, U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., <https://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> [<https://perma.cc/AME7-ULDR>] (summarizing international human rights law as defined by the U.N.). When a country seeks to sign an international human rights instrument, it has two main options: simple signature or signature and ratification. HEIDI FROSTESTAD KUEHL & MEGAN A. O'BRIEN, INTERNATIONAL LEGAL RESEARCH IN A GLOBAL COMMUNITY 33 (2018) (presenting a country's options in regards to joining an international agreement). For an explanation of simple signature compared to ratification of international treaties, see *infra* notes 33–34 and accompanying text.

<sup>26</sup> See *International Human Rights Law*, *supra* note 25. The Universal Declaration of Human Rights (U.D.H.R) is considered the origin of international law as it relates to human rights. *The Foundation of International Human Rights Law*, U.N., <https://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html> [<https://perma.cc/4U55-XJJ9>].

<sup>27</sup> See Friedman, *supra* note 9, at 189 (discussing the global shift in attitude regarding international human rights after World War II); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 1 (1982) (explaining the “prehistory” of the development of international human rights law).

<sup>28</sup> *The Foundation of International Human Rights Law*, *supra* note 26; see U.D.H.R., *supra* note 7. In the wake of World War II, the international community established the U.N. and ratified the U.D.H.R. in an attempt to ensure the world would never again experience the human rights atrocities committed during the war. Frans Viljoen, *International Human Rights Law: A Short History*, U.N. (Jan. 2009), <https://www.un.org/en/chronicle/article/international-human-rights-law-short-history> [<https://perma.cc/HEH-WKJU>] (providing a brief history of the inception of international human rights law).

<sup>29</sup> *The Core International Human Rights Instruments and Their Monitoring Bodies*, U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> [<https://perma.cc/Y9J2-TKED>] (listing the foundational human rights instruments); see Covenant, *supra* note 7. The Covenant and other U.N. human rights instruments and protocols are essential to the enforcement of human rights law because they are binding on states upon ratification and clearly define terms that ratifying states must follow. See Univ. of Minn., *A Short History of Human Rights*, in HUMAN RIGHTS HERE AND NOW: CELEBRATING THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (Nancy Flowers ed., 1998), <http://hrlibrary.umn.edu/edumat/hreduseries/hereandnow/>

legal document when ratified,<sup>30</sup> the U.D.H.R. is merely persuasive authority that prescribes human rights norms *expected* but not legally *required* to be followed by signing countries.<sup>31</sup> The United States has signed both of these treaties, but it has not ratified the Covenant and therefore has not made it legally enforceable.<sup>32</sup> A signature on an international instrument signifies eventual intent to be bound by the terms of the agreement after formal ratification.<sup>33</sup> A signing party may also, however, express intent to not ratify the treaty, which means the party has declined to legally bind itself to the treaty.<sup>34</sup>

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Default.htm [https://perma.cc/4MBB-CHFX] (explaining the missions of several fundamental human rights instruments); see also *Appendix 3: Human Rights Glossary*, in HUMAN RIGHTS HERE AND NOW: CELEBRATING THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, *supra* (defining “ratification” as “formal procedure by which a state becomes bound to a treaty after acceptance”). The U.D.H.R., the Covenant, and the International Covenant on Civil and Political Rights (I.C.C.P.R.) together comprise the “International Bill of Human Rights” and outline the most integral and fundamental human rights recognized by the U.N. and international community. *A Short History of Human Rights, supra*.

<sup>30</sup> Int’l Network for Econ., Soc. & Cultural Rts., *Section 5: Background Information on the ICESCR*, ESCR-NET, https://www.escr-net.org/resources/section-5-background-information-icescr [https://perma.cc/6QS9-5DWE]. When an agreement is binding, a nation must comply with its terms or risk action being taken against it by the agreement’s treaty-monitoring body. Int’l Network for Econ., Soc. & Cultural Rts., *Human Rights Enforcement Mechanisms of the United Nations*, ESCR-NET, https://www.escr-net.org/resources/human-rights-enforcement-mechanisms-united-nations [https://perma.cc/W5TR-U7MH] (providing a comprehensive overview of U.N. enforcement mechanisms and actions that trigger involvement of treaty-monitoring bodies).

<sup>31</sup> *A Short History of Human Rights, supra* note 29. Many U.N. declarations and reports, including the U.D.H.R., could fall under the umbrella of “soft law.” See Dinah L. Shelton, *Soft Law*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL LAW 3–4 (David Armstrong ed., 2008). “Soft law” has varying definitions in the international studies community, however it typically refers to non-binding instruments that prescribe a set of expected norms and behaviors. *Id.* It does not create an obligation for or bind parties, but it may nevertheless be a powerful normative force. See *id.*

<sup>32</sup> See *Status of Ratification: Interactive Dashboard*, U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS., https://indicators.ohchr.org/ [https://perma.cc/EL9J-9GYV] (displaying which states have signed, ratified, or taken no action on major U.N. human rights treaties). The United States made the policy decision that non-self-executing treaties may not be enforced in domestic courts absent enacting legislation, and there has been no such legislation granting the Covenant legal status. See David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT’L L. 129, 144, 154 (1999) (explaining the legal status of international agreements in the United States and how treaties may become legally enforceable).

<sup>33</sup> KUEHL & O’BRIEN, *supra* note 25, at 33 (explaining the effect of signing an international treaty).

<sup>34</sup> *Id.* The consequences attached to signing and or ratifying a treaty come from the Vienna Convention on the Law of Treaties. Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331 (defining the scope of obligations attached to ratifying an international treaty). At this convention, delegates from 103 nations collectively determined the laws that would govern international treaties, as well as how these treaties would be interpreted, enforced, amended, and struck down. Eberhard P. Deutsch, *Vienna Convention on the Law of Treaties*, in INTERNATIONAL RULE OF LAW 146, 147 (1977). The United States is not a party to this treaty, as it failed to obtain the advice and consent of the Senate necessary to ratify international treaties. *Vienna Convention on the Law of Treaties*, U.S. DEP’T OF STATE, https://2009-2017.state.gov/s/l/treaty/faqs/70139.htm#:~:text=Is%20the%20United%20States%20a,and%20consent%20to%20the%20treaty [https://perma.cc/D9Q9-5V2D]; see U.S. CONST. art. II, § 2 (requiring two-thirds of the Senate to vote in favor of ratifying international treaties to ratify them).

Other international human rights law enforcement mechanisms exist both within and outside of the U.N., and range from the body of international human rights law itself to individual countries' human rights treaties.<sup>35</sup> In order to increase compliance with international treaties promoting human rights, the most essential agreements have accompanying treaty-monitoring bodies.<sup>36</sup> The Committee on Economic, Social, and Cultural Rights (the Committee) monitors parties to the Covenant and issues recommendations to increase adherence to the agreement.<sup>37</sup> The Covenant also has an Optional Protocol, which, if ratified, allows individuals in participating nations to submit complaints alleging violations of the Covenant to the Committee, and permits the Committee under certain circumstances to undertake investigations into alleged violations.<sup>38</sup>

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<sup>35</sup> *The Foundation of International Human Rights Law*, *supra* note 26 (describing the premise of international human rights law and role of international treaties); see *Human Rights Enforcement Mechanisms of the United Nations*, *supra* note 30 (providing an overview of mechanisms employed to ensure compliance with international human rights treaties). When countries ratify international and domestic human rights treaties, they take on the legal obligation to protect those rights listed in the treaty and can face international or domestic consequences if they fail to abide by these treaties. *The Foundation of International Human Rights Law*, *supra* note 26.

Countries are primarily responsible for monitoring the implementation and enforcement of human rights within their own borders, and failures are handled domestically. *Id.* When a country is unable to rectify its own human rights violations, however, the U.N. may invoke international human rights law and serve the country with punishment. *Id.* Within the U.N., the primary enforcement body is the Office of High Commissioner for Human Rights (O.H.C.H.R.), which oversees the preservation of human rights through policy implementation and monitoring. See *Human Rights Enforcement Mechanisms of the United Nations*, *supra* note 30. Within this Office, the Human Rights Council is specifically tasked with overseeing the advancement of human rights and identifying developing human rights violations. *Id.* This council is comprised of forty-seven member states, a group that notably does not include the United States because it voluntarily left the council in 2018. *Id.*; see Colin Dwyer, *U.S. Announces Its Withdrawal from U.N. Human Rights Council*, NAT'L PUB. RADIO (June 19, 2018), <https://www.npr.org/2018/06/19/621435225/u-s-announces-its-withdrawal-from-u-n-s-human-rights-council> [<https://perma.cc/299Y-FAC5>] (discussing the Trump Administration's decision to withdraw the United States from the Human Rights Council because of its alleged ineffectiveness).

<sup>36</sup> *Treaty Monitoring Bodies*, U.N. OFF. OF THE HIGH COMM'R FOR HUM. RTS., <https://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx> [<https://perma.cc/V5TG-9XFX>]. Currently, there are ten treaty bodies in place to implement and monitor compliance with international human rights treaties that are comprised of human rights experts. *Id.*

<sup>37</sup> Economic and Social Council Res. 1985/17 (May 28, 1985). A General Assembly resolution in May 1985 created the Committee on Economic, Social, and Cultural Rights (the Committee), and tasked it with carrying out the mandate set forth in the Covenant. *Id.* The regular duties of the Committee include reviewing reports submitted by parties, making suggestions based on those reports, and assisting the Economic and Social Council in fulfilling the Covenant. *Id.* ¶ f. In this context, a "party" to the treaty is a nation that either ratified the agreement, or signed and expressed intent to abide by its terms. See KUEHL & O'BRIEN, *supra* note 25, at 33 (explaining how a nation may become bound by an international treaty). The United States is not a party to the treaty, as it chose not to ratify the Covenant, nor did it signify an intent to abide by its terms. See *Status of Ratification: Interactive Dashboard*, *supra* note 32 (listing United States' treatment of all major U.N. human rights instruments).

<sup>38</sup> G.A. Res. 63/117, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights ¶¶ 1–2, 11 (Dec. 10, 2008). A country is bound by the terms of the Optional Protocol only if it chooses to ratify the instrument. *Id.* ¶ 1. The United States opted out of this protocol. *Id.*



The Covenant itself contains an enforcement provision for ratifying parties, which requires the party to enforce the agreement using the full extent of resources available.<sup>39</sup> The Limburg Principles, created by experts from the Committee, clarify the specific obligations that participating nations agree to take on when they ratify the Covenant.<sup>40</sup> The Covenant emphasizes enacting legislation and strongly recommends that participating nations employ legislative, administrative, and judicial methods to ensure fulfillment of its terms.<sup>41</sup> Lastly, the Covenant imposes on parties the obligation to provide remedies for violations of rights, which may include court-imposed remedies.<sup>42</sup>

## 2. The Right to Adequate Housing

The U.D.H.R. sets forth a universal right of every person to an adequate standard of health and well-being, including adequate housing.<sup>43</sup> Housing is

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<sup>39</sup> *The Right to Adequate Housing*, *supra* note 11, at 30; *see* Covenant, *supra* note 7, ¶ 2.1. The full enforcement provision is as follows:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Covenant, *supra* note 7, ¶ 2.1. Ratifying nations take on an obligation to actively work towards enforcement of social and economic rights for all. *See* Rodrigo Uprimny et al., *Bridging the Gap: The Evolving Doctrine on ESCR and 'Maximum Available Resources,'* in *THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS* 624, 627–28 (Katharine G. Young ed., 2019) (clarifying the expectations of parties to the Covenant).

<sup>40</sup> Rep. of the Permanent Mission of the Kingdom of the Neth. on the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, U.N. Doc. E/CN.4/1987/17, at iv (Jan. 8, 1987) [hereinafter Report on the Limburg Principles]. The Limburg Principles require countries to use the “maximum resources available” for human rights. *Id.* at 3. There has been much debate over what level of national engagement and action this standard requires, but some legal scholars have succinctly articulated the main objectives from the Limburg Principles. *See* Uprimny, *supra* note 39, at 627–28 (clarifying the obligations imposed on parties by the Limburg Principles). Ratifying states must begin using available resources immediately upon ratification to promote and protect the rights specified in the Covenant and must submit periodic reports on measures taken to achieve compliance to the Committee. *Id.* Resources include both economic resources and non-economic resources, such as international support. *Id.* at 627. Resources also include judicial, legislative, and educational measures. *Id.* at 629.

<sup>41</sup> Report on the Limburg Principles, *supra* note 40, ¶ 17. Article 2(1) of the Covenant contains the obligation that participating nations take affirmative steps towards realizing the rights contained in the treaty, in particular by implementing legislation. Covenant, *supra* note 7, ¶ 2.1.

<sup>42</sup> Report on the Limburg Principles, *supra* note 40, ¶ 19. Even if nations are reluctant to grant domestic courts jurisdiction to hear violations of the Covenant, some form of remedy must be available and there must be a body, whether it is a court or oversight body, that may hear complaints of violations. INT’L NGO COAL. FOR THE OPTIONAL PROTOCOL TO THE ICESCR, A TOOLKIT FOR ACTION: BOOKLET 1, at 11 (2010) (providing information for nations on how to successfully implement the Covenant domestically).

<sup>43</sup> U.D.H.R., *supra* note 7, ¶ 25.1. Article 25(1) reads as follows:

recognized universally as one of the most essential human needs because of its connection to physical and mental health and overall quality of life.<sup>44</sup> There is an obvious correlation between housing, and other fundamental human rights, including the rights to health, work, privacy, and education.<sup>45</sup> Since 1948, all 193 U.N. member states have signed the U.D.H.R.<sup>46</sup> Despite this unanimous approval of the U.D.H.R., it is not binding on member states, although there are other sources that codify and bind signatories to recognition and enforcement of the right to housing.<sup>47</sup> The Covenant, ratified in 1966 and signed by 153 U.N. member states, including the United States, contains an almost identical right to adequate housing as provided in the U.D.H.R.<sup>48</sup> Though the Covenant, unlike the U.D.H.R., is binding on ratifying parties through acts of treaty-monitoring bodies, the United States, as noted above, did not ratify the Cov-

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Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

*Id.*

<sup>44</sup> See *The Right to Adequate Housing*, *supra* note 11, at 9 (articulating the connection between housing and overall quality of life and enjoyment of other human rights). Guaranteed housing allows for the substantial enjoyment of other rights and freedoms, including the right to security of persons and the freedoms of expression and association. Abul Hasnat Monjurul Kabir, *Development and Human Rights: Litigating the Right to Adequate Housing*, 3 ASIA-PAC. J. ON HUM. RTS. & L. 97, 104 (2002). The right to housing allows for the protection of security of persons by preventing forced evictions and providing safeguards in the case of evictions. *Id.*; see *The Right to Adequate Housing*, *supra* note 11, at 5. Specifically, the U.N. requires national governments to exhaust all other options before effecting an eviction. *The Right to Adequate Housing*, *supra* note 11, at 5.

<sup>45</sup> *The Right to Adequate Housing*, *supra* note 11, at 9. Forced evictions can have serious negative effects on other rights; for example, children's education may be temporarily or permanently discontinued if the child experiences eviction. *Id.*

<sup>46</sup> *UN Housing Rights*, *supra* note 10; see U.D.H.R., *supra* note 7.

<sup>47</sup> See *UN Housing Rights*, *supra* note 10 (listing international human rights instruments that recognize housing as a right). The U.D.H.R. was intended to provide a framework for preservation and encouragement of human rights by being the first multilateral instrument to establish and codify these rights. *History of the Document*, U.N., <https://www.un.org/en/sections/universal-declaration/history-document/index.html> [<https://perma.cc/KJ97-W3HV>]. Though the U.D.H.R. is not binding on signing parties, there is an expectation of compliance, as the declaration is now treated as customary law. *A Short History of Human Rights*, *supra* note 29.

<sup>48</sup> Covenant, *supra* note 7, ¶ 11.1; see U.D.H.R., *supra* note 7, ¶ 25. Article 11(1) of the Covenant provides:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

Covenant, *supra* note 7, ¶ 11.1.

enant.<sup>49</sup> The right to housing is implicitly protected by other multilateral treaties, including the Convention on the Rights of the Child (C.R.C.) and the International Convention on the Elimination of All Forms of Racial Discrimination (I.C.E.R.D.).<sup>50</sup> The treaty-monitoring body of the Covenant is tasked with monitoring enforcement and implementation of the agreement and periodically issuing recommendations to states to enhance compliance with the instrument.<sup>51</sup> The Committee is the primary body responsible for enforcement of the Covenant, although there are other bodies within the U.N. that assist with this function.<sup>52</sup>

There are three freedoms contained within the right to adequate housing as defined in the U.D.H.R.: (1) safety against forced evictions, (2) the right to choose where one lives and to move freely, and (3) freedom from intervention with one's familial and residential privacy.<sup>53</sup> In order for housing to be deemed "adequate," it must be habitable and provide basic facilities needed to sustain

<sup>49</sup> Curtis Bradley, *The United States and Human Rights Treaties: Race Relations, the Cold War, and Constitutionalism*, CHINESE J. INT'L L. 321, 337–38 (2010) (explaining that the United States never ratified the Covenant); *UN Housing Rights*, *supra* note 10 (listing the U.D.H.R. as a non-binding instrument and the Covenant as binding).

<sup>50</sup> See C.R.C., *supra* note 9, ¶ 27.3 (committing state parties to providing funding for housing for children); I.C.E.R.D., *supra* note 9, ¶ 5.e.iii (recognizing a right to housing free from discrimination). The right to housing is also contained in the Convention on the Elimination of All Forms of Discrimination Against Women. G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women, ¶ 27 (Dec. 18, 1979). Though the United States has signed a majority of these treaties, it has only ratified one: the International Convention on the Elimination of All Forms of Racial Discrimination (I.C.E.R.D.) See *Status of Ratification: Interactive Dashboard*, *supra* note 32 (listing the treatment of all major human rights treaties by the United States).

<sup>51</sup> *Human Rights Enforcement Mechanisms of the United Nations*, *supra* note 30 (explaining the role of the Committee in enforcing the Covenant); see Economic and Social Council Res. 1985/17, *supra* note 37, ¶¶ a, f (creating the Committee and its mandate).

<sup>52</sup> *Human Rights Enforcement Mechanisms of the United Nations*, *supra* note 30. These additional mechanisms include the O.H.C.H.R., the Human Rights Council, the Committee on the Rights of the Child, and the Committee on the Elimination of Discrimination Against Women. *Id.* The Committee on the Rights of the Child and the Committee on the Elimination of Discrimination Against Women are treaty-monitoring bodies whose primary role is ensuring countries are complying with the terms of treaties. *Id.* This monitoring comprises of reviewing reports submitted by participating nations, discussing issues with nations, and issuing recommendations to improve nations' compliance with the treaties. *Id.*

<sup>53</sup> *The Right to Adequate Housing*, *supra* note 11, at 3. The right to housing also encompasses entitlements to equality and freedom from discrimination in access to housing, security of tenure, affordability, accessibility, and cultural adequacy. *Id.* at 3–4. The U.N. suggests that the concept of "adequate" housing goes beyond simply a structure one may reside in and argues that in order for housing to truly be adequate, it must be accompanied by certain freedoms and guarantees. *Id.* at 3. More broadly, the right to adequate housing encompasses at the minimum seven general principles: "(1) security of tenure; (2) availability of services . . . ; (3) affordability; (4) habitability; (5) accessibility; (6) location; and (7) cultural adequacy." Lisa T. Alexander, *Occupying the Constitutional Right to Housing*, 94 NEB. L. REV. 245, 253 (2015); see Comm. on Econ., Soc. & Cultural Rts., General Comment No. 4: The Right to Adequate Housing, U.N. Doc. E/1992/23 (Dec. 13, 1991) (clarifying the principles embodied in the right to adequate housing).

health, including safe drinking water and proper sanitation.<sup>54</sup> Habitability implies that the dwelling provides sufficient protection against the elements and acceptable guarantees of physical safety.<sup>55</sup> Further, adequate housing must be affordable, take into account special needs of disadvantaged groups, provide services for infrastructure, and consider cultural identity and expression.<sup>56</sup> In order for housing to be sufficiently affordable, its cost must not be so high that it burdens or threatens fulfillment of other basic needs.<sup>57</sup>

Security of tenure protects individuals from involuntary evictions, harassment, and additional threats to their housing in order to create stability and reduce the possibility of displacement.<sup>58</sup> If an eviction is economically justifiable, then it must be carried out in accordance with international human rights law and all alternatives to eviction must be explored before an eviction may occur.<sup>59</sup> The right to housing does not oblige governments to supply enough housing to support their populations, but rather focuses on preventing homelessness, eviction, and discrimination, and maintaining security of tenure.<sup>60</sup> Similarly, the right to housing does not equate to any right to property or land ownership.<sup>61</sup> National governments that promise a right to housing have an

<sup>54</sup> *The Right to Adequate Housing*, *supra* note 11, at 3–4; see Alexander, *supra* note 53, at 253–54 (explaining the right to housing and entitlements as defined by the U.N.).

<sup>55</sup> *The Right to Adequate Housing*, *supra* note 11, at 4.

<sup>56</sup> *Id.* For the purposes of this Note, the most important element of adequate housing is that it is affordable. See *id.* (including affordability as a necessary component of the right to housing).

<sup>57</sup> General Comment No. 4: The Right to Adequate Housing, *supra* note 53, at 3. The Committee urges national governments to ensure a variety of price points for housing, corresponding to income levels, and provide subsidies for individuals who cannot acquire affordable housing. *Id.* The Committee also strongly recommends that tenants should be shielded from unreasonably high rent prices. *Id.*

<sup>58</sup> *Guiding Principles on Security of Tenure*, U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/EN/Issues/Housing/Pages/StudyOnSecurityOfTenure.aspx> [<https://perma.cc/7VNT-4P2T>]; see Alexander, *supra* note 53, at 253–54 (elaborating on the freedoms associated with the right to housing). Security of tenure encompasses protection from “forced evictions, harassment, and other threats.” *The Right to Adequate Housing*, *supra* note 11, at 4. Essentially, this principle assures tenants that they will not be forced out of their homes against their will and will be able to live peacefully without harassment. See General Comment No. 4: The Right to Adequate Housing, *supra* note 53, at 3. The U.N. has focused its efforts on improving security of tenure for the urban poor and has tasked national governments with protecting this freedom. *The Right to Adequate Housing*, *supra* note 11, at 4–5. National governments of parties to the Covenant must take affirmative steps to protect against forced evictions. See *id.*

<sup>59</sup> Raquel Rolnik (Special Rapporteur), *Rep. of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in This Context*, ¶ 7, U.N. Doc. A/HRC/25/54 (Dec. 30, 2013).

<sup>60</sup> *The Right to Adequate Housing*, *supra* note 11, at 6. Before a government may sanction eviction, it must ensure residents are given adequate due process and alternatives to eviction are explored. *Id.* at 5. Procedural safeguards available to these governments include advanced notice of eviction and information about the eviction, legal remedies and aid to those that the eviction effects, and a ban on evictions at night or in bad weather. *Id.*

<sup>61</sup> *Id.*

obligation to actively undertake steps to protect housing using the greatest amount of resources available, even during periods of economic downturn.<sup>62</sup>

Enforcement of the right to housing is left primarily in the hands of national governments, although there are several U.N. committees, known as treaty bodies, that oversee the implementation of human rights instruments containing this right.<sup>63</sup> If necessary, the U.N. General Assembly will appoint a Special Rapporteur to investigate potential housing right violations, and if a violation is found, will issue a report detailing the violation and recommending actions a government may take to better protect the right to housing for its citizens.<sup>64</sup>

### *B. Right to Adequate Housing and the United States*

The U.N. recognizes a right to adequate housing in several of its foundational human rights instruments.<sup>65</sup> The United States declined to give these treaties legal enforceability in domestic courts, and is thus not bound to advance the rights contained in them, including the right to housing.<sup>66</sup> One major consequence of this policy decision to not include a legal requirement to provide adequate housing for U.S. citizens is the ongoing affordable housing cri-

<sup>62</sup> *Id.* at 30; see Covenant, *supra* note 7, ¶ 2; see also Lisa T. Alexander, *Bringing Home the Right to Housing to Advance Urban Sustainability*, 4 TEX. A&M J. PROP. L., 67, 69 (2018) (explaining the commitments parties adopt when they ratify the Covenant and recognize housing as a right).

<sup>63</sup> *Protect Human Rights*, U.N., <https://www.un.org/en/sections/what-we-do/protect-human-rights/> [<https://perma.cc/J8B5-3HWP>] (discussing U.N. offices and bodies tasked with administering international human rights instruments); *The Foundation of International Human Rights Law*, *supra* note 26. Treaty bodies are created concurrently with human rights instruments to monitor to ensure compliance with treaty provisions through reviewing reports and hearing complaints. *Human Rights Enforcement Mechanisms of the United Nations*, *supra* note 30.

<sup>64</sup> *Human Rights Enforcement Mechanisms of the United Nations*, *supra* note 30; see, e.g., *Report on Adequate Housing 2019*, *supra* note 5, at 5–7 (explaining the principles underlying the right to adequate housing and recommending governmental actions to support this right). The current Special Rapporteur on adequate housing issued a comprehensive set of guidelines to assist countries in promoting and protecting the right to adequate housing. See Leilani Farha (Special Rapporteur), *Guidelines for the Implementation of the Right to Adequate Housing*, at 4, U.N. Doc. A/HRC/43/43 (Dec. 26, 2019). Her recommendations include defining housing as a human right, stopping evictions when feasible, promoting gender and racial equality in housing, and implementing “monitoring and accountability mechanisms.” *Id.* at 4, 8, 10–12, 20. Special Rapporteurs are experts in their respective fields, with one such field being the right to adequate housing, who are tasked with investigating complaints of rights violations, conducting investigations, and offering advice to nations for how to handle human rights issues. *FAQs: United Nations Special Rapporteurs*, ACLU, <https://www.aclu.org/other/faqs-united-nations-special-rapporteurs> [<https://perma.cc/3VKD-EMUF>]. In order to carry out their mandates, Special Rapporteurs often visit countries to study their compliance with human rights and international treaties. *Id.* The U.N. Human Rights Council appoints these individuals, though they are not technically employees of the United Nations. *Id.*

<sup>65</sup> See Covenant, *supra* note 7, ¶ 11 (recognizing housing as a right); U.D.H.R., *supra* note 7, ¶ 25.1, (declaring housing as a human right).

<sup>66</sup> Friedman, *supra* note 9, at 230 (explaining that the United States has yet to ratify the Covenant so its obligations are not binding on the government). The U.D.H.R. is a non-binding declaration that does not impose legal standards on participating nations. *UN Housing Rights*, *supra* note 10.

sis, whereby hundreds of thousands of Americans lack stable or affordable housing.<sup>67</sup> The following subsections discuss the current state of housing in the United States, and state and local guarantees to protect housing rights.<sup>68</sup>

### 1. Current State of Housing in the United States

The U.S. Constitution does not guarantee a right to housing,<sup>69</sup> and the right to housing contained in the Covenant is not legally enforceable in U.S. courts.<sup>70</sup> Accordingly, Americans do not enjoy a right to housing promised by any federal law or court decision; rather, they have a bundle of individual housing rights, the most prominent being a freedom from discrimination in housing provided by the Fair Housing Act.<sup>71</sup> This system of rights is a stark contrast to the many countries that recognize adequate housing as a fundamental human right.<sup>72</sup>

The fight to classify housing as a human right in the United States, begun by the President Franklin Roosevelt and First Lady Eleanor Roosevelt, has

<sup>67</sup> Thrush, *supra* note 1 (noting that a large number of Americans are spending a significant portion of their income on rent during a growing affordable housing crisis).

<sup>68</sup> See *infra* notes 69–109 and accompanying text.

<sup>69</sup> See U.S. CONST. (providing no constitutional right to housing); Maria Foscarnia & Eric Tars, *Housing Rights and Wrongs: The United States and the Right to Housing*, in BRINGING HUMAN RIGHTS HOME 150 (Cynthia Soohoo et al. eds., 2006) (explaining the current status of housing rights in the nation and the refusal of the federal government and Supreme Court to recognize a right to housing); Ann M. Burkhart, *The Constitutional Underpinnings of Homelessness*, 40 HOUS. L. REV. 211, 211–13 (2003). This refusal is a result of the political and social climate that existed during the creation of the Constitution, which was hostile towards universal housing. See Burkhart, *supra*, at 213 (explaining the attitude of the Framers towards government social welfare programs). The Framers did not intend to extend sweeping human rights to disenfranchised individuals, including poor individuals and minorities. See *id.* at 213–14 (discussing that poor and minority individuals enjoyed fewer rights). These individuals were already politically excluded before the formation of the Constitution, and the Framers maintained this status quo. See *id.* (explaining that poor and minority populations did not participate in the political process).

<sup>70</sup> See Bradley, *supra* note 49, at 337–38 (discussing that the United States signed, but did not ratify, the Covenant); Friedman, *supra* note 9, at 230 (explaining that the federal government is not legally bound by the terms of the Covenant).

<sup>71</sup> See Fair Housing Act, 42 U.S.C. §§ 3601–3619; Alexander, *supra* note 53, at 253 (discussing the absence of a federally-guaranteed right to housing in the United States). Congress enacted the Fair Housing Act in 1968 against the backdrop of the Civil Rights Movement to protect against housing discrimination, including in buying, selling, and renting properties, based on “race, color, religion, sex, familial status, or national origin” and disability. See 42 U.S.C. § 3604; Sara Pratt, *Fair Housing Act at Fifty*, 53 U. RICH. L. REV. 1021, 1022 (2019) (looking back on the history and implementation of the Fair Housing Act since its inception). The Fair Housing Act protects individuals from discrimination by providing a vehicle for those who have experienced discrimination to challenge the discriminatory acts in court. See Pratt, *supra*, at 1024.

<sup>72</sup> See Tars, *supra* note 13, at 1–13 (discussing other nations that have a right to housing in their constitutions); see also Michael Kolocek, *The Human Right to Housing in the 27 Member States of the European Union*, 7 EUR. J. HOMELESSNESS 135, 149 (2013) (explaining that most members of the European Union recognize housing as a basic human right and take measures to protect this right in response to a growing homeless population).

continued for decades.<sup>73</sup> In 1949, Congress passed the landmark Housing Act, which ordered the construction of public housing to raise the standard of living for Americans.<sup>74</sup> After the implementation of this legislation, the economic focus of the nation shifted and lawmakers no longer prioritized housing.<sup>75</sup> The Supreme Court of the United States expressly declared that citizens did not enjoy a constitutional right to housing in 1972 in *Lindsey v. Normet*.<sup>76</sup> The Court explained that state legislatures, rather than the judiciary, are responsible for assuring adequate housing through state-level legislation.<sup>77</sup> The United States committed to reducing the homeless population through the ratification and enforcement of the New Urban Agenda, a report stemming from the U.N.

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<sup>73</sup> See John Bartlett, “Step by Step the Longest March Can Be Won”: *The Struggle to Define Housing as a Human Right*, 17 PUB. INT. L. REP. 277, 279 (2012) (explaining the history of movements to classify housing as a human right in the United States and the challenges faced by those involved); Richard N. Gardner, Opinion, *Eleanor Roosevelt’s Legacy: Human Rights*, N.Y. TIMES, Dec. 10, 1988, at 27 (describing the crucial role of Eleanor Roosevelt in the development of human rights law). During his 1944 State of the Union Address, President Roosevelt called for the universal right of families to have adequate housing as a part of a “second Bill of Rights.” President Franklin D. Roosevelt, State of the Union (Jan. 11, 1944).

<sup>74</sup> National Housing Act, 42 U.S.C. § 1472 (1949); see U.S. DEP’T OF HOUS. & URBAN DEV., MAJOR LEGISLATION ON HOUSING AND URBAN DEVELOPMENT ENACTED SINCE 1932, at 3 (2014) (providing an overview of significant housing legislation and its intended effects); *Housing Act of 1949*, AM. PLAN. ASS’N, <https://www.planning.org/awards/2014/1949housingact.htm> [<https://perma.cc/TZ7J-H5TM>] (explaining the National Housing Act). A migration of Americans from cities to suburbs triggered the passage of the Housing Act of 1949. *Housing Act of 1949*, *supra*. The federal government attempted to decrease the amount of migration by building more affordable housing in cities to increase the population and standard of living. *Id.*

<sup>75</sup> See Bartlett, *supra* note 73, at 279 (explaining how a national shift in economic policy hindered the growth of housing as a right). Today, organizations like the National Homelessness Law Center, Human Rights Watch, and National Low Income Housing Coalition spearhead the movement to classify housing as a human right. See *About*, NAT’L HOMELESSNESS L. CTR., <https://nlhpc.org/about/> [<https://perma.cc/SGV3-H65F>] (describing the organization’s view that housing is a human right); *Explore Issues*, NAT’L LOW INCOME HOUS. COAL., <https://nlihc.org/explore-issues> [<https://perma.cc/76WK-LACK>] (committing to ensuring that low income individuals in the United States have access to affordable housing); *UN Housing Rights*, *supra* note 10 (explaining the Human Rights Watch’s position that housing is a human right). On the local level, two women, along with the group *Moms 4 Housing*, are fighting the city of Oakland, California for their right to housing. Otis R. Taylor Jr., *2 Oakland Moms Take Radical Stand in Battle for Housing*, S.F. CHRON. (Jan. 9, 2020), <https://www.sfchronicle.com/bayarea/otisrtaylorjr/article/2-Oakland-moms-take-radical-stand-in-battle-for-14960452.php> [<https://perma.cc/L9NA-58UC>].

<sup>76</sup> See 405 U.S. 56, 74 (1972) (explaining that it is not the role of the Constitution to remedy all social and economic problems faced by citizens). The plaintiffs in this case brought suit after their landlord commenced an eviction proceeding against them for failure to pay rent. *Id.* at 58. The plaintiffs also challenged the constitutionality of the Oregon Forcible Entry and Wrongful Detainer statute, which allowed landlords to bring suit to repossess the property if tenants failed to pay rent in a reasonable time frame. *Id.* at 63; see OR. REV. STAT. §§ 105.115, 105.125 (1970). The Court held that the statute was not unconstitutional and did not violate the Equal Protection Clause or Due Process Clause of the Fourteenth Amendment. *Lindsey*, 405 U.S. at 65–66.

<sup>77</sup> *Lindsey*, 405 U.S. at 74 (“Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.”).

Habitat III Conference, but this agenda does little to address housing as a human right and instead focuses on the decriminalization of homelessness.<sup>78</sup>

The United States has failed to keep pace with the growing affordable housing crisis.<sup>79</sup> There is a lack of affordable housing available to low income Americans, and the United States Department of Housing and Urban Development (HUD) has declined to take adequate steps to alleviate this issue.<sup>80</sup> Two exaggerating factors are exclusionary zoning ordinances and the reduction of existing affordable housing.<sup>81</sup> Furthermore, the COVID-19 outbreak likely exacerbated homelessness in the United States, as unemployment significantly increased and the American economy experienced a serious downturn.<sup>82</sup>

One of the key issues stemming from the absence of housing as a right is the increasing number of Americans that are “cost-burdened” by housing,

<sup>78</sup> G.A. Res. 71/256, New Urban Agenda (Dec. 23, 2016); see Tars, *supra* note 13, at 1-15. In signing this agenda, the United States committed to implementing policies that would further establish the right to adequate housing and reduce and decriminalize homelessness. Tars, *supra* note 13, at 1-15.

<sup>79</sup> See Thrush, *supra* note 1 (emphasizing the inadequate amount of affordable housing in the United States and describing the role of the United States Department of Housing and Urban Development (HUD) in worsening the affordable housing crisis). Approximately 10.4 million people in the United States rely on federal rental assistance to afford their rent; 40% of these individuals spend more than 50% of their income on rent. CTR. ON BUDGET & POL’Y PRIORITIES, UNITED STATES FEDERAL RENTAL ASSISTANCE FACT SHEET 1 (2019).

<sup>80</sup> See Thrush, *supra* note 1. As rent prices increase along with a rising cost of living and inflation, the need for federal rent assistance also increases. *Id.*

<sup>81</sup> See Sophie Quinton, *More States See Zoning as Lever to Lower Housing Costs*, PEW CHARITABLE TRS. (Jan. 30, 2020), [https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/01/30/more-states-see-zoning-as-lever-to-lower-housing-costs?utm\\_campaign=2020-01-30+SD&utm\\_medium=email&utm\\_source=Pew](https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/01/30/more-states-see-zoning-as-lever-to-lower-housing-costs?utm_campaign=2020-01-30+SD&utm_medium=email&utm_source=Pew) [<https://perma.cc/D2BZ-A5PT>] (explaining the negative consequences of exclusionary zoning practices and the disappearance of inexpensive housing options in major cities); Thrush, *supra* note 1 (explaining HUD’s failure to provide more affordable housing despite a growing need for such housing); see also EDWARD GLAESER & JOSEPH GYOURKO, *THE IMPACT OF ZONING ON HOUSING AFFORDABILITY* 4–5 (2002) (suggesting that restrictive zoning ordinances contribute to a shortage of affordable housing by increasing the minimum cost of housing in neighborhoods).

<sup>82</sup> See *Analysis on Unemployment Projects 40-45% Increase in Homelessness This Year*, CMTY. SOLS. (May 11, 2020), <https://community.solutions/analysis-on-unemployment-projects-40-45-increase-in-homelessness-this-year/> [<https://perma.cc/EL2M-95PQ>]; Joey Moses, *COVID-19 and the State of Homelessness*, NAT’L ALL. TO END HOMELESSNESS (May 19, 2020), <https://endhomelessness.org/covid-19-and-the-state-of-homelessness/> [<https://perma.cc/KE9G-FS7J>]; Parker et al., *supra* note 2 (noting that a higher percentage of lower-income Americans lost their employment during the COVID-19 outbreak compared to 11% of middle-income individuals). Public health experts stated that there is a strong link between housing and health, and that homeless individuals were at a significantly higher risk of contracting COVID-19 because they cannot self-isolate or take proper protective measures. See *The Impact of the COVID-19 Crisis on Homelessness*, EUR. PUB. HEALTH ALL. (Mar. 31, 2020), <https://epha.org/the-impact-of-the-covid-19-crisis-on-homelessness/> [<https://perma.cc/SU9G-RY68>] (explaining the negative effects of the COVID-19 outbreak on homeless individuals). According to one study, during the course of the pandemic, approximately thirty-two percent of lower-income individuals struggled to pay their rent or mortgage. Parker et al., *supra* note 2.



meaning they spend more than thirty percent of their income on housing.<sup>83</sup> A staggering percentage of these individuals spend more than fifty percent of their income on housing.<sup>84</sup> Rent prices in the United States have consistently risen and the number of affordable apartments has not kept pace, nor has federal rent assistance.<sup>85</sup> A 2019 study found that the new housing supply failed to meet increased housing demands and an increasing percentage of homes are larger than necessary, which prevents low and moderate-income families from moving in.<sup>86</sup> Simultaneously, the country is losing millions of low-income rental units, and approximately half of the remaining units are more than fifty-years-old.<sup>87</sup> During the COVID-19 outbreak, many cities and states froze rent and placed moratoriums on evictions, however, as of October 2020, many of these measures have long-since expired.<sup>88</sup> In September 2020, the Trump Administration and the Centers for Disease Control and Prevention announced a federal eviction moratorium through the end of the year.<sup>89</sup>

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<sup>83</sup> Robert Hickey, *2019 State of the Nation's Housing Report: Lack of Affordable Housing*, HABITAT FOR HUMAN., <https://www.habitat.org/costofhome/2019-state-nations-housing-report-lack-affordable-housing> [<https://perma.cc/C9M5-7MAK>]. Approximately eighteen million households—approximately one in six—spend more than half of their income on rent. *Id.* This figure is even higher in popular housing markets, and more than eighteen million households are paying more than half of their income for housing, with a large number of these individuals earning less than \$30,000 annually. *Id.*

<sup>84</sup> Passy, *supra* note 3. According to a new report, approximately 10.9% of renters are using more than 50% of their income to make rent. *Id.*

<sup>85</sup> Thrush, *supra* note 1.

<sup>86</sup> JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV., *supra* note 3, at 4, 8.

<sup>87</sup> Hickey, *supra* note 83 (explaining that between 2011 and 2017, approximately four million low-cost rental units disappeared). Many residents of these old units are at risk of being priced out of their current residence after rent ceilings expire or after the demolition of their building. *Id.* Approximately 1.3 million children live in unstable housing, whether it is in shelters, on the streets, with other families, or in hotels. FEDERAL RENTAL ASSISTANCE FACT SHEET, *supra* note 79, at 2.

<sup>88</sup> See Emily Benfer, *Coronavirus Rent Freezes are Ending and a Wave of Evictions Will Sweep America*, NBC (June 22, 2020), <https://www.nbcnews.com/think/opinion/coronavirus-rent-freezes-are-ending-wave-evictions-will-sweep-america-ncna1230916> [<https://perma.cc/524M-B8W6>] (noting that upwards of twenty million American renters are at risk of eviction yet Senate Majority Leader Mitch McConnell refused to send a federal bill with rent assistance to a vote on the Senate floor); *COVID-19 Housing Policy Scorecard*, EVICTION LAB, <https://evictionlab.org/covid-policy-scorecard/> [<https://perma.cc/VP8K-LMU2>] (outlining state legislation passed during the COVID-19 pandemic related to protecting housing); Kelly Mena, *Evictions Loom as State Freezes on Rent Payments Expire*, CNN (May 31, 2020), <https://www.cnn.com/2020/05/31/politics/rent-coronavirus-reopening/index.html> [<https://perma.cc/N7Y2-DHQL>] (discussing the rise and fall of rent freezes and eviction bans across the United States).

<sup>89</sup> Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292 (Sept. 4, 2020) (including an explanation that this measure is intended to protect public health and decrease community spread of the virus); see Dale Smith & Shelby Brown, *National Eviction Moratorium for 2020: What to Know About a Declaration Form and Nov. 1 Rent*, CNET (Oct. 26, 2020), <https://www.cnet.com/personal-finance/national-eviction-moratorium-for-2020-what-to-know-about-a-declaration-form-and-nov-1-rent/> [<https://perma.cc/U2QD-T7H9>] (discussing implications and consequences of the national eviction moratorium). This action covers every single one of America's renters living in approximately forty-three million rental homes across the nation. Smith & Brown, *supra*. In order to benefit from this ban, renters must submit a declaration form to their land-

The Trump Administration proposed cutting the HUD budget by \$8.8 billion in 2021, despite a worsening affordable housing crisis.<sup>90</sup> The federal government increasingly deregulated housing during the Trump presidency, and even removed federal monitoring regulations put in place to map racial segregation in government housing.<sup>91</sup> This action came at the same time that the Trump Administration considered reducing disparate impact protections, raising the bar for housing discrimination claims, and decreasing the availability of affordable housing in suburban areas.<sup>92</sup> On a more ideological level, the financialization of housing in the United States has increased the affordable housing crisis.<sup>93</sup> Housing is treated as an investment and commodity, rather than a right, which causes developers and property owners to evict and displace ten-

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lord indicating that they lost wages due to the COVID-19 outbreak and previously attempted to obtain rental assistance. *Id.* The moratorium expires January 1, 2021. *Id.*

<sup>90</sup> See Thrush, *supra* note 1 (detailing the Trump Administration's response to the affordable housing crisis and its negative effect on rental affordability).

<sup>91</sup> See J. Edward Moreno, *HUD to Roll Back Obama-Era Housing Desegregation Rule*, THE HILL (Jan. 7, 2020), <https://thehill.com/homenews/administration/477171-hud-to-rollback-obama-era-housing-desegregation-rule> [<https://perma.cc/FA4V-X7A9>]. HUD placed the responsibility of monitoring segregation, a practice originally implemented to end racial segregation in government housing, in the hands of local mayors. *Id.* Critics of this action believe it will make it more difficult for individuals to obtain housing without discrimination. See *id.* (discussing concerns about recent executive actions repealing existing programs).

<sup>92</sup> See Katy O'Donnell, *HUD Proposes Rule Setting Higher Bar for Housing Discrimination Claims*, POLITICO (Aug. 16, 2019), <https://www.politico.com/story/2019/08/16/hud-proposes-rule-setting-higher-bar-for-housing-discrimination-claims-1665155> [<https://perma.cc/Y3zG-H988>] (detailing the higher threshold that plaintiffs alleging discrimination in housing would have to meet beyond the previous standard of disparate impact). Former President Trump informed the nation, via tweet, that his administration would be working to reduce the amount of affordable housing in the suburbs. See Kevin Liptak & Gregory Wallace, *Trump Again Attempts to Stoke Racial Divisions in Housing Message*, CNN (July 29, 2020), <https://www.cnn.com/2020/07/29/politics/donald-trump-suburbs-housing/index.html> [<https://perma.cc/557N-PAPR>]; Donald J. Trump (@realDonaldTrump), TWITTER (July 29, 2020, 12:19 PM), <https://twitter.com/realDonaldTrump/status/1288509568578777088> [<https://perma.cc/6WVT-8RX2>]. According to Trump, this policy decision was intended to help citizens living in the suburbs who were "bothered or financially hurt by having low income housing built in [their] neighborhood." Trump, *supra*; see Liptak & Wallace, *supra* (describing President Trump's tweet). The decision was also allegedly intended to reduce segregation in the suburbs. See Liptak & Wallace, *supra*. To accomplish this, Trump rescinded the Affirmatively Fair Housing Rule, which was enacted to support the 1968 Fair Housing Act and provide further protection against racial discrimination in the housing process. See *id.*

<sup>93</sup> See *Financialization of Housing*, *supra* note 4 (explaining the concept of commodification of housing and its effect on affordable housing). The clearest example of the financialization of housing is when developers knock down old buildings with previously affordable rent and stable tenants while gentrifying neighborhoods and replacing affordable housing with luxury apartment complexes. See Patrick Butler, *'Housing Should Be Seen as a Human Right. Not a Commodity.'* THE GUARDIAN (Feb. 28, 2017), <https://www.theguardian.com/society/2017/feb/28/luxury-real-estate-housing-crisis-unhomelessness> [<https://perma.cc/H2XY-FSST>] (describing the consequences of prioritizing income over providing affordable housing for the population). In cases like these, the housing becomes disconnected from its social function and is treated primarily as a commodity and a vehicle for investment. See *id.* (discussing that housing is no longer viewed as a social good under a system of financialization).

ants in desirable areas so they may build more expensive homes without protest from the government.<sup>94</sup>

During the Trump presidency, budgets for social welfare programs, including those for housing, medical care, and food assistance decreased dramatically.<sup>95</sup> Additionally, the United States has recently shown less regard for the rights of non-citizens as compared to citizens, which further highlights the reluctance of the nation to grant expanded rights to those living within its borders.<sup>96</sup> It has also gradually demonstrated less support for low-income citizens who rely on government-funded programs for their basic needs.<sup>97</sup>

## 2. State and Local Guarantees and Protections of Housing Rights

To compensate for the absence of a federal right to housing, several cities and states have taken on the challenge of mitigating the affordable housing crisis on the local level by passing legislation and ratifying judicial decisions that promote housing as a right.<sup>98</sup> In 2019, the Illinois General Assembly

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<sup>94</sup> See *Financialization of Housing*, *supra* note 4 (explaining that developers tend to construct new buildings with higher rental prices that existing tenants cannot afford). One clear example of the financialization and gentrification of housing is the Cabrini-Green public housing complex in Chicago, Illinois. See Sophie Kasakove, *A Major Chicago Public Housing Lawsuit Is Wrapping up. The Segregation It Fought Against Lives on*, PAC. STANDARD (Mar. 11, 2019), <https://psmag.com/social-justice/a-major-chicago-public-housing-lawsuit-is-wrapping-up-the-segregation-it-fought-against-lives-on> [<https://perma.cc/RJ5C-NSAW>] (providing an overview of the development of the public housing crisis in Chicago). In the 1990s, HUD began offering cities, including Chicago, large sums of grant money to tear down existing public housing projects and replace them with developments intended for families who could afford to pay higher rent. *Id.*

<sup>95</sup> See SHARON PARROTT ET AL., TRUMP BUDGET DEEPLY CUTS HEALTH, HOUSING, OTHER ASSISTANCE FOR LOW- AND MODERATE-INCOME FAMILIES 1 (2018), <https://www.cbpp.org/research/federal-budget/trump-budget-deeply-cuts-health-housing-other-assistance-for-low-and> [<https://perma.cc/5Y9V-8D7X>]; see also *Trump Administration Civil and Human Rights Rollbacks*, LEADERSHIP CONF. ON CIV. & HUM. RTS., <https://civilrights.org/trump-rollbacks/#2019> [<https://perma.cc/27U6-BW9H>] (listing all of the actions taken by the Trump Administration that had an adverse effect on individual civil or human rights).

<sup>96</sup> See *United States World Report 2018*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2018/country-chapters/united-states#9120f2> [<https://perma.cc/S3EP-T4XU>] (discussing the treatment of non-citizens living in the United States). The United States increased its deportation efforts in 2018 and 2019 and carried out mass arrests of undocumented individuals with no regard for their rights to home, family, and freedom to work. *Id.*

<sup>97</sup> See RICHARD KOGAN ET AL., CUTS TO LOW-INCOME ASSISTANCE PROGRAMS IN PRESIDENT TRUMP'S 2020 BUDGET ARE WIDE-RANGING 1 (2019) <https://www.cbpp.org/research/federal-budget/cuts-to-low-income-assistance-programs-in-president-trumps-2020-budget-are> [<https://perma.cc/3GHH-ZASH>]. Although the Trump Administration reduced social welfare and assistance programs for low-and-middle-class individuals in an attempt to reduce the national deficit, it simultaneously introduced tax cuts for the wealthy. See *id.* (explaining that tax breaks for high income-bracket individuals persisted while social welfare funding decreased).

<sup>98</sup> See *infra* notes 99–109 and accompanying text (describing housing rights in several cities). State courts are the appropriate forum for resolving housing issues because the Supreme Court declined to recognize housing as a federal constitutional right. *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (holding that the Constitution does not protect any right to housing); see Stewart G. Pollock,

passed a resolution that amended the Illinois Human Rights statute to include a declaration of housing as a human right.<sup>99</sup> Massachusetts recognized a “right to shelter” in a state law, which directed the state Department of Housing and Community Development (D.H.C.D.) to provide emergency housing to needy families.<sup>100</sup> California attempted to enact a right to housing for children and families, but the resolution failed in the State Assembly in January of 2020.<sup>101</sup> Connecticut considered creating a right to housing that, if implemented, would make it the first state with a codified right to housing.<sup>102</sup> Several states passed

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*State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 717 (1983) (arguing that state courts are better equipped to handle cases about housing rights than federal courts because they are more in tune with local conditions and it would be impractical to have federal courts dictate state housing practice).

<sup>99</sup> Yaacov Delaney, *Victory for Housing as a Human Right!*, CMTY. RENEWAL SOC’Y (June 4, 2019), <https://www.communityrenewalsociety.org/blog/victory-for-housing-as-a-human-right> [<https://perma.cc/R4L7-UFFC>] (explaining that this resolution will prevent landlords from discriminating against renters with a history of arrest, criminal history, or juvenile record); *see* 775 ILL. COMP. STAT. 5/1-103 (2019) (amending the Illinois Human Rights Act). This bill went into effect on January 1, 2020, accompanied by a justiciable right whereby residents who have been denied housing because of prior arrests or publicized criminal records may file a claim with the Illinois Department of Human Rights. *Landmark Housing Legislation Goes into Effect!*, CMTY. RENEWAL SOC’Y (Jan. 1, 2020), <https://www.communityrenewalsociety.org/blog/justhousing2020> [<https://perma.cc/9RZ6-XSVK>].

<sup>100</sup> MASS. GEN. LAWS ch. 23b, § 30 (2018) (providing that the Department of Housing and Community Development (D.H.C.D.) must carry out a program to ensure emergency housing for children and families). To fulfill its mandate, the D.H.C.D. frequently houses homeless families in hotels on a temporary basis when the existing shelter system is at capacity. *See* Brief of the Appellant-Defendant Department of Housing & Community Development at 9–10, *Garcia v. Dep’t of Hous. & Cmty. Dev.*, 108 N.E.3d 945 (Mass. 2018) (No. SJC-12507) (explaining the inadequacy of housing homeless individuals in motels). The Massachusetts chapter of the American Civil Liberties Union, on behalf of 3,500 individuals using the emergency assistance housing program, filed a lawsuit against the department in 2016 alleging that motels were inadequate shelters and inconsistent with the statutory mandate of section 30. *Garcia*, 108 N.E.3d at 948–49; *see* ch. 23b, § 30. The plaintiffs alleged that D.H.C.D. violated the statute by placing some families in shelters more than twenty miles away from their communities instead of in closer motels. *Garcia*, 108 N.E.3d at 948–49. D.H.C.D. responded by arguing that the current motel practice was consistent with state law. Brief of the Appellant-Defendant Department of Housing & Community Development, *supra*, at 28. The Supreme Judicial Court vacated a prior preliminary injunction issued by the Superior Court and affirmed the D.H.C.D.’s use of motels as consistent with section 30. *Garcia*, 108 N.E.3d at 961.

<sup>101</sup> *See* Hannah Wiley, ‘Right to Housing’ Bill Dies Mysteriously in California Capital. *What Happened?*, SACRAMENTO BEE (Jan. 23, 2020), <https://www.sacbee.com/news/politics-government/capitol-alert/article239576043.html> [<https://web.archive.org/web/20200613145243/https://www.sacbee.com/news/politics-government/capitol-alert/article239576043.html>]. The proposed legislation contained a right for every child and family in California to have “safe, decent, and affordable housing.” Assemb. B. 22, 2019–2020 Leg., Reg. Sess. (Cal. 2019). The Assembly Appropriations Committee blocked the proposed legislation before the general body could vote on it. Wiley, *supra*. The State Assembly ultimately struck down the bill because the final draft was allegedly “inappropriately” edited with the addition of new provisions and could therefore not go to a vote. Sebastian Cahill, *Bill to Provide Families with Right to Housing Dies in CA State Assembly*, DAILY CALIFORNIAN (Feb. 29, 2020), <https://www.dailycal.org/2020/01/28/bill-to-provide-families-with-right-to-housing-dies-in-cal-state-assembly/> [<https://perma.cc/27WD-Q5ZN>].

<sup>102</sup> *See* Jacqueline Rabe Thomas & Jenna Carlesso, ‘Right to Housing’ Gains Traction Among Connecticut Legislators Heading into the Session, HARTFORD COURANT (Jan. 28, 2020), <https://>

homeless bills of rights, which guarantee that homeless individuals shall enjoy the same rights and privileges as non-homeless individuals.<sup>103</sup> The New Jersey Supreme Court has even held that municipalities must provide opportunities for affordable housing.<sup>104</sup>

New York City made strides in providing access to housing for all through its “right to shelter” mandate that requires the city to provide temporary emergency shelter to all individuals eligible under the law.<sup>105</sup> This right evolved when the New York State Supreme Court, following its 1979 decision in *Callahan v. Carey*, issued a consent decree requiring New York City to provide shelter for homeless men who apply and meet the requirements.<sup>106</sup> The plaintiffs in this case brought suit against the city and alleged it failed to adequately enforce a right to housing implicit in the New York State Constitu-

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www.courant.com/politics/hc-pol-connecticut-affordable-housing-20200128-5n4iy37dyjadxkngib47yw7xe-story.html [https://perma.cc/373C-DW9V] (recounting state legislators’ views on creating a right to housing in Connecticut). Connecticut is facing its own housing crisis, exacerbated by exclusionary zoning practices that prohibit affordable housing in wealthy neighborhoods, which in turn results in highly segregated neighborhoods that fuel the poverty cycle. Jacqueline Rabe Thomas & Jenna Carlesso, *After Our Reporting, Connecticut Officials Are Taking on Housing Segregation*, PRO PUBLICA (Jan. 24, 2020), https://www.propublica.org/article/after-our-reporting-connecticut-officials-are-taking-on-housing-segregation [https://perma.cc/54J9-JD22]. In February 2020, Connecticut Governor Ned Lamont announced a proposal to use \$300 million to construct more affordable housing in the state, although the enacting legislation has not yet been drafted. Jacqueline Rabe Thomas & Keith M. Phaneuf, *Lamont to Propose Millions for Affordable Housing Construction*, CT. MIRROR (Feb. 4, 2020), https://ctmirror.org/2020/02/04/lamont-to-propose-millions-for-affordable-housing-construction/ [https://perma.cc/MS67-LTZA].

<sup>103</sup> Tars, *supra* note 13, at 1-15 (listing states that have created homeless bills of rights and states that are considering creating such bills); see 775 ILL. COMP. STAT. 45/10 (2019) (Illinois homeless bill of rights); 2012 R.I. Pub. Laws 316 (Rhode Island homeless bill of rights).

<sup>104</sup> See *S. Burlington Cnty. NAACP v. Mount Laurel Twp.*, 456 A.2d 390, 460, 490 (N.J. 1983) (affirming the holding that the township must realistically provide “low and moderate income housing”). The court’s decision requires municipalities in New Jersey to take affirmative steps to provide sufficient housing for low and moderate-income families based on need. *Id.* at 460; *What Is the Mount Laurel Doctrine?*, FAIR SHARE HOUS. CTR., https://fairsharehousing.org/mount-laurel-doctrine/ [https://perma.cc/KD4D-N5TM]. This doctrine developed into the state’s Fair Housing Act. *What Is the Mount Laurel Doctrine?*, *supra*.

<sup>105</sup> See *The Callahan Legacy*: Callahan v. Carey and the Legal Right to Shelter, COAL. FOR THE HOMELESS, https://www.coalitionforthehomeless.org/our-programs/advocacy/legal-victories/the-callahan-legacy-callahan-v-carey-and-the-legal-right-to-shelter/ [https://perma.cc/4AAX-7AA8] [hereinafter *The Callahan Legacy*] (providing a history of the right to shelter in New York City).

<sup>106</sup> *Id.*; see *Callahan v. Carey*, 762 N.Y.S.2d 349, 351 (App. Div. 2003) (explaining the consent decree entered into by the plaintiffs and New York City requiring the city to provide shelter for homeless individuals); *The Callahan Consent Decree*, Callahan v. Carey, No. 79/42582 (Sup. Ct. N.Y. County Dec 5, 1979), https://www.coalitionforthehomeless.org/wp-content/uploads/2014/06/Callahan-ConsentDecree.pdf [https://perma.cc/7TZX-Y6WQ]. As per the consent decree, to obtain shelter individuals must satisfy certain requirements and must be in need of temporary shelter. *The Callahan Consent Decree*, *supra*, ¶ 1 (establishing the prerequisites that must be satisfied to obtain emergency housing).

tion.<sup>107</sup> The court held in favor of the plaintiffs and placed the burden of securing shelter on public officials, commanding that New York City provide shelter for homeless individuals.<sup>108</sup> Members of the homeless population of New York City can challenge violations of this decree by the city in court and vindicate their legal right to shelter.<sup>109</sup>

## II. THE UNWILLINGNESS AND INABILITY TO CODIFY HOUSING AS A FEDERAL RIGHT IN THE UNITED STATES, THE RESPONSE OF INDIVIDUAL STATES, AND THE RIGHT TO HOUSING ABROAD

The United States does not recognize housing as a right, and its refusal to do so creates a massive hurdle to providing sufficient access to affordable housing for millions of Americans.<sup>110</sup> As discussed in Part I, the United States is a signing party to several international human rights treaties that designate adequate housing as a human right, but has chosen not to give these agreements any legal enforceability in domestic courts.<sup>111</sup> To fill the gap left by the

<sup>107</sup> See *Callahan*, 762 N.Y.S.2d at 351 (summarizing the plaintiffs' claims in the 1979 case); The *Callahan* Consent Decree, *supra* note 106 (explaining the class action suit commenced on behalf of homeless individuals in New York City against the city). The plaintiffs pointed to Article XVII of the New York State Constitution, which categorizes caring for the homeless as a public concern, and asserted that enforcing this provision requires providing access to housing. *The Callahan Legacy*, *supra* note 105; see N.Y. CONST. art. XVII, § 1 (declaring that it is the role of the state to provide aid and support for the needy).

<sup>108</sup> *Callahan*, 762 N.Y.S.2d at 351 (explaining the holding of the court); The *Callahan* Consent Decree, *supra* note 106, ¶ 1. Initially, the right to shelter was reserved only for men, however, two subsequent cases extended this right to include women and families with children. The *Callahan* Consent Decree, *supra* note 106, ¶¶ 3, 51; see *McCain v. Koch*, 502 N.Y.S.2d 720, 727–28 (App. Div. 1986) (holding that the right to shelter extends to children and families), *rev'd in part*, 70 N.Y.2d 109 (N.Y. 1987); *Eldredge v. Koch*, 469 N.Y.S.2d 744, 745 (App. Div. 1983) (holding that the right to shelter must be extended to women).

<sup>109</sup> See *The Callahan Legacy*, *supra* note 105 (explaining the development of the consent decree over time and its lasting legal effects); *What You Need to Know About Bringing a Lawsuit Against the Department of Homelessness*, LEGAL AID SOC'Y, <https://www.legalaidnyc.org/get-help/housing-problems/what-you-need-to-know-about-bringing-a-lawsuit-against-the-department-of-homeless-services/> [<https://perma.cc/W2F8-KSQP>] (explaining that homeless individuals may bring suit against the city if they feel their right to shelter has been violated). Although this action was a significant step towards implementing housing as a right, New York law only requires that the city provide temporary shelter and does not affirmatively provide for more sustainable long-term housing. See *The Callahan Legacy*, *supra* note 105 (describing the limited effect of the consent decree).

<sup>110</sup> See NAT'L L. CTR. ON HOMELESSNESS & POVERTY, "SIMPLY UNACCEPTABLE": HOMELESSNESS AND THE HUMAN RIGHT TO HOUSING IN THE UNITED STATES 6–7 (2011) (acknowledging the link between inadequate housing and human rights violations); *Report on Adequate Housing 2017*, *supra* note 5 (explaining the negative effects on housing affordability of treating housing as a commodity as opposed to a right); *Financialization of Housing*, *supra* note 4 (reporting the United States' failure to implement housing as a right because housing is treated instead as a commodity).

<sup>111</sup> See Goldsmith, *supra* note 6, at 366 (restating the conscious decision by the federal government not to include international human rights in domestic laws); *supra* notes 48–49; see also M. Shah Alam, *Enforcement of International Human Rights by Domestic Courts in the United States*, 10 ANN. SURV. INT'L & COMPAR. L. 27, 29 (2004) (discussing steps taken by the United States to avoid

federal government, several states and cities have taken steps towards recognizing and promoting human rights for all residents, some drawing from international human rights law for support.<sup>112</sup> Section A of this Part discusses the effects of the United States' reluctance to enforce international human rights law and treaties to which it is a party.<sup>113</sup> Section B describes the treatment of the right to housing by other nations.<sup>114</sup> Lastly, Section C explains how individual states have committed to implementing international human rights law, despite the hesitancy of the federal government to do so.<sup>115</sup>

### *A. The United States Treatment of International Treaties and How It Has Prevented Implementation of Housing as a Right*

The United States has ratified several fundamental declarations of human rights and indicated its support for the rights protected in these instruments.<sup>116</sup> Notably absent from this list is the Covenant.<sup>117</sup> Rather than ratify the treaty, the United States opted to merely sign onto it, which denied the treaty legal enforceability in United States courts.<sup>118</sup> In addition to abstaining from ratifying other treaties, the United States reduces their legal effects by issuing reservations, understandings, and declarations (RUDs).<sup>119</sup> When it ratifies international treaties, the United States includes a safeguard provision, which declares

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enforcement of international treaties in domestic law and customs); Friedman, *supra* note 9, at 191 (explaining that ratified treaties are not domestic law).

<sup>112</sup> See *infra* notes 151–160 and accompanying text.

<sup>113</sup> See *infra* notes 116–137 and accompanying text.

<sup>114</sup> See *infra* notes 138–150 and accompanying text.

<sup>115</sup> See *infra* notes 151–160 and accompanying text.

<sup>116</sup> See Friedman, *supra* note 9, at 213–17 (providing an overview of the United States' involvement in international agreements and its evolution). This list of signed declarations includes: the Convention on the Prevention and Punishment of the Crime of Genocide, the I.C.C.P.R., the I.C.E.R.D., and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. *Status of Ratification: Interactive Dashboard*, *supra* note 32 (listing which treaties the United States has signed or ratified). The United States indicated that when it signs a treaty, this signals general support for the rights contained, but does not create any legal obligations for the federal government. See Natasha Fain, *Human Rights Within the United States: The Erosion of Confidence*, 21 BERKLEY J. INT'L L. 607, 611 (2003) (detailing the consequences of reservations, understandings, and declarations).

<sup>117</sup> *Status of Ratification: Interactive Dashboard*, *supra* note 32.

<sup>118</sup> See Covenant, *supra* note 7. When a party ratifies a treaty, it commits to protecting and promoting the rights recognized in the treaty. See Vienna Convention, *supra* note 34, art. 18 (laying out the implications of signing and ratifying a treaty). Simple signature on a treaty signifies a state's commitment to the terms of the agreement until the state either officially ratifies the treaty or gives express intent to not be legally bound. KUEHL & O'BRIEN, *supra* note 25, at 33.

<sup>119</sup> See Friedman, *supra* note 9, at 217–19 (explaining the effects of reservations, understandings, and declarations (RUDs) on the obligations created by international agreements). Reservations alter the legal obligations of a signatory nation, whereas understandings and declarations describe the nation's interpretation and scope of its obligations. *Id.* at 217–19. Reservations have the greatest negative effect on the legitimacy of a treaty by specifically exempting certain provisions from having legal force. See *id.* at 217–18 (describing the legal effect of issuing reservations on international treaties).

the treaties as not self-executing to prevent citizens from invoking these treaties in domestic judicial proceedings where their rights are threatened.<sup>120</sup>

These actions minimize the effects of international agreements on the domestic front and signal to the international community that the United States prioritizes its own declarations of rights over multilateral treaties.<sup>121</sup> Several presidential administrations made this choice deliberately, influenced by the government's views on the nation as a world leader and the supremacy of the U.S. Constitution.<sup>122</sup> When the United States assisted in the drafting of international human rights agreements, it intended to ensure the protection of human rights by other participating nations but not necessarily its own.<sup>123</sup> This conclusion flows naturally from the theory of American exceptionalism, whereby the United States believes it has inherent "greatness" and does not need to be bound by international human rights treaties when it provides adequate protections for its citizens at home.<sup>124</sup> Scholars have referred to the United States'

<sup>120</sup> See *id.* at 250, 252 (explaining that whenever the United States ratifies a treaty it declares that treaty to be non-self-executing, which prevents the treaty from affecting domestic law). In simple terms, a non-self-executing treaty is one that requires domestic legislative action to carry the force of law. Sloss, *supra* note 32, at 146. The key distinction between self-executing and non-self-executing treaties is that self-executing treaties are effective immediately and may be enforced directly by domestic courts. Friedman, *supra* note 9, at 196–97. Typically, non-self-executing treaties do not create legally enforceable rights for Americans that domestic courts may vindicate. See Sloss, *supra* note 32, at 152. If a citizen wanted to invoke one of these treaties, it must have first been implemented by the legislature, or else the treaty could not be enforced as federal law. See Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1587–88 (2003) (discussing the common consensus that non-self-executing treaties do not create private rights of action). Courts have reinforced this notion by holding that only self-executing treaties, or those which have had prior legislative approval, are privately enforceable. See *Buell v. Mitchell*, 274 F.3d 337, 372 (6th Cir. 2001) (“[A] ‘non-self-executing’ agreement will not be given effect as law in the absence of necessary authority.” (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 (AM. L. INST. 1987))); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 375 (7th Cir. 1985) (holding that the U.N. Charter was not privately enforceable by U.S. courts).

<sup>121</sup> See Friedman, *supra* note 9, at 217–19 (discussing how RUDs severely limit enforceability of international treaties in the United States).

<sup>122</sup> See Fain, *supra* note 116, at 611 (discussing the intentional inclusion of RUDs to several human rights treaties to eliminate legal influence of treaties on domestic law); Goldsmith, *supra* note 6, at 367–68 (discussing the goals of the United States in attaching RUDs to international treaties, including avoiding creating private legal rights for citizens). Article VI of the Constitution, referred to as the Supremacy Clause, declares that the Constitution's authority is absolute. U.S. CONST. art. VI (“This Constitution . . . and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .”).

<sup>123</sup> See Goldsmith, *supra* note 6, at 366 (explaining that although the United States urges other countries to enforce these multilateral agreements, it actively seeks to avoid their implementation domestically).

<sup>124</sup> See Jack Sullivan, *What Donald Trump and Dick Cheney Got Wrong About America*, THE ATLANTIC (Jan. 2019), <https://www.theatlantic.com/magazine/archive/2019/01/yes-america-can-still-lead-the-world/576427/> [<https://perma.cc/X76G-Y5WH>] (discussing the origins of American exceptionalism and its continued influence on foreign policy). American exceptionalism can be traced back to the birth of the nation when the United States defined itself as a nation built upon preservation of natural rights and liberty, which the country believed made it “morally superior” to other nations. See



noncompliance with the international agreements it helped create as the “United States Double Standard.”<sup>125</sup>

The United States signed the Covenant on October 5, 1977 and despite its submittal to the Senate for ratification on February 23, 1978, its status remains as “pending.”<sup>126</sup> Along with a copy of the Covenant, President Jimmy Carter and the State Department sent a submittal and transmittal letter to Congress recommending the ratification of several international treaties.<sup>127</sup> This presidential support, however, was not sufficient to obtain the two-thirds majority vote in the Senate required for ratification.<sup>128</sup> In its report to Congress on the ratification of the Covenant, along with other fundamental human rights instruments, the State Department recommended that, if ratified, the treaties would not be self-executing.<sup>129</sup> For example, Congress ratified the International Covenant on Civil and Political Rights (I.C.C.P.R.) but included a non-self-execution declaration, which made the legal enforceability of the covenant negligible absent congressional legislation implementing the agreement or its rights.<sup>130</sup>

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Amy C. Harfeld, *Oh Righteous Delinquent One: The United States' International Human Rights Double Standard—Explanation, Example, and Avenues for Change*, 4 N.Y. CITY L. REV. 59, 69 (2001) (explaining the theory that, since the principles in the Constitution have survived so long, the document must be the “best” constitution); Ian Tyrell, *What, Exactly, Is ‘American Exceptionalism’?*, THE WEEK (Oct. 21, 2016), <https://theweek.com/articles/654508/what-exactly-american-exceptionalism> [<https://perma.cc/25WK-2CSR>] (describing the nation’s view that it is “morally superior” to other nations because of its Constitution and protection of individual freedoms).

<sup>125</sup> See Goldsmith, *supra* note 6, at 366 (noting that the United States helped create several major multilateral human rights agreements and expects compliance from other parties while simultaneously failing to comply with the terms); see also Harfeld, *supra* note 124, at 64 (discussing the presumption that the United States complies with international human rights law when in reality it does not).

<sup>126</sup> *Treaties Pending in the Senate*, U.S. DEP’T OF STATE (Oct. 22, 2019), <https://www.state.gov/treaties-pending-in-the-senate/> [<https://perma.cc/HER2-LJW7>]; see Covenant, *supra* note 7.

<sup>127</sup> Message from the President of the United States Transmitting Four Treaties Pertaining to Human Rights, S. EXEC. DOC. NOS. C, D, E, F, 95-2, at III (1978) [hereinafter Transmittal Letter]. The transmittal letter from the State Department focused primarily on the I.C.C.P.R., which is consistent with the common view that civil and political rights more closely resemble human rights whereas social and economic rights are optional additions. See *id.*; Katharine G. Young, *Waiting for Rights*, in THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS, *supra* note 39, at 654, 656 (addressing the debate over whether social and economic rights are in fact human rights).

<sup>128</sup> Transmittal Letter, *supra* note 127 (indicating presidential signatory support for the Covenant and I.C.C.P.R.); see U.S. CONST. art. II, § 2 (specifying congressional procedure for ratifying treaties); *Treaties Pending in the Senate*, *supra* note 126 (listing the Covenant as pending and not yet ratified since 1977).

<sup>129</sup> Transmittal Letter, *supra* note 127, at XV (recommending that the instruments signed be declared non-self-executing); see Philip Alston, *U.S. Ratification of the Covenant on Economic, Social, and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT’L L. 365, 366–67 (1990) (noting the improbability that the United States will ever ratify the Covenant or give it legal enforceability).

<sup>130</sup> *Status of Ratification: Interactive Dashboard*, *supra* note 32 (displaying the United States’ declarations on the I.C.C.P.R.); see G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966) [hereinafter I.C.C.P.R.] (including the United States’ declaration that the treaty shall not be self-executing); see also Anna Maria Gabrielidis, *Human Rights Begin at*

Complementing the theory of American exceptionalism, government officers often view human rights treaties with suspicion and historically have expressed concerns about their effects on domestic policy, if ratified.<sup>131</sup> In 2019, perhaps to compensate for its withdrawal from the Human Rights Commission, the State Department unveiled the Commission on Unalienable Rights (the Commission).<sup>132</sup> The Commission's mandate is to evaluate the state of

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*Home: A Policy Analysis of Litigating International Human Rights in U.S. State Courts*, 12 BUFF. HUM. RTS. L. REV. 139, 147 (2006) (explaining the United States' treatment of the I.C.C.P.R. and its near lack of legal effect). There is an interesting parallel between the right to education and the right to housing, as both are recognized as human rights under the Covenant but not entirely by the United States government. See *Covenant*, *supra* note 7, ¶ 13 (recognizing education as a human right for all); Michael Rebell, *The Right to Education in the American State Courts*, in *THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS*, *supra* note 39, at 137, 139 (distinguishing between the right to education under the Covenant and the right as defined by the federal government). Though state governments have acknowledged education as a right, the Supreme Court announced that it is not a fundamental right supplied by the Constitution, and therefore any remedy available lies with state courts and not the federal government. See Rebell, *supra*, at 137–38 (explaining the Supreme Court's treatment of the right to education); see also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (holding that there is no constitutional right to education, and federal law does not implicitly or explicitly create this right). The Supreme Court in its 1973 decision, *San Antonio Independent School District v. Rodriguez*, reinforced the lack of a fundamental right to housing. 411 U.S. at 32–33 (“Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial functions.” (quoting *Lindsey v. Normet*, 405 U.S. 56, 74 (1972))). The main difference between housing and education as rights is that education is a justiciable right and complaints may be filed with courts for violations. See Rebell, *supra*, at 139 (explaining that individuals enjoy a justiciable right to education in the United States and state courts may grant remedies for violations of this right).

<sup>131</sup> See Friedman, *supra* note 9, at 204–07 (explaining constitutional and policy objections to ratification of international human rights agreements). One of the main concerns was that these international agreements posed a threat to national sovereignty by subjecting American citizens to foreign laws. See *id.* at 207. Opponents of ratification also argued that using international treaties and the treaty-making power to promote and protect human rights was unconstitutional. *Id.* at 204–05. According to this argument, using human rights treaties to enforce human rights is unconstitutional because human rights are between a state and its citizens and not for “international negotiations.” See *id.*; see also David Golove, *Human Rights Treaties and the U.S. Constitution*, 52 DEPAUL L. REV. 579, 581, 585 (2002) (discussing that opponents thought multilateral agreements improperly interfered with the nation's relationship with its citizens).

<sup>132</sup> See Caitlin Oprysko, *Mike Pompeo Unveils Panel to Examine ‘Unalienable Rights,’ POLITICO* (July 8, 2019), <https://www.politico.com/story/2019/07/08/pompeo-panel-unalienable-rights-1400023> [<https://perma.cc/3HHS-94QP>] (reporting on the creation of the Commission on Unalienable Rights (the Commission)). It is unclear what the exact goals of the Commission will be, although according to the State Department, the role of the Commission is “providing the U.S. government with advice on human rights grounded in [the United States'] . . . founding principles and the principles of the 1948 Universal Declaration of Human Rights.” See *Commission on Unalienable Rights*, U.S. DEP'T OF STATE, <https://www.state.gov/commission-on-unalienable-rights> [<https://perma.cc/AX9D-WT3Q>]; see also Oprysko, *supra* (explaining that it is unclear what exactly the Commission is set to accomplish). The fate of the Commission remains unclear following the election of Joe Biden, as he will have the ability to disband the Commission once he takes office. See Sarah B. Snyder, *Comment: Biden Can Resume Human Rights Focus that JFK Started*, HERALDNET (Nov. 24, 2020), <https://www.heraldnet.com/opinion/comment-biden-can-resume-human-rights-focus-that-jfk-started/> [<https://perma.cc/EQS9-7G5S>].

human rights law in the nation and define the human rights to which Americans are entitled.<sup>133</sup> In July 2020, the Commission released a draft report that called for the United States to fight for human rights protections abroad with its foreign policy.<sup>134</sup> Overall, the Trump Administration maintained the status quo between the United States and international human rights law, and simultaneously reduced the rights of non-citizens and minorities in the United States.<sup>135</sup>

It is important to understand how the practices of the United States contributed to the non-enforceability of social and economic rights recognized by international human rights law in the United States.<sup>136</sup> This in turn demonstrates how attempting to solve the affordable housing crisis requires creatively using an international human rights law framework.<sup>137</sup>

### *B. The Right to Housing in Foreign Nations*

Canada and South Africa, through legislation and judicial decisions, recognize housing as a human and constitutional right.<sup>138</sup> In 2019, Canada de-

<sup>133</sup> See *Commission on Unalienable Rights*, *supra* note 132 (announcing the creation of the Commission by the United States government); Oprysko, *supra* note 132 (discussing the Commission's main objectives). Many organizations, including Democracy Forward, have criticized and even sued the Commission for allegedly violating the Federal Advisory Committee Act (F.A.C.A.). See Jennifer Hansler, *Human Rights Organizations File Suit Over Pompeo's 'Unalienable Rights' Commission*, CNN (Mar. 6, 2020), <https://www.cnn.com/2020/03/06/politics/human-rights-organizations-lawsuit-unalienable-rights-commission/index.html> [<https://perma.cc/92JB-DU5H>] (providing a brief overview of the lawsuit against the commission and reasons for opposition to its duties); see also Complaint at 3–4, Robert F. Kennedy Ctr. for Justice & Hum. Rts. v. Pompeo (S.D.N.Y. Mar. 6, 2020) (No. 1:20-cv-02002). The plaintiffs allege that the Commission violated several requirements of F.A.C.A. by having a majority of members with the same point of view, insufficiently demonstrating the need for the commission and its public benefit, and failing to disclose sufficient information to the public about the work of the Commission. Complaint, *supra*, at 3. The Commission has faced pushback since its creation in July, and its opponents contend that it will severely limit the rights of women and members of the LGBTQI community due to the political ideology of members involved. Hansler, *supra*.

<sup>134</sup> COMM'N ON UNALIENABLE RTS., REPORT OF THE COMMISSION ON UNALIENABLE RIGHTS (2020). The Commission attempted to clarify the existing human rights framework and articulate new civil and political rights, as well as create new interpretations of already defined rights. See *id.* In response to the report, 111 nongovernmental organizations and 119 individuals sent a letter to the Commission that rejected the findings and warned of the dangerous consequences the report could have on human rights internationally. See Letter from the Ctr. for Just. & Accountability, to Professor Mary Ann Glendon, Chairperson of the Comm'n on Unalienable Rts. (July 30, 2020) [<https://perma.cc/4QCA-NH45>]. Signatories include former senior government officials, legal scholars and professors, and community and religious advocates. See *id.*

<sup>135</sup> See *Trump Administration Civil and Human Rights Rollbacks*, *supra* note 95 (listing the measures taken by the Trump Administration that cut against international human rights).

<sup>136</sup> See generally Friedman, *supra* note 9, at 195–208 (explaining a multitude of factors and ideologies inhibiting the United States from fully realizing international socio-economic rights).

<sup>137</sup> See *infra* notes 161–196 and accompanying text (arguing that states must declare housing as a right and borrow from international human rights law to successfully do so).

<sup>138</sup> See S. AFR. CONST., 1996 § 26 (declaring adequate housing as a human right in the South African Constitution); National Housing Strategy Act, S.C. 2019, c 29, s 313 (Can.) (implementing

clared adequate housing a human right and enacted the National Housing Strategy Act (N.H.S.A.) to ensure all citizens could fully enjoy this right.<sup>139</sup> This legislation acknowledges and draws support from the right to housing contained in the Covenant.<sup>140</sup> The N.H.S.A. vests in the Canadian Parliament jurisdiction over violations of the new national housing policy, but provides that the National Housing Council may create a review panel to hold hearings and submit a report to Parliament.<sup>141</sup>

South Africa famously recognized housing as a human right in its 1996 national constitution and the nation's highest court has subsequently upheld the right.<sup>142</sup> The South African Constitution guarantees "access to adequate housing"<sup>143</sup> and the Constitutional Court held in 2000 that the government vio-

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housing as a right in Canada). The U.N. declared that economic and social rights are justiciable and may be litigated before domestic courts and international tribunals, among other bodies. *Resource Page on Justiciability of Economic, Social and Cultural Rights (ESCR)*, ESCR-NET, <https://www.escr-net.org/resources/resource-page-justiciability-economic-social-and-cultural-rights-escr> [<https://perma.cc/VE6K-SZLB>]; see also AMNESTY INT'L, MAKE OUR RIGHTS LAW: ENFORCE ECONOMIC, SOCIAL AND CULTURAL RIGHTS 4 (2010) (listing examples of individuals successfully challenging deprivations of economic and social rights in court); Evan Rosevear et al., *Justiciable and Aspirational Economic and Social Rights in National Constitutions*, in THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS, *supra* note 39, at 37, 40 (describing the significant increase in justiciable economic and social rights in national constitutions). One study found that the incidence of justiciable housing rights in national constitutions increased between 2000 and 2016, and now a right to housing is contained in forty percent of national constitutions. Rosevear et al., *supra*, at 51.

<sup>139</sup> National Housing Strategy Act, S.C. 2019, c 29, s 313; see Jeff Morrison, *Right to Housing Is Now Law in Canada: So Now What?*, CAN. HOUS. & RENEWAL ASS'N (Jul. 5, 2019), [https://chra-achru.ca/blog\\_article/right-to-housing-is-now-law-in-canada-so-now-what-2/](https://chra-achru.ca/blog_article/right-to-housing-is-now-law-in-canada-so-now-what-2/) [<https://perma.cc/3QAV-9V4C>] (explaining that this legislation requires the Canadian government to create and implement a "National Housing Strategy" over the next ten years to ensure all citizens have access to housing). Similar to the United States, provinces in Canada, prior to this new legislation, had codified fair housing and equal protection laws that served as the primary protections of housing as a right for citizens, but no affirmative right to housing existed. See *Housing*, ONTARIO HUM. RTS. COMM'N, [http://www.ohrc.on.ca/en/social\\_areas/housing](http://www.ohrc.on.ca/en/social_areas/housing) [<https://perma.cc/25CR-D2X3>] (providing a compilation of all laws related to housing as a right in Canada).

<sup>140</sup> S.C. 2019, c 29, s 313 ("[A] national housing strategy would support the progressive realization of the right to adequate housing as recognized in the [I.C.E.S.C.R.] . . ."). The strategy requires that the country create a Federal Housing Advocate position, which is tasked with monitoring compliance with the statute. *Id.*

<sup>141</sup> *Id.* The National Housing Council is one of two enforcement bodies created by this statute. See *id.* (outlining additional new positions and bodies that will be created to implement the right to housing in Canada). Interestingly, Canada faced a similar federalism issue as the United States, whereby the federal government was unable to impose international human rights treaty obligations on provinces because it lacked constitutional authority to do so. See Peter J. Spiro, *The States and International Human Rights*, 66 FORDHAM L. REV. 567, 579 (1997).

<sup>142</sup> See S. AFR. CONST., 1996 § 26 (declaring a right to access adequate housing in the South African Constitution); *Gov't of the Republic of S. Afr. v. Grootboom* 2001 (1) SA 46 (CC) para. 40 (affirming access to housing as a justiciable right); see also Katharine G. Young, *Rights and Queues: On Distributive Contests in the Modern State*, 55 COLUM. J. TRANSNAT'L L. 65, 93 (2016) (discussing the form of housing as a right in South Africa).

<sup>143</sup> S. AFR. CONST., 1996 § 26. South Africa adopted a new constitution in 1996 after the end of apartheid that included a commitment to protect and promote a variety of economic and social rights.

lates the right to housing by failing to make housing accessible to those in dire need of it.<sup>144</sup> Individuals in South Africa have the ability to file housing rights claims with South African courts, which in turn oversee the enforcement of the housing right.<sup>145</sup> At the same time, however, courts are hesitant to issue individual remedies to plaintiffs and therefore restrict their holdings to declarations of unconstitutional behavior by the government.<sup>146</sup> In addition to Canada and

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See Lucy A. Williams, *The Right to Housing in South Africa: An Evolving Jurisprudence*, 45 COLUM. HUM. RTS. L. REV. 816, 817–18 (2014) (describing, briefly, the South African Constitution and the rights contained in its Bill of Rights). The goal of including economic and social rights in the constitution was to remedy the damage done by apartheid relating to social, income, and racial inequality. See Young, *supra* note 142, at 96–97; see also Williams, *supra*, at 819 (articulating the connection between apartheid and increased protection of housing rights).

<sup>144</sup> *Grootboom*, 2001 (1) SA 46 para. 66; see also Young, *supra* note 142, at 98–99 (describing the holding in *Grootboom* and the remedy issued by the Court). The Court held that the government violated the constitutional right to housing by failing to “provide for relief for those in desperate need.” *Grootboom*, 2001 (1) SA 46 para. 66. The Court also found that the Constitution guarantees protection from active violations of one’s housing rights. *Id.* para. 34. The Constitutional Court defined the scope of the right to guarantee emergency housing relief, but not “housing on demand.” Beth Simmons, *Should States Ratify the Protocol?—Process and Consequences of the Optional Protocol to the ICESCR*, 27 NOR. J. HUM. RTS. 64, 68 (2009) (explaining the scope of the right to housing contained in the South African Constitution).

<sup>145</sup> See Young, *supra* note 142, at 98 (explaining judicial oversight over enforcement of the right to housing and the right of private individuals to file housing claims); see also Williams, *supra* note 143, at 841–42 (discussing a landmark Constitutional Court case that reinforced the constitutional right to housing in South Africa). One notable case is *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 Ltd.*, where Blue Moonlight purchased a building that housed eighty-six individuals and sought to evict all residents to redevelop the property. 2012 (2) SA 104 (CC) paras. 1, 3 (S. Afr.); see also Williams, *supra* note 143, at 840 (emphasizing the importance of the *Blue Moonlight* holding for the right to housing in South Africa). The Constitutional Court held that Blue Moonlight could not legally evict the residents until the city secured temporary, adequate, and substitute housing for all residents facing eviction. *Blue Moonlight*, 2012 (2) SA 104 paras. 96–97; see Williams, *supra* note 143, at 842 (noting that the Court ordered this remedy without taking into consideration whether the city had the financial resources to provide the former residents with adequate substitute housing).

<sup>146</sup> See Young, *supra* note 142, at 99 (discussing opposition to and support for government-led remedies as opposed to judicial remedies for housing rights violations and the reluctance of the Constitutional Court to issue individual remedies); see also Young, *supra* note 127, at 655, 657 (explaining that South African courts hesitate to order affirmative action on the part of rights violators because it creates a “line” for individuals to experience judicial remedies). Rather than provide individual remedies for successful plaintiffs, courts require “meaningful engagement” between plaintiffs and the government. See Young, *supra* note 142, at 100 (describing the trend of South African courts to prefer meaningful engagement as a remedy). Meaningful engagement most often consists of court-ordered negotiations between parties. *Id.* Accordingly, meaningful engagement may replace the need for judicial enforcement of individual rights by requiring parties to first attempt to resolve their conflicts on their own. See *id.* Courts may review the negotiated agreement and use it to make the final determination on a case. See *Occupiers of 51 Olivia Rd. v. City of Johannesburg* 2008 (3) SA 2008 (CC) at 219 para. 30 (S. Afr.) (considering a proposed settlement); Williams, *supra* note 143, at 830 (discussing *Occupiers of 51 Olivia Road v. City of Johannesburg*, a case in which plaintiffs and the government made arguments before the court and then submitted a proposed settlement for judicial approval). In some cases, the Constitutional Court provides engagement orders with specific instructions and requirements that the parties must abide by when engaging. See Williams, *supra* note 143, at 832 (re-

South Africa, numerous other foreign constitutions contain a right to housing for citizens or alternatively a commitment by the national government to improve housing conditions.<sup>147</sup>

The treaty-monitoring body of the Covenant has authority to receive complaints of violations of the right to housing by participating nations and adjudicate these claims if a party ratified the Optional Protocol.<sup>148</sup> In 2015, the Committee published a momentous decision, *IDG v. Spain*, in which it found Spain violated the housing right of one of its citizens by not taking sufficient steps to implement the right.<sup>149</sup> The Committee recommended Spain to enact legislation to ensure this form of deprivation did not occur again.<sup>150</sup>

counting the Constitutional Court's specific order for meaningful engagement in a housing rights case).

<sup>147</sup> See, e.g., Art. 14bis, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) (“[T]he laws shall establish . . . family allowances and access to a worthy housing.”); CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 6 (Braz.) (“Education, health, food, work, housing . . . and assistance to the destitute are social rights, as set forth by this Constitution.”); QANUNI ASSASSI JUMHURII ISLAMAI IRAN [THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF IRAN] 1358 [1980] art. 31 (“It is the right of every Iranian individual and family to possess housing commensurate with his needs.”); CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE NICARAGUA [Cn.] tit. III, ch. LXIV, LA GACETA, DIARIO OFICIAL [L.G.] 9 Jan. 1987 (“Nicaraguans have the right to decent, comfortable and safe housing that guarantees familial privacy.”); CONSTITUCIÓN ESPAÑOLA, B.O.E. n. 47, 1978 (Spain) (“All Spaniards have the right to enjoy decent and adequate housing.”); REGERINGSFORMEN [RF] [CONSTITUTION] 1:2 (Swed.) (“[T]he public institutions shall secure the right to . . . housing . . .”).

<sup>148</sup> See G.A. Res. 63/117, *supra* note 38, ¶¶ 2, 14 (specifying the terms of the Optional Protocol); *Human Rights Enforcement Mechanisms of the United Nations*, *supra* note 30 (explaining the role of the Committee in monitoring and ensuring enforcement of the Covenant); *What Is an Optional Protocol?*, U.N. WOMEN, <https://www.un.org/womenwatch/daw/cedaw/protocol/whatis.htm> [<https://perma.cc/86BC-TTVX>] (explaining that a nation may voluntarily ratify an Optional Protocol, which defines procedures for ensuring compliance with the instrument or expands on a substantive area of the instrument). In order for a party to be subject to the jurisdiction of the Committee, it must ratify the Optional Protocol in addition to the Covenant itself. G.A. Res. 63/117, *supra* note 38, ¶ 1. Once the Committee receives a complaint, it will respond with its recommendations for compliance with the Covenant and the accused party may submit additional measures taken in furtherance of fulfillment. *Id.* ¶ 9. The United States refused to ratify the Covenant and therefore citizens may not submit complaints to the treaty-monitoring body, as the body does not have the authority to hear these complaints. See *id.* ¶ 1; see also *Status of Ratification: Interactive Dashboard*, *supra* note 32 (indicating the United States did not ratify the Covenant).

<sup>149</sup> Comm. on Econ., Soc. and Cultural Rts., Views of the Committee on Economic, Social and Cultural Rights Under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Fifty-fifth Session) Concerning Communication No. 2/2014, U.N. Doc. E/C.12/55/D/2/2014 (2015) [hereinafter Views Concerning Communication No. 2/2014]. The Committee was only able to hear this complaint because of the 2008 Optional Protocol, which allowed the Committee to receive communications from individuals alleging violations of the Covenant from ratifying nations, like Spain. See G.A. Res. 63/117, *supra* note 38, ¶¶ 1–2. This landmark case involved a woman from Spain who was evicted from her home after missing several mortgage payments and only received notice of her eviction via public posting on the Madrid Courts Central Notification and Enforcement Service notice board. Views Concerning Communication No. 2/2014, *supra*, ¶¶ 2.2–4. She first filed an action in Spain, but her action was dismissed by the Spanish Constitutional Court for failure to demonstrate that her fundamental rights were violated. *Id.* ¶ 2.10. She then filed a complaint with the Committee, claiming that Spain violated her right to adequate housing guaranteed by the

### C. State and Local Implementation of International Human Rights Law

Many American states and cities have taken steps towards promoting civil and political, as well as economic and cultural, rights of citizens through inclusion of these rights in state and local laws.<sup>151</sup> State constitutions can fill in the gaps left by the federal government's hesitancy to protect individual economic and social liberties in the federal Constitution.<sup>152</sup> Many state courts, encouraged by the federal government, have construed their respective constitutions to protect a broader spectrum of individual liberties than those protected by the federal Constitution.<sup>153</sup> These holdings are consistent with the federalist principles underlying the United States' constitutional system.<sup>154</sup>

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Covenant. *Id.* ¶ 3.1. The Committee found that Spain violated her right to adequate housing by denying her the opportunity to present this right as a defense in her initial trial, and by failing to take sufficient reasonable measures to provide notice to the plaintiff. *Id.* ¶¶ 13.3, 13.7.

<sup>150</sup> Views Concerning Communication No. 2/2014, *supra* note 149, ¶ 17. The Committee issued a specific recommendation to Spain that it guarantee the plaintiff sufficient due process before her property is sold at auction and also issued a general recommendation that the government prevent this sort of incident from occurring again. *Id.* ¶¶ 16–17. The Committee does not have authority to impose any punishment or sanction on Spain, as it may only issue recommendations. *Id.* ¶¶ 17–18.

<sup>151</sup> See Risa E. Kaufman, *Localizing Human Rights in the United States Through the 2030 Sustainable Development Agenda*, 49 COLUM. HUM. RTS. L. REV. 99, 113–14 (2017) (emphasizing the importance of state and local governments' commitments to sustainable development and measures adopted by these bodies); Anthony F. Pipa, *Can US Cities Help the World Achieve Sustainable Development Goals?*, BROOKINGS (Nov. 29, 2018), <https://www.brookings.edu/blog/future-development/2018/11/29/can-us-cities-help-the-world-achieve-the-sustainable-development-goals/> [<https://perma.cc/9AEL-67Y8>] (explaining that U.S. cities have taken the initiative to promote U.N. Sustainable Development Goals while also combating significant issues including climate change and extremism). Several cities, including Baltimore and New York City, have been crucial in the implementation of sustainable development goals in the United States. See Kaufman, *supra*, at 114 (describing these cities as “pilots” for domestic implementation). Baltimore demonstrated its commitment to these goals by creating an action plan along with indicators to measure progress. *Id.* Similarly, New York City implemented a sustainability plan to combat socio-economic and environmental issues. *Id.* at 115.

<sup>152</sup> See Johanna Kalb, *Human Rights Treaties in State Courts: The International Prospects of State Constitutionalism After Medellín*, 115 PENN ST. L. REV. 1051, 1051 (2011) (explaining the reluctance of the federal government to allow international human rights treaties to trump state law because of federalism concerns); see also RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW OF THE UNITED STATES § 302 (AM. L. INST. 2018) (requiring treaties be entirely consistent with the U.S. Constitution). Justice William J. Brennan Jr. sparked this concept by declaring that state courts could defend individual rights not recognized by the Constitution or federal government. See William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986) (arguing that states can step in and fill the gap left by the federal government's minimal recognition of individual rights). The Supreme Court, according to Justice Brennan, ought to be deferential in reviewing decisions based on state law regarding individual rights because of federalism principles. See *id.* at 552 (suggesting that federalism should be preserved when federal courts are reviewing state regulatory decisions).

<sup>153</sup> See Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights Law*, 30 N.Y.U. REV. L. & SOC. CHANGE 359, 368–69 (2006) (providing a list of state supreme court decisions holding that state constitutions may grant more rights to citizens than the U.S. Constitution). It is important to note the distinctions between state constitutions and the federal Constitution, namely, that state constitutions serve as a guide for the function of government and contain mainly

The Supreme Court in 2008, in *Medellín v. Texas*, emphasized the limited enforceability of non-self-executing international agreements in domestic courts absent enacting legislation.<sup>155</sup> States, however, are free to incorporate human rights contained in international agreements into their own constitutions.<sup>156</sup> For example, several state constitutions contain provisions guaranteeing public health and state support for the needy.<sup>157</sup> Many states also recognize

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positive rights, as opposed to the less detailed federal Constitution that contains mostly negative rights. See Robert F. Williams, *The Brennan Lecture: Interpreting State Constitution as Unique Legal Documents*, 27 OKLA. CITY U. L. REV. 189, 192 (2002) (comparing state constitutions and the federal Constitution). From a functional standpoint, the federal Constitution focuses on granting powers to state legislatures, whereas state constitutions function to place limitations on their own legislatures. *Id.* at 207.

<sup>154</sup> See Brennan, *supra* note 152, at 548, 550–51 (arguing that under the principles of federalism, the federal Bill of Rights is the “constitutional floor” for individual liberties and state courts are free to protect rights above this floor). Although the federal government is the primary body through which enforceable human rights are created, the Tenth Amendment reserves significant power for the states to regulate social welfare. See U.S. CONST. amend. X; Davis, *supra* note 153, at 361–62 (explaining that federalism has led to the federal government deferring to the states for regulation of areas of law including social welfare); see also COLUMBIA L. SCH. HUM. RTS. INST., HUMAN RIGHTS, SOCIAL JUSTICE AND STATE LAW: A MANUAL FOR CREATIVE LAWYERING 3 (2008) (stating that the federal government vested complete authority in states to regulate economic and social rights).

<sup>155</sup> *Medellín v. Texas*, 552 U.S. 491, 505 n.2 (2008) (“[A] ‘non-self-executing’ treaty does not by itself give rise to domestically enforceable federal law.”); see Kalb, *supra* note 152, at 1052 (explaining the Court’s 2008 holding in *Medellín v. Texas* and its implications on enforcement of international treaties domestically). The Court explained that in order to determine whether an international treaty without accompanying legislation has domestic enforceability, courts must look to the intent of Congress and the President. *Medellín*, 552 U.S. at 521. The significance of this limiting language is that these agreements do not create an actionable right for private citizens to sue in state court. See Kalb, *supra* note 152, at 1054 (describing the practical consequences of labeling a treaty as non-self-executing). Courts have not pushed back on this custom of non-enforcement, rather, they have continuously declined to recognize international law as having the force of law domestically. See Curtis A. Bradley, *Customary International Law and Private Rights of Action*, 1 CHI. J. INT’L L. 421, 424–29 (2000) (listing federal court cases involving domestic plaintiffs where the court showed complete unwillingness to apply international human rights law); John F. Coyle, *The Case for Writing International Law into the U.S. Code*, B.C. L. REV. 433, 444 (2015) (noting that federal courts frequently require a high “threshold showing” of judicial enforceability before a litigant may invoke an international treaty in court and assert a private right of action).

<sup>156</sup> See Davis, *supra* note 153, at 368 (explaining that states may take on international human rights obligations that the federal government does not recognize). States most commonly adopt positive rights relating to welfare, including the rights to work, health, and education, as these rights are not in the federal Constitution. See *id.* at 372 (providing examples of states adopting positive rights).

<sup>157</sup> See *id.* at 372 (explaining that states often recognize rights in their constitutions that are absent from the national Constitution, including the right to welfare); see, e.g., ALASKA CONST. art. VII, § 4 (“The legislature shall provide for the promotion and protection of public health.”); HAW. CONST. art. IX, § 3 (“The State shall have the power to provide financial assistance, medical assistance and social services for persons who are found to be in need of and are eligible for such assistance and services as provided by law.”); N.Y. CONST. art. XVII, § 1 (“The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine.”); S.C. CONST. art. XII, § 1 (“The health, welfare, and safety of the lives and property of the people of this State . . . are matters of public concern.”). The right to public health is contained in the U.D.H.R. in the same provision as the right to



a right to work under a minimum standard of conditions.<sup>158</sup> Lastly, despite the nonexistence of the right to education in the federal Constitution, state courts have worked to promote this right, defined as a human right in several international human rights treaties.<sup>159</sup> In addition to actual authority resulting from incorporation in state constitutions, international human rights law carries persuasive authority in domestic federal and state courts.<sup>160</sup>

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housing. See U.D.H.R., *supra* note 7, ¶ 25.1 (“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family . . .”).

<sup>158</sup> See Davis, *supra* note 153, at 372 (listing the right to work as a human right frequently added to state constitutions); see, e.g., COLO. CONST. art. V, § 25a (limiting workday to eight hours in “dangerous” industries); IDAHO CONST. art. XIII, § 2 (limiting public employees’ workday to eight hours). The right to work is found in several fundamental international human rights treaties, including the Covenant, I.C.C.P.R., and C.R.C. See C.R.C., *supra* note 9, ¶ 32 (specifying working conditions for minors); Covenant, *supra* note 7, ¶ 6 (declaring a right to work); I.C.C.P.R., *supra* note 130, ¶ 8.3.a (prohibiting “forced or compulsory labor”).

<sup>159</sup> See Davis, *supra* note 153, at 372 (describing the lack of a fundamental right to education); Rebell, *supra* note 130, at 137–38 (noting that education is not a fundamental right recognized by the federal government but states may guarantee a right to education); see also Covenant, *supra* note 7, ¶ 13.1 (codifying a right to education); U.D.H.R., *supra* note 7, ¶ 26 (declaring that everyone has a right to education that shall be free at the elementary level); EMILY PARKER, 50-STATE REVIEW 5–22 (2016) (listing education rights provisions in every state constitution). Despite not being a constitutional right, education in the United States is an “affirmative right,” which means that states must actively seek to provide adequate education for all residents. See Rebell, *supra* note 130, at 139, 147 (explaining that education is an affirmative constitutional right that states are required to provide). Education differs from other non-federal human rights because state courts have expressly declared education to be a constitutional right. *Id.* at 147 (describing how states have undertaken the challenge of guaranteeing a right to education); see, e.g., Campbell Cnty. Sch. Dist. v. Wyoming, 907 P.2d 1238, 1279 (Wyo. 1995) (holding that Wyoming’s legislature must provide adequate educational opportunities to fulfill their constitutional mandates).

<sup>160</sup> See Kalb, *supra* note 152, at 1055, 1059 (suggesting that international human rights law can be used to better understand human rights in state constitutions that do not have a federal counterpart but exist in international human rights treaties). Justice Ruth Bader Ginsburg expressed her support for using international law as persuasive authority in constitutional cases and encouraged other judges to “look to the wisdom” of international judges. See Adam Liptak, *Ginsburg Shares Views on Influence of Foreign Law on Her Court, and Vice Versa*, N.Y. TIMES (Apr. 11, 2009), <https://www.nytimes.com/2009/04/12/us/12ginsburg.html> [<https://perma.cc/4ZVW-QP78>] (summarizing Justice Ginsburg’s view that international law carries persuasive authority); Debra Cassens Weiss, *Ginsburg Doesn’t Understand ‘Brouhaha’ About Foreign Law References*, AM. BAR ASS’N J. (Apr. 13, 2009), [https://www.abajournal.com/news/article/ginsburg\\_doesnt\\_understand\\_brouhaha\\_about\\_foreign\\_law\\_references](https://www.abajournal.com/news/article/ginsburg_doesnt_understand_brouhaha_about_foreign_law_references) [<https://perma.cc/37CV-879B>] (clarifying that United States courts can look to international law for guidance without treating it as binding precedent). There are several notable instances in which state appellate and supreme courts relied on international human rights treaties for non-binding persuasive authority. Kalb, *supra* note 152, at 1059 (providing examples of state courts citing to international agreements as persuasive authority); see, e.g., Moore v. Ganim, 660 A.2d 742, 771, 780 (Conn. 1995) (Peters, C.J., concurring) (construing the requirement of a minimum safety net for the poor in the Connecticut state constitution using the Covenant and U.D.H.R.); Simmons v. Roper, 112 S.W.3d 397, 411 (Mo. 2003) (terminating Missouri’s practice of executing minors based on protections contained in the C.R.C.); Sterling v. Cupp, 625 P.2d 123, 131 n.21 (Or. 1981) (holding that prisoners may bring state constitutional challenges against improper searches by corrections officers relying in part on the U.D.H.R. and American Convention on Human Rights).

### III. MITIGATION OF THE AFFORDABLE HOUSING CRISIS USING AN INTERNATIONAL HUMAN RIGHTS LAW FRAMEWORK

Housing is an internationally recognized human right and the United States should take affirmative steps towards adopting and promoting this right to lessen the worsening affordable housing crisis.<sup>161</sup> The United States has strategically developed policies and laws that frustrate the ability of individuals to claim, and domestic courts to enforce, economic and social rights.<sup>162</sup> States can circumvent these procedural hurdles, however, by declaring housing as a right in their respective constitutions.<sup>163</sup> Section A explains why it is necessary to approach the affordable housing crisis from an international human rights law perspective.<sup>164</sup> Section B argues that states should incorporate principles of international human rights law and international agreements when creating their new constitutional rights and enforcement mechanisms.<sup>165</sup>

#### *A. Why International Human Rights Law Is Needed to Resolve the Affordable Housing Crisis*

Implementing housing as a right requires applying an international human rights law framework, as a preliminary matter, to define the right of adequate housing and the protections individuals could expect once this right has the force of law.<sup>166</sup> International human rights law and multilateral treaties may

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<sup>161</sup> See *infra* notes 173–196 (arguing that state governments can mitigate the public housing crisis by adding a right to housing in their respective constitutions); see also Covenant, *supra* note 7, ¶ 11 (declaring that adequate housing is a human right); U.D.H.R., *supra* note 7, ¶ 25 (recognizing housing as a fundamental human right).

<sup>162</sup> See *supra* notes 116–137 (discussing the United States’ treatment of international human rights agreements and decisions to not treat these agreements as federal law).

<sup>163</sup> See Friedman, *supra* note 9, at 216–19 (explaining the intentional limiting effects of reservations, understandings, and declarations). One such hurdle is that United States foreign policy must comply with the Constitution and treaties must bend to the rights and provisions contained in the Constitution. See RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW OF THE UNITED STATES § 302 (AM. L. INST. 2018) (clarifying that no international agreement may contradict any part of the Constitution). Furthermore, unlike many European nations, the United States does not treat customary norms as legally binding, meaning that in order to enforce international human rights norms, they must be contained in legislation. See Goldsmith, *supra* note 6, at 369 (discussing the disinclination of domestic courts towards enforcing customary international law).

<sup>164</sup> See *infra* notes 166–172 and accompanying text.

<sup>165</sup> See *infra* notes 173–196 (suggesting how states can draw from international human rights law principles to enforce housing as a right). In addition to creating a constitutional right to housing, states must implement adequate enforcement mechanisms to increase compliance with the new constitutional provision. See Young, *supra* note 142, at 85 (explaining that in order to guarantee citizens are not deprived of their rights by third-parties, the government must enact some enforcement mechanism, such as passing laws).

<sup>166</sup> See Tars, *supra* note 13, at 1-13, 1-15 (arguing that a right to adequate housing contained in major international human rights agreements may be successfully enforced in the United States). State governments must look to foreign nations, namely Canada and South Africa, and international agreements as models for the language of a state housing right. See S. AFR. CONST., 1996 § 26 (recognizing

serve as basic models that state governments can follow in reinterpreting housing as a human and constitutional right.<sup>167</sup> Many states have taken steps to ensure adequate housing for all, but the measures adopted, although momentous, are insufficient to meaningfully mitigate the affordable housing crisis.<sup>168</sup> A new strategy is required to combat the size and breadth of the current crisis that the COVID-19 pandemic has intensified.<sup>169</sup>

Other nations achieved increased housing protections by invoking international human rights law to enforce housing as a right and the United States could learn from their accomplishments.<sup>170</sup> Implementation of other international human rights besides housing, such as education and welfare, have en-

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adequate housing as a right); National Housing Strategy Act, S.C. 2019, c 29, s 313 (Can.) (declaring housing as a human right). An international framework is additionally necessary because of the shortcomings of domestic law and the federal government's unwillingness to adequately respect the right to housing. *See Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (denying the existence of a right to housing in the U.S. Constitution or federal law); Goldsmith, *supra* note 6, at 366 (describing the steps taken to ensure international treaties have no legal enforceability in the United States). The continued worsening of the affordable housing crisis is evidence enough that the government must take a new approach in regards to alleviating homelessness and housing insecurity. *See Thrush, supra* note 1 (discussing the exacerbation of the public housing shortage via inadequate funding). The state of the nation's public housing crisis and absence of legislation attempting to curtail the crisis serve as indicators of either the inability or unwillingness of the federal government to treat housing as a right. *See JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV., supra* note 3, at 4–5 (explaining that the number of cost-burdened renters increased for lower income bracket renters, as did homelessness in states with expensive rents); Thrush, *supra* note 1 (describing the lack of affordable housing in the United States and actions taken by the federal government that aggravated the public housing crisis).

<sup>167</sup> *See Kalb, supra* note 152, at 1051 (explaining that states may borrow from international human rights law to give individuals more rights than recognized by the federal government).

<sup>168</sup> *See The Callahan Consent Decree, supra* note 106, ¶ 1 (requiring that New York City provide temporary housing for all homeless men who apply and satisfy the criteria); MASS. GEN. LAWS ch. 23B, § 30 (2018) (requiring Massachusetts to provide temporary housing for needy families via the Massachusetts Emergency Housing Assistance Program). Although these states recognize housing as fundamental, they only guarantee a right to temporary emergency housing and shelter, which, while necessary for the social welfare of citizens, does not provide long-term nor stable housing for needy individuals. *See e.g.* N.Y. CONST. art. XVIII; ch. 23B, § 30. The California State Legislature attempted to pass legislation defining housing as a human right but could not even get the resolution to the Assembly Floor, and a vote was never taken. *See Wiley, supra* note 101 (reporting that the proposed legislation died before a full vote could be taken). This legislation would have declared housing as a right and charged the state with preventing children and families from becoming homeless. Assemb. B. 22, 2019–2020 Leg., Reg. Sess. (Cal. 2019).

<sup>169</sup> *See JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV., supra* note 3, at 4, 33 (explaining that the amount of low rent units has decreased dramatically over the past several years and there are presently more low-income renters than units available); *see also supra* notes 83–89 for a discussion of the current state of low-income housing in the United States and the devastating effects of COVID-19.

<sup>170</sup> *See S. AFR. CONST., 1996* § 26 (declaring housing as a right); S.C. 2019, c 29, s 313 (creating a right to housing in Canada). Citizens in South Africa have taken advantage of the right to bring suit against the federal government for violations of the constitutional right to housing and American citizens should have the freedom to do the same. *See Gov't of the Republic of S. Afr. v. Grootboom* 2001 (1) SA 46 (CC) para. 66 (affirming the right to adequate housing in South Africa and the responsibility of the government to protect and promote this right).

joyed significant success in the United States.<sup>171</sup> Many states and cities have demonstrated a willingness to adopt international law to promote both civil and political, as well as social and economic, rights of citizens.<sup>172</sup>

### B. Using State Constitutions to Enforce Housing as a Human Right

Housing is a human right, and must be treated as such in the United States.<sup>173</sup> Ideally, the United States government would pass federal legislation declaring housing a right for all Americans, however, historical practice relating to international human rights law suggests that this avenue is improbable.<sup>174</sup> A strategy more plausible and practical than federal legislation is adop-

<sup>171</sup> See *infra* notes 157–159 (discussing how states have successfully incorporated positive rights into their constitutions that the federal government has not).

<sup>172</sup> See Kalb, *supra* note 152, at 1056–65 (explaining the influence of international treaties in state court decisions as persuasive soft law); Pipa, *supra* note 151 (describing how cities have taken the initiative to promote U.N. sustainable development goals while also combating significant issues, such as climate change and extremism). One of the more prevalent uses of international human rights law has been the use of human rights treaties as “soft law” and persuasive authority by state courts. See Kalb, *supra* note 152, at 1063–65 (suggesting that although international law is not binding on United States courts, it still may carry persuasive weight, and also providing examples of judges using international treaties as “soft law”); Shelton, *supra* note 31, at 2–3 (explaining the normative and social impacts of non-binding “soft law” on the international community). Attempts to challenge domestic laws as invalid by invoking international law as binding authority have been less successful, although courts are more willing to recognize principles of international human rights in certain contexts, such as capital punishment. See Kalb, *supra* note 152, at 1063–67 (discussing the decrease in reliance on the death penalty resulting in part from an increased number of defendants invoking international human rights treaties that prohibit capital punishment).

<sup>173</sup> See Covenant, *supra* note 7, ¶ 11 (declaring housing as a human right); U.D.H.R., *supra* note 7, ¶ 25 (debuting the universal right to adequate housing); *The Right to Adequate Housing*, *supra* note 11, at 3–9 (discussing the freedoms and entitlements contained within the right to adequate housing that must be promoted by parties to the Covenant). Although the right to housing does not demand governments provide housing for every single person, the U.N. requires that housing be affordable, and, as evidenced by the affordable and public housing crisis, Americans stand to benefit significantly from the declaration of housing as a right. See Thrush, *supra* note 1 (writing on the state of the nation’s affordable housing crisis); *The Right to Adequate Housing*, *supra* note 11, at 6 (clarifying that nations that ratify the Covenant do not have to construct housing for the entire population).

<sup>174</sup> See Alam, *supra* note 111, at 29 (explaining that the United States affirmatively takes steps to avoid giving international agreements power in domestic courts); Friedman, *supra* note 9, at 213–17 (discussing declarations of the federal government stating that even ratified treaties will have no effect on domestic law and describing the tradition of the United States generally not ratifying treaties); Goldsmith, *supra* note 6, at 366 (explaining that all three branches of government have declined to abide by international human rights treaties and laws). A right as expansive and inclusive as housing conflicts with the limited individual protections contained in the U.S. Constitution. See U.S. CONST. amend. X (reserving significant power to the states); Brennan, *supra* note 152, at 548 (acknowledging the Supreme Court’s reluctance to identify additional constitutional rights). Further, the United States is satisfied with its human rights record and demonstrates significant reluctance to recognize any additional rights not contained in the Constitution. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35, 40 (1973) (declining to categorize education as a fundamental or constitutional right); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (holding that Americans are not protected against deprivations of housing by the national Constitution); Hansler, *supra* note 133 (announcing the creation of the

tion and enforcement of housing as a right by individual states through amendments to state constitutions.<sup>175</sup> State constitutions often provide broader protections of individual rights and are easier to amend than the national Constitution, and with the affordable housing crisis worsening every day, time is of the essence.<sup>176</sup>

States should borrow from international human rights treaties and foreign constitutions to define a right to housing in the same way that the federal government would if it ratified one of these treaties.<sup>177</sup> In particular, states should embrace South Africa's justiciable right to housing and affirmative remedies ordered by courts, and should follow Canada by declaring housing as a human right.<sup>178</sup> The current measures taken by states, although significant and revolu-

Commission on Unalienable Rights and its mission to redefine human rights in the United States); Harfeld, *supra* note 124, at 59–60 (explaining the theory of American exceptionalism whereby the United States views itself as a leader for the international community).

<sup>175</sup> See U.S. CONST. amend. X (reserving powers not delegated to the federal government to the states); Brennan, *supra* note 152, at 550 (explaining that the Fourteenth Amendment allows states to grant protections above and beyond the “federal constitutional floor”). Many states have already taken advantage of this amendment and included broad human rights protections in their state constitutions. See Davis, *supra* note 153, at 368, 372 (providing examples of states incorporating human rights into their constitutions that do not exist in the federal Constitution). Justice Louis Brandeis once suggested that a state may “serve as a laboratory” for testing new economic and social experiments without risking harm to the rest of the country; state implementation of rights to housing could be such an experiment. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>176</sup> See Brennan, *supra* note 152, at 550–51 (describing the federal constitution as the “floor” for individual liberties and explaining that states may step in to provide broader protections of human rights); Davis, *supra* note 153, at 367 (showing how states have taken advantage of the gaps in rights left by the federal government to create their own set of individual rights); COLUMBIA L. SCH. HUM. RTS. INST., *supra* 154, at 3 (emphasizing that enforcement of economic and social rights is left solely to the states).

<sup>177</sup> See S. AFR. CONST., 1996 § 26; National Housing Strategy Act, S.C. 2019, c 29, s 313 (Can.); Covenant, *supra* note 7, ¶ 11. As explained above, federalism allows states to provide greater protections of rights not recognized by the federal government and states have the ability to independently adopt international human rights law in legislation. See Brennan, *supra* note 152, at 550–51 (describing federal law as the “constitutional floor” for human rights and civil liberties); Davis, *supra* note 153, at 361–62, 368 (explaining federalism and its influence on states adopting additional economic and social rights not protected by the federal government).

<sup>178</sup> See S.C. 2019, c 29, s 313; *Gov't of the Republic of S. Afr. v. Grootboom* 2001 (1) SA 46 (CC) paras. 45–46 (ordering the government to actively work towards providing accessible housing); Young, *supra* note 142, at 97 (discussing a government commitment to provide housing for all South Africans through development projects). One feature of the Canadian legislation that must be altered to ensure greater success in the United States is the lack of a justiciable right to housing that may create private causes of action. See S.C. 2019, c 29, s 313 (providing no justiciable right to housing); Morrison, *supra* note 139 (explaining entitlements that the National Housing Strategy Act does not contain and describing how this could frustrate the enforcement of housing as a human right). Justiciable rights experience the greatest success of individual protections. See Bradley, *supra* note 155, at 428 (reiterating the significant impact of creating an actionable right that may be subject to judicial review). Although South African courts are also somewhat hesitant to issue individual remedies, the right to housing, as construed by the courts, contains an affirmative privilege to sue for violations of the right. See *Grootboom*, 2001 (1) SA 46 paras. 1–4. (involving individual plaintiffs suing the gov-

tionary, are insufficient to adequately protect a right to housing.<sup>179</sup> Using existing international human rights law and constitutional provisions from other nations, states should create their own constitutional right to housing, rather than merely adopting an existing model.<sup>180</sup> A constitutional right is preferable to statutory law because courts have historically looked to state constitutions for declarations of individual rights.<sup>181</sup>

The substance of the state constitutional right to housing should take the hybrid form of a positive entitlement mixed with a negative right.<sup>182</sup> A positive

ernment for allegedly violating their housing rights); Young, *supra* note 142, at 99 (describing the reluctance of the South African Constitutional Court to grant individual remedy).

<sup>179</sup> See 775 ILL. COMP. STAT. 5/1-103 (2019) (amending the Illinois Human Rights Act to broaden housing rights); MASS. GEN. LAWS ch. 23b, § 30 (2018) (protecting a right to shelter in Massachusetts); The Callahan Consent Decree, *supra* note 106 (creating right to shelter in New York); Delaney, *supra* note 99 (discussing the recent creation of a housing right by the Illinois General Assembly). The maximum extent of state practice currently is granting rights to shelter, which does not do enough to create long-term stability for homeless and cost-burdened individuals and is merely putting a bandage on an exponentially growing problem. ch. 23b, § 30 (protecting a right to shelter); The Callahan Consent Decree, *supra* note 106 (dictating a right to shelter in New York). As housing inequality is significantly tied to income inequality and housing affects many fundamental human and constitutional rights, it is crucial that states affirmatively commit to providing more affordable housing, instead of only guaranteeing housing one day at a time. See NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 110, at 6–7 (articulating the connection between the right to housing and other fundamental human rights).

<sup>180</sup> See *Medellín v. Texas*, 552 U.S. 491, 505 n.2 (2008) (explaining that non-self-executing treaties are not enforceable in domestic law on their own and thus eliminating the possibility of states ratifying or applying non-self-executing international agreements absent enacting legislation from the federal government); *Alston*, *supra* note 129, at 366–67 (arguing that it is highly unlikely the Covenant will ever be legally enforceable in the United States). Rather than relying on the federal government, this Note proposes that states should borrow from these international treaties, mainly the Covenant, and draft their own constitutional amendment defining housing as a right that may be exercised and vindicated by courts or some other judicial body. Covenant, *supra* note 7, ¶ 11 (declaring adequate housing as a right); see S. AFR. CONST., 1996 § 26 (providing a right to housing in South Africa); S.C. 2019, c 29, s 313 (codifying Canadian legislation on housing rights).

<sup>181</sup> See Brennan, *supra* note 152, at 548 (urging states to include broader rights protections in their constitutions); Williams, *supra* note 153, at 192 (emphasizing reliance on state constitutions as sources of individual rights). Judge Stewart G. Pollock of the New Jersey Supreme Court, who voted to require townships to provide realistic opportunities for low- and moderate-income housing in *Southern Burlington County NAACP v. Mount Laurel Township*, recognized the importance of state constitutions as sources of rights, and did so expressly in the context of housing rights. See Pollock, *supra* note 98, at 717–18 (characterizing state constitutions as the primary source for fundamental liberties); see also *S. Burlington Cnty. NAACP v. Mount Laurel Twp.*, 456 A.2d 390, 460, 490 (N.J. 1983) (holding that Mount Laurel Township must provide the “realistic opportunity” of “low and moderate income housing”). Many state constitutions already contain provisions that closely resemble international human rights instruments, including the Covenant, which is evidence that they could include housing as a right as well. See Davis, *supra* note 153, at 372–73 (discussing the similarities between socio-economic rights in state constitutions and those contained in the Covenant, among other international agreements).

<sup>182</sup> See *Report on Adequate Housing 2019*, *supra* note 5, ¶ 17 (recommending countries employ both positive and negative obligations to increase realization of the right to housing). Typically, state constitutions contain positive or affirmative rights, however, this Note contends that because of the current state of the housing crisis and the novelty of this right in the United States, it would benefit

entitlement might resemble the right to shelter resulting from a 1979 New York County Supreme Court decision, *Callahan v. Carey*, which allows homeless individuals to commence action against New York City when it fails to affirmatively protect this right.<sup>183</sup> Under this framework, a constitutional right to adequate housing would require states to pledge resources to increasing affordable housing to suit the growing need of the population.<sup>184</sup> The negative component of the right could prohibit states from demolishing or significantly modifying existing affordable housing without ensuring there is an adequate substitution.<sup>185</sup> This could also prohibit governments from sanctioning rent

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individuals to have constitutions combining positive and negative attributes. See Hirschl, *supra* note 24, at 1071 (defining positive and negative rights in constitutions); Williams, *supra* note 153, at 192 (describing state constitutions as being primarily composed of positive rights).

<sup>183</sup> See *Callahan v. Carey*, 762 N.Y.S.2d 349, 351 (App. Div. 2003) (discussing the legal consequences of the 1981 consent decree); Hirschl, *supra* note 24, at 1071 (describing social welfare programs as a basic example of positive entitlements). Positive rights coincide with the concept of “progressive realization” whereby governments commit to take measures towards implementation of a right, which could include constructing more affordable housing. See Young, *supra* note 142, at 73–74 (explaining that progressive realization entails creating a minimum set of standards for a right and both positive and negative obligations). The remedy granted by the New York County Supreme Court in *Callahan v. Carey* is a positive right because it requires the government to act and provide shelter for individuals who apply and qualify. See *Callahan*, 762 N.Y.S.2d at 351 (restating the obligations of the New York government); Hirschl, *supra* note 24, at 1071 (defining positive rights and providing examples). States should look to the doctrine of *Mount Laurel* as applied in New Jersey because it demands cities take affirmative action and provide housing for low and moderate-income families on demonstration of the need for such housing. See *Mount Laurel Twp.*, 456 A.2d at 460, 490 (affirming the requirement that municipalities ensure the existence of enough low and moderate-income housing to meet the needs of the municipality).

<sup>184</sup> See *Mount Laurel Twp.*, 456 A.2d at 390 (commanding that municipalities provide some affordable housing for low and moderate income families); *Callahan*, 307 A.D.2d at 151–52 (summarizing the obligations of New York City to provide shelter); *Consent Decree*, *supra* note 106 (compelling the state to provide a right to shelter for all those who qualify); Thrush, *supra* note 1 (explaining that there is a growing shortage of affordable housing and an increasing number of Americans rely on federal rental assistance). This Note does not intend to provide a detailed solution to an incredibly complex social, economic, and legal issue, but prior actions taken by courts and legislatures, along with reports, suggest that one practical way to mitigate the affordable housing crisis is to simply build more affordable housing. See *Report on Adequate Housing 2019*, *supra* note 5, ¶ 17 (proposing that governments dedicate more resources to providing housing and rental assistance); see also JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV., *supra* note 3, at 35–36 (explaining measures taken to increase the supply of affordable housing to combat the crisis).

<sup>185</sup> See *Report on Adequate Housing 2019*, *supra* note 5, ¶ 17 (articulating the need for a negative right protecting individuals from deprivation of housing by the government); see also JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV., *supra* note 3, at 4, 33 (stating that the amount of low cost rental units has dropped over the past several years and that there are presently more low-income renters than units available). The treatment of housing as a commodity leads states to prioritize more expensive housing developments over affordable, lower-priced units, and the new right to housing must address this issue. See *Financialization of Housing*, *supra* note 4 (describing how this practice has worsened socio-economic inequality in wealthy nations). This Note includes the stipulation that an adequate substitution must be available for current housing because there are times when existing public housing does not meet the needs of those living there and demolition and replacement is necessary. See Kasakove, *supra* note 94 (discussing the inadequacy of public housing complexes construct-

increases for existing tenants, as one of the fundamental stipulations for adequate housing is that it is affordable.<sup>186</sup>

Critically, individuals could use the newly defined right to raise a claim in a state court or similar adjudicatory body.<sup>187</sup> Housing is unquestionably a human right, and human rights are more effectively realized when supported by the rule of law.<sup>188</sup> Americans must be able to lodge complaints against state actors and private individuals for deprivations of their housing right and receive an effective remedy, as citizens of nations that ratified the Optional Protocol to the Covenant may.<sup>189</sup> Rather than tasking domestic courts with adjudicating these matters, states could create a body or administrative agency tasked with monitoring or ensuring compliance.<sup>190</sup> Much like U.N. treaty bodies,

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ed in Chicago and how destruction of these complexes was an improvement for the city and its low-income and minority residents); *The Right to Adequate Housing*, *supra* note 11, at 3–9 (listing the requisite components for housing to be deemed adequate, including access to adequate services and physical safety).

<sup>186</sup> See General Comment No. 4: The Right to Adequate Housing, *supra* note 53, at 3 (recommending that state governments shield tenants from rent increases); *The Right to Adequate Housing*, *supra* note 11, at 4 (outlining the requirements for adequate housing).

<sup>187</sup> See Bradley, *supra* note 155, at 422 (explaining the significant impact of creating an actionable right that may be subject to judicial review); Litinski, *supra* note 24, at 23 (confirming that economic and social rights are justiciable and arguing that constitutionalizing these rights may be an effective mechanism to promote them); Young, *supra* note 142, at 85 (explaining that in order to guarantee citizens are not deprived of their rights by third-parties, the government must enact some enforcement mechanism); *Report on Adequate Housing 2019*, *supra* note 5, ¶ 1 (arguing that rights holders must be able to challenge deprivations of their rights). A major contributing factor to the success of a housing right in South Africa was the justiciability of the right. See *Gov't of the Republic of S. Afr. v. Grootboom* 2001 (1) SA 46 (CC) para. 90 (finding that the South African government violated the constitutional right to housing); Young, *supra* note 142, at 96–98 (explaining the significance of *Grootboom* and the judicial oversight and enforcement employed by South African courts).

<sup>188</sup> See Covenant, *supra* note 7, ¶ 11(1) (declaring housing a human right); U.D.H.R., *supra* note 7, ¶ 25.1 (introducing adequate housing as a human right); MAYERFELD, *supra* note 23, at 20 (arguing that human rights should be supported by laws to ensure enforcement and have a greater effect on populations).

<sup>189</sup> See G.A. Res. 63/435, annex, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Nov. 28, 2008) (defining the Optional Protocol and laying out its obligations); Economic and Social Council Res. 1985/17, *supra* note 37 (creating the Committee charged with monitoring compliance with the Covenant); Views Concerning Communication No. 2/2014, *supra* note 149, ¶¶ 3.1, 15 (describing a case in which the Committee agreed that the Spanish government violated a Spanish citizen's right to housing following her complaint filed with the Committee). States should adopt language from the Optional Protocol and Covenant, most importantly the commitment of governments to use the "maximum available resources" to realize the rights in the Covenant. See G.A. Res. 63/435, *supra* (emphasizing the commitment of parties to the Covenant); Covenant, *supra* note 7, ¶ 2 (specifying the obligations of parties to the Covenant); Uprimny et al., *supra* note 39, at 627–28 (explaining that parties to the Optional Protocol must actively take steps towards enforcement of economic and social rights for all); Report on the Limburg Principles, *supra* note 40, ¶ 51 (requiring parties to the Optional Protocol to provide effective remedies for rights violations).

<sup>190</sup> See Kaufman, *supra* note 151, at 118 (recommending that state and local governments create monitoring bodies to ensure implementation of sustainable development goals). The Committee acts both as a court and as an administrative agency because it has the authority to hear complaints and can adjudicate claims, despite not being a formal court, and states should construct a similar body. See



these agencies would have authority to receive complaints from individuals as well as review periodic reports submitted by state governments.<sup>191</sup>

States must create their own right to housing instead of applying existing international law or human rights treaties because of the federal government's unfavorable treatment of these laws and agreements.<sup>192</sup> This approach would circumvent the potential conflict between national and international law, as well as the potential legal challenges facing states that attempt to codify non-ratified international treaties.<sup>193</sup> Additionally, state legislatures are the appropriate bodies to task with realization of a housing right because a majority of the rights contained in international human rights treaties, especially the Covenant, are customarily reserved for states to regulate.<sup>194</sup>

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G.A. Res. 63/435, *supra* note 189, ¶ 2 (granting the Committee authority to hear claims of rights violations from individuals); Economic and Social Council Res. 1985/17, *supra* note 37, ¶ f (delegating to the Committee the authority to receive reports from participating nations). States could likewise create administrative agencies tasked with monitoring the current state of affordable housing and ensuring development agencies are complying with their new positive and negative obligations. *See generally Treaty Monitoring Bodies*, *supra* note 36 (summarizing that the role of treaty bodies is to monitor and ensure compliance with international agreements).

<sup>191</sup> *See* G.A. Res. 63/435, *supra* note 189, ¶ 2 (resolution outlining the powers and duties of the Committee for parties to the Optional Protocol); Economic and Social Council Res. 1985/17, *supra* note 37, ¶ f (defining the initial obligations of the Committee); Alston, *supra* note 129, at 370 (explaining that the main obligation of parties to the Covenant is submitting comprehensive reports on achievement of the rights in the Covenant to the Committee).

<sup>192</sup> *See* Bradley, *supra* note 155, at 422–24 (explaining that customary international law does not create private causes of action that may be exercised in domestic courts and therefore concluding that rights must be included in legislation to have legal effect); Friedman, *supra* note 9, at 216–20 (describing how RUDs, imposed on almost every international instrument signed or ratified by the United States, prevent international law from ever superseding state law). The current authority of international human rights law is persuasive, at best, and it would be idealistic to expect norms to change so significantly across all the states that such implementation of international treaties would be feasible. *See* Kalb, *supra* note 152, at 1059–60 (discussing the persuasive and non-binding authority of international human rights instruments like the Covenant).

<sup>193</sup> *See* RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW OF THE UNITED STATES § 302 (AM. L. INST. 2018) (reiterating the supremacy of the Constitution and its practical effects on implementing international law in the United States). Although Article VI of the Constitution declares that ratified treaties are functionally equivalent to federal law in the United States, the enforceability of treaties that the United States signed, but expressly did not ratify, is still questionable and a source of continued scholarly debate. *See* U.S. CONST. art. VI (declaring duly ratified treaties as “supreme Law of the Land”); Kalb, *supra* note 152, at 1057 (explaining the uncertainty of states in regards to the legal applicability of international agreements in state courts).

<sup>194</sup> *See* Davis, *supra* note 153, at 368 (suggesting that states may implement international obligations and rights that the federal government does not recognize and supply greater protections for citizens). Many of the rights in the Covenant that the United States could codify are economic and social rights, which have historically been primarily reserved for the states, consistent with principles of federalism and the practice of allowing states to be the leading authority on declaring individual rights. *See id.* (describing social and economic human rights protections in state constitutions that are not recognized by the federal government); Spiro, *supra* note 141, at 575 (explaining that the United States never ratified the C.R.C. because it involved an area regulated almost entirely by states). States took advantage of this opportunity to expand rights by creating laws requiring adequate public education, despite the non-existence of a constitutional right to education, and could potentially do the same

This Note is optimistic about the prospects of a housing right, however, this proposal is merely a starting point for mitigating the effects of the housing crisis and is in no way intended to be a comprehensive plan of action for solving such a complex, multifaceted problem.<sup>195</sup> Lastly, though it is undoubtedly true that states may embark on construction of affordable housing without first declaring housing as a right, creating a constitutional right and giving Americans a vehicle to demand action in courts has the potential to significantly accelerate the process of providing the affordable housing that is so desperately needed.<sup>196</sup>

## CONCLUSION

Past foreign practice and a general hesitancy to give international agreements any legal force in domestic law have led to a struggle to protect and promote fundamental human rights, including housing, in the United States. The worsening affordable housing crisis is a painful demonstration of this struggle. Using an international human rights law framework, the United States can begin taking significant steps to solve its accelerating housing crisis at the state level. Housing is a human right and must be included in state constitutions so that it may be justiciable and enforceable in domestic courts. Many states have demonstrated a willingness both to adopt international human rights law and to broaden housing rights for residents, signaling promise that this strategy could experience success. Using foreign nations that recognize a right to housing and existing principles of international human rights law as models, states will be able to individually mitigate the affordable housing crisis and ensure human rights are better protected on the domestic front.

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with housing. *See* Rebell, *supra* note 130, at 138–39 (discussing state supreme court cases declaring education a fundamental right regardless of the Supreme Court’s holding that education is *not* a fundamental right).

<sup>195</sup> *See* Alston, *supra* note 129, at 372–73 (explaining that one of the major obstacles to ratification of the Covenant in the United States is a general non-acceptance of economic and social rights as enforceable rights); Young, *supra* note 146, at 654 (explaining that positive government duties may take a significant amount of time and resources to be fulfilled).

<sup>196</sup> *See* *Report on Adequate Housing 2019*, *supra* note 5, ¶¶ 1, 15 (arguing that one must be able to bring claims alleging deprivation of their rights to truly be a “rights holder”); Young, *supra* note 127, at 658–59 (discussing the fact that parties to the U.D.H.R. agree to undertake positive measures to promote the rights recognized in the treaty). State governments will be compelled to act if courts find that individuals’ constitutional rights are being violated either by the actions or inactions of the government or private individuals. *See* Young, *supra* note 127, at 659 (explaining that parties to the Covenant must take economic, technical, and legislative steps to achieve realization of social and economic rights).