

The Ambition and Transformative Potential of Progressive Property

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The emerging progressive property school celebrates and finds its meaning in the social nature of property. Rejecting the idea that exclusion lies at the core of property law, progressive property scholars call for a reconsideration of the relationships owners and nonowners have with property and with each other. Despite these ambitions, progressive property scholarship has so far largely confined itself to questions of exclusion and access. This Essay argues that such an emphasis glosses over race-related acquisition and distribution problems that pervade American history and property law. The modest structural changes supported by progressive property scholars fail to account for this racial history and, by so doing, present a limited vision of the changes to property law that progressive scholars should support. Though sympathetic with the political and scholarly orientation of the progressive property school, and with its policy arguments regarding exclusion and access, I argue that the first priority of any transformative project of progressive property must be revisiting acquisition and distribution.

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INTRODUCTION

The goal of this Essay is to pick a fight with progressive property scholars. But because I anticipate getting pummeled by the leaders in the field, I will first explain why a vigorous debate on the left would be a good thing. Now is an interesting time to be a property law scholar. The big issues seem to be up for grabs: What is property? How dynamic or stable should rules be? What does good academic scholarship look like? What, if anything, do property owners owe the public? Heated—at least by academic standards—intellectual debates on these issues spill across the pages of law reviews and dominate conference proceedings.¹ Led by professors Thomas Merrill and Henry Smith, the conservative camp argues that the informational value of rules such as the

1. See Jane B. Baron, *The Contested Commitments of Property*, 61 HASTINGS L.J. 917, 918–20 (2010) (discussing the heated nature and terms of the debate); John A. Lovett, *Progressive Property in Action: The Land Reform (Scotland) Act 2003*, 89 NEB. L. REV. 739, 743–50 (2011) (same). For examples of law review issues covering these debates, see articles from the *Symposium on New Directions in Property Theory*, 160 U. PA. L. REV. 1853, 1853–2225 (2012); *Special Issue: Property and Obligation*, 94 CORNELL L. REV. 743, 743–1071 (2009).

right to exclude and the *numerus clausus* principle cautions against changing existing law.² The progressive camp, in contrast, argues that property is about more than just exclusion and sees more areas of the law that should be changed to account for societal interests.³ The war is raging across the aisle and neither camp seems particularly interested in engaging in constructive dialogue or self-criticism. Something is lost, however, when academic factions mute their internal challenges. Breaking from that tendency, this Essay engages in a left-flanking maneuver, challenging mainstream progressive property scholarship as inadequately attentive to the history and present force of racialized acquisition and distribution of property.

Although academics prefer to assert their differences as mere suggestions of areas ripe for scholarly attention, progressive property scholars need to fight among themselves.⁴ The choice of what to emphasize and where to devote scholarly attention is value laden. The history of race-related acquisition and distribution of property cannot be simply written off as an area that will be covered in the future, because such neglect or choice of emphasis suggests that property's troubling history is a secondary concern. The centrality of race and poverty in American property suggests that to deemphasize this history is to mischaracterize and undermine what should be the progressive vision of property law. Debates that center on exclusion and force progressives to defend relatively modest assertions, such as those that dominate property law today, limit progressive imagination and ambition. Proposals to help those without property or to correct past wrongs seem unworkable and utopian when the major debates animating the field largely ignore such topics. Debate among those who share a similar progressive outlook might help shift scholarly attention from theoretical discussions of what property is to a discussion of how property law can help historically marginalized groups.

Given the goal of sparking a debate on the left, this Essay pays only passing attention to conservative scholarship and instead focuses on an emerging school of property law scholarship on the left. Labeled "progressive property" by four leading scholars—Professors Gregory Alexander, Eduardo Peñalver, Joseph Singer, and Laura Underkuffler—who published a joint statement of common principles, this school seeks to reframe and reimagine

2. Merrill and Smith developed their information-based theory of property over a series of articles spanning more than a decade. *See, e.g.*, Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849 (2007); Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000).

3. *See infra* Part I (presenting in detail the arguments of progressive property scholars).

4. Although most academics prefer to frame their assertions less confrontationally, a mere suggestion that scholars turn their attention to this history would fail to reflect the degree of difference between scholarship that glosses over this history and scholarship that prioritizes accounting for this history.

property law.⁵ Though still in its formative stage, the progressive property school of thought consists of two linked propositions: (1) that conventional law and economics and the related assumption of a single metric—efficiency—should not be the sole means of evaluating laws and establishing property norms, and (2) that alternative, progressive frameworks should be used.

Progressive property scholars are united in the general direction of their scholarship and their hopes for property law, and they offer a number of overlapping but not identical alternative visions. Alexander's normative argument is that property law should be guided by recognition of the importance of owners' social obligations, a position he supports with positive descriptions of cases that provide implicit support to such a social-obligation norm.⁶ While sharing Alexander's emphasis on human flourishing, Peñalver asserts that property should inculcate virtue.⁷ Although embracing more than one framework, what Singer terms a democratic model of property law similarly emphasizes the connection between property law, equality, and social relations.⁸ The works of Professor Jedediah Purdy and Underkuffler, among others, offer alternative progressive visions of and for property law and arguably fit within the emerging progressive property school, although they have never adopted the label.⁹ The collective progressive property works of these five scholars trace the movement's contours, but understanding progressive property requires seeing these scholars' particular identities as secondary to the emerging school's choices regarding what issues academics should emphasize, and its general social conception of property.

Progressive property can be understood as both a reaction against the particularly strong influence of economic approaches to the law and an assertion that property law making must be more nuanced, more expressly political, and less preoccupied with the owner's right to exclude. By rejecting the idea that the scope of concern should be limited to efficiency and utility maximization, scholars create more space to contest values. Arguing that "[p]roperty implicates plural and incommensurable values," progressive property scholars call for socially oriented politics to replace the seemingly mechanical application of rules supporting law and economics' normative values.¹⁰ At the same time, the "progressive" in "progressive property" captures

5. Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009).

6. Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009).

7. Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821 (2009).

8. Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009 (2009).

9. *Id.* at 1046–47.

10. Alexander et al., *supra* note 5, at 743. For pragmatic defenses of commensurability, see Richard Craswell, *Incommensurability, Welfare Economics, and the Law*, 146 U. PA. L. REV. 1419 (1998); Richard A. Epstein, *Are Values Incommensurable, or Is Utility the Ruler of the World?*, 1995 UTAH L. REV. 683.

the generally left-leaning aspirations of the school of thought. These scholars emphasize limits on the right to exclude and focus on “the underlying values that property serves and the social relationships it shapes and reflects.”¹¹ Although not acknowledged in the joint statement, commonalities of these scholars include reliance on both economist Amartya Sen’s capabilities approach to human flourishing and the subset of property law cases that fit well with the progressive property agenda.

In this Essay, I suggest that the ambitions of the progressive property school do not fit the inherently conservative nature of U.S. property law. Although I share the hope of moving property from its excessive focus on exclusion to a more socially minded orientation, efforts to change property law from the inside—through use of property concepts alone—are unlikely to bear fruit. Ironically, progressive property is at once too radical and not radical enough. Notions of the social obligations of ownership, even if reflecting some of the mechanics of the law, are at odds with popular ideas of property. On the other hand, so far progressive property scholars have largely labored in the theoretical realm and have limited their practical explorations to a few carefully selected cases and vague observations that distribution matters. Curiously absent from these discussions is the recognition that without a fresh start to correct for the problematic origins of property in the United States and the exclusionary effect of ownership rights property law is, and will likely remain, largely conservative when viewed from the perspective of the propertyless.¹²

Progressive property is still an emerging school of thought, but one in need of a course correction. Rather than treating acquisition and distribution as irrelevant or secondary to rules involving use rights, progressive scholars should embrace and emphasize these issues. Legal and popular understanding of the racialized nature of acquisition and distribution offers a powerful means of questioning the exclusionary force of ownership. An acquisition- and distribution-centered approach would bring attention to prior wrongful acquisition and to related, currently experienced inequality. Rather than being based on absolute rights of exclusion, individual property rights are necessarily contextual. In the United States, race is a core aspect of that context.¹³

Limiting the owner’s right to exclude in light of the public interests at stake in private property is a common theme of progressive property scholarship, and in certain circumstances such limits can come close to

11. Alexander et al., *supra* note 5, at 743.

12. For more on how prioritizing marginalized groups’ experiences might change property law, see A.J. van der Walt, *Property and Marginality*, in *PROPERTY AND COMMUNITY* 81, 81–105 (Gregory S. Alexander & Eduardo M. Peñalver eds., 2010).

13. By advocating a race-centric approach, and one that is based largely on the experiences of Indians and African Americans, I do not mean to suggest that other groups—in particular, women, LGBT individuals, and other racial groups—have not also been subordinated in ways that should inform how property is understood.

promoting land redistribution.¹⁴ But largely left off the table in the progressive property articles is the need to revisit acquisition in light of past wrongs and perhaps to engage in corrective redistribution.¹⁵ As a consequence of ignoring acquisition and distribution, the race-based property advantages enjoyed by whites will remain and will continue to undermine the possibility that society will realize a robust version of progressive property.

The minimal attention in progressive property articles to issues of acquisition and distribution is somewhat surprising given the general appreciation among progressive property scholars of the historical injustice suffered by Indians and blacks. Joseph Singer, for example, is a leading Indian (Native American) law scholar and has written extensively on the taking of Indian land and property rights.¹⁶ But perhaps as a matter of political convenience, progressive property articles treat the taking of the continent and the subjugation of black labor either in passing or as a speed bump in a larger story.¹⁷ This criticism of progressive property as it exists could be likened to the volleys critical race theorists fired at critical legal studies (CLS); namely, that CLS failed to adequately account for race.¹⁸ Critical race scholars essentially have claimed the day, partly as a result of this maneuver—after all, who wants to be accused of being insensitive to race issues? CLS as an

14. This is arguably the case internationally for some residents of informal housing—slums in India, *favelas* in Brazil, and *champas* in El Salvador—who enjoy relative security of possession despite not having formal title. Land titling converts these extreme limitations on an owner's right to exclude into examples of property redistribution. See generally HERNANDO DE SOTO AND PROPERTY IN A MARKET ECONOMY (D. Benjamin Barros ed., 2010).

15. This is not to say that these scholars are not concerned with distribution and acquisition, but in their progressive property scholarship such concern has taken a backseat. To be fair, Singer briefly discusses acquisition in a manner that aligns with my goals for this Part: "If we were to take seriously the idea that property rights are legitimate only if they have legitimate origins, then we would have to reorient our thinking to focus on the concept of equal opportunity and the extent to which it is present or lacking in contemporary American society." Singer, *supra* note 8, at 1022–23. In other work Singer has written extensively about acquisition and distributional fairness. See, e.g., Joseph William Singer, *Original Acquisition of Property: From Conquest & Possession to Democracy & Equal Opportunity*, 86 IND. L.J. 763 (2011).

16. See, e.g., Singer, *supra* note 15; Joseph William Singer, Reply, *Double Bind: Indian Nations v. The Supreme Court*, 119 HARV. L. REV. F. 1, 3–7 (2005) [hereinafter Singer, *Double Bind*]; Joseph William Singer, *The Continuing Conquest: American Indian Nations, Property Law, and Gunsmoke*, 1 RECONSTRUCTION 97 (1991).

17. Glossing over past wrongs is politically convenient because, under the reigning mythologies of the American melting pot and deserved wealth, reparations and other efforts to correct for historical injustices are unlikely to resonate with white Americans. See Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 79–80 (1993).

18. See, e.g., Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301 (1987); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987).

intellectual movement has withered.¹⁹ But, while I think progressive property could, and should, take lessons from the contributions of critical race scholars, my goal is not to lay asunder the impulse or agenda of progressive property. The dominance of critical race theory and the passage of CLS represent not only the relative success of a new wave of race-centered scholarship but also a lost opportunity for collective work.²⁰ I do think, however, that property scholars, particularly progressive ones, ought not to gloss over how a significant amount of property in the United States was acquired, even where it is hard to fashion a hopeful story out of such history and its present consequences.²¹

Progressive property's relative neglect of racialized acquisition is also surprising because moral critiques of property often center on acquisition questions. Carol Rose's typology of when "property come[s] under moral attack" is a useful reminder of the importance of acquisition.²² Rose acknowledges the existence of other issues but "concentrate[s] on three somewhat overlapping loci: acquisition (where it is argued that property is based on wrongful acts of acquisition), distribution (where it is argued that property is unequally and unfairly distributed), and commodification (where it is argued that treating things as property undermines their true meaning)."²³ Rose's essay in many respects foreshadows the progressive property school of thought; Rose writes that "the moral objections to the institution of property generally are drawn from the sense that property concedes too much to human self-interest."²⁴ In many ways this could stand in as a summary of the progressive property argument: law and economics' approaches to property concede too much to narrowly defined self-interest. But by concentrating almost entirely on Rose's third locus, *A Statement of Progressive Property* expresses a version of progressive property that rests on a challenge to commodification and abandons acquisition and, to a degree, distribution.²⁵

The responses to progressive property offered to date focus primarily on how progressive property fits, or does not fit, the property law canon. The first

19. CLS's other central fault was its inability to make prescriptive arguments despite very effectively dismantling existing legal structures; CLS scholarship was great on critique but short on policy suggestions.

20. For a proposal of how critical race theory and critical legal studies might engage in a joint project, see Daria Roithmayr, *Left over Rights*, 22 CARDOZO L. REV. 1113, 1131–33 (2001).

21. Singer makes an effort to put a positive spin on part of this history. In a recent essay, Singer begins by saying we must acknowledge the "bad news," namely, that "[w]e cannot trace our land titles to a just origin, and we should stop pretending we can. Our titles come from a combination of military conquest of sovereign nations and forced relocations of free peoples." Singer, *supra* note 15, at 773. But Singer finds hope in the practice of democracy and the possibilities of pursuing equal opportunity through redistributive policies. *Id.* at 773–78.

22. Carol M. Rose, *The Moral Subject of Property*, 48 WM. & MARY L. REV. 1897, 1903 (2007).

23. *Id.*

24. *Id.* at 1902–03.

25. See Alexander et al., *supra* note 5.

critical responses to progressive property were included in same issue of the *Cornell Law Review* that published *A Statement of Progressive Property* and the Alexander, Peñalver, and Singer articles.²⁶ The responses, focused on the contributions of Alexander and Peñalver, generally applaud the authors for bringing new ideas or underutilized theories to bear on property law and for opening up a new scholarly path.²⁷ But the responses also share some skepticism about the authors' creative use of outlier cases and the frameworks—social obligation and virtue—offered as alternatives to law and economics.²⁸ My argument shares some of the concerns contained in these responses, particularly Henry Smith's observations regarding the core and the periphery of property law.²⁹ But the main contribution I hope to make in this Essay is to question the efficacy of progressive property in its current state while accepting the scholarly movement's goals as worthy ones.

Progressive property is an example of leading scholars' attempting to make the best out of property law's available material. Unfortunately for the project, the common understanding of property as a right to be free from outside interference in one's domain is the rock on which progressive scholars inevitably bump their heads.³⁰ Not only does this common understanding provide some real benefits for owners and arguably society, but it also limits what can be accomplished through the rhetoric of social obligation, virtue, and democratic property. Realizing progressive change in property's role in our society requires destabilizing this common understanding. Arguing that property rights are associated with obligations is a start, but it does not do enough to undermine the societal sense of entitlement and deservedness generally associated with ownership. Acquisition and distribution, although neglected by progressive property scholarship so far, represents a site of intervention to challenge the extent to which property rights trump the interests of the propertyless.

Examining acquisition and distribution in a meaningful way involves deliberately shaking the foundation of much of the property held in the United States. This is something worth doing. Progressive property scholarship, by

26. The responses, in order of publication, are Eric R. Claeys, *Virtue and Rights in American Property Law*, 94 CORNELL L. REV. 889 (2009); Jedediah Purdy, *A Few Questions About the Social-Obligation Norm*, 94 CORNELL L. REV. 949 (2009); Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959 (2009); Katrina M. Wyman, *Should Property Scholars Embrace Virtue Ethics? A Skeptical Comment*, 94 CORNELL L. REV. 991 (2009).

27. See, e.g., Claeys, *supra* note 26, at 890–91; Purdy, *supra* note 26, at 949; Smith, *supra* note 26, at 960.

28. See, e.g., Smith, *supra* note 26.

29. See *id.* at 971–80.

30. As Singer explains, thinking of property in terms of protection of the rights of owners, what he calls the “castle model” of property, continues to captivate judges and the public. Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309, 316–22 (2006).

engaging in such a project, can help lessen the extent to which property law protects the propertied classes and the status quo.

Rather than being buried in the minutiae of property law rules and the details of regulatory change, this Essay follows the pattern, established by *A Statement of Progressive Property* and the scholarship on progressive property, of attempting to cover a broad field. I begin, in Part I, with a brief overview of progressive property. I focus on the articles by Alexander, Peñalver, and Singer, and a related recent work by Purdy.³¹ In Part II, I present the heart of this Essay, a critique of progressive property's neglect of acquisition and distribution issues. Progressive property scholars, however, aim to do more than simply better understand property; they hope that property law will change in a decidedly progressive way. Therefore, although in Part II I challenge some of the positive descriptions of law made by progressive property scholarship, my chief concern is the risk that the current form of progressive property will be treated as the exclusive field for progressive concern. In Part III, I argue that scholars should tackle issues where their efforts are more likely to make a difference or, if they want to stay within the domains of property law, they should give acquisition and distribution more attention. I conclude by suggesting that the debates currently animating property law are overly narrow and fail to provide the tools needed for progressive property to live up to its promise.

I.

PROGRESSIVE PROPERTY'S MANY FACES

Progressive property is more an orientation than a fully defined set of values or intellectual commitments. While Alexander, Peñalver, and Singer offer three particular accounts of progressive property, there is space for other scholars to offer alternative theories—divorced from Alexander's social-obligation norm, Peñalver's virtue ethics, or Singer's democratic model—that would still fit under the ambit of progressive property. The brief, two-page *Statement on Progressive Property* seemingly covers the minimum requirements for scholarship to fit within the new school of thought. Presumably, as the emerging school of property scholarship develops, a range of voices will arise, but for now we can best understand progressive property through the articles published in the *Cornell Law Review*.

31. It is worth emphasizing that my argument is based on the progressive property contributions of these authors and does not attempt the herculean task of surveying their many scholarly contributions. To give just one example, according to his faculty profile, Alexander is an author or coauthor of twelve books, forty-six articles or book chapters, and nine essays or book reviews. Gregory S. Alexander CV (Dec. 3, 2012), http://ww3.lawschool.cornell.edu/faculty/faculty_cvs/Alexander.pdf. It should also be noted that Purdy fits somewhat awkwardly here because, unlike the other scholars, he has not self-identified as a progressive property scholar.

A. The Social-Obligation Norm

In *The Social-Obligation Norm in American Property Law (The Social-Obligation Norm)*, Gregory Alexander argues that a social-obligation norm operates in U.S. property law and that this norm should be strengthened.³² Although the norm is as yet unacknowledged by courts and scholars, Alexander finds it in various decisions and doctrines that limit a property owner's dominion when social values would be threatened by libertarian protection of exclusionary rights.³³ In drawing out a latent and unappreciated aspect of property law, *The Social-Obligation Norm* engages in a scholarly project reminiscent of Joseph Singer's *The Reliance Interest in Property*, a work Alexander cites as in line with his own theory.³⁴

Alexander argues that people are inherently social and, relatedly, that property owners have obligations that run to the community. The basis of these obligations are developed through heavy use of Aristotelian virtue ethics and the capabilities approach of Martha Nussbaum and Amartya Sen.³⁵ Alexander's assertion that property owners have an obligation to help the community is rooted in the idea that human flourishing is all about community and social relations.³⁶ Alexander explains "[t]he major claim here, in short, is that our (and others') dependence creates, for us (and for them), an obligation to participate in and support the social networks and structures that enable us to develop those human capabilities that make human flourishing possible."³⁷ Indeed, bringing Sen's capabilities and human flourishing approach to property law is arguably *The Social-Obligation Norm's* core contribution to the literature.³⁸

The remainder of the article analyzes property law examples, and some counterexamples, of the asserted social-obligation norm. Most of the examples are recognizable to those who teach property law, and Alexander aptly connects them to the social-obligation norm.³⁹ But as a leading casebook author,⁴⁰ Alexander recognizes that the principles he finds in the cases surveyed in the article are not fully integrated into mainstream property law. Alexander writes "[t]he point is not that current American property law, public and private, has already fully internalized the idea that private owners owe thick responsibilities to the communities to which they belong. It has not. But American property law has partially internalized social obligations, albeit indirectly and

32. Alexander, *supra* note 6, at 748.

33. *Id.* at 773–810.

34. *See id.* at 748 n.7.

35. *Id.* at 760–73.

36. *Id.* at 767.

37. *Id.* at 770.

38. Alexander also identifies this part of the paper as the "core" section. *Id.* at 751.

39. *See, e.g., id.* at 773–810 (discussing in turn eminent domain, nuisance, property rights in postapartheid South Africa, historical preservation, environmental regulations, and beach access).

40. JESSE DUKEMINIER ET AL., PROPERTY (7th ed. 2010).

confusingly.⁴¹ This forthright admission anticipates many of criticisms of the assertion that the social-obligation norm animates a broad swath of property law. Thus, although *The Social-Obligation Norm* looks to everything from eminent domain and nuisance to historic preservation and environmental regulations, the best examples Alexander offers are *Modderklip*,⁴² a South African case where the court deployed the country's socioeconomic rights-protective constitution to help recognize squatters' rights, and American case law limiting the right to exclude.⁴³ I agree with Alexander that the *Modderklip* decision "fits very comfortably within the social-obligation theory," but it is telling that Alexander had to look so far afield to find such a case.⁴⁴

In U.S. law, Alexander's coverage of right-to-exclude (or no-right-to-exclude) cases provides the best way to understand the social-obligation norm theory. Alexander lauds the exceptional cases holding that owners *do not* have the right to exclude others from their property. Alexander argues we can see the workings of the social-obligation norm in the beach-access cases granting the public access to dry sand portions of the beach owned by private parties.⁴⁵ On their face, the cases are simply extensions of the public trust doctrine; the public traditionally had access to the ocean. In *Matthews v. Bay Head Improvement Ass'n*,⁴⁶ the New Jersey Supreme Court took recreational use of beaches into account in expanding traditional access rules to include dry sand portions of the beach.⁴⁷ Like the New Jersey Supreme Court, Alexander highlights that "the owner's right to exclude is preserved" where nonowners have reasonable access to public beaches.⁴⁸ For Alexander, the limitations on owners' right to exclude in the beach access cases are examples of owner obligations arising narrowly from the importance of recreation and more broadly from the value of human interdependency.⁴⁹

Moving from the Jersey Shore to a Jersey farm, the next question Alexander considers is whether legal aid and medical professionals can enter private property over the objections of the owner in order to provide assistance to migrant farmworkers housed there. In *State v. Shack*⁵⁰—which along with *Javins* is perhaps the most progressive decision found in the property law canon—the New Jersey Supreme Court, in expansive language held against the property owner, finding there was no right to exclude in this case. For

41. Alexander, *supra* note 6, at 774.

42. *Modder East Squatters v. Modderklip Boerdery (Pty) Ltd.* 2004 (8) BCLR 821 (SCA) (S. Afr.).

43. See *infra* notes 46–53 and accompanying text (discussing Alexander's exploration of U.S. right-to-exclude case law).

44. Alexander, *supra* note 6, at 790.

45. *Id.* at 805–07.

46. 471 A.2d 355 (N.J. 1984).

47. *Id.* at 366–70.

48. Alexander, *supra* note 6, at 807.

49. *Id.* at 805–07.

50. 277 A.2d 369 (N.J. 1971).

Alexander, the result—recognition of migrants’ property right to have visitors—supports values of access to the capacity of life and human flourishing.⁵¹ Although I have a more pessimistic view of *Shack*’s transformative power, discussed in detail in Part II, it is probably the case that most embodies both progressive property and Alexander’s social-obligation norm.⁵² Eduardo Peñalver certainly seems to think so. In *Land Virtues*, Peñalver says the “case exemplifies, in many ways, the rich pluralism of the approach I am advocating.”⁵³ After highlighting what was at stake for the migrant farmworkers, Peñalver notes that the owner still retains a “substantial degree of freedom” in how the property is used and who can enter.⁵⁴ There is some irony, however, in how Peñalver characterizes what the court did in “enforcing the farmer’s obligations to act virtuously.”⁵⁵ After all, where is the virtue if the law gives you no choice but to be virtuous?⁵⁶

B. Land Virtues

Eduardo Peñalver’s *Land Virtues* makes two principal arguments. First, it engages in an extensive critique of law and economics’ approaches to property law and land-use decisions.⁵⁷ Second, Peñalver offers Aristotelian virtue ethics as a preferable way of considering property law because it allows morality, and not economics alone, to come to bear on policy.⁵⁸ Although the number of articles dedicated to attacking the primacy of law and economics approaches could perhaps fill a small library,⁵⁹ Peñalver’s critique is the most extensive offered so far by the progressive property school. Using evidence that people do not always behave as predicted by the simplified *Homo economicus* of law and economics, Peñalver argues that law and economics is often unable to make strong predictions regarding human behavior.⁶⁰ More importantly, deference to owners predicated on the economist’s assumption that owners will maximize the long-term value of their land, Peñalver argues, often fails to protect important values.⁶¹

51. Alexander, *supra* note 6, at 808–09.

52. See Helen Hershkoff, “Just Words”: *Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521, 1566 (2010) (noting that *Shack* “holds iconic status in theories of property rooted in conceptions of human flourishing, virtue, and democracy,” and citing to Alexander, Peñalver, and Singer).

53. Peñalver, *supra* note 7, at 883.

54. *Id.* at 884.

55. *Id.* (emphasis added).

56. See Wyman, *supra* note 26, at 1004.

57. See Peñalver, *supra* note 7, at 832–60.

58. See *id.* at 868–69.

59. See, e.g., *id.* at 823 n.5 (collecting sources).

60. See also Gregory S. Alexander & Eduardo M. Peñalver, *Introduction*, in PROPERTY AND COMMUNITY, *supra* note 12, at xxii (making the same argument).

61. Peñalver, *supra* note 7, at 848–60.

Land Virtues is quite literally a grounded article: many of the arguments are based on the idea that land is different from other resources. As Peñalver explains, land parcels by definition are unique, and land also has a memory, meaning that what happens in the initial period will largely determine how the land can and is used in subsequent periods.⁶² This is not to say that land uses do not change, but the construction of, for example, a community of homes and businesses will make it likely that future owners will use the buildings or at least will not convert the land back to its earlier state.⁶³ The same can be said of environmental destruction and exploitation of the land; one generation's open-pit mine may make the land largely unusable for future generations.⁶⁴

Law and economics-based approaches risk confusing “what is” for “what should be” and equating model-predicted human behavior with actual human behavior.⁶⁵ The examples Peñalver uses to illustrate the limitations of applying law and economics to property law are well chosen: owners in gentrifying areas resist gentrification even though it would mean higher property values;⁶⁶ individuals derive value from ownership that is not reflected, or not perfectly accounted for, in market pricing;⁶⁷ and the discount rate used by owners seems to facilitate excessive consumption today to the detriment of future generations.⁶⁸ In all of these cases, economic reasoning alone either misses a big part of what motivates landowners or wrongly suggests that landowner economic self-interest will fully protect community interests.

The thin version of law and economics that Peñalver presents risks being characterized as a too-convenient foil. Peñalver protects against this by noting that the argument is not directed against more nuanced understandings of economics such as are found in behavioral economics and new institutional economics, and repeatedly telling the reader that economics can contribute to our understanding of property law.⁶⁹ Peñalver argues that a cost-benefit framework, when used to normatively support particular policies, does not address the incommensurability of values at stake in land-use decisions.⁷⁰ Land-use scholars who simply adopt “the maximizing presuppositions of

62. *Id.* at 829–32.

63. *Id.* at 831.

64. *See id.* at 853–56 (highlighting the intergenerational justice issues arising from land's memory and environmentally harmful land uses).

65. A similar sort of confusion—that overemphasis on the beauty of economic models and inattention to the ways the market can deviate from models of the market—might help explain how economists failed to prevent or predict the bursting of the housing bubble and resulting depression of 2008. *See* Paul Krugman, *How Did Economists Get It So Wrong?*, N.Y. TIMES, Sept. 6, 2009, at MM36.

66. Peñalver, *supra* note 7, at 842–44.

67. *Id.* at 834–41.

68. *Id.* at 854–56.

69. *See, e.g., id.* at 886 (“Virtue theory's strength is its ability to provide the framework for exploring the content of that space beyond economics, without rejecting the significance of the information provided by economic analysis.”).

70. *Id.* at 858.

economic theory as their normative framework,” Peñalver concludes, neglect the fundamental question of how the law can help “bring our land-use practices into greater harmony with our moral obligations.”⁷¹ As this argument suggests, despite a few caveats, Peñalver’s attack really is directed at the law and economics school writ large. After all, most law and economics–based writing rests on all manner of simplifications,⁷² precisely in order to avoid the sort of moral questions Peñalver thinks property scholars should be asking.⁷³

The battle between the Cornell and Chicago schools of thought that rages through the first half of *Land Virtues* sets the stage for Peñalver to propose a virtue-based vision of progressive property. Peñalver’s advocacy for virtue theory begins on a cautious note: although “there are other approaches that might similarly be able to situate economic analysis within a broader moral framework,” he continues by stating that his purpose “is not to present a knock-down case on behalf of a virtue theory of property.”⁷⁴ Peñalver’s definition of virtues resonates well with the values found in Alexander’s *The Social-Obligation Norm*. Peñalver writes that “[v]irtues are acquired, stable dispositions to engage in certain characteristic modes of behavior that are conducive to human flourishing.”⁷⁵ To put it mildly, this is not the normal fare of property law scholarship.⁷⁶ Virtues improve decision making in the context of multiple, incommensurable values and can help people “strike the right balance between our obligations towards others and our inclination to favor our own interests.”⁷⁷ Virtue ethics defines the good according to a particular standard, not based on observed preferences à la economics or even democratic decision making. Using the virtues of industry, justice, and humility to illustrate his case, Peñalver asserts that property law can and should foster virtue.⁷⁸

71. *Id.* at 860.

72. In his response to Alexander’s *The Social-Obligation Norm*, Smith highlights the simplifications found in law and economics and defends such simplifications as helping improve communication to a broader audience. Smith, *supra* note 26, at 974.

73. Perhaps the best example of law and economics scholars’ avoiding moral questions is their frequent claim that because redistribution can be most efficiently done through taxation, redistribution should not be a goal of other areas of law. *See, e.g.*, Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994); Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821 (2000). For summary of a law and economics–based rejection of redistributive goals being incorporated into property law, see ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 111–13 (4th ed. 2004).

74. Peñalver, *supra* note 7, at 863.

75. *Id.* at 864.

76. Peñalver acknowledges as much in his conclusion. *See id.* at 887 (“This sort of preoccupation with virtue and wisdom in private and public decision making sounds alien to modern ears and is largely absent from contemporary land-use discussions, at least within the academy.”).

77. *Id.* at 870.

78. *Id.* at 876–88.

C. Democratic Estates

Joseph Singer's vision of progressive property in *Democratic Estates: Property Law in a Free and Democratic Society* (*Democratic Estates*) roots property rights in an idealized version of American democracy.⁷⁹ For Singer, property law should reflect the aspirations of democracy, with owner obligations based on the features of a robust democratic society. Singer begins by exploring what he sees as the alternative schools of thought about property, and the subsequent discussion of a utopian democratic model selectively incorporates elements from each school.⁸⁰ For those familiar with Singer's earlier works, particularly *Entitlement: The Paradoxes of Property* and *The Edges of the Field: Lessons on the Obligations of Ownership*,⁸¹ it will come as no surprise that Singer's version of democracy is a decidedly progressive one. Singer writes that progressive property scholars focus "on understanding the role that property and property law play in a free and democratic society that treats each person with equal concern and respect."⁸² The remainder of the article focuses principally on the obligations of ownership, distribution of wealth, and what might be labeled as democratic decision making.⁸³

The idea that ownership imposes duties on both the owner and on the rest of society recurs throughout *Democratic Estates*. When someone has the right to exclude, it imposes on others an obligation to respect that exclusionary right.⁸⁴ The owner of a good generally can expect to be protected by the state against trespass or theft even if the so-called thief is a homeless person and the good is a loaf of bread or an unused patch of land.⁸⁵ Singer emphasizes that because property's allocation and enforcement affects third parties, "property owners have obligations as well as rights."⁸⁶ The content of this statement is left open ended as *Democratic Estates* does not delve into specifics about what in property law should be changed and what concretely should be expected of owners. Singer does not advocate for a single model, instead arguing that "a variety of normative frameworks are useful—yes, including economic analysis, but also including Rawlsian theory, narrative and literary theory, deontological theory, historical analysis, balancing of interests, virtue ethics, elaboration of

79. See Singer, *supra* note 8.

80. Singer covers, in order, the traditional alienability, legal realism or bundle of rights, efficiency, liberal egalitarian, and the catch-all personality, human flourishing, capabilities, and virtue ethics approaches. *Id.* at 1029–46.

81. JOSEPH WILLIAM SINGER, *ENTITLEMENT: THE PARADOXES OF PROPERTY* (2000); JOSEPH SINGER, *THE EDGES OF THE FIELD: LESSONS ON THE OBLIGATIONS OF OWNERSHIP* (2000) [hereinafter SINGER, *THE EDGES OF THE FIELD*].

82. Singer, *supra* note 8, at 1047.

83. *Id.* at 1046–61.

84. *Id.*

85. Adverse possession, premised on an often extremely lengthy period in which the owner does not enforce his or her rights, serves as the exception that proves the rule. *Cf. id.* at 1050 (discussing the systematic effects of such property protections).

86. *Id.* at 1048.

human values, deconstruction, and rhetorical theory.”⁸⁷ His theory is an elastic and pluralistic one.⁸⁸ While not limiting itself to a single framework (virtue) or norm (social obligation), Singer’s version of progressive property dovetails nicely with Alexander’s and Peñalver’s arguments. Like Alexander, Singer argues that a reductionist version of property—hewing to popular notions of property and discounting regulatory limits and structure—is the wrong way to think about property law.⁸⁹ The reductionist accounts of property put forward by information theorists tend to emphasize exclusion and property’s general rules, treating exceptions as secondary and not inherently part of the rules themselves.⁹⁰ For Alexander and Singer, such reductionist accounts are misleading because exceptions and limitations to the rights of owners are built into and integral to property law.⁹¹ Additionally, like Alexander and, particularly, Peñalver, Singer believes that “[m]ost things we care about cannot be adequately expressed in terms of price” and that economic analysis is of limited normative value.⁹²

Ultimately, *Democratic Estates* advocates a value orientation instead of a list of rules. After explicitly embracing normative pluralism, Singer argues that a democratic approach “recognizes that choices about property law are choices about social and political structure” and, as such, owner autonomy cannot be property law’s exclusive interest.⁹³ Singer emphasizes that “the allocation and exercise of property rights imposes externalities on others and on social life in general.”⁹⁴ Finally, like Alexander and Peñalver, Singer highlights both the social obligations that accompany ownership and the need to consider more than just the preference-maximization goal of law and economics.⁹⁵

87. *Id.* at 1055.

88. Singer, subsequent to *Democratic Estates*, coauthored an argument for pluralism. See Martha Minow & Joseph William Singer, *In Favor of Foxes: Pluralism as Fact and Aid to the Pursuit of Justice*, 90 B.U. L. REV. 903 (2010); see also Gregory S. Alexander, *Pluralism and Property*, 80 FORDHAM L. REV. 1017 (2011) (making a similar argument about pluralism and property law); Alexander & Peñalver, *supra* note 60, at xxvii (same).

89. Singer, *supra* note 8, at 1052.

90. See, e.g., Thomas W. Merrill, *The Property Strategy*, 160 U. PA. L. REV. 2061 (2012) (describing the basic elements of property and arguing that exceptions are not central to how property is understood); Singer, *supra* note 30; Henry E. Smith, *On the Economy of Concepts in Property*, 160 U. PA. L. REV. 2097 (2012) (arguing that property is best understood in terms of baseline rules).

91. See, e.g., Gregory S. Alexander, *Governance Property*, 160 U. PA. L. REV. 1853 (2012); see also GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY 143 (2012) (critiquing information theorists’ treatment of “each of the many widely recognized exceptions to the right to exclude as an anomalous intrusion on owner’s rights that stands in need of explanation”).

92. ALEXANDER & PEÑALVER, *supra* note 91, at 1054.

93. *Id.* at 1059.

94. *Id.*

95. *Id.*

The import of *Democratic Estates* depends on whether Singer is describing the law as it already is or as it should be.⁹⁶ In other words, should *Democratic Estates* be understood as advocating radical change or just slight tinkering? Significantly heightening owners' obligations and taking the human values implicated by property law seriously might threaten the larger structure of American property law. On the other hand, a weak understanding of the obligations presented in *Democratic Estates* would amount to little more than a suggestion for slight modifications to the law, a defense of the status quo that hardly amounts to a progressive vision for property law. Singer is undoubtedly a progressive scholar; tellingly, the article's conclusion begins with quotes from President Barack Obama that Singer uses to highlight the central importance of human flourishing in how legal institutions are structured.⁹⁷ In calling attention to obligations of ownership, the democratic model is certainly progressive relative to both popular understandings of property and the ideological pull of treating ownership as rights over property. Ultimately, the democratic model is only radical if a libertarian understanding of property rights is accepted as the baseline from which more radical change is required.

D. The Meaning of Property

Consistent with other progressive property scholarship, particularly Singer's democratic model, Jedediah Purdy's *The Meaning of Property* argues that there is a freedom-promoting tradition of property law.⁹⁸ "The tradition of reform that a freedom-promoting approach to property inherits follows a single arc," Purdy explains.⁹⁹ Nonreciprocal forms of dependence have been incrementally replaced with "reciprocal forms, which are more hospitable to freedom in all its dimensions."¹⁰⁰ Starting with a reexamination of Adam Smith's monumental *Wealth of Nations*, Purdy highlights the revolutionary nature of Smith's call for a free labor society where returns to capital and labor were determined by contracts freely negotiated by market participants.¹⁰¹ As with other progressive scholars, Purdy thought big, treating labor law as a subset of property law.¹⁰² And given the disturbing fact that slavery—the ownership of people by other people—pollutes a large portion of our nation's history, this choice is justified even if property textbooks tend to gloss over

96. Singer uses a hypothetical tenant wanting to put up a political sign as a way to see the democratic model in action, but the tentative nature of the conclusions reached only invites questions on how the democratic model would respond to larger questions of distribution and power.

97. Singer, *supra* note 8, at 1061–62.

98. JEDEDIAH PURDY, *THE MEANING OF PROPERTY: FREEDOM, COMMUNITY, AND THE LEGAL IMAGINATION* (2010). For a good example of the overlap of the scholarship of Purdy and Singer, see Joseph William Singer, *Subprime: Why a Free and Democratic Society Needs Law*, 47 HARV. C.R.-C.L. L. REV. 141, 145–55 (2012).

99. PURDY, *supra* note 98, at 155.

100. *Id.*

101. *Id.* at 12–16.

102. *Id.* at 4–5.

labor issues. Purdy sees the freedom-promoting tradition in changes to labor law that recognize the rights of workers to agree or disagree to proposed terms of employment, including the move to a free labor society and the eventual rejection of slavery.¹⁰³ At a smaller scale, Purdy argues that the rejection of English precedent granting property owners the right to disallow even beneficial changes to the land through the law of waste reflects a commitment to economic efficiency, the breakdown of land-based hierarchy, and a vision of progress through development.¹⁰⁴ With a title announcing the work's ambition, *The Meaning of Property* locates a freedom-promoting tradition in U.S. property law and advocates such an approach to current challenges ranging from climate change and the relationship between intellectual property and the public sphere to women's empowerment and the role (bad) luck plays in individual income.¹⁰⁵

Purdy's work reflects the emerging progressive property school, even though he does not adopt the label.¹⁰⁶ He offers a typology that divides thinking on property into three camps: libertarian, welfarist, and personhood.¹⁰⁷ Although explicitly embracing a variety of approaches—similar to progressive property generally—Purdy ends up advocating, at a minimum, expanded attention to the relationship between property and personhood values. He does this through a now familiar turn to Sen's capabilities approach. Using Sen's conceptual division of freedom into both process and opportunity dimensions as his framework, Purdy argues against narrowing freedom to negative liberties, instead emphasizing the relationship between human development and property.¹⁰⁸ Within the three-part typology Purdy offers, the loosely defined personhood camp best captures Purdy's freedom-promoting tradition, and perhaps progressive property in general.¹⁰⁹ To his credit, Purdy does tackle the two most significant counterexamples to the freedom-promoting tradition: the taking of Indian land and slavery.¹¹⁰ And Purdy ends by acknowledging that his work regarding the freedom-promoting tradition is both descriptive and normative: "We inhabit an inchoate and partly obscured tradition Bringing that to the foreground, making it explicit, is a matter partly of recovery, partly

103. *Id.* at 87.

104. *Id.* at 63.

105. *Id.* at 127–49.

106. I am not alone in considering Purdy's work as fitting within the progressive property school of thought. See Alexander, *supra* note 88, at 1030; Lovett, *supra* note 1, at 744; Baron, *supra* note 1, at 924 n.12.

107. PURDY, *supra* note 98, at 19–20.

108. *Id.* at 124–27.

109. Singer breaks property thought into more categories, but tellingly the final category includes personality, human flourishing, capacities, and virtue ethics; and, from among the categories, Singer's democratic model would probably fit best there as well had he not created a new category for his theory. See Singer, *supra* note 8.

110. PURDY, *supra* note 98, at 67–114.

of interpretation, and partly—as with any living tradition—of creation.”¹¹¹ Ultimately, *The Meaning of Property* is a richly textured contribution to property literature and the most extensively developed vision of progressive property.

But in its presentation of the freedom-promoting tradition, *The Meaning of Property* arguably presents an overly idealized version of the role of property law in U.S. history. Whenever property scholars weave together a narrative or strain of history out of big and small aspects of the law, there is the danger that they will inadequately address counternarratives and counternorms. To drift into an analogy, just because one can tell a story of moments when the Chicago Cubs won games or played well does not mean it would be accurate to describe them as a particularly successful baseball team. The same may be true of the freedom-promoting tradition of property law, and for reasons to be discussed later, also of Alexander’s social-obligation norm and Singer’s democratic model. While Purdy makes a convincing case that a freedom-promoting tradition informs property law’s long arc, the tradition is an exception to the conservative core of property law.

E. A Statement of Progressive Property

The challenge of proposing a new, progressive direction for American property scholarship while recognizing the heavy popular influence of owner independence and economic thinking pervades *A Statement on Progressive Property (Statement)*, just as it does the related works of Alexander, Peñalver, Singer, and Purdy. After noting the “intuitively and legally powerful” idea that property amounts to state “protection of individual control over valuable resources,” the *Statement* argues that a broader understanding of property, one that recognizes limits on individual owners, is needed.¹¹² In *State v. Shack*, the New Jersey Supreme Court held, “Property rights serve human values. They are recognized to that end and are limited by it.”¹¹³ Channeling *Shack*, the authors of the *Statement* argue, “[W]e must look to the underlying human values that property serves and the social relationships it shapes and reflects” when confronted with disputes or establishing the institutions of property.¹¹⁴ From this broad overview of property, the *Statement* continues with a lengthy assertion that property implicates values—everything from human flourishing to individual and social well-being—that are “plural and incommensurable.”¹¹⁵ The prominence of economic thinking explains the authors’ perceived need to attack decision making through cost-benefit analysis or any other singular

111. *Id.* at 160.

112. Alexander et al., *supra* note 5, at 743.

113. 277 A.2d 369, 372 (N.J. 1971).

114. Alexander et al., *supra* note 5, at 743.

115. *Id.*

metric.¹¹⁶ After advocating decision making through reasoned deliberation, the *Statement* notes that “[p]roperty confers power” and argues that “property laws should promote the ability of each person to obtain the material resources necessary for full social and political participation.”¹¹⁷ The *Statement* ends by highlighting the social aspect of property and calling for a property law that establishes institutions of “social life appropriate to a free and democratic society.”¹¹⁸

As a guiding document, the *Statement* succinctly captures the frustrations of many progressives when it comes to property law, but it does so in a way that reflects the paralysis of the progressive movement today. Frustration at the expansive claims and ideological might of law and economics dotted the legal literature prior to the *Statement*¹¹⁹ and will likely color many law review articles to come. Struggling with the disconnect between popular emphasis on ownership as dominion and the law’s many exceptions and limits on absolute ownership similarly animates progressive scholarship.¹²⁰ Today’s “progressives” might have fit comfortably (or uncomfortably) first within the critical legal scholarship community a generation ago, and before that perhaps in the legal realism movement.¹²¹ Those intellectual movements are in the chain of title to the *Statement*’s discussion of property as power and property’s connection to human flourishing, social connections, and a democracy of equals. But progressive property, as proclaimed in the *Statement* and worked out in the articles that follow it, is at once too aggressive in its positive description of the law’s content and too timid in its response to the historical injustices and inequalities that are *the* defining feature of American property law.

II.

AMBITION MISPLACED

Property law expresses our beliefs about the connection between the past and the values of today; it is a tool of emancipation and freedom as well as of oppression and constraint. No wonder then that property scholars struggle between hope and despair, between progressive ambition and pessimistic defense of the status quo. In 1967, Martin Luther King, Jr. observed that “the arc of the moral universe is long, but it bends towards justice.”¹²² Changes in property law support this idea; with some changes being matters of history and

116. *Id.* at 744.

117. *Id.*

118. *Id.*

119. See Peñalver, *supra* note 7, at 823 n.5 (collecting sources critiquing law and economics).

120. See, e.g., Alexander, *supra* note 91, at 1887.

121. See Nestor M. Davidson, *Property and Relative Status*, 107 MICH. L. REV. 757, 771–72 (2009) (grouping legal realists and progressive property scholars).

122. A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF DR. MARTIN LUTHER KING, JR. 199 (Clayborne Carson & Kris Shepard eds., 2001).

others still history in the making. Free labor and mutual agreement replaced feudalism and slavery; treatment of women as mere wards of their husbands was replaced by formal gender equality in marriage and in property division following divorce; and many, though certainly not all, forms of discrimination have been disallowed.¹²³ Even those of us born after King's assassination can recognize the truth of his observation in the agonizingly slow, but likely successful, campaigns to end state-sponsored discrimination against gay and lesbian individuals and couples. The political back and forth over establishing a property right to health care in the United States akin to that found in most other developed countries also attests to both the moral universe's long arc and its turn toward justice.

Property law also involves the protection of the propertied against the excluded and those whose claims are not recognized. The question for property scholars is not whether the long arc of the moral universe bends toward justice, an idea I will assume and the questioning of which is beyond the scope of this Essay, but whether property law contributes to or retards positive change. It is one thing to observe that the law has changed in a way that enables people to better develop their capacities. It is another to argue that an aspect of property law, whether the freedom-promoting tradition or a social-obligation norm, explains the change. This Part focuses on property acquisition and on exclusion and access. My goal is to highlight progressive property's insufficient attention to the troubling origins of ownership in the United States and to show the limited reach of those exclusion and access cases championed by progressive scholars.

A. Acquisition

In today's convenient accounting, America is a land of opportunity, where one's wealth above all comes from individual effort. This discourse relies on the linked ideas that those with property have earned their advantage and that the origins of property in the United States are not tainted by historical injustices. The "unfortunate historical misdeeds" of our country's taking Indian lands and its lengthy reliance on slave labor do not fit well with the discourse of opportunity,¹²⁴ consequently, if these misdeeds are acknowledged at all, they are largely confined to the dustbin of history.¹²⁵ To connect present enjoyment

123. See, e.g., Laura M. Padilla, *Gendered Shades of Property: A Status Check on Gender, Race & Property*, 5 J. GENDER, RACE & JUST. 361 (2002) (providing a history of gender discrimination in marriage and divorce and highlighting the limits of formal equality); Phyllis Craig-Taylor, *To Be Free: Liberty, Citizenship, Property, and Race*, 14 HARV. BLACKLETTER L.J. 45, 64–69 (1998) (presenting a history of anti-discrimination legislation).

124. STEVE RUSSELL, *SEQUOYAH RISING: PROBLEMS IN POST-COLONIAL TRIBAL GOVERNANCE* 29 (2010).

125. In a rare example of the dispossession of Indian land holdings *not* being completely swept under the rug, the Supreme Court in *United States v. Sioux Nation*, 448 U.S. 371 (1980), held that the

of property with past *and current* injustices, the thinking goes, would be too destabilizing to a system reliant as it is on “[p]ossession as the basis of property ownership.”¹²⁶ Society accordingly treats property acquisition as a given, disconnected from past wrongs, even as new generations inherit the benefits and harms of property’s racial legacy.

1. *Continuing Conquest*

The issues affecting Indian nations and Indian demands for justice are largely marginalized in American society and in the law.¹²⁷ Non-Indians and non-Indian courts prefer to think of Indians as relics of an ancient history involving inevitable conquest.¹²⁸ Accordingly, Indians are tolerated, even celebrated, so long as few demands are placed on the larger society and tribal difference is muted.¹²⁹ The same can be said of Indian law. For more than three decades, the Supreme Court has been hostile to the exercise of tribal sovereignty, particularly when non-Indians are involved.¹³⁰ Similarly, among legal academics, Indian law is a largely neglected field. Yet, as the late Professor Philip Frickey wrote, “Federal Indian law does not deserve its image as a tiny backwater of law.”¹³¹ Frickey explained that “few areas, if any, are more fundamental to an assessment of the normative and institutional components of American law.”¹³² The first case that most students read for

Sioux Tribe had a right to compensation for the taking of the Black Hills. Writing in dissent, Rehnquist lamented the Court’s decision to revisit history:

There were undoubtedly greed, cupidity, and other less-than-admirable tactics employed by the Government during the Black Hills episode in the settlement of the West, but the Indians did not lack their share of villainy either. It seems to me quite unfair to judge by the light of “revisionist” historians or the mores of another era actions that were taken under pressure of time more than a century ago.

448 U.S. at 435 (Rehnquist, J., dissenting). Rehnquist’s perspective reflects the unexamined norm of not considering the provenance of land settled and currently enjoyed by non-Indians. But, as Frank Pommersheim argues, Rehnquist’s idea that the history of America’s treatment of Indians should not be reexamined in light of “evolving notions” of justice “merely capitulates to continuing injustice.” FRANK POMMERSHEIM, *BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION* 116–17 (2009).

126. Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 81 (1985).

127. See Clinton, *supra* note 17 (suggesting reasons for this marginalization).

128. See Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481, 530 (1994).

129. See, e.g., Frank Pommersheim, *Coyote Paradox: Some Indian Law Reflections from the Edge of the Prairie*, 31 ARIZ. ST. L.J. 439, 470 n.92 (1999) (noting that “federal Indian policy has inexorably pressed toward assimilation and has tolerated only minor or ‘quaint’ differences”). On the other hand, when Indian norms or culture differ significantly from non-Indian society, controversy erupts. See, e.g., Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 810–20 (2007) (discussing the conflict between tribal sovereignty and liberalism in the holding and controversy surrounding *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)).

130. See David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573 (1996).

131. Philip P. Frickey, *Marshalling the Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 383 (1993).

132. *Id.*

their first-year Property Law class is an Indian law case, *Johnson v. M'Intosh*,¹³³ but for many students it is also the only Indian law case they will read in law school. Likewise, this Section begins with *Johnson v. M'Intosh*, but then connects the Supreme Court's foundational cases with more recent cases that continue the conquest of Indian land.

a. Discovery and Conquest

Chief Justice John Marshall's opinion in *Johnson v. M'Intosh* paved the way for continued westward expansion and made explicit the country's denial of Indian property rights. *Johnson* held that by virtue of discovery, title acquired from the U.S. government was superior to title acquired from Indians because tribes had only limited occupancy rights.¹³⁴ Partly relying on European colonial powers' assertions of sovereignty and superior land rights over the tribes they encountered, *Johnson* extended such precedent to the relationship between Indian tribes and the United States. Marshall explained that "the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy."¹³⁵ Later in the opinion, Marshall continued in this questionable line, writing that "the character and habits" of Indians offered "some excuse, if not justification" for denying them the same rights to property as European nations.¹³⁶

As many commentators have noted, Marshall at times in the opinion expresses doubt about the very justifications he offers for prioritizing non-Indian claims over Indian land rights.¹³⁷ Marshall seems partly to abandon the doctrine of discovery when he writes, "Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted."¹³⁸ A vast literature explores whether history should applaud Marshall for writing a forward-thinking opinion for the time period or deride him for the racism of *Johnson's* holding and language.¹³⁹ What is clear

133. 21 U.S. 543 (1823).

134. *Id.* at 587–92. As Robert A. Williams, Jr.'s work shows, the doctrine of discovery can be traced to religious doctrine recognizing the right of Christian nations to claim discovered territory and subdue native populations. See ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1992).

135. *Johnson*, 21 U.S. at 573.

136. *Id.* at 589.

137. See, e.g., Jedediah Purdy, *Property and Empire: The Law of Imperialism in Johnson v. M'Intosh*, 75 GEO. WASH. L. REV. 329, 346–49 (2007); Raymond Cross, *Sovereign Bargains, Indian Takings, and the Preservation of Indian Country in the Twenty-First Century*, 40 ARIZ. L. REV. 425, 451 (1998).

138. *Johnson*, 21 U.S. at 588.

139. The leading exchange on this question and its modern significance played out in a heated debate between Robert Laurence and Robert Williams. Compare Robert Laurence, *Learning to Live with the Plenary Power of Congress over the Indian Nations: An Essay in Reaction to Professor*

is that despite his apparent skepticism in dicta regarding the justice of the discovery doctrine, Marshall ruled that Indian title was subordinate to title conveyed by the U.S. government.¹⁴⁰ According to Eric Kades, the decision in *Johnson* made the federal government a monopsonist purchaser of land, reducing the price of non-Indian acquisition of land, and facilitating the efficient expropriation of the continent.¹⁴¹ As Purdy notes, the opinion's "evasions do not quite manage to wipe the blood from its hands."¹⁴² *Johnson* "is at the root of title for most real property in the United States," even though the unsavory nature and present implications of such a beginning are rarely considered.¹⁴³

Indian land was not taken by a single case. Nearly a decade after *Johnson*, in *Worcester v. Georgia*,¹⁴⁴ Marshall would acknowledge that power, not justice, explains the subjugation of Indians and denial of Indian rights. Marshall began by questioning the idea that "the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied."¹⁴⁵ Marshall then dismissed the notion that nature somehow gives Europeans ("agriculturists and manufacturers") superior rights over Indians ("hunters and fishermen").¹⁴⁶ With remarkable honesty, Marshall held, "power, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend."¹⁴⁷

Conquest both preceded and followed *Johnson*. Long before the Supreme Court made the doctrine of discovery officially part of U.S. property law, the

Williams' Algebra, 30 ARIZ. L. REV. 413 (1988) and Robert Laurence, *On Eurocentric Myopia, The Designated Hitter Rule and "The Actual State of Things,"* 30 ARIZ. L. REV. 459 (1988), with Robert A. Williams, Jr., *Learning Not to Live with Eurocentric Myopia: A Reply to Professor Laurence's Learning to Live with the Plenary Power of Congress over the Indian Nations*, 30 ARIZ. L. REV. 439 (1988) and Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219.

140. *Johnson*, 21 U.S. at 591. It may not be an accident that many readers see in the opinion Marshall's "embarrassment with what he *had* to write." DUKEMINIER ET AL., *supra* note 40, at 12 n.5 (emphasis added). In his discussion of *Johnson*, Purdy explains that "[Marshall] presented himself as bound twice over: by law, but just as basically by a vision of history in which the law appeared not just as human achievement but as part of a natural course of development." PURDY, *supra* note 98, at 85.

141. Eric Kades, *History and Interpretation of the Great Case of Johnson v. M'Intosh*, 19 LAW & HIST. REV. 67 (2001).

142. PURDY, *supra* note 98, at 86.

143. Kenneth H. Bobroff, *Indian Law in Property: Johnson v. M'Intosh and Beyond*, 37 TULSA L. REV. 521, 521 (2001); see also Singer, *supra* note 15, at 766 (calling this a "highly inconvenient" fact); Frickey, *supra* note 131, at 383 (noting that "the justifications for colonization . . . recognized by the Supreme Court . . . do not go down easily in the late-twentieth century").

144. 31 U.S. 515 (1832).

145. *Id.* at 543.

146. *Id.*

147. *Id.* Philip Frickey argues that in *Worcester*, Marshall "domesticate[d]" *Johnson's* "colonial vision" and "essentially admitted that colonization, with its accompanying theories of discovery and conquest, was difficult to defend normatively." Frickey, *supra* note 131, at 395.

Indian land base had shrunk through treaties, intrusive non-Indian settlement practices, and military conquest.¹⁴⁸ Marshall's opinion, however, did more than simply approve and accept this history: it also licensed the continued denial of Indian rights.¹⁴⁹ Although *Johnson* presents conquest as a *fait accompli*, the majority of the country was still in Indian hands when it was decided.¹⁵⁰ History would record the subsequent Cherokee Trail of Tears, the Navajo Long Walk, the massacre at Wounded Knee, and the various legal and extralegal mechanisms through which Indian rights were denied and Indian land was taken.¹⁵¹

Johnson highlights the troubled origins of U.S. real property and, if taken seriously, suggests the need to revisit the property legacy of our colonialism. Despite forming a significant aspect of our cultural inheritance, perhaps the biggest danger is that students and scholars will “dismiss the case as an interesting historic relic, with little to contribute to a modern understanding of Property.”¹⁵² Alexander's coauthored *Property* casebook seems to do just that, for while it is the textbook's first case, the notes that follow state that neither the doctrine of discovery nor conquest “has much immediate relevance today.”¹⁵³ Such a position can partly be explained by the common treatment of Indians and wrongs committed against Indian tribes as having purely historical importance. Purdy's perspective on *Johnson* mirrors my own; the *Johnson* “ruling blessed . . . expropriation of an inhabited continent at the cost—even then becoming increasingly clear—of extinguishing a way of life and most of its people.”¹⁵⁴ But missing is acknowledgment that the Supreme Court continues to rely on *Johnson*'s establishment of federal supremacy and diminished Indian rights to strip Indians of their property rights.

148. See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. 1, 15 (1931) (discussing treaty-based land acquisition); *Johnson v. M'Intosh*, 21 U.S. 543, 590–91 (1823) (discussing military conquest in the context of a case about non-Indian settlement of Indian land).

149. Put differently, even after Marshall accepted discovery as an unavoidable part of American law, discovery's scope could have been limited. See Abraham Bell & Gideon Parchomovsky, *Reconfiguring Property in Three Dimensions*, 75 U. CHI. L. REV. 1015, 1039 (2008) (“The principle of discovery, however, says nothing about how to determine the assets that may be acquired by discovery. Does the discoverer—or in this case, the conqueror—acquire rights only in the entire North American continent? In all the lands that were not yet possessed by another European power? In land stretching as far as the eye can see? Or only in land on which it set foot?”).

150. See Cross, *supra* note 137, at 455. Tellingly, when the High Court of Australia faced a similar question of whether the doctrine of discovery divested indigenous Australians of their land, the Court emphasized that “Aborigines were dispossessed of their land parcel by parcel,” and not through discovery alone. *Mabo v. Queensland (No. 2)* (1992) 175 CLR 1, ¶ 82 (Austl.).

151. See generally STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* (2007).

152. Bobroff, *supra* note 143, at 523.

153. DUKEMINIER ET AL., *supra* note 40, at 11.

154. PURDY, *supra* note 98, at 86.

b. Continued Dispossession

The process of dispossession continues into the present, as is illustrated by two more recent Supreme Court decisions. In *Tee-Hit-Ton v. United States*,¹⁵⁵ the Supreme Court, relying on a depiction of the Tee-Hit-Ton clan of the Tlingit Tribe of Alaska as less civilized than non-Indians, denied the clan compensation for the government's taking of land and timber. In language reminiscent of *Johnson's* embrace of manifest destiny, the Court stated "[t]he American people have compassion for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization."¹⁵⁶ Once again the Court relied on a reductionist account of history that failed to acknowledge the Court's role in permitting continued denial of indigenous land rights:

Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.¹⁵⁷

Milner Ball argues that through such legal fiction the Supreme Court itself served as conqueror, noting that "[s]omehow, 'after conquest' property of the Tlingit was not property protected by the fifth amendment."¹⁵⁸ The uncompensated taking permitted in *Tee-Hit-Ton* captures but one example of the many policies premised on Indians' supposed inferiority that afforded little regard for Indian property rights.¹⁵⁹ In his critique of the Court's tortured reasoning in *Tee-Hit-Ton*, Singer notes, "some property rights that would be recognized if held by non-Indians are denied recognition when claimed by Indian nations."¹⁶⁰

In *City of Sherrill v. Oneida Indian Nation of New York*,¹⁶¹ the Supreme Court held that the Oneida Indian Nation could not "unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue" by refusing to

155. 348 U.S. 272 (1955).

156. *Id.* at 281.

157. *Id.* at 289–90.

158. Milner S. Ball, *Legal Storytelling: Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280, 2299 (1989); see also Jen Camden & Kathryn E. Fort, "Channeling Thought": *The Legacy of Legal Fictions from 1823*, 33 AM. INDIAN L. REV. 77, 91–92 (arguing that *Johnson* led directly to this passage and noting that "[t]he fiction of conquest continued its utility for the Supreme Court, even while all pretense of its fictional qualities in Marshall's writing was eliminated").

159. In particular, the allotment policy of 1887 to 1934 forced targeted tribes to split their reservations into individually held plots and opened up surplus land to non-Indians and showed little regard for Indian treaty-protected land rights. General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified in part at 25 U.S.C. §§ 331–381 (1983)). For an overview of allotment, see Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 10–18 (1995).

160. Singer, *Double Bind*, *supra* note 16, at 4; see also Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 2 (1991).

161. 544 U.S. 197 (2005).

pay property taxes.¹⁶² The issues in *City of Sherrill* arose because the State of New York, by violating the Non-Intercourse Act of 1790, obtained invalid title to land within the tribe's original reservation.¹⁶³ The Oneida Indian Nation claimed that by purchasing land within the original reservation boundaries, it had "unified fee and aboriginal title" and could "assert sovereign dominion over the parcels."¹⁶⁴ Relying upon a theory of laches that was not briefed by the parties, the Court ruled that the tribe was precluded "from rekindling embers of sovereignty that long ago grew cold."¹⁶⁵ The academic commentary on *Sherrill* has been almost uniformly critical.¹⁶⁶ As Sarah Krakoff observes, *Sherrill* is part of a process of legal dispossession of Indian land: "[T]he Court distorts the history of our government's suppression of tribalism and uses those distortions as the basis for its current unilateral perpetuation of that suppression."¹⁶⁷

2. *Inheriting Discrimination*

If America's real property came from dispossessing Indians, much of the country's wealth can be traced back to the systematic exploitation of African Americans, first as slaves and later as second-class citizens.¹⁶⁸ For many white individuals and families, such ill-gotten wealth is not an abstraction—and not merely the increase in national GDP attributable to this racial legacy—but something currently enjoyed.¹⁶⁹ Though generally unacknowledged, the racial component of wealth and privilege is often acquired by successive generations through inheritance, broadly understood.¹⁷⁰ As a means of property acquisition,

162. *Id.* at 203.

163. Joseph William Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605, 609–10 (2006).

164. 544 U.S. at 213.

165. *Id.* at 214.

166. See, e.g., Kathryn E. Fort, *The New Laches: Creating Title Where None Existed*, 16 GEO. MASON L. REV. 357 (2009); Singer, *supra* note 163; Alex Tallchief Skibine, *Teaching Indian Law in an Anti-Tribal Era*, 82 N.D. L. REV. 777, 785–86 (2006). Not surprisingly, there were many non-Indians in upstate New York who felt vindicated by the Court's decision. See Ezra Rosser, *Protecting Non-Indians from Harm? The Property Consequences of Indians*, 87 OR. L. REV. 175, 198–209 (2008).

167. Sarah Krakoff, *City of Sherrill v. Oneida Indian Nation of New York: A Regretful Postscript to the Taxation Chapter in Cohen's Handbook of Federal Indian Law*, 41 TULSA L. REV. 5, 11 (2005).

168. Angela Harris writes, "Our slavery became their freedom: our degraded labor produced their 'free labor,' our political nonexistence, their political belonging." Leslie Espinoza & Angela P. Harris, *Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race*, 85 CALIF. L. REV. 1585, 1597 (1997) (writing in an exchange with her coauthor).

169. Pamela Strand explains, "The wave of racialized wealth owned by the parents of the baby boom generation is currently washing over the baby boomers in an enormous intergenerational transfer of wealth." Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 OR. L. REV. 453, 455 (2010).

170. Daria Roithmayr, *Them That Has, Gets*, 27 MISS. C. L. REV. 373, 374–76 (2008). This is not to suggest that the class of whites who benefit from racial advantage is limited to those who inherit accumulated advantage or even to those whose families immigrated to the United States before the end of slavery or the end of Jim Crow. See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV.

inherited advantage breaks from the mythology of merit while undergirding the continuation of our nation's racial hierarchy.

a. Institutionalized Advantage

An extensive literature highlights the centrality of slavery in the rise of America's political and economic might, and there is near uniform social disapproval of this aspect of our history. Such disapproval is also mixed with pride; the multigenerational expansion of the rights of African Americans is held up as an example of what makes the United States a great country. From this perspective the Civil War and the subsequent civil rights movement allowed the country to live up to the foundational idea that "all men are created equal."¹⁷¹ And this sense of the country as destined to improve itself¹⁷² is not all for the bad; Martin Luther King, Jr. famously drew upon the ideas of national destiny and universal equality in his "I Have a Dream" speech.¹⁷³ But the danger is that in our rush to distance ourselves from the past, we ignore the extent to which whites in particular continue to benefit from this well-documented history of oppression. And though the impulse to claim that such wrongs are purely historical is understandable—who wants to be called out as complicit in structural racism, after all?—overemphasizing advances in the treatment of African Americans risks denying present inequities.

Two significant and underappreciated facets of white privilege are the accumulated wealth and related race-associated property advantages enjoyed by whites. Over a series of articles, Professor Daria Roithmayr shows how racial advantage and disadvantage need not be tied to intentional discrimination; instead, such advantages and disadvantages can remain stable because the effects of prior discrimination and related early advantages get locked into place.¹⁷⁴ For example, the postapartheid South African government's decision to continue a system of public school fees that disproportionately benefits the white elite because of the high costs of switching away from that system locks in inequality.¹⁷⁵ Similarly, Roithmayr argues that "during Jim Crow and

1707 (1993). But financial inheritance provides a good starting point for understanding, in concrete terms, how racial advantages continue in the post-civil rights era.

171. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

172. See, e.g., SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 301 (2004) ("Since its founding, our country has evolved with each passing century, slowly completing a struggle to extend the privileges and opportunities of citizenship to everyone.")

173. King eloquently stated, "I have a dream that one day this nation will rise up and live out the true meaning of its creed: 'We hold these truths to be self-evident: that all men are created equal.'" Martin Luther King, Jr., Address at Lincoln Memorial, I Have a Dream (Aug. 28, 1963), available at <http://abcnews.go.com/Politics/martin-luther-kings-speech-dream-full-text/story?id=14358231#.T7FDFO33DLY>.

174. I thank Lee Fennell for drawing my attention to Daria Roithmayr's work.

175. Daria Roithmayr, *Locked in Inequality: The Persistence of Discrimination*, 9 MICH. J. RACE & L. 31 (2003).

slavery, whites constructed the institutional rules of the game in favor of whites, and the game now continues to reproduce that advantage.¹⁷⁶ The overlapping, mutually reinforcing effects of real estate prices, differential school quality levels, and neighborhood network effects, such as informal job referrals, ensure the persistence of racial inequalities.¹⁷⁷ Borrowing from theories of economic organization, Roithmayr describes white advantage in terms of “monopoly power that continues long after the original anti-competitive conduct has ceased.”¹⁷⁸ Roithmayr argues in a more recent article that the wealth and opportunity advantages enjoyed by whites today are the product of prior discriminatory actions of white racial cartels, a fact rarely considered by their white beneficiaries.¹⁷⁹ Other scholars have also highlighted the numerous ways, obvious and subtle, whites experience racial privilege in their everyday lives.¹⁸⁰ But rarely do whites consider that their houses, or the houses of their parents, may be citadels perpetuating prior discriminatory policies.¹⁸¹

The connection between enjoyment of property and our country’s racial legacy is strongest, and paradoxically least acknowledged, in the home. The United States prides itself on being a nation of homeowners, and for most middle-class Americans the majority of their wealth is tied up in their home.¹⁸² But despite the importance of the home,¹⁸³ the racial characteristics of home ownership receive only passing media and scholarly attention.¹⁸⁴ Most people

176. Daria Roithmayr, *Locked in Segregation*, 12 VA. J. SOC. POL’Y & L. 197, 201 (2004).

177. Roithmayr, *supra* note 170, at 384–88, 394–97.

178. Roithmayr, *supra* note 176, at 202.

179. Daria Roithmayr, *Racial Cartels*, 16 MICH. J. RACE & L. 45, 48 (2010).

180. *See, e.g.*, Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women’s Studies*, in CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 291 (Richard Delgado & Jean Stefancic eds., 1997); Barbara J. Flagg, “*Was Blind, But Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993).

181. For a dramatic example of this in the context of a former plantation, see Ginger Thompson, *Reaping What Was Sown on the Old Plantation; a Landowner Tells Her Family’s Truth. A Park Ranger Wants a Broader Truth*, N.Y. TIMES, June 22, 2000, at A1.

182. Thomas M. Shapiro, *Race, Homeownership and Wealth*, 20 WASH. U. J.L. & POL’Y 53, 59 (2006); Florence Wagman Roisman, *Teaching About Inequality, Race, and Property*, 46 ST. LOUIS U. L.J. 665, 668–69 (2002).

183. For more on the importance of the home, see D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255 (2006). *But see* Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093 (2009) (arguing against the home’s special place in property law).

184. This is true even in a period marked by an economic crisis, which can be traced to problems in the housing market. *See* Nestor M. Davidson & Rashmi Dyal-Chand, *Property in Crisis*, 78 FORDHAM L. REV. 1607 (2010) (highlighting the unique *property* aspects of the economic crisis that began with troubles in the subprime market but spread to the entire housing market). The crisis inspired some initial grumblings that efforts to extend homeownership to minority communities and the poor were at fault, but as the crisis spread there was greater recognition that multiple structural weaknesses in the housing and finance markets caused the problems. *See, e.g.*, Raymond H. Brescia, *Part of the Disease or Part of the Cure: The Financial Crisis and the Community Reinvestment Act*, 60

do not acknowledge the racial legacy of the government policies that underlie much of the housing wealth enjoyed by whites, and white owners rarely consider the significance of policies that systematically disfavored blacks.

Throughout the twentieth century, the government excluded blacks from equal access to homeownership through programs that disproportionately (and deliberately) benefitted whites.¹⁸⁵ Starting during the Great Depression and lasting until at least 1962, government lending–subsidy programs run by the Fair Housing Administration and the Veterans Administration followed the practice of “redlining” adopted by the Home Owners Loan Corporation (HOLC) and chose to support only segregated forms of development.¹⁸⁶ In the postwar period, blacks were excluded from both Fair Housing Act (FHA) and Veterans Affairs housing loan guarantee programs, effectively keeping them from acquiring single-family homes in the emerging suburbs.¹⁸⁷ Though such overt discrimination is no longer allowed, studies have consistently found that blacks remain more likely to have their home loan applications rejected than similarly situated whites.¹⁸⁸

S.C. L. REV. 617 (2009) (rejecting the theory that the CRA is to blame for the economic crisis); andré douglas pond cummings, *Racial Coding and the Financial Market Crisis*, 2011 UTAH L. REV. 141, 204–16 (explaining and debunking the myth that lending to minorities caused the crisis). For more on subprime loans and the rise in predatory lending affecting minority neighborhoods, see Kathleen C. Engel & Patricia A. McCoy, *From Credit Denial to Predatory Lending: The Challenge of Sustaining Minority Homeownership*, in SEGREGATION: THE RISING COSTS FOR AMERICA 81, 89–101 (James H. Carr & Nandinee K. Kutty eds., 2008).

A perfect storm of overly optimistic risk modeling by the major banks, agency problems inherent in the separation of loan origination and loan holding, overreliance on rating agencies, and societal faith in ever increasing housing prices pushed the country into the 2008–2010 recession. There is a massive, and rapidly growing, literature on the economic crisis, but the following popular texts are good places to start: MICHAEL LEWIS, *THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE* (2010); ROGER LOWENSTEIN, *THE END OF WALL STREET* (2010).

185. Beverly Moran & Stephanie M. Wildman, *Race and Wealth Disparity: The Role of Law and the Legal System*, 34 FORDHAM URB. L.J. 1219, 1230 (2007).

186. Roisman, *supra* note 182, at 676–80; see also CASHIN, *supra* note 172, at 110–13; Douglas S. Massey, *Origins of Economic Disparities: The Historical Role of Housing Segregation*, in SEGREGATION: THE RISING COSTS FOR AMERICA, *supra* note 184, at 39, 69–75. The term “redlining” emerged out of the HOLC practice of categorizing neighborhoods according to the racial composition and giving African American neighborhoods the lowest rating, marking such neighborhoods with the color red. Leland Ware & Theodore J. Davis, *Ordinary People in an Extraordinary Time: The Black Middle-Class in the Age of Obama*, 55 HOW. L.J. 533, 556 (2012).

187. Roisman, *supra* note 182, at 681.

188. For more on the persistent racial discrimination in qualifying for loans, see THOMAS M. SHAPIRO, *THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY* 109–11, 198–99 (2004); STEPHEN L. ROSS & JOHN YINGER, *THE COLOR OF CREDIT: MORTGAGE DISCRIMINATION, RESEARCH METHODOLOGY, AND FAIR-LENDING ENFORCEMENT* (2002) (reviewing the most significant mortgage discrimination studies); James H. Carr & Nandinee K. Kutty, *The New Imperative for Equality*, in SEGREGATION: THE RISING COSTS FOR AMERICA, *supra* note 184, at 1, 10–11.

The current front in FHA-discrimination challenges in the wake of the subprime crisis involves discretionary pricing and loan steering. See Robert G. Schwemm & Jeffrey L. Taren, *Discretionary Pricing, Mortgage Discrimination, and the Fair Housing Act*, 45 HARV. C.R.-C.L. L. REV. 375 (2010).

Loan subsidies were paired with a host of related programs designed to enable (white) families the ability to escape the (black) urban center city and live instead in manufactured semipastoral communities.¹⁸⁹ Massive investments in highways and infrastructure facilitated the white flight that began before, and continued long after, *Brown v. Board of Education*.¹⁹⁰ But the threat of integrated schools played a particularly crucial role in the decision making of many white families who sought out the desirable public schools, where quality of education and life was thought to go hand-in-hand with exclusion of blacks.¹⁹¹ Local funding of public education almost guaranteed that the “best” schools are in the “best” neighborhoods, and vice versa.¹⁹² Pretending that suburban communities were distinct from the central metropolis and protecting this pretense under the guise of local governance enabled middle- and upper-class whites to secede from the challenges presented by urban black poverty.

The effects of white exodus remain visible today. The predictable consequence of these public and private decisions is that instead of making progress on integration with “all deliberate speed,”¹⁹³ municipalities continue to relegate many blacks, particularly poor blacks, to communities with lower quality schools, worse public services, and fewer economic opportunities.¹⁹⁴ Middle- and upper-class whites in contrast enjoy tax subsidies for home ownership and experience greater appreciation in the value of their property than black homeowners of the same classes.¹⁹⁵ Residential segregation dampens wealth growth among African American homeowners by “suppressing their home equity” but has the opposite effect on white

189. See SHAPIRO, *supra* note 188, at 122 (“In justifying their moves, whites commonly cite declining property values, deteriorating schools, and fear of crime.”); Ingrid Gould Ellen, *Continuing Isolation: Segregation in America Today*, in SEGREGATION: THE RISING COSTS FOR AMERICA, *supra* note 184, at 260, 261–77 (“Yet contemporary segregation is not simply a relic of the past; it is also the result of ongoing, present-day residential moves that are restricted by ongoing discrimination and racial tensions. Perhaps most central are the everyday decisions of white households to avoid moving to racially integrated and largely minority communities.”).

190. See generally KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES*, 163–89 (1985).

191. See Brian Patrick Larkin, Note, *The Forty-Year “First Step”: The Fair Housing Act as an Incomplete Tool for Suburban Integration*, 107 COLUM. L. REV. 1617, 1631–33 (2007); Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659, 1673–74 (1995).

192. Deborah Kenn, *Institutionalized, Legal Racism: Housing Segregation and Beyond*, 11 B.U. PUB. INT. L.J. 35, 49 (2001).

193. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

194. CASHIN, *supra* note 172, at 127–260. As a Census Bureau study looking at the 1980–2000 period found, “[R]eduction of African American residential segregation thus remained steady, even if modest.” JOHN ICELAND ET AL., *RACIAL AND ETHNIC RACIAL SEGREGATION IN THE UNITED STATES: 1980–2000*, at 9 (2002), available at http://www.census.gov/hhes/www/housing/housing_patterns/pdf/censr-3.pdf.

195. Dorothy A. Brown, *Shades of the American Dream*, 87 WASH. U. L. REV. 329, 336–62 (2009); Lauren J. Krivo & Robert L. Kaufman, *Housing and Wealth Inequality: Racial-Ethnic Differences in Home Equity in the United States*, 41 DEMOGRAPHY 585 (2004).

homeowners.¹⁹⁶ Setting aside the red herring of affirmative action,¹⁹⁷ whites have been, and continue to be, remarkably blind to the advantages of skin color¹⁹⁸ and the lasting legacy of slavery and segregation.¹⁹⁹

b. Continued Advantage

It is ordinarily impossible to trace wealth disparities between white and nonwhite families perfectly to particular aspects of our history. Even though “[i]t’s hard for many white people to accept the reality that they profited from these government-promoted white advantages,”²⁰⁰ racial wealth and housing disparities are dramatic and are probably best explained as a result of systematic racial discrimination and related preferences.²⁰¹ “The United States began as a slave nation,” Beverly Moran and Stephanie Wildman explain, “and the end of slavery did not break the tie between race and wealth.”²⁰² The white household wealth to black household wealth ratio may be as high as ten to one.²⁰³ Inherited wealth—passed upon death or through inter vivos transfers—helps explain the “unequal footing” of young white and black families.²⁰⁴

196. SHAPIRO, *supra* note 188, at 121; *see also* Margalynne Armstrong, *Race and Property Values in Entrenched Segregation*, 52 U. MIAMI L. REV. 1051, 1059 (1998) (discussing the impact of low white demand for property in areas with significant minority populations on value of such property).

197. Affirmative action generates substantial ire among whites who see such preferences as antithetical to their asserted colorblind ideal, yet other preferences, such as legacy admissions policies, that disproportionately benefit whites are not subjected to the same intense criticism and legal challenges. *See, e.g.*, Richard D. Kahlenberg, Op-Ed., *Elite Colleges, or Colleges for the Elite*, N.Y. TIMES, Sept. 30, 2010, at A30.

198. Leslie Espinoza’s explanation of white blindness to racial advantage is worth quoting at length:

Race definitions operate to define the “have-nots” and to mask the correlation between race and the “haves.” American social discourse attaches negative characteristics by group; for example, he is poor because he is a lazy Spic. We do not attach success by racial group. Success is the reward of individual characteristics, e.g., he is rich because he is smart, he works hard and he is ruthless. We do not acknowledge that, as a statistical reality, he is rich because he is a white male.

Espinoza & Harris, *supra* note 168, at 1612 (writing in an exchange with her coauthor).

199. President Barack Obama, while still a presidential candidate, highlighted the lasting legacy of these related dark spots in our history in his March 18, 2008, speech on race:

We do not need to recite here the history of racial injustice in this country. But we do need to remind ourselves that so many of the disparities that exist in the African-American community today can be directly traced to inequalities passed on from an earlier generation that suffered under the brutal legacy of slavery and Jim Crow.

Barack Obama, Speech in Philadelphia (Mar. 18, 2008), *available at* <http://www.nytimes.com/2008/03/18/us/politics/18text-obama.html?pagewanted=all> [hereinafter *Speech in Philadelphia*].

200. MEIZHU LUI ET AL., *THE COLOR OF WEALTH: THE STORY BEHIND THE U.S. RACIAL WEALTH DIVIDE* 225 (2006).

201. *See, e.g.*, Shapiro, *supra* note 182, at 67 (“African-Americans were frozen out of the greatest wealth building opportunities in American history.”).

202. Moran & Wildman, *supra* note 185, at 1223.

203. Strand, *supra* note 169, at 463.

204. Maury Gittleman & Edward N. Wolff, *Racial Differences in Patterns of Wealth Accumulation*, 39 J. HUM. RESOURCES 193, 203 (2004).

Whites on average inherit or are given financial assets worth ten times more than blacks,²⁰⁵ and blacks are half as likely to receive an inheritance as whites.²⁰⁶

Significantly, while one-half of white families have parents who can help them buy a house, only one-fifth of black families are so fortunate.²⁰⁷ This perhaps helps explain the relatively stable 25 percent gap in white-minority homeownership rates.²⁰⁸ As Harvard's *State of the Nation's Housing 2011* observes, homeownership plays a "vital role" in "generating household wealth," which means that different homeownership rates in prior generations translate into significantly different contemporary levels of wealth between minorities and whites.²⁰⁹ Differential homeownership rates reflect not a failure of government policy but the unfortunate success of centuries of preferential treatment for white Americans.²¹⁰ Though the formal barriers of de jure segregation have been removed, large portions of the black population still live in what can fairly be called de facto segregation. As Thomas Shapiro states, in his conclusion to *The Hidden Costs of Being African American: How Wealth Perpetuates Inequality*, a "just society would not wish racial legacies and inheritance to block opportunities and make a mockery of merit."²¹¹ Elsewhere Shapiro explains that wealth, particularly wealth tied to homeownership, "represents the sedimentation of historical inequalities in the American experience, in a sense the accumulation of advantages and disadvantages for different racial, class and ethnic groups."²¹²

For whites, it can be uncomfortable to think about the acquisition of property as a racial issue. Confronting the wrongs done to African Americans requires acknowledging not only the impact history has had on the accumulation of wealth and property by blacks, but also the racialized advantages whites continue to enjoy.²¹³ Admitting to such advantage is perhaps

205. LUI ET AL., *supra* note 200, at 77 (reporting the 2001 amounts as \$20,685 for whites, around \$2000 for blacks).

206. Dalton Conley, *Decomposing the Black-White Wealth Gap: The Role of Parental Resources, Inheritance, and Investment Dynamics*, 71 SOC. INQUIRY 39, 46 (2001).

207. LUI ET AL., *supra* note 200, at 19.

208. JOINT CTR. FOR HOUSING STUD. OF HARV. UNIV., *THE STATE OF THE NATION'S HOUSING 2011*, at 19 (2011), available at <http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/son2011.pdf>.

209. *Id.*

210. See LUI ET AL., *supra* note 200, at 266 ("Clearly, government assistance in asset development works: after centuries of preferential treatment in land policy, farm aid, housing subsidies, the safety net, education, etc., white people's net worth is much greater than people of color's net worth.").

211. SHAPIRO, *supra* note 188, at 204.

212. Shapiro, *supra* note 182, at 65.

213. See, e.g., Adam Gordon, *The Creation of Homeownership: How New Deal Changes in Banking Regulation Simultaneously Made Homeownership Accessible to Whites and Out of Reach for Blacks*, 115 YALE L.J. 186, 219 (2005) (connecting discriminatory FHA policies with white wealth and human capital advantages); Dalton Conley, *Getting into the Black: Race, Wealth, and Public Policy*, 114 POL. SCI. Q. 595, 604 (1999–2000) ("Much of the discussion of residential segregation

more difficult than conceding historical wrongs. After all, the overlapping mythologies of property and wealth suggest that ownership reflects what has been earned—either directly by the individual or, through inheritance, by ancestors.²¹⁴ Once acquisition is stripped of deservedness and merit, once whites recognize the systematic advantages that their ancestors enjoyed,²¹⁵ and that they enjoy currently,²¹⁶ the ownership status quo is harder to defend. Property rights protection in such a context ensures that past wrongs—racially defined disadvantages for blacks and advantages for whites—continue to have present day effects.

3. *Progressive Gloss*

Perhaps the best way to understand the demands the progressive property school makes on acquisition—and the reach and limits of those demands—is to consider the contrasting treatment of intellectual property and real property in Eduardo Peñalver and Sonia Katyal’s recent book, *Property Outlaws*.²¹⁷ The major thesis of *Property Outlaws* is that those who break property laws or engage in forms of property disobedience can help improve property law.²¹⁸ Consequently, Peñalver and Katyal argue that space needs to be allowed for disobedience and that in many circumstances there is a danger of property rights overenforcement and rule-breaking overdeterrence. As a work coauthored by leading experts in real property (Peñalver) and intellectual property (Katyal), *Property Outlaws* is illuminating for scholars of either field. While the authors effectively show areas of overlap, the most interesting part of the book perhaps is the contrast between their embrace of property disobedience in intellectual property and their more limited allowance for the same when it comes to tangible property.

focuses on the deleterious effects this pattern has on African Americans. Often left out of the debate, however, is the beneficial effect that segregation has for whites.”).

214. Similarly, Bernadette Atuahene writes, “The underlying assumption behind the sanctity given to property is the notion of desert: People generally deserve what they own because they labored for it or received it through the hard work of someone else who bequeathed that property as a gift or in a will.” Bernadette Atuahene, *From Reparation to Restoration: Moving Beyond Restoring Property Rights to Restoring Political and Economic Visibility*, 60 SMU L. REV. 1419, 1421–22 (2007); see also Speech in Philadelphia, *supra* note 199 (“Most working- and middle-class white Americans don’t feel that they have been particularly privileged by their race. Their experience is the immigrant experience—as far as they’re concerned, no one’s handed them anything, they’ve built it from scratch.”).

215. See Strand, *supra* note 169, at 476.

216. See, e.g., Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727 (2000) (arguing that past discrimination has locked in white advantages and constructed barriers to entry for minorities, under the guise of meritocratic criteria).

217. EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, *PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP* (2010).

218. *Id.* at viii–ix.

Property Outlaws begins with a description of the February 1960 sit-ins in Greensboro, North Carolina.²¹⁹ Black college students sat down at the Woolworth's lunch counter and were refused service, in accordance with the local Woolworth's discriminatory customs.²²⁰ Though the Greensboro Woolworth's eventually responded to the daily protests by closing their lunch counter, copycat protestors across the South were arrested for criminal trespass when they refused to leave after being denied service and being asked to leave by store owners.²²¹ As Peñalver and Katyal note, the "protesters were maligned as threatening sacred rights of private property and the rule of law" by both conservatives and some involved in the struggle for civil rights.²²² Sit-in protests aimed at impacting more than just lunch counter service, and part of their strength came from drawing attention to the discriminatory legal regime using nonviolence.²²³ Looking back, we know that the protesters succeeded in limiting the ability of business owners to discriminatorily exercise their right to exclude.²²⁴ Later in *Property Outlaws*, Peñalver and Katyal give a property law-centric explanation of the sit-ins, "the black students participating in lunch-counter sit-ins were . . . intentionally disregarding the very property rights they sought to change."²²⁵

Although the contrast between real property and intellectual property at times leads to strained analogies,²²⁶ *Property Outlaws* makes a compelling case for the preservation of the public domain, and for the importance of preserving space for intellectual property rights violations. Using examples ranging from students who published the source codes for electronic voting machines and countries that sought to violate HIV/AIDS drug patents to more popularly known examples such as peer-to-peer websites and the end-users who download rights-protected content, the book continually highlights the social and human values that are at times supported by violations of intellectual property rights.²²⁷

In contrast, Peñalver and Katyal's claims are much more modest when it comes to tangible property.²²⁸ For example, after introducing the doctrine of necessity, which allows someone in dire need to take property, Peñalver and Katyal merely observe that an argument could be made that the doctrine should

219. *Id.* at 1–3.

220. *Id.* at 1.

221. *Id.* at 2–3.

222. *Id.* at 7; *see also id.* at 65–66.

223. *Id.* at 31.

224. *Id.* at 70.

225. *Id.* at 65.

226. The strain on these analogies is acknowledged by the authors. *See, e.g., id.* at 7.

227. *Id.* at 71–121.

228. There are good reasons to support rule breaking in the intellectual property context, the "nonrivalrous nature of information" chief among them. *Id.* at 148.

extend to a broader understanding of need.²²⁹ They do not take a stance on this possible understanding of the doctrine and their conclusion is similarly hedged: “a broader understanding of human need might justify expanding the prerequisites for an assertion of necessity beyond a showing of imminent physical harm.”²³⁰ To their credit, in their discussion of adverse possession, Peñalver and Katyal underscore the problems associated with rising housing vacancy rates and argue that despite the fall in monitoring costs, the law has not kept up by decreasing the adverse possession period.²³¹ Peñalver and Katyal ultimately conclude that “government-sponsored redistribution and social insurance” are superior to the poor resorting to self-help-based solutions—here, use by nonowners under a broad assertion of necessity.²³² While Peñalver and Katyal advocate for such redistribution as preferable because of the disruption and costs associated with self-help, they go on to note that “although a system of voluntary or mandatory redistribution may be more efficient than distributive-minded changes in property law, it does not follow that self-help is inferior to a highly unequal status quo and therefore not justified when adequate redistribution is not forthcoming.”²³³ But because *Property Outlaws* explores neither the political challenge of increasing redistribution to the poor nor the form massive self-help might take to right the status quo, the *deus ex machina* solution of government aid is unsatisfying.²³⁴

Peñalver and Katyal show the positive role violations of property law can play in improving the law and ensuring that the law matches our values. Prior commentators have questioned the celebration of property outlaws in light of the often antisocial nature of such violations.²³⁵ My point of departure from their argument is that they do not consider more radical breaks from existing law and associated inequality in the distribution of property. In their conclusion, the authors observe that “[t]he law must therefore aim to strike a balance between protecting the stability of property and intellectual property

229. *Id.* at 136. Not surprisingly, their discussion of a broader understanding of need showcases Adam Smith and Amartya Sen. *Id.* at 137–38.

230. *Id.* at 138; *see also id.* at 160–63, 217–19 (discussing “expressive necessity”). It should be noted that in an article coauthored with Alexander, Peñalver advocates a broader understanding of necessity. *See* Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQ. L. 127, 146–48 (2009).

231. PEÑALVER & KATYAL, *supra* note 217, at 150–52.

232. *Id.* at 157.

233. *Id.* at 157–58; *see also id.* at 165 (suggesting subsidizing civil litigation and political access for the poor as a way to increase their voice and support alternatives to outlaw behavior).

234. My critique of *Property Outlaws* on this point builds upon Greg Lastowka’s observation that “any state that relies on modern-day Robin Hoods as a significant source of redistributive value has clearly failed to meaningfully protect the interests of its citizens.” Greg Lastowka, *Property Outlaws, Rebel Mythologies, and Social Bandits*, 20 CORNELL J.L. & PUB. POL’Y 377, 388 (2010). While Lastowka’s response generally emphasizes state reliance on so-called Robin Hoods, this Essay focuses on state failure to protect citizens’ interests.

235. *See, e.g., id.* at 383–84; Lee Anne Fennell, *Order with Outlaws?*, 156 U. PA. L. REV. PENNUMBRA 269, 273 (2007).

norms—without such stability those norms would lose a great deal of their value—and permitting some degree of disobedience in order to keep this dynamic system in motion.”²³⁶ The thrust of the book suggests that the authors favor recognizing a great deal of leeway for rule violations in intellectual property while supporting a higher degree of stability when it comes to real property.²³⁷ There is something ironic in *Property Outlaws*’ hesitant and cabined support for disobedience and law violations in the real property sphere. As has been previously discussed, a significant amount of the country’s land and material wealth has a problematic origin. Property disobedience would seem a natural way for those disadvantaged by this history to respond to these acquisition issues. Peñalver and Katyal stress the role property outlaws can play in creating space for change: “The property outlaw provides the official decision maker with actual, rather than hypothetical, circumstances under which to evaluate his or her commitment to the status quo.”²³⁸

Drawing on the strength of their exploration of property outlaws and related improvements in property law and in society, Peñalver and Katyal might have considered more radical changes, such as destabilizing existing property rights or redistribution, had their vision of the related changes in real property not hewn so closely to the status quo. In their preface, Peñalver and Katyal briefly describe the occupation of Alcatraz by Indian activists and the positive changes in federal policy that followed this early Red Power act of property disobedience.²³⁹ What is missing from *Property Outlaws* is an answer to how the authors would respond to similar acts of self-help (re)possession by groups who have colorable claims to land and wealth currently held in either government or private (white) hands.²⁴⁰

Perhaps Peñalver and Katyal’s apparent commitment to a slightly modified status quo in real property simply needs to be shaken by property outlaws. Although title to tangible property appears fixed relative to emergent areas of intellectual property where massive disobedience is common, it is

236. PEÑALVER & KATYAL, *supra* note 217, at 235.

237. Such a stance seems to mirror that line drawing of most Americans, who have responded to the ease of electronic copying by engaging in massive intellectual property theft. *See id.* at 169.

238. *Id.* at 33.

239. *Id.* at vii.

240. In one of her responses to Peñalver and Katyal’s arguments, Underkuffler raises exactly this possibility:

Not all groups who have experienced injustice are legitimate candidates for tolerated property lawbreaking in the public mind. For instance, most observers would probably place the grievances of Japanese Americans interned during World War II into a different, monetarily compensable category. One cannot imagine tremendous public sympathy if these victims or their descendants illegally occupied public or private land to dramatize their claims, however just their arguments.

Laura S. Underkuffler, *Lessons from Outlaws*, 156 U. PA. L. REV. PENNUMBRA 262, 265 (2007). Underkuffler raises this hypothetical in part because she reads into Peñalver and Katyal’s argument the idea that the public tolerates property lawbreaking partly in “public acknowledgment (on occasion) of historic injustice done to particular groups.” *Id.* at 264–65.

worth remembering that such stability depends on the acquiescence of the propertyless. Peñalver and Katyal's discussion of the civil rights sit-ins illustrate the point:

[T]he protesting students demonstrated to local authorities the need for black cooperation in the preservation of private property rights. The disruption that a few hundred students were able to produce illustrated how even a small number of persistently uncooperative people excluded by the allocation of private ownership rights could substantially undermine the ability of the most determined state to enforce established law.²⁴¹

By showing the important role disobedience to property laws can play in law reform, *Property Outlaws* provides a valuable contribution to property law scholarship and to the emerging progressive property school of thought. (Although Sonia Katyal is not a signatory to the *Statement on Progressive Property*, with this work, she at the very least is a sympathizer.) The vision of legal change Peñalver and Katyal advance is progressive to be sure, but is also tied to existing institutions and doctrines. Their expressed ambition is limited to tweaking the rules and they steer clear of changes that might lead to instability.²⁴² As such, *Property Outlaws* is perhaps as radical as can be hoped for from law professors but is highly compliant compared to the acts of property disobedience portrayed throughout the book.²⁴³

241. PEÑALVER & KATYAL, *supra* note 217, at 69.

242. As Lee Fennell observes in her response to the law review version of *Property Outlaws*, “Avoiding an undue weakening of the property system as a whole is an obvious concern, and one that is reflected throughout the article.” Fennell, *supra* note 235, at 276.

In a more recent article, Peñalver directly tackles the distributive aspect of property law by expanding on the theme of the memory of property which he introduced in *Land Virtues*. After discussing the “powerful path-dependence in land use,” Peñalver writes, “What may be less intuitive is the way allocations of property among human beings constitute a form of collective memory that is transmitted from one generation to the next. . . . [W]e can understand the relative distribution itself as a form of social memory written into the system of property.” Eduardo M. Peñalver, *Property's Memories*, 80 *FORDHAM L. REV.* 1071, 1081 (2011). Peñalver goes on to highlight how property's memory can contribute to inherited advantage, as well as the unfairness and inefficiency of rigid class structures. *Id.* at 1082–84. Peñalver ends the article not with a call for a broad rethinking of property law but with a more narrow critique of efforts by conservatives to further protect inherited wealth. In his celebration of the “measured approach” and “balance” of the common law, Peñalver seems to be again advocating an approach that prioritizes stability over more radical responses to property law's distributive memory. *Id.* at 1087.

243. Underkuffler makes a similar observation about *Property Outlaws*: “Why are Peñalver and Katyal so cautious? Why do they seemingly feel the need, for instance, to camouflage rawly redistributive notions in less controversial theories[?]” Underkuffler, *supra* note 240, at 266. Elsewhere, Underkuffler again notes Peñalver and Katyal's reluctance to explore need as a basis for redistribution before arguing that need ought to be included “as a part of the property calculation.” Laura S. Underkuffler, *The Politics of Property and Need*, 20 *CORNELL J.L. & PUB. POL'Y* 363, 369 (2010) [hereinafter *The Politics of Property and Need*].

B. Exclusion and Access

The dominant theme of progressive property scholarship is a call to reconsider the centrality of the right to exclude in property law. Although property scholars have developed this idea in a number of different ways—and it might therefore be considered not as a single call at all but a series of related calls—they generally resist prioritizing the right to exclude over social values. Public demands for state support and for access to private property should, according to the progressive property school of thought, at times trump the “sole and despotic dominion” of individual property ownership described by Blackstone.²⁴⁴ By itself this claim, though it runs contrary to popular notions of property, is not controversial. As Elizabeth Glazer elegantly explains, “[T]he right to exclude is absolute, except when it is not.”²⁴⁵ Progressive property seeks to push the law to recognize more exceptions to the default rights of an owner to exclude, or put differently, to expand recognition of the public’s interest in privately held property.

This Section is not going to rehash the debates about the relative importance of the right to exclude. The literature is extensive and, besides, it would be of little use to try to put the much maligned bundle-of-sticks into a cardinal order.²⁴⁶ Just as most progressives recognize that the right to exclude is important, most conservatives or libertarians likewise will concede that in some circumstances the right to exclude must bend to social demands. What this Section focuses on instead are areas that seem to be either inadequately addressed or not fully appreciated by the progressive property school of thought. The primary strength of progressive property is that it forces a reconsideration of exclusion and access by emphasizing the social nature of property. The goal of this Section, accordingly, is to applaud that emphasis and suggest there is room to push even harder against the right to exclude. It begins by discussing the role the state plays in the provision of property, returning to the now familiar idea of new property. It continues by discussing the exclusion and access cases that form the canon, or at least the most frequently celebrated cases, of progressive property. The Section ends on a cautionary note by discussing current practices of communities and individuals that push back against the social obligations of property.

244. DUKEMINIER ET AL., *supra* note 40, at 92 (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *2).

245. Elizabeth M. Glazer, *Rule of (Out)Law: Property’s Contingent Right to Exclude*, 156 U. PA. L. REV. PENUMBRA 331, 339 (2008). Underkuffler made a similar observation about property in general that, although not specific to the right to exclude, bears repeating: “If we are completely honest, we must acknowledge that we sometimes want property rights to protect individual interests—and sometimes not.” LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* viii (2003).

246. *But see* Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998) (arguing that the right to exclude deserves to be first among the rights associated with property).

1. *New Property and State Goods*

The popular distinction between earned income and state largess rests in part on the notion that property is a merit good, but this distinction has only superficial support. Rejecting a natural law theory of property rights in favor of an approach that is mindful of “the socially contingent nature of property,”²⁴⁷ the progressive property school emphasizes the relational aspects of ownership. Property rights do not exist in a vacuum; the isolated individual need not worry about property rights because such rights only have meaning when there is the possibility of competing claims. Support for an approach that prioritizes the social nature of property can be found throughout the property law canon, starting with *Johnson v. M’Intosh*, where the right to property depended critically on state recognition and enforcement of claimed rights.²⁴⁸ But Charles Reich’s seminal article, *The New Property*, deserves much of the credit for the general scholarly acknowledgment of the centrality of the state in allocating property.²⁴⁹

Reich’s primary thesis is that property protections should be extended to various forms of government largess. In making this claim, Reich notes that the government has become “a major source of wealth . . . money, benefits, services, contracts, franchises, and licenses.”²⁵⁰ Because such wealth does not fit within standard conceptions of property, the government can withhold it without compensation and can even, because of its conditionality, undermine other protected rights.²⁵¹ Reich argues that largess and traditional forms of property should be accorded similar property right protections.²⁵² Reich rejects the argument that state-granted largess is somehow different from traditional property, observing “[t]raditional property also comes from the state, and in much the same way.”²⁵³ The similar origins of largess and traditional property—state recognition—provide Reich support to advocate an expanded understanding of individual ownership rights over government largess.

247. UNDERKUFFLER, *supra* note 245, at 4.

248. 21 U.S. 543, 587–93 (1823).

249. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964). The natural law approach has not disappeared altogether from property scholarship and is still championed by some leading scholars. But mainstream scholarship largely eschews the often premodern and libertarian conclusions suggested by natural law scholars. As Alexander explains, labeling something “natural” seems to be simply an attempt to bolster the constitutional strength of private property rights vis-à-vis collective interests. Gregory S. Alexander, *The Ambiguous Work of “Natural Property Rights,”* 9 U. PA. J. CONST. L. 477, 478 (2007); see also John Edward Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1986 U. ILL. L. REV. 1, 4 (noting that property scholars “have rejected most of the older views justifying private property—the occupation theory, the natural rights theory, the labor theory, the legal theory—and are finally driven to the social utility theory”).

250. Reich, *supra* note 249, at 733.

251. *Id.* at 744–49, 756–64.

252. *Id.* at 778.

253. *Id.*

Reich's theory of "new property" quickly found a receptive audience. The Supreme Court in *Goldberg v. Kelly*²⁵⁴ hinted at a willingness to embrace a new property understanding of welfare benefits. In *Goldberg*, the Court struck down New York's summary process for terminating welfare under the Aid to Families with Dependent Children (AFDC) program because recipients were not given a chance to be heard before the state terminated their benefits.²⁵⁵ The Court noted that "[s]uch benefits are a matter of statutory entitlement for persons qualified to receive them,"²⁵⁶ and, in a footnote citing two of Reich's articles, including *The New Property*, explained, "It may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.'"²⁵⁷

The *Goldberg* decision has come to be seen as the high-water mark for welfare rights, but at the time the decision suggested the possibility of a truly progressive understanding of property.²⁵⁸ A more conservative Court held in *HUD v. Rucker*²⁵⁹ that public housing tenants could be evicted for a single drug offense. The one-strike rule meant, for example, that a grandmother would lose her housing if her grandson or even a guest in the unit engaged in drug-related activity.²⁶⁰ While the Court based its decision in part on justifiable concern about the prevalence of drug activity and drug-related violence in public housing, the ruling severely limited the property rights of public housing tenants. In some respects, the decision should not have come as a surprise: numerous policies, such as the midnight enforcement of man-in-the-house rules, have treated welfare recipients as second-class citizens.²⁶¹ Although

254. 397 U.S. 254 (1970).

255. The holding addressed only procedural protections and was not a panacea for all the problems of poverty or problems in the delivery of welfare assistance. See, e.g., Lucie E. White, *Goldberg v. Kelly on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861, 887 (1990) ("Constitutionalizing welfare procedures has not done very much to imbue the welfare system with the norms of human dignity that the *Kelly* decision rhetorically endorsed.").

256. 397 U.S. at 262.

257. *Id.* at 262 n.8.

258. As Joel Handler explains, "The hopes for a vanguard Supreme Court were short-lived." Joel F. Handler, "Constructing the Political Spectacle": *The Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History*, 56 BROOK. L. REV. 899, 900 (1990). Similarly, in the same issue of the *Brooklyn Law Review*, Charles Reich noted, "we must confront the fact that the road opened by *Goldberg v. Kelly* has not been taken. Instead there has been retreat." Charles A. Reich, *Beyond the New Property: An Ecological View of Due Process*, 56 BROOK. L. REV. 731, 731 (1990).

259. 535 U.S. 125 (2002).

260. *Id.* at 128.

261. Until the Court disallowed the practice in *King v. Smith*, 392 U.S. 309 (1968), welfare caseworkers enforced eligibility qualifications in part by conducting midnight raids on the homes of female recipients to see if there was a man in the house. See Amy Mulzer, Note, *The Doorkeeper and the Grand Inquisitor: The Central Role of Verification Procedures in Means-Tested Welfare Programs*, 36 COLUM. HUM. RTS. L. REV. 663, 669 (2005). Kaaryn Gustafson explains:

The stated reason for surprise visits was to catch men sleeping in the homes of women receiving welfare. Unmarried women with men in their beds were deemed morally unfit and their households therefore unsuitable for assistance. In addition, the men discovered in the homes were considered household breadwinners who had hidden their income support from the aid office.

welfare reform predated *HUD v. Rucker* by six years, the decision represents a judicial version of the same. Welfare reform came as a reaction to expanding welfare rolls, arguably driven by Supreme Court rulings between 1968 and 1979 that recognized “procedural protections and equitable eligibility standards” for welfare recipients.²⁶² As Ron Haskins, a primary architect of welfare reform, proudly declared, welfare reform “was the end of entitlement Parents no longer had a right to welfare.”²⁶³ What Congress and President Clinton “accomplished” with welfare reform, the Supreme Court embraced in *HUD v. Rucker*: the rejection of the idea that recipients had a property right—an entitlement—in their state support. Put differently, Richard Epstein, not Charles Reich, won the day.²⁶⁴

A neglected aspect of *The New Property* is the implicit possibility that, based on similarities between new and old property, property protections should be *weakened*. On its face, Reich’s argument has two essential pillars: (1) government largess is now a significant source of wealth and has a similar origin to traditional property, and (2) property protects individual autonomy and individual rights.²⁶⁵ Putting these ideas together, Reich concludes that government largess should be treated as a new form of property and afforded similar protections to traditional forms of property. As such, *The New Property* embraced the traditional power of property rights and extended them to a new context.²⁶⁶ By advocating a “property” solution, Reich sought to change what fell within the property rubric, but not the nature of property law.²⁶⁷ One could conclude, however, from the similar origins of government largess and

Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 649 (2009).

262. Laura T. Kessler, *PPI, Patriarchy, and the Schizophrenic View of Women: A Feminist Analysis of Welfare Reform in Maryland*, 6 MD. J. CONTEMP. LEGAL ISSUES 317, 335 (1995); see also Handler, *supra* note 258, at 923 (giving additional reasons eligibility limits were lifted and rolls expanded).

263. Ron Haskins, *What Works Is Work: Welfare Reform and Poverty Reduction*, 4 NW. J.L. & SOC. POL’Y 30, 42 (2009).

264. Epstein wrote pre-welfare reform in a retrospective on *Goldberg*, “Welfare benefits are precarious and may be terminable by the state without the consent of the recipient.” Richard A. Epstein, *No New Property*, 56 BROOK. L. REV. 747, 762 (1990).

265. Reich’s second pillar fits what Peñalver has called the “property as exit” conception of property: “At the heart of this conception of property as a crucial safeguard of freedom is the notion of an individual ensconced within the safety of his property.” Eduardo Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1892 (2005); see also D. Benjamin Barros, *Property and Freedom*, 4 N.Y.U. J.L. & LIBERTY 36, 47–49 (2009).

266. Alexander explains that Reich “tried to accommodate the welfare state with the rule of law by doctrinally transforming welfare benefits from largess into legal protected property.” GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970*, at 363 (1997). By tying new property to “old” property and emphasizing procedural protections, the progressive reach of Reich’s argument as far as redistribution is inherently limited. *Id.* at 368–75. As Bill Simon writes, Reich “bypass[ed] the distributive issue.” William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1, 26 (1985).

267. A pessimistic view of *The New Property* is that it “only served to give stability to those who already had a stake in society (and then only for a very short period).” Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 361 (1998).

traditional property that traditional property does not deserve as much protection as it has traditionally received. Reich thought new and old property should be brought into balance by recognizing property rights in government benefits, but another way to align old and new property would be to diminish the advantages associated with traditional property. Once one acknowledges the centrality of government action in establishing and protecting property rights, it is unclear why owners of traditional forms of property merit higher levels of protection than the poor.²⁶⁸ Reich offered one solution to this imbalance—raising the protections surrounding new property—but moving away from traditional property protection would be another solution.

Progressive property scholars struggle with these two possibilities, offering visions of change that modify but do not necessarily diminish traditional property protections. One reading of *The Social-Obligation Norm* is even more modest: Alexander claims to merely describe a heretofore unrecognized aspect of property law. Similarly, Purdy claims there is an existing freedom-promoting tradition in property law. On the other hand, the notion that the right to exclude is not absolute is a common refrain in progressive property scholarship—that public claims to use land can sometimes trump private exclusionary rights. Arguably, such a position effectively diminishes traditional property protections even if it is deliberately not characterized as such. Progressive property emphasizes the other sticks in the bundle, including the rights of nonowners over private property, but is curiously reluctant to admit that doing so amounts to an attack on popular understandings of property. Though the impulse behind progressive property—at its core a belief that property law ought to promote human flourishing—might suggest radically rewriting the law, the progressive property framework makes fairly limited demands of traditional property concepts, even of the right to exclude. Put differently, progressive property nudges against the exclusionary nature of current property law but is careful not to stray outside of the lines.

To remedy our society's failure to provide a basic level of protection to all its members, including children, from the harmful effects of poverty and inequality, a nudge against traditional understandings of property law is inadequate.²⁶⁹ In a retrospective essay on *The New Property* and *Goldberg v.*

268. Exploring the idea that people on the margins should force a reconsideration of the centrality of property in determining rights, A.J. van der Walt makes the similar argument that “we have to try and think away the power and the centrality of rights, entitlements, and privileges and to imagine a legal order not dominated by the hierarchies built upon the distinction between their presence or absence.” Van der Walt, *supra* note 12, at 98.

269. Underkuffler's explanation of the property origins of this harm is worth quoting at length: Because the same human desires—and the same core values—are involved in the acquisitive claims of all people, *and* because granting the acquisitive claims of some people (to physical, finite, non-shareable goods) necessarily means denying the acquisitive claims of others, the conclusion that existing distributions of wealth ‘harm’ those who possess little is undeniable.

Kelly, Reich noted that “the modest, due process, cost-benefit approach to individual security must surely be deemed a failure.”²⁷⁰ According to Reich, that left two alternatives: “We can allow economic forces unrestrained sway, and take no communal responsibility for individual security. Or we can give economic security the status of a constitutional right which must be honored ahead of the other goals of society.”²⁷¹ Not surprisingly, Reich concluded that individual protection required a constitutional guarantee.²⁷²

In the twenty years since Reich’s retrospective, society has continued to prioritize economic forces and has not made progress on the constitutionalization of positive rights. In *San Antonio Independent School District v. Rodriguez*,²⁷³ the Supreme Court rejected a race- and class-based challenge to the inequities of school funding tied to local property taxes. The majority reasoned, in education, “at least where wealth is concerned, the Equal Protection Clause does not require absolute equality or precisely equal advantages.”²⁷⁴ Though the district court held that education was a fundamental right, the Supreme Court reversed.²⁷⁵

The Supreme Court in *San Antonio v. Rodriguez* carefully signaled that it would slam the door on other similar positive rights-based claims. The Court rejected arguments that education merited constitutional protection “because it bears a peculiarly close relationship to other rights and liberties accorded protection under the Constitution,” even though the it nearly conceded that education did in fact serve such a function.²⁷⁶ The problem, according to the Court, was that this “nexus theory” proved too much: “How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter?”²⁷⁷ The Court discarded the nexus theory because it recognized that to embrace it “would cast serious doubt” on its prior antiwelfare rights and prolandlord holdings.²⁷⁸

The Court’s dismissive attitude in *San Antonio v. Rodriguez* toward a right to educational equality regardless of parental wealth specifically, and towards the recognition of positive rights generally, fits squarely with American political hesitation and skepticism regarding positive rights. Advocates of positive rights have not managed to shift the debate from the theoretical starting

UNDERKUFFLER, *supra* note 245, at 120.

270. Reich, *supra* note 258, at 732–33.

271. *Id.*

272. *Id.*

273. 411 U.S. 1 (1973).

274. *Id.* at 24.

275. *Id.* at 35.

276. *Id.* at 35–36; *see also id.* at 111–16 (Marshall, J., dissenting) (illustrating the close nexus between education and rights recognized by the Court).

277. *Id.* at 37.

278. *Id.*

position that property rights are about protection from government.²⁷⁹ The limited set of rights contained in the Bill of Rights echoes this bias, and arguments that negative liberties often depend on positive rights largely fall on deaf ears both politically and before the courts.²⁸⁰ Scholars offer a range of explanations for American skepticism of positive rights.²⁸¹ Some see this dichotomy (strong protection for negative liberties, zero protection for positive rights) from a Cold War standpoint: the United States offered political freedom but not economic security while the communist states offered the opposite.²⁸² The Court's dismissive attitude may also reflect the potentially destabilizing effects rigorous judicial enforcement of positive rights would have on property. In order to meet, say, rights to adequate food and shelter, the state would have to expend resources. Obtaining such resources would likely require the state to expropriate property from those whose minimum needs, now constitutionally protected rights, are already met.²⁸³ The point here is that there are likely trade-offs between positive and negative rights: strongly protecting private property could hinder the state's ability to deliver on the promise of positive rights and, vice versa, strong conceptions of positive rights could undermine private property protections.²⁸⁴

279. Frank Cross, in his critique of positive rights, explains, "The distinction between positive and negative rights is an intuitive one. One category is a right to be free *from* government, while the other is a right to command government action." Frank B. Cross, *The Error of Positive Rights*, 48 *UCLA L. REV.* 857, 864 (2001).

280. Although exploring positive rights state-by-state is beyond the scope of this Essay, it is worth noting that in "contrast to the Federal Constitution, every state constitution in the U.S. includes some textual commitment to a social or economic right." Hershkoff, *supra* note 52, at 1534.

281. Cass Sunstein, for example, presents and discusses many of the explanations that have been offered—everything from path dependency (providing for citizens through positive rights was not widely considered the role of the state at the time the Constitution was written) to American exceptionalism—before concluding that political happenstance provides the best explanation for American rejection of positive rights. CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* (2004).

282. See, e.g., Anu Bradford & Eric A. Posner, *Universal Exceptionalism in International Law*, 52 *HARV. INT'L L.J.* 1, 13 (2011) (explaining that the "United States championed the negative rights embedded in the [International Covenant on Civil and Political Rights] and the former Soviet Union championed the positive rights embedded in the International Covenant on Economic, Social, and Cultural Rights").

283. This would likely be done indirectly through progressive taxation, not through direct expropriation that could run afoul of the Fifth Amendment. Underkuffler notes that "we are (as a society) apparently far more willing to assert redistributive claims to money, or other forms of fungible wealth, than we are to land." UNDERKUFFLER, *supra* note 245, at 121.

284. See DAVID BILCHITZ, *POVERTY AND FUNDAMENTAL RIGHTS: THE JUSTIFICATION AND ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS* 230 (2007); Steven J. Eagle, *The Really New Property: A Skeptical Appraisal*, 43 *IND. L. REV.* 1229, 1255 (2010) (noting that "'positive liberty' inevitably would encroach upon the 'negative liberty' of individual independence that is buttressed by traditional property").

2. *Public Rights in Private Property*

The idea that in certain circumstances the public has rights over private property is perhaps *the* common theme in progressive property scholarship. Exclusion and access are linked: cases limiting the owners' right to exclude outsiders can also be viewed as recognizing public's right of access. Though it runs counter to what Underkuffler calls the "common conception of property," which sees property as a bulwark against collective claims,²⁸⁵ by itself there is nothing particularly progressive about the recognition that sometimes public rights trump private rights.²⁸⁶ What is distinct about progressive property scholarship is the unusual emphasis placed on cases recognizing public rights. Rather than seeing such cases as outliers or exceptions that prove the (exclusionary) rule, progressive property scholars build their vision of what property law should be around these cases.

In this Section, I focus, as progressive property scholars have, on *Matthews v. Bay Head Improvement Ass'n* and *State v. Shack*. Having already introduced the cases in Part I, my focus here is on the centrality these cases hold in the progressive property project and on the leverage they provide. The literature's emphasis on these cases raises the question whether they form the foundation for a progressive understanding of property or are instead the starting point for deeper change.

a. *Leading Progressive Property Cases*

In *Matthews*, the New Jersey Supreme Court held that the public maintained rights of access to, and limited use of, dry sand portions of the beach.²⁸⁷ The New Jersey Supreme Court acknowledged that the public trust doctrine had previously only recognized the public's right to the wet sand portions of the beach, up to the mean high-tide line, but held that changing conditions warranted extending the doctrine's reach.²⁸⁸ Although *Matthews* used the quasi-public nature of the defendant landowner to partially side-step deciding whether private landowners were subject to the public trust doctrine, subsequent case law affirmed the basic idea of *Matthews*: collective rights to

285. UNDERKUFFLER, *supra* note 245, at 62.

286. See, e.g., LEE ANNE FENNEL, THE UNBOUND HOME: PROPERTY VALUES BEYOND PROPERTY LINES 11 (2009) ("Legal thinkers have always recognized the property as it actually exists does not square with [the dominion] model. Indeed, Blackstone himself did not endorse such an absolute view of property, as his writings make clear. But idealized visions of dominion and exclusion live on in the popular imagination as representing the true core of property."); Bell & Parchomovsky, *supra* note 149, at 1032 ("The Blackstonian ideal of property as absolute dominion of a single owner over a thing retains broad political appeal At the same time, it must be recognized that property rights are not often easily bundled into neat Blackstonian packages.").

287. *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (N.J. 1984).

288. *Id.* at 365; see also N.J. DEPT. OF ENVTL. PROTECTION, PUBLIC ACCESS IN NEW JERSEY: THE PUBLIC TRUST DOCTRINE AND PRACTICAL STEPS TO ENHANCE PUBLIC ACCESS 9 fig.2 (2005), available at http://www.state.nj.us/dep/cmp/access/public_access_handbook.pdf (identifying the different portions of the beach).

use the beach may trump the exclusionary interests of private property owners.²⁸⁹ This remains true even when the public's interest is only recreational.²⁹⁰ Not surprisingly, a healthy subset of the extensive academic literature on the public trust doctrine focuses on *Matthews*.²⁹¹ The case invites progressive celebration: the New Jersey Supreme Court arguably recognized the dynamic nature of property and reaffirmed the idea that property law should change as society changes.²⁹²

The “iconic” status of *State v. Shack* in the progressive canon²⁹³ owes as much to the public-interest language employed by the New Jersey Supreme Court as to the case's holding. As a brief recap from Part I, *Shack* involved a trespass action against two people trying to serve migrant laborers employed by, and living on land owned by, the plaintiff landlord.²⁹⁴ The defendants, one a legal aid attorney, the other a fieldworker for a health services nonprofit, were found not guilty of trespass because, according to the court, they “invaded no possessory right of the farmer-employer.”²⁹⁵ The court held that the exclusionary rights of the landowner did not include barring access to government services designed to serve the migrant population. So far, so good: a holding that progressives might find useful, although hardly the linchpin for a progressive theory of property. But in reaching its holding, the court broadened the discussion considerably: “Property rights serve human values. They are recognized to that end, and are limited by it.”²⁹⁶ The court went on to explain that property rights are not absolute; instead they are inherently relative to the rights of others and must at times yield to necessity.²⁹⁷ Needless to say, this is not the standard fare of property law opinions.²⁹⁸ The New Jersey Supreme

289. See *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club*, 879 A.2d 112 (N.J. 2005).

290. 471 A.2d at 363 (explaining that “[e]xtension of the public trust doctrine to include bathing, swimming, and other shore activities” promotes the general welfare).

291. See Hope M. Babcock, *The Public Trust Doctrine: What a Tall Tale They Tell*, 61 S.C. L. REV. 393, 394 n.10 (2009) (collecting sources); Deborah Mongeau, *Public Beach Access: An Annotated Bibliography*, 95 LAW LIBR. J. 515 (2003) (collecting and summarizing sources).

292. See, e.g., UNDERKUFFLER, *supra* note 245, at 134 (“‘Property’ is not a preordained or acontextual concept—it is a socially constructed concept, with all the flux and change which that involves.”).

293. David Fagundes calls *Shack* the “iconic case” of what he labels the social discourse of property, which serves a similar role to what in this Essay is the progressive property school of thought and stands in contrast with the ownership discourse. David Fagundes, *Property Rhetoric and the Public Domain*, 94 MINN. L. REV. 652, 678 (2010).

294. 277 A.2d 369, 370 (N.J. 1971).

295. *Id.* at 375.

296. *Id.* at 372.

297. *Id.* at 373–74.

298. As Underkuffler explains, “Although consideration of the ‘purposes’ of free speech is a routine part of the courts’ treatment of this right, there is no similar, routine discussion of the ‘purposes’ of property.” UNDERKUFFLER, *supra* note 245, at 144.

Court moved beyond dry rules to consider the fundamental nature of property and did so in a way that has strong intellectual and emotional appeal.²⁹⁹

b. Cautionary Note

My concern regarding progressive property's reliance on *Matthews* and on *Shack* is that these cases do not provide sufficient force to move property in the direction the school advocates. Focusing first on the cases themselves and then on the role these cases play in progressive property scholarship, I argue that these cases alone cannot transform U.S. property law.

Shack is an ideal case for progressive property scholars, full of expansive and quotable passages. But, unfortunately, enthusiasm for *Shack* has outstripped its significance. Despite the opinion's powerful language, more than anything else *Shack* highlights the challenge of converting formal rules, even progressive rules, into meaningful, substantive rights. As a doctrinal matter, the case does little to upset owners' expectations. And as a practical matter, countervailing social and political forces limit the case's import. In his response to Alexander's *Social-Obligation Norm*, Henry Smith wrote, "When Alexander and others see *State v. Shack* as a paradigm of how to decide property cases, they are advocating removing any presumption in favor of owners' exclusion rights."³⁰⁰ Alexander rejects Smith's strong accusation out of hand: "I am advocating no such thing. . . . [T]he social-obligation theory in the main is consistent with the strong protection of private property rights, including the right to exclude."³⁰¹ Peñalver makes a similar point when he claims virtue theory is compatible with the strong exclusion principles expressed in *Jacques v. Steenberg Homes*.³⁰² But considering the progressive rhetoric surrounding *Shack*, and the conservative angst the case inspires,³⁰³ Smith's position is understandable. Singer argues that the landowner in *Shack* "wanted to act like a [feudal] lord" and uses New Jersey Supreme Court's decision as an example of legal rejection of feudalism, slavery, apartheid, caste-systems, and company towns.³⁰⁴ Alexander and Peñalver argue that *Shack* "addresses at least three of the capabilities that we have identified as necessary

299. In a slightly different reading, Joan Williams highlights the emotional and critiques the intellectual appeal of *Shack*'s flourish, writing, "'Property rights serve human values' is a stirring sentence, but what on earth does it mean?" Williams, *supra* note 267, at 345.

300. Smith, *supra* note 26, at 983.

301. Gregory S. Alexander, *The Complex Core of Property*, 94 CORNELL L. REV. 1063, 1066–67 (2009).

302. 563 N.W.2d 154 (Wis. 1997); Peñalver, *supra* note 7, at 884 n.251.

303. Eric Claeys, for example, calls *Shack* "an illustration of judicial hubris and self-deception" and suggests that "decisions like *Shack* could also reflect a complicated tyrannical impulse." Claeys, *supra* note 26, at 945.

304. Joseph W. Singer, *Things That We Would Like to Take for Granted: Minimum Standards for the Legal Framework of a Free and Democratic Society*, 2 HARV. L. & POL'Y REV. 139, 154 (2008).

for the well-lived life—freedom, practical reasoning, and affiliation.”³⁰⁵ As a normative matter, *Shack*, and the inclusionary concept of property that *Shack* embodies more broadly, ought to be central to a progressive concept of property. Yet as a descriptive matter, such a view of *Shack* is inaccurate. Unfortunately, the degree of progressive enthusiasm and related hope for broader change building on the case belies the case’s significance. As both Smith and Claeys note, the case has not led to dramatic changes in the forty years since it was decided.³⁰⁶

The progressive ambitions associated with *Shack* stand in marked contrast to the continued marginalization of the migrant farmworker communities that the case was meant to protect. The New Jersey Supreme Court’s holding allows access to physical property for legal aid attorneys but does not ensure meaningful access to justice for migrant communities. A legal aid attorney’s ability to act on their right to meet with migrant workers has been imperiled not only by continued battles over the right of lawyers to enter migrant labor camps,³⁰⁷ but also by budgetary attacks on legal aid that continue through the present.³⁰⁸ The lawyer’s right to access migrant communities loses its significance when legal aid office understaffing almost guarantees that indigent communities, including migrant farmworkers, will not have adequate representation for their legal needs.³⁰⁹ Compounding the funding problems are the practice limitations Congress imposed to ensure legal aid attorneys do not engage in broad-based structural advocacy.³¹⁰ Growers even succeeded in getting limitations imposed on Legal Service Corporation–funded programs to specifically restrict their representation of farmworkers.³¹¹ Perhaps more importantly, the undocumented or temporary worker status of many migrant

305. Alexander & Peñalver, *supra* note 230, at 151.

306. Smith explains, “Life goes on much as it did before, partly because even the New Jersey Supreme Court does not take [the *Shack*] approach literally.” Smith, *supra* note 26, at 984. Claeys writes that he does not see the holding as “disastrous,” explaining “American law muddles along tolerating other unjustifiable exceptions on trespassory rights, and it has also survived *Shack*.” Claeys, *supra* note 26, at 939–40.

307. See Lori Nessel & Kevin Ryan, *Migrant Farmworkers, Homeless and Runaway Youth: Challenging the Barriers to Inclusion*, 13 LAW & INEQUALITY 99, 126–32 (1994).

308. ALAN W. HOUSEMAN & LINDA E. PERLE, SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES 15–16, 29–34 (2007), available at <http://www.clasp.org/admin/site/publications/files/0158.pdf>; Kat Aaron, *The Budget-Slashing Hysteria’s Latest Victim: Legal Aid for the Poor*, MOTHER JONES (July 12, 2011), <http://www.motherjones.com/politics/2011/07/budget-cuts-hysteria-legal-aid-poor>; Allen Redlich, *Who Will Litigate Constitutional Issues for the Poor?*, 19 HASTINGS CONST. L.Q. 745, 757–59 (1992).

309. A recent study by the Legal Services Corporation found that at least half of those seeking legal assistance had to be turned down because of insufficient resources and that at most 20 percent of the legal problems faced by low-income people are addressed with the assistance of an attorney. LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 4 (2009), available at <http://www.lsc.gov/justicegap.pdf>.

310. HOUSEMAN & PERLE, *supra* note 308, at 36.

311. Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 575, 614 (2001).

farmworkers, coupled with the increased criminalization of immigration,³¹² leads to justifiable fear of retaliation among immigrants should they assert their rights.³¹³ As congressional legislation and recent Supreme Court cases show, many otherwise applicable labor laws do not apply to undocumented workers.³¹⁴ Although the rise in Access to Justice commissions³¹⁵ and state-level efforts to improve legal representation of the poor³¹⁶ both hold some promise, insufficient societal support for indigent criminal and civil representation assures that the migrant communities and laborers continue to be marginalized and vulnerable.

Similarly, the beach access cases might be viewed less romantically.³¹⁷ Arguably, beachfront property owners had no reason to expect that they could wholly exclude the public.³¹⁸ As Singer explains, “Property rights to exclude or to control property must be curtailed to protect the legitimate interests of the citizens of the state and to further the general welfare.”³¹⁹ But while that perspective may be accurate as far as New Jersey beaches are concerned, it risks overstating general property law.³²⁰ The public trust doctrine, for example, is great for beach goers but provides far less support for forms of social recreation away from coastal areas.³²¹ This is not to suggest that the public trust doctrine has not achieved important progressive results in other

312. The crimmigration literature is booming, but for a good, recent overview of this topic, see Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U.L. REV. 1281 (2010).

313. See Holley, *supra* note 311, at 596 (reporting on the retaliation and blacklisting used against temporary workers “who dare complain about abuses”).

314. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002); Holley, *supra* note 311, at 605–07.

315. For more on the rise, role, and place of access-to-justice commissions in the larger efforts to secure civil Gideon rights, see Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869 (2009).

316. See Alan W. Houseman, *The Future of Civil Legal Aid: Initial Thoughts*, 13 U. PA. J.L. & SOC. CHANGE 265, 292–93 (2009–2010) (describing promising initiatives in Massachusetts, Texas, and California).

317. For the sake of brevity, I focus on the *Matthews* case in this Section, but *Matthews* is joined by similar cases that similarly recognize the public’s right to beach use and access. See Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 714 (1986) (explaining that such cases usually rely upon theories of the public trust doctrine, prescription, and/or custom).

318. See Timothy M. Mulvaney & Brian Weeks, “Waterlocked”: *Public Access to New Jersey’s Coastline*, 34 ECOLOGY L.Q. 579, 585–86 (2007). But see Kristen A. Scaduto, *The Erosion of Private Property Rights After Raleigh Avenue Beach Ass’n v. Atlantis Beach Club*, 51 VILL. L. REV. 459, 460 (2006) (“The Framers of our Constitution would be disheartened to know that the judiciary, without legislative or executive support, was retroactively redefining property rights at the expense of its citizens.”).

319. Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 675 (1988).

320. See, e.g., Rose, *supra* note 317, at 716 (labeling beach access and similar cases that prioritize public access over private property protections “singular exceptions to the standard doctrines of property law”).

321. Henry Smith and Carol Rose make similar points about the scope of the public trust doctrine. See Smith, *supra* note 26, at 986; Rose, *supra* note 317, at 779–80.

contexts, especially the protection of the environment.³²² But courts can only push background principles³²³ and supposed customs³²⁴ so far in support of the doctrine, and consequently, the doctrine's reach and transformative potential is inherently limited.

In sum, if exclusion and access cases like *Shack* and *Matthews* are the foundation of progressive property, the school's transformative potential seems quite limited.³²⁵ Practical limitations should temper our celebration of judicial recognition of public rights. On the other hand, if these cases are but a starting point for more profound societal changes, why aren't those changes pursued more directly? Progressive property scholars have labored to elevate *Matthews*, and especially *Shack*, but in doing so have arguably limited the conversation. I share the instinct to celebrate these cases and even to make exclusion and access central to progressive property. But as we advocate for property law to adopt the approaches used in these cases, we should also participate in a broader progressive push for inclusion. Even as we applaud the progressive possibilities of affirming the social aspect of property, we should not lose sight of property law's socioeconomic context.³²⁶ Progressive property scholarship seems especially focused on the ways in which property law determines the permeability of private property when faced with collective demands, but the distributive function of property law is at least as important. Ultimately, though *Matthews* and *Shack* might offer the strongest available justifications for a progressive property regime,³²⁷ the two cases provide slender reeds on which to

322. See generally Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 643–56 (1986).

323. Expanding the categories of “background principles” of property law that do not amount to a compensable taking fits squarely within the progressive property approach and, in fact, has been a method used by courts to recognize collective interests in private property. See Michael C. Blumm & Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321 (2005) (discussing the rise of this progressive phenomenon post-*Lucas*). But see David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375, 1442–46 (1996) (criticizing the same; written by the plaintiff's counsel in *Lucas*).

324. See Babcock, *supra* note 291.

325. As Amnon Lehavi, responding to the exclusionary debates, writes, “Whereas the nature and extent of exclusion—that is, the general duty of non-owners to ‘stay-out’—is definitely a major issue in determining socio-legal relationships with respect to resources, the very core elements of allocation, control, and protection of property interests in resources contain much more than exclusion.” Amnon Lehavi, *The Property Puzzle*, 96 GEO. L.J. 1987, 2003 (2008).

326. UNDERKUFFLER, *supra* note 245, at 141.

327. Another case that progressive property scholars may consider is *Javins v. First National Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970). The case tends to be cited but not discussed, an oversight considering that the vision of the law that pervades *Javins* is similar to that found in both *Matthews* and *Shack* while the case arguably has had a greater reach. See Cribbet, *supra* note 249, at 7 (emphasizing legal and theoretical importance of *Javins*). But see David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389 (2011) (highlighting rules that have limited the reach of *Javins*).

Judge Skelly Wright's legal realist explanation for his role creating the implied warranty of habitability is remarkably honest and moving:

rest a vision of progressive change and jointly suggest the limitations of contemporary property law as a mechanism for change.

3. *Escaping and Resisting Social Obligations*

A recurring theme in property law scholarship is the disconnect between popular understandings of property and property law itself. The popular or intuitive understanding of property, particularly of real property, is that you can do what you want with your property. On your property you are king or queen and the institution of property separates you from the demands of the state.³²⁸ Underkuffler calls this the common conception of property and contrasts it with the operative conception of property.³²⁹ The common conception of property is significant in that it arguably limits the extent Americans are prepared to accept collective claims over private property. But the common conception of property is misleading if it is taken as an accurate description of the legal rights and obligations attendant to ownership. As Singer notes, “ownership does not mean, and has never meant, the absolute right to do what one wants on one’s own land.”³³⁰ A vast array of property doctrines—everything from nuisance to the *numerus clausus* principle—impose limitations on what owners can do with their land.

Conservatives and libertarians often complain that the limitations on the rights of owners have increased with time. Adopting an approach to the law that acknowledged the need for limitations on property to change with industrialization, the Supreme Court in *Euclid* approved of municipal zoning, based in part on analogies to nuisance.³³¹ Add on environmental regulations, building codes, historic districts, et cetera, and it seems credible that the freedom enjoyed by property owners shrank throughout the twentieth

I was indeed influenced by the fact that, during the nationwide racial turmoil of the sixties and the unrest caused by the injustice of racially selective service in Vietnam, most of the tenants in Washington, D.C. slums were poor and black and most of the landlords were rich and white. . . . I didn’t like what I saw, and I did what I could to ameliorate, if not eliminate, the injustice involved in the way many of the poor were required to live in the nation’s capital.

I offer no apology for not following more closely the legal precedents which had cooperated in creating the conditions that I found unjust.

Letter from J. Skelly Wright to Professor Edward H. Rabin, Oct. 14, 1982, *reprinted in* Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 549 (1984). For more on *Javins*, see Richard H. Chused, Saunders (*a.k.a.* Javins) v. First National Realty Corporation, 11 GEO. J. ON POVERTY L. & POL’Y 191 (2004).

328. Or, as Bethany Berger puts it, “There is something basic—whether its origins are instinctual or cultural—in the notion of ‘mine’ that attaches to physical possessions and that sees the power of others over those possessions as inappropriate interference to be vigorously resisted.” Bethany R. Berger, *What Owners Want and Governments Do: Evidence from the Oregon Experiment*, 78 FORDHAM L. REV. 1281, 1297 (2009).

329. UNDERKUFFLER, *supra* note 245, at 61–62.

330. Singer, *supra* note 30, at 312.

331. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

century.³³² But what this account misses, and what progressive property ironically misses as well, are the countervailing trends. If property law “has shifted from an excessive emphasis on individual rights toward a greater dominance of the social interest,”³³³ the trends in the development and consumption of housing reflect a pushback against the socialization of property. Those with the financial ability to purchase their way out of the actual or potential social obligations of ownership can do so, and have done so, through the linked power of escaping urban areas to the suburbs, discussed previously in Part II.A.2, and restrictive covenants.

a. Restrictive Covenants and Common Interest Communities

Common interest communities (CICs), although they seem to exemplify the socialization of property, can be better understood as an important example of owners pushing back against, and escaping from, societal obligations. Restrictive covenants in CICs allow owners to bind together to support common facilities and ensure greater uniformity of use. Individual property owners must not only pay homeowner association dues but also limit their behavior and the use of their property according to deeded promises.³³⁴ By purchasing a house or an apartment in a CIC, the owner seems to be voluntarily accepting *additional* social obligations, not fewer.³³⁵ Homeowner associations can tell owners what color their window curtains need to be, whether pets are allowed, and even whether cooking in a wok is allowed.³³⁶ CICs and gated communities would seem to epitomize the social-obligation norm in action.³³⁷ And they might be,³³⁸ but only for those obligations that begin and end at the gate.

Counterintuitively, CICs represent a pushback against social obligations even though owners in CICs have obligations they would not have if they held

332. See, e.g., James W. Ely, Jr., *Property Rights and Environmental Regulation: The Case for Compensation*, 28 HARV. J.L. & PUB. POL'Y 51, 51–52 (2004) (making such an argument regarding environmental regulations).

333. Cribbet, *supra* note 249, at 42.

334. For a brief overview of CICs and homeowner associations, see Janet M. Bollinger, Comment, *Homeowners' Associations and the Use of Property Planning Tools: When Does the Right to Exclude Go Too Far?*, 81 TEMP. L. REV. 269, 272–75 (2008).

335. But see Paula A. Franzese & Steven Siegel, *Trust and Community: The Common Interest Community as Metaphor and Paradox*, 72 MO. L. REV. 1111, 1119–29 (2007) (questioning the characterization that buyers are voluntarily choosing CIC rules and presenting alternative structural explanations).

336. Paula A. Franzese, *Does It Take a Village? Privatization, Patterns of Restrictiveness and the Demise of Community*, 47 VILL. L. REV. 553, 555–56 (2002); see also Nadav Shoked, *The Community Aspect of Private Ownership*, 38 FLA. ST. U. L. REV. 759, 776 (2011).

337. See Alexander, *supra* note 91, at 1862 (using the rise of CICs as evidence to support the idea that governance property—property subject to multiple rights holders—has become more important than exclusion property).

338. And they might *not* be, as Franzese describes in an article section aptly titled, *Trouble in Common Interest Community Paradise*. Franzese, *supra* note 336, at 572–76.

title in fee simple. But, by accepting known limitations on ownership in a CIC, owners protect themselves against future obligations to the public in at least four ways.

First, replacing public services through private contracting places CIC owners in a better position to opt out, or at least demand less, of politics and public engagement.³³⁹ Although gated access and private security guards are the most easily identified example of how CICs enable people to buy their way out of public services, many CICs offer numerous types of common facilities that enable their residents to further insulate themselves.³⁴⁰ Why support quality state services such as public swimming pools, well-maintained sidewalks, or even public education when your homeowner association fees cover some or all of these goods within the community?³⁴¹

Second, CICs allow owners to separate themselves and their largest investment, their home, from nonowners. This physical separation can protect owners from aspects of the urban environment that might cause discomfort or lower property values.³⁴² Gated communities allow residents to sterilize their surroundings, shielding owners not only from crime but also interactions with people who are different.³⁴³ CICs facilitate owners' withdrawal from society into homogeneous communities. Given America's racially defined housing and wealth, CICs are also often racially uniform and, because one must purchase one's way into such communities, socioeconomically homogeneous.³⁴⁴

339. See EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* 187 (1996).

340. See *id.* at 187–88.

341. Audrey McFarlane addresses this question in terms of the effect CICs can have on norms: “It does not seem a stretch to imagine that the explosive rise of common interest communities in the suburban context is influencing our expectation of which services local residents can in fact be responsible for arranging and delivering to themselves.” Audrey G. McFarlane, *Preserving Community in the City: Special Improvement Districts and the Privatization of Urban Racialized Space*, 4 STAN. AGORA 1, 10 (2003); see also Sheryll D. Cashin, *Privatized Communities and the “Secession of the Successful”: Democracy and Fairness Beyond the Gate*, 28 FORDHAM URB. L.J. 1675, 1677 (2001) (“These private contractual arrangements for the provision of formerly ‘public’ services have put the nation on a course toward civic secession.”).

342. Harvey Rishikof & Alexander Wohl, *Private Communities of Public Governments: “The State Will Make the Call,”* 30 VAL. U. L. REV. 509, 512–14 (1996).

343. See Dana Young, Note, *The Laws of Community: The Normative Implications of Crime, Common Interest Developments, and “Celebration,”* 9 HASTINGS WOMEN’S L.J. 121, 132–33 (1998). A similar phenomenon—carefully controlled interactions with others in a secure environment—arguably occurs at suburban shopping malls as well. See Jennifer Niles Coffin, Note, *The United Mall of America: Free Speech, State Constitutions, and the Growing Fortress of Private Property*, 33 U. MICH. J.L. REFORM 615, 617–21 (2000) (explaining that by entering shopping malls, patrons become “citizens” of the private-corporation mall owners).

344. Mona Lynch, *From the Punitive City to the Gated Community: Security and Segregation Across the Social and Penal Landscape*, 56 U. MIAMI L. REV. 89, 99–100 (2001); Cashin, *supra* note 341, at 1681–83; Angel M. Traub, Comment, *The Wall Is Down, Now We Build More: The Exclusionary Effects of Gated Communities Demand Stricter Burdens Under the FHA*, 34 J. MARSHALL L. REV. 379, 387–88 (2000); see also EVAN MCKENZIE, *BEYOND PRIVATOPIA*:

Third, CICs secure individual owners a stronger bargaining position when faced with collective demands. Homeowners associations serve a pooling function, bringing together individual owners and allowing them to express unified preferences. Equally important, even if owners do not channel their desires through the association, CIC development creates its own constituency by concentrating together individuals of the same class who share similar interests when it comes to public life.

CICs' grouping function makes it harder for the state to place demands on CIC homeowners, regardless of whether this grouping is accomplished formally, through an association, or informally, through the homogeneous interests of owners. Consider, for example, a proposed government taking for a clear public purpose. Partly because, as Peñalver emphasizes, land has memory,³⁴⁵ taking land from an owner in a developed CIC is likely to be harder and generate more legal challenges than taking land from an individual owner whose property is not part of a CIC. Not only will the CIC form mean that taking land could require compensating even those whose residences are untouched by the taking (because the government may have to pay for violating the covenants that benefit all owners in the CIC), but unlike isolated homeowners, CICs normally have a homeowner association that can fight the taking on behalf of the entire community.

Finally, CICs protect owners from zoning changes by layering private ordering and the security of restrictive covenants over initial zoning restrictions. An individual buyer of a standalone property faces the danger that the locality will, for example, decrease protections for single family homes in a developing area by allowing increased density. Through covenants, CICs can protect owners from the danger that an apartment complex will replace their neighbor's home when the zoning changes.

By opting out of public services, separating from others, associating with a more homogeneous group, and insulating themselves from zoning changes, homeowners within CICs are reacting to the socialization of property by disassociating themselves from their broader social context.

b. Kelo and the Kelo Backlash

The pushback against an expanded understanding of the social obligations of property is not limited to the rise of gated communities. Although some of these examples are debatable, the operation of an antiobligation impulse appears in the prevalence of discrimination found on Craigslist,³⁴⁶ in fair

RETHINKING RESIDENTIAL PRIVATE GOVERNMENT 38–41 (2011) (expanding on and explaining this perspective on CICs in terms of critical urban theory).

345. See Peñalver, *supra* note 7, at 829–32.

346. See generally Rigel C. Oliveri, *Discriminatory Housing Advertisements On-Line: Lessons from Craigslist*, 43 IND. L. REV. 1125 (2010).

housing underenforcement,³⁴⁷ and even in anti-immigrant exclusionary property ordinances.³⁴⁸ But I will briefly focus on two clear examples outside gated communities: the popular reaction against *Kelo v. City of New London*³⁴⁹ and the efforts to secure property and particular communities following Hurricane Katrina.

In *Kelo*, the Supreme Court upheld the use of eminent domain to take private property in order to promote redevelopment in an economically depressed community. The plaintiff, Susette Kelo, was one of the holdout property owners.³⁵⁰ The *Kelo* majority held that the taking was within the police power of the state, fitting within a broad understanding of public use.³⁵¹ In this case, the proposed development included mixed public and private space intended to entice a large pharmaceutical company to operate in the city.³⁵² The case raised the prospect that eminent domain could be used to transfer land from one private party to another private party simply because the subsequent owner had more economic power and the transfer would increase tax revenues. Or, from the oral argument transcript:

Justice Scalia: “I just want to take property from people who are paying less taxes and give it to people who are paying more taxes. That would be public use, wouldn’t it?”

Justice O’Connor: “For example, Motel 6 and the city thinks, well, if we had a Ritz-Carlton, we would have higher taxes. Now, is that okay?”

Mr. Horton [Attorney for New London]: “Yes, Your Honor.”³⁵³

347. See, e.g., John A. Powell, *Reflections on the Past, Looking to the Future: The Fair Housing Act at 40*, 41 IND. L. REV. 605, 608–16 (2008) (discussing how, although the Fair Housing Act has reduced discrimination, it has fallen short in providing fair housing and integration). See generally James A. Kushner, *An Unfinished Agenda: The Federal Fair Housing Enforcement Effort*, 6 YALE L. & POL’Y REV. 348 (1988) (critiquing the federal enforcement effort).

348. See Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 592–93 (2008) (describing landlord-tenant ordinances in Hazleton, Pennsylvania, targeting unlawful immigrants).

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

350. *Id.* at 475. George Lefcoe reports that Kelo ultimately negotiated the sale of her house with the state in 2006, receiving \$442,000 for a house she had bought nine years earlier for \$53,500 and that had a condemnation value in 2000 of \$123,000. George Lefcoe, *Jeff Benedict’s Little Pink House: The Back Story of the Kelo Case*, 42 CONN. L. REV. 925, 954–55 (2010) (book review). For a history of the case largely told from the perspective of the plaintiff homeowners, see JEFF BENEDICT, *LITTLE PINK HOUSE: A TRUE STORY OF DEFIANCE AND COURAGE* (2009).

351. *Kelo*, 545 U.S. at 488–90.

352. *Id.* at 495–96.

353. Transcript of Oral Argument at 29–30, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108), available at http://www.ij.org/images/pdf_folder/private_property/kelo/kelo_ussc_transcript.pdf; see also Richard A. Posner, *The Supreme Court 2004 Term—Forward: A Political Court*, 119 HARV. L. REV. 32, 93 (2005) (asking in the wake of *Kelo* “what is to prevent a city from condemning the homes of lower-middle-class families and giving them free of charge to multimillionaires” if they could pay sufficiently high taxes to offset the compensation owed to the original owners).

Though the final opinion undercut this argument by emphasizing the economic challenges facing New London and the related public interest in increasing employment through waterfront redevelopment, the public saw *Kelo* as sanctioning eminent domain abuse. Ultimately, the *Kelo* holding highlights the disconnect between the mechanics of property law and popular notions of property's sanctity. The outcry that followed the decision amounts in some respects to a momentary public recognition of this disconnect.³⁵⁴

Kelo inspired a popular and political backlash that received considerable media coverage.³⁵⁵ The attorney for Susette Kelo called it “probably the most universally despised Supreme Court decision in decades.”³⁵⁶ The “firestorm of controversy”³⁵⁷ surrounding *Kelo* led all but seven states to pass reactionary legislation limiting the use of eminent domain.³⁵⁸ Yet as Judge Richard Posner observes, these same efforts at passing legislation to counter the holding “are evidence of its pragmatic soundness.”³⁵⁹

What is remarkable about *Kelo* is not the holding itself, but the public reaction. Ilya Somin, for example, identifies “the massive backlash against a decision that largely reaffirmed existing case law” as one of the “anomalous aspects of the *Kelo* controversy.”³⁶⁰ The fear that, applying *Kelo*'s holding, states could strip owners of their property under the banner of economic development drove the backlash. Seen in this light, the public response following *Kelo* can be thought of as a popular effort to curb the state's ability to make collective demands on an individual property owner. Public attention made *Kelo*'s reaffirmation of the broad scope of eminent domain a matter of public debate, putting the gap between common conceptions of property and the workings of property law into sharp relief. The strong public reaction to the case arguably amounts to a civil society effort to reduce this gap by insisting that property law more closely track common conceptions of property that tend to emphasize exclusionary interests over societal interests.

354. For a great, short essay exploring the popular reaction to *Kelo* in terms of the disconnect between scientific policy makers' understandings of property and that of ordinary observers, see Eduardo M. Peñalver, *Property Metaphors and Kelo v. New London: Two Views of the Castle*, 74 *FORDHAM L. REV.* 2971 (2006).

355. See, e.g., William Woodyard & Glenn Boggs, *Public Outcry: Kelo v. City of New London—A Proposed Solution*, 39 *ENVTL. L.* 431, 440–41 (2009) (giving examples of the public backlash and media coverage).

356. William Yardley, *After Eminent Domain Victory, Disputed Project Goes Nowhere*, N.Y. *TIMES*, Nov. 21, 2005, at A1 (quoting Scott Bullock and cited in Alberto B. Lopez, *Revisiting Kelo and Eminent Domain's "Summer of Scrutiny,"* 59 *ALA. L. REV.* 561, 562 (2008)); accord Ilya Somin, *Introduction to Symposium on Post-Kelo Reform*, 17 *SUP. CT. ECON. REV.* 1, 1 (2009) (arguing that *Kelo* “generated a broader political backlash than any other decision in decades”).

357. Laura S. Underkuffler, *Kelo's Moral Failure*, 15 *WM. & MARY BILL RTS. J.* 377, 377 (2006).

358. Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 *MINN. L. REV.* 2100, 2102 (2009).

359. Posner, *supra* note 353, at 98.

360. Somin, *supra* note 358, at 2163–64.

c. *Hurricane Katrina and Its Aftermath*

Events following Hurricane Katrina provide the third clear example of a pushback against collective claims. Katrina killed sixteen hundred people and displaced more than a million people.³⁶¹ Katrina wrought both natural and man-made devastation that illustrates our dependence on government. Although finger pointing between city, state, and federal officials began almost immediately, there was plenty of blame to spread around.³⁶² Excessive development of the Mississippi River basin and overreliance on canals and levees lessened the environmental dampening—in this case the natural storm protection—that the wetlands south of the city had historically provided.³⁶³ The levees, built by the Army Corps of Engineers, provided the “guarantee” needed for the city to grow and for people to build houses below grade, but failed despite assurances they were sufficient.³⁶⁴ And following the storm, Americans, mostly poor black Americans, were left waiting too long to be rescued from the supposed safety of the Superdome.³⁶⁵

As a relatively privileged person living in the Uptown neighborhood of New Orleans, I was able to get out of the city in time because I had a car and enough money to pay for a hotel room in Houston.³⁶⁶ But I believed at the time and still believe today that our country’s response would have been much different if those left behind had been mostly middle-class white people.³⁶⁷

361. William P. Quigley, *Thirteen Ways of Looking at Katrina: Human and Civil Rights Left Behind Again*, 81 TUL. L. REV. 955, 957 (2007).

362. See generally SELECT BIPARTISAN COMM. TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, A FAILURE OF INITIATIVE: THE FINAL REPORT OF THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA (2006), available at <http://www.gpoaccess.gov/katrinareport/fullreport.pdf> (repetitively making the point that all levels of government failed).

363. CTR. FOR PROGRESSIVE REFORM, AN UNNATURAL DISASTER: THE AFTERMATH OF HURRICANE KATRINA (2005), available at http://www.progressivereform.org/articles/Unnatural_Disaster_512.pdf.

364. Michael Lewis explains, “When the levees broke, Lake Pontchartrain stole back the wetlands long ago reclaimed for housing.” Michael Lewis, *Wading Toward Home*, N.Y. TIMES, Oct. 9, 2005, § 6 (Magazine), at 47. In the dry language of the Army Corps of Engineers’ extensive self-study, Katrina “exceeded design criteria, but the performance was less than the design intent.” U.S. ARMY CORPS OF ENGINEERS INTERAGENCY PERFORMANCE EVALUATION TASK FORCE, PERFORMANCE EVALUATION OF THE NEW ORLEANS AND SOUTHEAST LOUISIANA HURRICANE PROTECTION SYSTEM: DRAFT FINAL REPORT I-3 (2006), available at http://www.nytimes.com/packages/pdf/national/20060601_ARMYCORPS_SUMM.pdf.

365. See Sherrie Armstrong Tomlinson, Note, *No New Orleanians Left Behind: An Examination of the Disparate Impact of Hurricane Katrina on Minorities*, 38 CONN. L. REV. 1153, 1155–60 (2006) (providing a timeline of the storm and subsequent evacuation).

366. In contrast with my privilege, many poor African Americans did not have access to transportation and could not afford to pay for alternative housing. *Id.* at 1163–64.

367. A public opinion poll reveals that two-thirds of blacks agree but more than three-fourths of whites disagree with my belief that race slowed the federal response. L. Darnell Weeden, *The Black Eye of Hurricane Katrina’s Post Jim Crow Syndrome Is a Basic Human Dignity Challenge for America*, 37 CAP. U. L. REV. 93, 101 (2008).

It was along such lines that some uglier examples of pushback against collective property claims occurred. Gretna, a white suburban town located just south of New Orleans and connected to the city by a bridge over the Mississippi River, survived the storm relatively unscathed. But when a group of black people fleeing New Orleans tried to cross the bridge, the Gretna police erected a blockade and fired warning shots over the crowd.³⁶⁸ When evacuees later tried to set up camp on the bridge, they were told to “Get the f— off the bridge” by an officer pointing his gun at them and finally moved when a helicopter dipped low near the bridge and disrupted the camp.³⁶⁹

These events reflected a racialized perception that the black people trapped in New Orleans after the storm were dangerous. In an oft-cited example, a news photo of a black man carrying a full garbage bag and a case of soda was captioned “*looting* a grocery store in New Orleans,” while a photo of a white couple also wading through chest-deep water dragging goods behind them was captioned “*finding* bread and soda from a local grocery store.”³⁷⁰

Personally, the aspect of Katrina that remains most troubling to me was the rush by whites to take up arms in defense of their property in the days and months after Katrina. The parts of town least affected by flooding were the older areas that had been built on high ground and were both more expensive and whiter than most of the rest of New Orleans.³⁷¹ Some white areas were also flooded, but the main impacts were on poor black wards.³⁷² (I was renting an apartment on high ground in the Uptown neighborhood.) Fear that blacks would enter white upper-class neighborhoods that had been spared led whites to arm themselves. Michael Lewis, the author of *Liar’s Poker*, reported upon returning to his parent’s house in Uptown, a high-end neighborhood near Tulane and Loyola universities:

Pretty quickly, it became clear that there were more than a few people left in the city and that they fell broadly into two categories: extremely well armed white men prepared to do battle and a ragtag collection of

368. Tomlinson, *supra* note 365, at 1171.

369. *Id.*; see also Mitchell F. Crusto, *Enslaved Constitution: Obstructing the Freedom to Travel*, 70 U. PITT. L. REV. 233, 244–50 (2008) (critiquing the dismissal of a constitutional challenge to the actions of the Gretna police). In a more deadly episode six days after Katrina flooded the city, New Orleans police shot at an unarmed black family walking on the Danziger Bridge with automatic weapons, brutally killing two members of the family; one victim was killed by a shotgun blast to his back and later stomped on by an officer. Times-Picayune Staff, *5 NOPD Officers Guilty in Post-Katrina Danziger Bridge Shootings, Cover-Up*, NEW ORLEANS TIMES-PICAYUNE (Aug. 5, 2011), http://www.nola.com/crime/index.ssf/2011/08/danziger_bridge_verdict_do_not.html; Campbell Robertson, *Officers Guilty of Shooting Six in New Orleans*, N.Y. TIMES, Aug. 6, 2011, at A1.

370. Stuart P. Green, *Looting, Law, and Lawlessness*, 81 TUL. L. REV. 1129, 1131–32 (2007).

371. An easy way to understand the areas flooded is through a great time-series multimedia graphic produced by The New Orleans Times-Picayune. See Dan Swenson, *Flash Flood: Hurricane Katrina’s Inundation of New Orleans*, NEW ORLEANS TIMES-PICAYUNE (Aug. 29, 2005), <http://www.nola.com/katrina/graphics/flashflood.swf>.

372. Jonathan P. Hooks & Trisha B. Miller, *The Continuing Storm: How Disaster Recovery Excludes Those Most in Need*, 43 CAL. W. L. REV. 21, 65 n.167 (2006).

irregulars, black and white, who had no idea there was anyone to do battle with. . . . The city on high ground organized itself around the few houses turned into forts.³⁷³

This siege mentality, Lewis explains, was based on rumors and had very little to do with reality.³⁷⁴ Before emergency supplies arrived for the evacuees at the convention center, a thousand battle-ready soldiers were sent in to secure the center.³⁷⁵

The siege mentality transformed those who might flee the devastation and floodwaters into dangerous threats to neighboring communities. As an article in *The Nation* reporting on suspicious deaths following Katrina noted, “[f]acing an influx of refugees, the residents of Algiers Point [a town on the opposite bank of the Mississippi River from New Orleans] could have pulled together food, water and medical supplies for the flood victims,” but instead they blocked roads and starting mounting armed patrols.³⁷⁶ As Cheryl Harris observes, “while armed White men were presumptively defending their property, Black men with guns constituted gangs of violent looters who society should contain.”³⁷⁷

There is of course nothing new about whites using violence or the threat of violence to prevent black competition for resources.³⁷⁸ After centuries of struggle, blacks are formally entitled to the same civil rights as whites, including property rights. But as post-Katrina New Orleans shows, latent reactionary pressures to the demands of blacks to be treated civilly remain.³⁷⁹ Racism and the idea that property should be strongly defended against collective demands combined when those evacuating New Orleans tried to cross into Gretna. The perception of those evacuating was that “they were a racial horde encroaching on the white space of Gretna, rather than people merely seeking safety and dry land.”³⁸⁰ And lest this be thought of as an isolated incident or as one only involving public officials, it is worth noting that following the blockade, Gretna residents showed their appreciation with thank-

373. Lewis, *supra* note 364, at 49.

374. *Id.* at 50.

375. Cheryl I. Harris, *Whitewashing Race: Scapegoating Culture*, 94 CALIF. L. REV. 907, 939–40 (2006) (reviewing MICHAEL K. BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLORBLIND SOCIETY* (2003)).

376. A.C. Thompson, *Katrina's Hidden Race War*, NATION (Dec. 17, 2008), <http://www.the.nation.com/article/katrinass-hidden-race-war>.

377. Harris, *supra* note 375, at 937.

378. See, e.g., Jeannine Bell, *The Fair Housing Act and Extralegal Terror*, 41 IND. L. REV. 537, 538–45 (2008) (discussing anti-integrationist violence before and after the passage of the Fair Housing Act); C. Michael Henry, *Introduction: Historical Overview of Race and Poverty from Reconstruction to 1969*, in RACE, POVERTY, AND DOMESTIC POLICY 1, 17–33 (C. Michael Henry ed., 2004) (discussing white violence and race riots targeting blacks).

379. Like L. Darnell Weeden, upon seeing the evacuation delays and related hardships, “I could not help but feel a sense of betrayal of the basic human dignity of the African-American community by public officials at all levels.” Weeden, *supra* note 367, at 107.

380. Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401, 450 (2010).

you signs on their yards, and Gretna vowed “to ‘secure’ the bridge the same way in the next hurricane.”³⁸¹ Whether through official police action or vigilantism, white communities that were not flooded too often reacted to the clear needs of fellow Americans by securing property and space against the perceived dangers of displaced blacks.

Like the CICs and the *Kelo* backlash, violent, exclusionary reactions of the white and wealthy in New Orleans to supposedly rogue blacks is yet another example of reinforcing exclusion despite recently socialized property policies. This tension between social obligations and owners’ intuitive understandings of property highlights of the importance of making exclusion and access more central to progressive property scholarship.

III.

REIMAGINING PROGRESSIVE PROPERTY

A fundamental goal of U.S. property law is to provide societal stability.³⁸² As Harold Demsetz famously explained, “[p]roperty rights are an instrument of society and derive their significance from the fact that they help a man form those expectations which he can reasonably hold in his dealings with others.”³⁸³ Progressive property emphasizes that absolute exclusion should not be, and has not always been, a reasonable expectation in all circumstances. The goal of progressive property is thus to destabilize common understandings of property in order to accomplish progressive ends. But by not directly addressing ill-gotten wealth, the progressive property school concedes too much to stability and expectation formation, neglecting the idea that property law is an instrument of society and thus potentially subject to more radical revision. Ultimately, progressive property’s goals—human flourishing, promotion of democracy, inculcation of virtue, and recognition of social obligations—are loftier than the modest means suggested.

A thick version of progressive property would recognize the singular importance of property’s allocative function and the related inextricability of property and distribution.³⁸⁴ Progressive property scholarship repetitively

381. Rebecca Eaton, Note, *Escape Denied: The Gretna Bridge and the Government’s Armed Blockade in the Wake of Katrina*, 13 TEX. WESLEYAN L. REV. 127, 144–45 (2006).

382. See Audrey G. McFarlane, *The Properties of Instability: Markets, Predation, Racialized Geography, and Property Law*, 2011 WIS. L. REV. 855, 866–71 (identifying the two components of stability as predictability and certainty).

383. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 347 (1967).

384. An emphasis on the allocative function of property reflecting a thick version of progressive property can be found in the definition of property in Peñalver and Alexander’s recent book, *An Introduction to Property Theory* (2012): “that area of law concerned with the function of allocating material resources.” E-mail from Eduardo Peñalver to Author (Aug. 16, 2011, 3:44 EST) (on file with author). This definition echoes the legal realist definition found in Alexander’s earlier book on constitutional property: “[P]roperty rights are nothing more or less than allocations of the state’s coercive power to individuals.” GREGORY S. ALEXANDER, *THE GLOBAL DEBATE OVER*

emphasizes the social nature of property but falls short of acknowledging that the project's wisdom is entirely contextual.³⁸⁵ That not everyone has easy beach access is what makes *Matthews* an important decision, just as the subordinated position of migrant farmworkers makes *Shack* deserve celebration. The rules have no inherent value outside of societal context.

Although progressive property contains traces of this argument already,³⁸⁶ tinkering around in what even a sympathetic reader called the “telling exceptions to the conventional operation of property rights”³⁸⁷ would not satisfy a more dynamic and transformative version of progressive property. Instead, a robust version of progressive property would remind the country that the misdistribution of wealth that property law protects is itself partially a reflection of conquest and oppression. Although many Americans pretend we live in a society marked by equality of opportunity, in which everyone begins at the same starting line, such thinking is marked by convenient short-sightedness and denial of unearned privilege. The conquest of Indian land continues to the present, as do the benefits of centuries of treating African Americans as subhuman, to say nothing of structural inequality. A thick version of progressive property would demand we face our past rather than allowing the institutions of property to immunize past wrongs. The social context calls for more, even if those who most benefit from property law's current prioritization of stability over justice will resist.

The approach involved in this effort at reimagining property law is necessarily fluid. In property law, as in most areas of law, the status quo enjoys a presumption of validity even if it is not stated as such.³⁸⁸ The leading scholarship highlighting the informational value of property law's categories amounts largely to a sophisticated defense of the status quo against the increasing number and strength of collective demands on property.³⁸⁹ Much the same could be said about the purpose of the argument that progressive property

CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE 4 (2006); *accord The Politics of Property and Need*, *supra* note 243, at 376 (“[P]roperty laws, of all laws, are the most inextricably intertwined with the use of coercive state power to allocate the resources necessary for human life.”).

385. In a veiled critique of progressive property, Smith writes that the realist's bundle-of-rights conception of property “promiscuously invokes context.” Henry E. Smith, *Property Is Not Just a Bundle of Rights*, 8 *ECON. J. WATCH* 279, 284 (2011); *see also* Henry E. Smith, *Property as the Law of Things*, 125 *HARV. L. REV.* 1691, 1717 (2012). My argument, in Smith's terms, is that contextual promiscuity should be increased and openly acknowledged.

386. *See* Baron, *supra* note 1, at 957–62 (describing the greater receptiveness of progressive property scholars to redistribution and dynamic change compared to scholars who emphasize the exclusion and information values of property).

387. Purdy, *supra* note 26, at 950.

388. Sometimes of course it is stated exactly as such. *See* Eagle, *supra* note 284, at 1240 (arguing that because of the “law of unintended consequences . . . long-established property regulations are preferable”).

389. *See* Ezra Rosser, *Living in Legoland* (July 2012) (unpublished manuscript) (on file with author) [hereinafter *Living in Legoland*].

is primarily laboring in property law's periphery, which I agree with as a descriptive matter but not in its normative direction.³⁹⁰ Though a number of theories have been advanced for preferring the status quo over "disruptive" changes, they boil down to the idea that existing rules work.³⁹¹ A thick version of progressive property rejects the reification of past practices and embraces an experimental optimism that existing institutions need not define the realm of the possible.³⁹² Where the formality that accompanies property law cannot be justified, progressive scholars need not be shy in suggesting that flexibility is preferable to ossified understandings of the law. Extending *A Statement of Progressive Property's* argument that "[p]roperty implicates plural and incommensurable values,"³⁹³ my approach questions the assumption that property rules should or actually do reflect purely efficiency concerns and highlights the ways in which the powerful benefit from our hesitation to disturb the status quo.³⁹⁴ Protests that change is inherently bad or unworkable must give way to greater risk taking and appreciation of context to ensure that property law works for all, not just for some.

It should be noted that my reading of progressive property might not be fair. Other scholars who have wrestled with the school's significance read into it many of the characteristics I wish, but fail, to see. In describing the ongoing debates in property law, Professor John Lovett, for example, contrasts information theorists' hesitation regarding the possibility of change with progressives who "are more impatient and ready to accept dynamism whatever its institutional source."³⁹⁵ Similarly, Professor Jane Baron presents progressive property as focused on issues facing the poor and propertyless, explaining that such "issues are not, for the progressive theorists, exceptional departures from a basically good-enough baseline, but part of the baseline itself."³⁹⁶ The emphasis on the dynamism and attention to distribution that Lovett and Baron read into

390. This argument is most forcefully made in Henry Smith's response to Alexander's *Social-Obligation Norm*. See Smith, *supra* note 26, at 971.

391. The explanations vary but the conclusions largely overlap. Evolutionary accounts of why they work stress that other institutions and forms of property law, such as feudalism and communism, do not function as well in practice as our institutions. Drawing from theoretical descriptions of human behavior in the state of nature, natural law explanations of what works connect existing (often with a nostalgic glance to the past) rules with supposedly inherent human nature. Finally, building upon American cultural prioritization of individualism, scholars that take a law-and-economics or broad utilitarian perspective tend to highlight how deference to status quo property arrangements ensures predictability and working markets. See Living in Legoland, *supra* note 389 (discussing the status quo bias of information theorists); GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY 137–43 (2012) (making a similar argument).

392. See Jill M. Fraley, *Finding Possession: Labor, Waste, and the Evolution of Property*, 39 CAP. U. L. REV. 51, 80 (2011) (arguing in a discussion of possession that "we have reified property as a thing never to be disturbed").

393. Alexander et al., *supra* note 5, at 743.

394. See generally JACK KNIGHT, INSTITUTIONS AND SOCIAL CONFLICT (1992) (arguing that property institutions reflect the interests of powerful groups and are not primarily based on efficiency).

395. Lovett, *supra* note 1, at 750.

396. Baron, *supra* note 1, at 921.

progressive property addresses many concerns I have raised about the school of thought. And it is worth emphasizing that although I have structured my argument in terms of particular authors, my hope is that readers will understand this Essay as responding to progressive property scholarship as it exists so far, and not as a criticism of individual scholars.

Outside of the progressive property context, the writing of Alexander, Underkuffler, and Singer on acquisition and distribution include elements very much in line with the more robust version of progressive property I have been advocating.³⁹⁷ If progressive property implicitly incorporates all their prior writing, the school of thought's coverage would be more expansive and would better address my acquisition and distribution concerns. But both broader and more sympathetic understandings of progressive property raise the larger general question about the efficacy of "property"-based progressive change.

A narrow understanding of property law's scope is incompatible with progressive property's ambitions, especially the version of progressive property advocated in this Essay. Once acquisition and distribution are treated as a given as they traditionally are, the scope of property law is dramatically reduced. Indeed, as traditionally conceived, property law seems the wrong field in which to expend progressive energies because the possibilities of change seem so limited; the material that ordinarily falls under the "property" umbrella is unusually rule bound and mechanically applied.

Even in areas of property law where there is general agreement that change is appropriate, change comes very slowly—just think of the easements, covenants, and equitable servitudes morass, or the long delays in moving away from the fee tail. In such an environment, progressive advocacy is unlikely to be particularly fruitful. Traditional property as a field is too limited—in its coverage and in its preference for stable rules—to provide a solid foundation for the substantive changes in property and in human relations that progressive scholars seek. It is only by broadening the conversation to include acquisition and distribution in a way that destabilizes societal assumptions regarding ownership that progressive property scholars can engage fully in the immense property-related challenges of racial advantage and economic inequality.

CONCLUSION

Progressive property holds the promise of advancing our understanding of the social foundation and ends of property law. But in order to make good on this promise, progressive scholars need to pay more attention to the acquisition and distribution problems that pollute our history and law. Progressive property scholarship so far has focused on exclusion and access and has neglected acquisition and distribution as areas of concern. Such neglect does a disservice

397. See, e.g., UNDERKUFFLER, *supra* note 245, at 146–49; ALEXANDER, *supra* note 266; SINGER, *THE EDGES OF THE FIELD*, *supra* note 81; *The Politics of Property and Need*, *supra* note 243.

to the progressive property agenda because it limits the transformative potential of an otherwise ambitious rethinking of the place of property in our society. Changing the rules of property can temper the harshness that results from overemphasizing exclusion, but the promotion of human flourishing requires more than supporting occasional public access in limited circumstances. To date, the right to exclude (and the informational value of stable property regimes) has taken center stage in the debates surrounding progressive property. Unfortunately, this debate not only reflects the power of American conservatism, but it also plays into the hands of those who would like to deny social obligations of property.

The debate that should be taking place and the debate this Essay hopes to inspire centers not on the right to exclude but on acquisition and distribution. In its current form, progressive property is not too radical—it is too conservative. Where others have attacked progressive property from the right, my concern is that progressive property so far has not adequately addressed the allocative function of property and the lasting impacts of recognizing property wrongly acquired. Where property has been wrongly acquired and the protection of property is but a continuation of the initial wrong, progressive ambitions must examine the past and the present.

Progressive property primarily describes and defends a future-oriented approach that balances the legitimate interests of property owners with the public interests at stake in property law. But to better understand what rules reflect the values associated with the school of thought, a glance backward is also necessary. Property's problematic origins in the United States and the exclusionary effect of property protection on the propertyless should force progressives to consider the need for corrective transfers and recognition of positive rights. This Essay, by attacking on the left flank and not the right, hopefully helps move the debate away from whether progressive property is a good thing to how the goals of progressive property can be accomplished.

