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## Progressive Property Theory and Housing Justice Campaigns

Brandon M. Weiss

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# Progressive Property Theory and Housing Justice Campaigns

Brandon M. Weiss\*

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*Progressive property theory emerged a decade ago to challenge law and economics as the dominant theoretical mode of property law analysis. Offering a fresh look at the rights and obligations of ownership, progressive property theory argues, among other propositions, that property rules and institutions should further the ability of all people to obtain the basic resources necessary to engage in the social and political life of a community.*

*Meanwhile, housing justice campaigns being waged across the United States, promoting policies like inclusionary zoning and rent control, are frequently met by critics who make theoretical arguments about the fundamental nature of property. Housing advocates often cede the theoretical domain, and instead respond with pragmatic data-driven appeals or technical precedential arguments that, I argue here, would benefit from a more robust theoretical grounding of the sort progressive property theory could provide.*

*Progressive property theory, however, is yet to exert any measurable influence outside of legal academia. Scholars have offered a variety of critiques of the theory that may help to explain its limited impact. I argue that exogenous factors—those external to the theory itself—also hold significant explanatory force. I conclude that the law school clinic could serve as one “theory delivery mechanism” to infuse progressive property theory more broadly into U.S. law and legal institutions.*

## INTRODUCTION

In May of 2009, the *Cornell Law Review* published a short, two-page piece entitled, *A Statement of Progressive Property* (the *Statement*).<sup>1</sup> Authored by four esteemed U.S. property law scholars—Gregory Alexander, Eduardo Peñalver, Joseph Singer, and Laura Underkuffler—the *Statement* was intended to serve as the foundation of a new theoretical mode of property law analysis. At the heart of the *Statement* is the notion that our common conception of property—at core being about the *rights* of owners to exclude and dictate the use of valued resources—pays insufficient attention to the *obligations* of ownership.<sup>2</sup> As such, our common conception of property, while widely influential in U.S. law, is “inadequate as the sole basis for resolving property conflicts or for designing property institutions.”<sup>3</sup>

The authors posit that we must look to the underlying values served by property in order to develop a more robust theoretical framework. These values include “life and human flourishing, the protection of physical security, the ability to acquire knowledge and make choices, and the freedom to live one’s life on one’s own terms. They also include wealth, happiness, and other aspects of individual and social well-being.”<sup>4</sup> Given the multivariate nature of such values, the authors argue that they cannot be reduced to a single metric. The *Statement* was intended as a response to law and economics as the dominant mode of theoretical analysis of property law.<sup>5</sup>

Meanwhile, around the country advocates are engaged in campaigns to improve the housing options for low-income households. These efforts are a response to widespread and severe housing challenges related to affordability, quality, security of tenure, as well as ongoing issues of residential racial segregation. In recent years, some of the most prominent of these campaigns have advocated for: the passage of inclusionary zoning ordinances,<sup>6</sup> rent control or rent

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1. Gregory S. Alexander, Eduardo M. Peñalver, Joseph William Singer & Laura S. Underkuffler, *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009) [hereinafter *A Statement of Progressive Property*].

2. *Id.*

3. *Id.* at 743.

4. *Id.*

5. Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 750 (2009) (making this point clear in a supplemental article published in the same issue of the *Cornell Law Review*: “In recent years, law-and-economics analysis has dominated property scholarship. One goal of this Article is to offer an alternative to that mode of analyzing property disputes. Although law-and-economics theory certainly provides important insights into a remarkably wide range of property issues, its vision is limited and at times flawed. Perhaps the greatest flaw in law-and-economics theory is the poverty of its analysis of moral values and moral issues.”).

6. See *infra* Section II.A. for analysis of recent inclusionary zoning litigation at the U.S. Supreme Court level.

stabilization,<sup>7</sup> prohibiting discrimination against Section 8 voucher holders,<sup>8</sup> rental housing quality inspection programs,<sup>9</sup> and an expansion of federal rental assistance.<sup>10</sup>

These campaigns are regularly met with fierce opposition from critics who often appeal to arguments about the fundamental nature of property. For example, inclusionary zoning ordinances typically require developers of new rental or for-sale multifamily properties to set aside a certain percentage of units (frequently five to twenty percent) for occupancy by lower-income households.<sup>11</sup> Opponents claim that such ordinances deprive owners of fundamental property rights and thus constitute an uncompensated taking of private property in violation of the Fifth Amendment of the U.S. Constitution.<sup>12</sup> Similar arguments are made with respect to rent control and related housing campaigns.<sup>13</sup>

As a theory that takes the contours of property rights as its main concern, progressive property theory has something important to contribute to such debates. Yet notwithstanding the theoretical force that it could bring to bear, ten years since the publication of its original manifesto, the theory is yet to have any demonstrable impact beyond legal academia. Scholars have commented on its progress and offered a variety of theoretical critiques assessing its feasibility,<sup>14</sup> adversarial

7. See *infra* Section II.B. for a discussion of the recent Proposition 10 rent control campaign in California.

8. See POVERTY & RACE RESEARCH ACTION COUNCIL, EXPANDING CHOICE: PRACTICAL STRATEGIES FOR BUILDING A SUCCESSFUL HOUSING MOBILITY PROGRAM app. B (2018) [hereinafter PRRAC, SECTION 8 DISCRIMINATION] (documenting the increasing number of state and local laws barring so-called “source-of-income” discrimination); see also AM. BAR ASS’N, RESOLUTION 119A RE SOURCE OF INCOME DISCRIMINATION (2017) (urging federal, state, local, tribal, and territorial governments to prohibit housing discrimination on the basis of lawful source of income).

9. See, e.g., Bill Turque, *‘Healthy Homes’ Measure for Inspecting Rental Properties in Kansas City Passes*, K.C. STAR (Aug. 7, 2018), <https://www.kansascity.com/news/politics-government/election/article216232395.html> [<https://perma.cc/PNS3-XVBA>] (noting dozens of other such programs).

10. See, e.g., DOUGLAS RICE, CTR. ON BUDGET AND POLICY PRIORITIES, CONGRESS SHOULD INCREASE HUD FUNDING IN 2019 TO PREVENT VOUCHER CUTS, HELP CHILDREN ESCAPE POVERTY (2018).

11. See EMILY THADEN & RUONIU WANG, LINCOLN INST. OF LAND POLICY, INCLUSIONARY HOUSING IN THE UNITED STATES: PREVALENCE, IMPACT, AND PRACTICES 46 (2017) [hereinafter INCLUSIONARY HOUSING IN THE U.S.].

12. See *infra* Section II.A.

13. See, e.g., *Pennell v. City of San Jose*, 485 U.S. 1 (1988) (upholding San Jose’s rent control ordinance in the face of a landlord’s challenge on takings grounds).

14. See, e.g., Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959 (2009); see *infra* Section III.A. for a discussion of Smith’s critique.

approach to challenging law and economics,<sup>15</sup> and failure to adequately address issues of initial acquisition and distribution as they relate to race.<sup>16</sup>

While such constructive critiques are productive, I argue that progressive property theory's failure to have a broader impact cannot be explained solely by reference to weaknesses in its theoretical constructs—though surely plenty in the *Statement* and associated scholarship could be debated at length. Rather than being a story of law and economics simply emerging victorious from the neutral battlefield of ideas, I argue that exogenous factors—i.e., factors unrelated to the content of the theory itself—have played a significant role that, thus far, have not been adequately considered in the progressive property scholarship. In making this argument, I draw upon Jon Hanson's analysis of the rise of law and economics and the wide array of stakeholders that supported its ascension.<sup>17</sup>

Needless to say, progressive property theory has been supported by no similar effort to alter the property law landscape. Housing justice campaigns proceed with advocates regularly ceding the theoretical domain, and instead making pragmatic data-driven appeals or technical precedential arguments that lack a more coherent theoretical basis. In this Article, I argue that progressive property theory could provide such a theoretical grounding. In order to do so, however, and to more broadly influence the institution of American property law writ large, it needs to be the province of more than a select group of legal scholars. Specifically, it needs to connect with vehicles of mobilization that can infuse the theory into real world legal debates. I conclude by offering the law school clinic as one such promising vehicle.

This Article proceeds as follows. Part II reviews the basic principles of progressive property theory in contrast to law and economics. Part III examines recent housing justice campaigns and offers inclusionary zoning and rent control as examples to demonstrate how progressive property theory could provide helpful theoretical grounding. Part IV considers critiques of progressive property theory and argues that external factors are essential to a complete understanding of the relative dominance of law and economics. Part V offers the law school clinic as one potential vehicle for furthering the impact of progressive property theory, particularly in housing justice campaigns.

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15. See, e.g., Jedediah Purdy, *A Few Questions About the Social-Obligation Norm*, 94 CORNELL L. REV. 949 (2009); Katrina M. Wyman, *Should Property Scholars Embrace Virtue Ethics—A Skeptical Comment*, 94 CORNELL L. REV. 991 (2009); see *infra* Section III.A. for a discussion of Purdy's and Wyman's critiques.

16. See Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CAL. L. REV. 107 (2013); *infra* Section III.A. for a discussion of Rosser's critique.

17. See, e.g., Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 PENN. L. REV. 129 (2003) [hereinafter *The Situation*].

## I. PROGRESSIVE PROPERTY THEORY AS A RESPONSE TO LAW &amp; ECONOMICS

*A. Against a Background of Law & Economics*

Progressive property theory emerged in 2009 in response to law and economics as the dominant theoretical mode of property law analysis.<sup>18</sup> Law and economics has both positive and normative dimensions. The positive dimension aims to use the tools of economic analysis to describe how the law operates and what the consequences will be of various legal regimes. The normative dimension argues for what the law and its ends *should* be.

Progressive property theorists acknowledge that law and economics comes in many variations.<sup>19</sup> At the core of most formulations is a commitment to some form of utilitarian moral theory. Such theories aim to maximize utility, a term defined in various ways. Early law and economics theorists used wealth as an easy and measurable stand-in for utility. More recently, law and economics scholars have used the concept of “welfare” to more broadly cover all individual desires and preferences.<sup>20</sup>

Under a standard law and economics approach, the goal of law is to maximize utility. Legal rules are efficient to the extent that they maximize, depending on the version of utility being employed, net wealth or welfare. The positive dimension of law and economics thus aims to explain which legal rules are most efficient, and the normative dimension argues that we should embrace the legal rules that maximize efficiency.

Law and economics has often been used to justify strong private property rights on efficiency grounds. The basic argument, such as the one contained in a famous formulation by Harold Demsetz, is that public property leads to inefficient behavior, such as overconsumption and freeriding.<sup>21</sup> Private property encourages owners to internalize the consequences of their decisions, thus reducing such inefficient behavior and increasing utility.

Critics of law and economics argue that it fails to take sufficient account of distributional outcomes. Law and economics scholars often take as a point of departure the Coase Theorem, or the proposition that in the absence of transaction costs, efficient outcomes will be attained regardless of how original property

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18. For general background on law and economics, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (9th ed. 2014); GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, *AN INTRODUCTION TO PROPERTY THEORY* 11–33 (2012).

19. See, e.g., Alexander, *supra* note 5, at n.6 (“I will be contrasting my social-obligation approach with a full family of approaches adopted by various legal scholars plying the “law-and-economics” tradition. Thus, I take into account the fact that law and economics has splintered into sundry variants since the 1970s, when Judge Richard Posner first promoted “wealth-maximization” as the solely relevant value (though he later turned away from that position).”).

20. See, e.g., Louis Kaplow & Steven Shavell, *Fairness Versus Welfare: Notes on the Pareto Principle, Preferences, and Distributive Justice*, 32 J. LEGAL STUD. 331 (2003).

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

entitlements are assigned. In other words, parties will bargain to the efficient outcome regardless of whether a property entitlement is granted to *Party A* or *Party B*, barring obstacles to negotiation. As such, in the absence of transaction costs, economic efficiency is indifferent to how property entitlements are distributed.

Where transaction costs are present, economic efficiency argues for those entitlements that encourage the most knowledgeable choices between social benefits and social costs—such as allocating entitlements such that costs are placed on the party that is best suited to engage in the appropriate cost-benefit analysis or, in certain contexts, the cheapest cost-avoider.<sup>22</sup>

To the extent that distributional outcomes are a concern, law and economics scholars classically argue that it is inefficient to alter legal rules in order to yield an alternative distribution of property entitlements. Rather, it is more efficient to allow the market to operate so as to maximize net utility and instead use the tax and transfer system to adjust distributional outcomes.<sup>23</sup> And since that method is most efficient, the normative dimension of law and economics argues that it should be the favored approach.

### B. *The Emergence of Progressive Property Theory*

In 2009, in a gesture that remotely conjures up the image of Martin Luther and his ninety-five theses, Gregory Alexander, Eduardo Peñalver, Joseph Singer, and Laura Underkuffler published the *Statement*. In a format atypical for law review articles, the *Statement* consists of only two pages and sets forth five principles in list format (some with sub-principles), which push back against many of the characteristics and assumptions inherent in classic law and economics scholarship.

The *Statement* was intended to trace the broad outlines of an alternative theoretical approach to resolving property conflicts and designing property institutions. At the heart of the *Statement* is the notion that the common conception of property—at core being about the rights of owners to exclude and dictate the use of valued resources—is insufficient because of “the inevitable impacts of one person’s property rights on others.”<sup>24</sup> The authors argue that in order to devise a better property system, it is necessary to examine the values served by property, including “life and human flourishing, the protection of physical security, the ability to acquire knowledge and make choices, . . . wealth, happiness, and other aspects of individual and social well-being.”<sup>25</sup>

Alexander expands on this notion in a companion article, in which he grounds progressive property theory not in the utilitarian tradition of Jeremy Bentham and

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22. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

23. 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).

24. *A Statement of Progressive Property*, *supra* note 1, at 743.

25. *Id.*

John Stuart Mill, but rather in the tradition of Aristotelian ethics that takes human flourishing as an “objective human good.”<sup>26</sup> In this and other writing, Alexander draws upon the “capabilities approach” of Amartya Sen and Martha Nussbaum, which posits that human flourishing is contingent upon the nurturing of certain capabilities: among those Alexander emphasizes are life (including health and security), freedom (including identity and self-knowledge), practical reason (consisting of the ability to deliberate about what is good for oneself), and “sociality” or “affiliation.”<sup>27</sup> Alexander and Peñalver argue that such capabilities are not developed in a vacuum but rather only emerge in community.<sup>28</sup> As such, they argue for an *obligation* to foster the development of these capabilities in others.<sup>29</sup> In doing so, they draw upon Thomas Aquinas, who built on Aristotelian ethics and argued for a duty “to support the social and material preconditions for [others’] (and our own) flourishing.”<sup>30</sup>

Not surprisingly given these theoretical roots, distributional concerns are at the core of the *Statement*: “Property confers power. It allocates scarce resources that are necessary for human life, development, and dignity. Because of the equal value of each human being, property laws should promote the ability of each person to obtain the material resources necessary for full social and political participation.”<sup>31</sup>

Law is not coterminous with morality in Alexander and Peñalver’s view; it is not the province of the law to enforce all worthy moral claims.<sup>32</sup> The legal system

26. See Alexander, *supra* note 5, at 767. Alexander defines human flourishing as “enabl[ing] individuals to live lives worthy of human dignity.” *Id.* at 748.

27. *Id.* at 765; see also ALEXANDER & PEÑALVER, *supra* note 18, at 90 (defining “sociality” as “a capability that encompasses subsidiary capabilities such as the possibility of social participation, self-respect and friendship”).

28. See Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQ. L. 127, 135 (2009) (“[H]uman beings develop the capacities necessary for a well-lived, and distinctly human life only in society with, indeed, dependent upon, other human beings. To put the point even more directly, living within a particular sort of society, a particular web of social relationships, is a necessary condition for humans to develop the distinctively human capacities that allow us to flourish.”); see also Alexander, *supra* note 5, at 761 (“Language itself—possibly even the capacity to so much as think—is an artifact of community. Community is constitutive of human flourishing in a very deep sense; perhaps community even comprises humanity (as that term is used by many understandings.”).

29. See ALEXANDER & PEÑALVER, *supra* note 18, at 91 (“If we can agree that our physical survival, our capacities to engage in practical reasoning, to participate in the social life of the community, and to make decisions about how to live our lives, are valuable components of the well-lived human life, then it would seem that we should also be able to agree that we owe some obligation to others within our communities to share our resources to support and nurture the social structures necessary for the development of these human capabilities. For if we affirm the value of these goods, and if these goods can only exist within particular sorts of social contexts and physical environments, then it would seem irrational to deny that we are obligated to participate in and contribute to the vitality of those social structures and physical environments. The facts of social dependence and interdependence prevent us from drawing clear lines between our individual well-being, or flourishing, and that of others.”).

30. *Id.* at 85.

31. *A Statement of Progressive Property*, *supra* note 1, at 744.

32. See ALEXANDER & PEÑALVER, *supra* note 18, at 92.

can and should, in their view, help promote human flourishing by enforcing certain moral obligations, including the duty to share surplus resources with those for whom a lack thereof is an obstacle to developing the capabilities necessary to flourish.<sup>33</sup> They argue that in modern times “the voluntary actions of private entities have never been sufficient to supply all members of society with access to all of the resources necessary for the opportunity to develop the capabilities necessary for human flourishing.”<sup>34</sup> At a minimum these resources include obtaining basic “survival resources,” “minimal provision for the well-being and education of the young,” “the economic resources necessary to provide a suitable environment in which the education effort can take root,” and the resources “necessary in order to facilitate the capability of sociality.”<sup>35</sup>

In addition to ensuring these basic survival resources, the authors of the *Statement* also emphasize law’s role in shaping the communal aspects of life.<sup>36</sup> “Property enables and shapes community life. Property law can render relationships within communities either exploitative and humiliating or liberating and ennobling. Property law should establish the framework for a kind of social life appropriate to a free and democratic society.”<sup>37</sup>

The existence of the objective moral good of flourishing and the duty to support the flourishing of others means that normative claims about what a property law system *should* promote require more than a mere utilitarian measuring of individual desires and preferences. “Values can generate moral demands and obligations that underlie judgments about the interests that the law should recognize as property entitlements.”<sup>38</sup> In other words, an analysis of values relevant to flourishing may argue for a set of property rules and institutions that deviates from what a simple tallying of aggregate preferences and desires would dictate. A legal system, such as that encouraged by law and economics, aimed at maximizing net utility as measured by satisfaction of individual preferences and desires, may not best promote human flourishing and thus may be left morally wanting.

The authors of the *Statement* also take issue with the notion that tallying along a single scalar metric is appropriate given the multivariate and incommensurable nature of the underlying human values at stake in the fashioning of property law

33. While not grounded in any expectation of direct reciprocity, Alexander and Peñalver argue that a second-order notion of reciprocity supports this duty: “This second order reciprocity does not operate through a long run accounting of costs and benefits, but rather looks to the possibility of rough reciprocity built into the structure of our social relationships.” *Id.* at 92.

34. *Id.* at 95.

35. *Id.* at 96.

36. Here and elsewhere, earlier incarnations of the themes developed in the *Statement* can be found in prior writings. See, e.g., Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 653 (“If we see people as situated in relation to others, rather than as isolated and autonomous, our understanding of social life changes, and with it, our understanding of the source of legal obligations.”).

37. *A Statement of Progressive Property*, *supra* note 1, at 744.

38. *Id.* at 743.

rules. “The plural values implicated by property are incommensurable. Because they relate to qualitatively distinct aspects of human experience, they cannot be adequately understood or analyzed through a single metric. Reducing such values as health, friendship, human dignity, and environmental integrity to one common currency distorts their intrinsic worth.”<sup>39</sup> How does one weigh the relative utility of one quantum of health-preference against one quantum of liberty-preference in conducting a welfarist analysis? The collapsing of all human values into a single scalar metric of “welfare” may be convenient for theoretical purposes, but if it results in a failure to capture the complexity and different-ness of the values at stake, then what is left is a tidy but inaccurate theory.<sup>40</sup>

If not a matter of tallying individual preferences and desires, then what would a progressive property-infused analysis look like? Here the authors of the *Statement* are upfront about the fact that its output would be necessarily messy. Their prescription is to proceed with rational deliberation in the face of this complexity. “Choices about property entitlements are unavoidable, and, despite the incommensurability of values, rational choice remains possible through reasoned deliberation. That deliberation should include non-deductive, non-algorithmic reflection.”<sup>41</sup> According to David Wiggins, as cited by Alexander and Peñalver, the best we can do in the face of incommensurability is “attend to each value in its separateness and irreducibility to others.”<sup>42</sup> Perhaps we are not always left with a single correct choice, but we are at least left with a more honest and robust method of analysis.<sup>43</sup>

A commitment to human flourishing as an objective human good and a duty to consider the flourishing of others as a basic obligation; a direct concern with distributional outcomes and the role that law plays in fashioning communal life; and a rebuke of preference-tallying along a single scalar metric as a feasible approach to generating moral claims about what a property law system should aim to do: these are some of the key notions expressed by the authors of the *Statement* in their attempt to depart from law and economics and fashion a new theoretical approach to property law.

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39. *Id.* at 744.

40. See ALEXANDER & PEÑALVER, *supra* note 18, at 98 (“But the question just is whether such a single scale exists, and pluralists deny that it does. Accordingly, the fact that value monists can generate a simpler decision-making process does not constitute an argument on behalf of those theories unless it is in fact true that there is such a single, all-encompassing value. If values are in fact plural and incommensurable, the difficulty of making social choices is simply a challenge that must be faced.”).

41. *A Statement of Progressive Property*, *supra* note 1, at 744.

42. See ALEXANDER & PEÑALVER, *supra* note 18, at 100 (citing David Wiggins, *Incommensurability: Four Proposals*, in *INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON* 52, 62 (Ruth Chang ed., 1998)).

43. See ALEXANDER & PEÑALVER, *supra* note 18, at 101.

## II. HOUSING JUSTICE CAMPAIGNS

Meanwhile, ten years ago, as the authors of the *Statement* labored away on their progressive property principles, housing advocates, tenants, organizers, and legal aid attorneys engaged in a variety of different, though not so unrelated, labors. The Great Recession was forcing a rapidly escalating number of households out of the workforce.<sup>44</sup> And yet, the best the government had to offer the great majority of those households unable to keep up on rent was to place their names on waitlists behind thousands of households already in line—a function of the fact that housing assistance is not an entitlement for low-income households in the United States.<sup>45</sup>

As other households lost their homes in the subprime mortgage foreclosure crisis, they were forced back into the rental market, contributing to a rapid escalation of market rents over the next several years.<sup>46</sup> This combined with a number of other factors, including ongoing stagnation of wages, to result in households paying an increasing portion of their income on rent and cutting back on other basic necessities.<sup>47</sup> At the same time, the high prevalence of evictions emerged into the national consciousness.<sup>48</sup>

For those lucky enough to find affordable housing, substandard conditions remained an issue, most acutely for those households with young children.<sup>49</sup> And while some cities made progress, residential racial and economic segregation continued to be pervasive, with all the attendant impacts on life outcomes that have come to be understood.<sup>50</sup>

44. See JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *THE STATE OF THE NATION'S HOUSING* 28, 31 (2010) (“The nation lost approximately 8.4 million jobs from the beginning of the recession in December 2007 through December 2009 . . . . It will likely take years for the fallout from the Great Recession to abate.”).

45. See, e.g., Aaron Schrank, *It's a Long Wait for Section 8 Housing in U.S. Cities*, MARKETPLACE (Jan. 3, 2018), <https://www.marketplace.org/2018/01/03/wealth-poverty/its-long-wait-section-8-housing-us-cities> [https://perma.cc/2FTK-NKBB] (providing Los Angeles as an example where 188,000 people recently applied for 20,000 spots on the Section 8 Voucher waitlist, a list from which approximately only 200 names are drawn per month).

46. See JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *THE STATE OF THE NATION'S HOUSING* 4 (2016) (“On the renter side, the number of cost-burdened households rose by 3.6 million from 2008 to 2014, to 21.3 million. Even more troubling, the number with severe burdens (paying more than 50 percent of income for housing) jumped by 2.1 million to a record 11.4 million.”).

47. *Id.*

48. This phenomenon was driven in part by Matthew Desmond's 2016 Pulitzer Prize-winning book, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY*.

49. See Michael Weitzman, Ahmareen Baten, David G. Rosenthal, Risa Hoshino, Ellen Tohn & David E. Jacobs, *Housing and Child Health*, 43 *CURRENT PROBS. PEDIATRIC & ADOLESCENT HEALTH CARE* 187 (2013) [hereinafter *Housing and Child Health*].

50. See generally Raj Chetty, Nathaniel Hendren & Lawrence F. Katz, *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 *AM. ECON. REV.* 855 (2016); KEVIN FOX GOTHAM, *RACE, REAL ESTATE, AND UNEVEN DEVELOPMENT: THE KANSAS CITY EXPERIENCE, 1900–2010* (2d ed. 2014) [hereinafter *RACE, REAL ESTATE, AND UNEVEN DEVELOPMENT*]; RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017) [hereinafter *THE COLOR OF LAW*].

A variety of campaigns emerged in response: to improve tenant living conditions, to provide more federal assistance, to prevent displacement and rapidly soaring rents, and to expand supply in “communities of opportunity.” In each case, critics met these efforts with a variety of familiar arguments: commonly, that (1) a given campaign or policy is not the best means to achieve the purported end,<sup>51</sup> (2) even worse, a given campaign or policy will hurt those it is intended to help,<sup>52</sup> and (3) even if a given policy or campaign would achieve its purported end, it unconstitutionally or otherwise improperly would infringe on private property rights.<sup>53</sup>

For purposes of this Article, I am primarily concerned with the last of these types of argument.<sup>54</sup> Below, I describe how such arguments about the infringement of private property rights have manifested in the context of inclusionary zoning litigation at the U.S. Supreme Court level, in the context of a political initiative like rent control, and how they are relevant to a broader spectrum of housing justice campaigns. Such arguments are necessarily built upon a basic conception of the nature of property rights. As such, I also describe in each case how progressive property theory, which takes the contours of property rights and obligations as its primary subject, could be deployed to address such arguments.

51. See, e.g., Robert C. Ellickson, *The False Promise of the Mixed-Income Housing Project*, 57 UCLA L. REV. 983, 1019 (2010) (“[B]uilding mixed-income subsidized projects is a mediocre policy approach. In most contexts, using tax revenues to enhance spending on housing vouchers would be far more efficient and fairer than devoting those same revenues to providing inclusionary units.”).

52. See, e.g., Steven J. Eagle, *Land Use Regulations and Good Intentions*, 33 J. LAND USE & ENVTL. L. 87, 142 (2017) (“A classic example of good intentions producing bad results is the tendency of regulations promulgated to provide better housing instead resulting in less housing and less affordability.”); see also Brief of Scholars of Land Use Regulation as Amici Curiae Supporting Petitioners, 616 Croft Ave., LLC, v. City of West Hollywood, 136 S. Ct. 377 (2017) (No. 16-1137) [hereinafter Land Use Scholars Brief] (“[B]oth economic theory and empirical evidence indicate that like exclusionary zoning, inclusionary zoning tends to reduce the supply of housing and increases prices relative to what we would see without it.”).

53. See *infra* Section II.A. for a discussion of this sort of argument in the context of inclusionary zoning.

54. Debates and studies regarding the efficacy of policies aimed at increasing housing affordability have been had at length, and will continue, elsewhere. See, e.g., Peter Marcuse & W. Dennis Keating, *The Permanent Housing Crisis: The Failures of Conservatism and the Limitations of Liberalism*, in A RIGHT TO HOUSING: FOUNDATION FOR A NEW SOCIAL AGENDA (Rachel G. Bratt, Michael E. Stone & Chester Hartman eds., 2006); AMY ARMSTRONG, VICKI BEEN, RACHEL MELTZER & JENNY SCHUETZ, NYU FURMAN CTR. FOR REAL ESTATE & URBAN POLICY, THE EFFECTS OF INCLUSIONARY ZONING ON LOCAL HOUSING MARKETS: LESSONS FROM THE SAN FRANCISCO, WASHINGTON DC AND SUBURBAN BOSTON AREAS (2008); William C. Apgar, Jr., *Which Housing Policy Is Best?*, 1 HOUSING POL’Y DEBATE 1 (1990). The purpose of this Article is not to engage in these important debates, but rather to examine a different breed of argument—namely, that a given policy would impermissibly intrude upon basic property rights.

A. INCLUSIONARY ZONING—PROPERTY THEORY IN THE CONTEXT OF  
U.S. SUPREME COURT LITIGATION

The Lincoln Institute of Land Policy reports that 886 jurisdictions in the United States across twenty-five states and the District of Columbia have adopted inclusionary housing policies.<sup>55</sup> The most prominent of such policies is inclusionary zoning, an approach that dates back to the 1970s.<sup>56</sup> A typical inclusionary zoning ordinance requires the developer of a new multifamily residential project to set aside a certain percentage of units—frequently in the range of five to twenty percent—for occupancy by low- or moderate-income households.<sup>57</sup> The ordinance often requires the recordation of a document on title setting forth rent or sales price limits on the set-aside units. To help offset the cost, jurisdictions frequently offer developers various options from a menu of incentives, including density bonuses, expedited permitting, fee reductions and/or waivers, zoning variances, and various tax benefits.<sup>58</sup> Developers also are often given the option of paying a fee in lieu of providing the affordable units equal to the cost of providing similar units off site.<sup>59</sup>

The efficacy of inclusionary zoning has been vigorously debated. Supporters point to the number of rent-restricted units created,<sup>60</sup> while critics claim that such policies merely increase rents for everyone else in the area.<sup>61</sup> For purposes of this Article, I am concerned with another frequent criticism of inclusionary zoning laws: namely, that they impermissibly infringe on private property rights.

1. *616 Croft Ave., LLC v. City of West Hollywood*

This argument figured prominently in the recent *616 Croft Ave., LLC v. City of West Hollywood* case.<sup>62</sup> At issue was the City of West Hollywood's inclusionary zoning ordinance that contained a typical set-aside requirement, requiring developers to restrict twenty percent of newly-constructed units to certain below-market levels. Developers alternatively could pay an in-lieu fee into the city's affordable housing trust fund to be used to develop subsidized housing off site. The developer-plaintiff in the case had applied to the city for the permits necessary to develop an eleven-unit condominium building. The city conditioned its approval of the project on the payment of a \$540,393.28 in-lieu fee. The developer sued, claiming that the conditional approval amounted to an unconstitutional taking of

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55. INCLUSIONARY HOUSING IN THE U.S., *supra* note 11, at 11.

56. *Id.* at 36.

57. *Id.* at 46.

58. *Id.* at 38–39.

59. *Id.* at 42.

60. *Id.* at 2 (noting that inclusionary housing policies like inclusionary zoning with the option of paying an in-lieu fee have created 49,287 affordable homeownership units in 443 jurisdictions and 122,320 affordable rental units in 581 jurisdictions).

61. *See, e.g.*, Land Use Scholars Brief, *supra* note 52.

62. 3 Cal. App. 5th 621 (2016), *petition for cert. denied*, 138 S. Ct. 377 (2017) (No. 16-1137).

property without just compensation under the Fifth Amendment of the U.S. Constitution.

The City of West Hollywood had prevailed in the case at the state appellate level and the plaintiffs appealed to the U.S. Supreme Court. Six amicus briefs were filed in support of the developer by various organizations and individuals, including: (1) the Southeastern Legal Foundation; (2) the Cato Institute, the Reason Foundation, and the National Association of Home Builders; (3) the National Federation of Independent Business, Small Business Legal Center, and Owners' Counsel of America; (4) the Citizens' Alliance for Property Rights Legal Fund; (5) the Center for Constitutional Jurisprudence; and (6) Scholars of Land Use Regulation.

The petition for writ of certiorari to the U.S. Supreme Court by the developer offered a strong rendering of the fundamental nature of private property rights:

“[T]he right of the owner of property to fix the price at which he will sell it is an inherent attribute of the property itself, and as such is within the protection of the Fifth and Fourteenth Amendments. . . .”<sup>63</sup> An owner of property has a “clear right to dispose of it, to sell it to whom he pleases and at such price as he can obtain.”<sup>64</sup>

The amicus briefs in support of the petition also offered similar renderings of the nature of property rights. The Southeastern Legal Foundation's brief, for example, stated:

In fact, property well may be considered the foundation for the other civil rights that we enjoy. John Locke, whose writings influenced the leaders of the American Revolution and the Framers of the Constitution more than any other single philosopher, described the preservation of property as “the end of government, and that for which men enter into society. . . .”

Locke's view found its way into both the English common law and the Enlightenment that generated our government. Private property and a free society were “so intimately connected as to be all but equivalent. . . .”

This Court has recognized the interplay between property rights and other civil rights. “The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a ‘personal’ right, whether the ‘property’ in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. . . .”

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63. 616 Croft Ave., LLC v. City of West Hollywood, 3 Cal. App. 5th 621 (2016), *petition for cert. filed*, 2017 WL 1090008, at \*17 (U.S. Mar. 15, 2017) (No. 16-1137) (citing *Old Dearborn Distrib. Co. v. Seagram Distillers Corp.*, 299 U.S. 183, 191–92 (1936)).

64. 616 Croft Ave., LLC v. City of West Hollywood, 3 Cal. App. 5th 621 (2016), *petition for cert. filed*, 2017 WL 1090008, at \*17 (U.S. Mar. 15, 2017) (No. 16-1137) (citing *Ex parte Quarg*, 149 Cal. 79, 80 (1906)).

Like other civil rights, property rights include the authority to dominion and use as one sees fit.<sup>65</sup>

The brief for the Center for Constitutional Jurisprudence contained a similar construction of the nature of property rights:

One of the core principles of the American Founding is that individual rights are not granted by majorities or governments, but are inalienable. . . . The Fifth Amendment seeks to capture a part of this principle in its announcement that “private property [shall not] be taken for public use, without just compensation. . . .” The importance of the individual right in property that is protected in this clause is evident in the writings on which the Founders based the notion of liberty that is enshrined in the Constitution.<sup>66</sup>

By contrast, not a single amicus brief was filed with the Supreme Court in support of the city. No counter conception of the fundamental nature of property was presented. The city’s opposition brief focused on technical arguments about the inapplicability of the Court’s *Nollan*, *Dolan*, and *Koontz* decisions to generally applicable land use regulations.<sup>67</sup> Nowhere did the brief contain an alternative conception of the contours and limits of property rights. The phrase “property rights” does not appear once in the opposition brief. While in this case, the Court ultimately denied certiorari, the decision was not made on the basis of any robust competing version of private property rights.

## 2. *California Building Industry Ass’n v. City of San Jose*

Questions about the fundamental nature of property rights also arose in *California Building Industry Ass’n v. City of San Jose*, another recent inclusionary zoning case.<sup>68</sup> The City of San Jose adopted an ordinance in January 2010 that, subject to various exemptions, required fifteen percent of units in new for-sale residential developments to be affordable to buyers with extremely-low to moderately-low incomes, or else for the developer to pay an in-lieu fee, dedicate land, or build off-site affordable housing. The ordinance was passed in an effort to address the fact that nearly half of all households in San Jose pay more than thirty

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65. Brief for Southeastern Legal Foundation as Amicus Curiae Supporting Petitioners at 16–17, 616 Croft Ave., LLC v. City of West Hollywood, 138 S. Ct. 377 (2017) (No. 16-1137) (internal citations omitted).

66. Brief for Center for Constitutional Jurisprudence as Amicus Curiae Supporting Petitioners at 13, 616 Croft Ave., LLC v. City of West Hollywood, 138 S. Ct. 377 (2017) (No. 16-1137) (internal citations omitted).

67. Opposition Brief of Respondent, 616 Croft Ave., LLC v. City of West Hollywood, 138 S. Ct. 377 (2017) (No. 16-1137). Thus far, this is an issue the U.S. Supreme Court has avoided deciding outright, having repeatedly denied petitions for certiorari on this legislative exactions issue. See Timothy M. Mulvaney, *Legislative Exactions and Progressive Property*, 40 HARV. ENVTL. L. REV. 137, 145 (2016) (“The Supreme Court has provided very limited doctrinal guidance on the issue to date, having denied at least fourteen petitions for certiorari raising this legislative-administration question in the exactions-takings context.”).

68. 61 Cal. 4th 435 (2015), *cert denied*, 136 S. Ct. 928 (2016) (No. 15-330).

percent of their income on housing, forcing many to “live in overcrowded or substandard conditions, while others must find housing far from their jobs, increasing traffic congestion and environmental impacts.”<sup>69</sup>

Before the ordinance could go into effect, the California Building Industry Association (CBIA) sued and won at trial, with the court’s decision justified in part on takings grounds. The City of San Jose appealed and won at the California Appellate and California Supreme Court levels. CBIA then filed a petition for certiorari with the U.S. Supreme Court. The petition made a variety of legal arguments, including that the Court should clarify that the standards set forth in the U.S. Supreme Court’s *Nollan* and *Dolan* decisions apply to legislatively-mandated exactions. The petition went further, however, also framing the argument in terms of the fundamental nature of property rights: “Owners have a right to their money, including their investment in their property. Owners also have a well-recognized right to sell their property to whom they choose, at a price they choose.”<sup>70</sup>

As with *616 Croft Ave., LLC*, a number of amicus briefs were filed in support of the petition by some of the same groups making the same sorts of arguments about the fundamental nature of property rights. The Center for Constitutional Jurisprudence’s brief stated:

California has a long-standing antipathy toward the notion of individual rights in private property. . . . This case demonstrates that California continues to be an “outlier” on the issue of individual rights in property. The state’s approach that necessary government permits constitute the grant of “advantage” for which the state can demand a portion of property stands in stark contrast to the notion of liberty enshrined in the United States Constitution. . . .

One of the core principles of the American Founding is that individual rights are not granted by majorities or governments, but are inalienable. The Fifth Amendment seeks to capture a part of this principle in its announcement that “private property [shall not] be taken for public use, without just compensation.” The importance of the individual right in property that is protected in this clause is evident in the writings on which the Founders based the notion of liberty that is enshrined in the Constitution.

Of course, the importance of individual rights in property predated the Declaration of Independence and the American Constitution. Blackstone noted that property is an “absolute right, inherent in every Englishman . . . which consists of the free use, enjoyment, and disposal of all his acquisitions, without any control or dominion, save only by the laws of the land.” From the pronouncement that “a man’s house is his castle”

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69. Opening Brief of Intervenors-Appellants at 2, *Cal. Bldg. Indus. Ass’n v. City of San Jose*, 157 Cal. Rptr. 3d 813 (2012).

70. *Cal. Bldg. Indus. Ass’n v. City of San Jose*, 61 Cal. 4th 435 (2015), *petition for cert. filed*, 2015 WL 5451038 at \*15 (U.S. Sept. 14, 2015) (No. 15-330).

to William Pitts' argument that the "poorest man" in the meanest hovel can deny entry to the King, the common law recognized the individual right in the ownership and use of private property. Blackstone captures the essence of this right when he notes that the right of property is the "sole and despotic dominion . . . over external things of the world, in total exclusion of the right of any other person in the universe." The individual rights in private property are part of the common law heritage that our founders brought with them to America. . . .

This Court has so often characterized the individual rights in property as "fundamental" that it is difficult to catalogue each instance. The Court has noted that these rights are among the "sacred rights" secured against "oppressive legislation." These rights are the "essence of constitutional liberty." In a word, they are "fundamental."<sup>71</sup>

The Mountain States Legal Foundation submitted an amicus brief that struck similar themes:

The sanctity of property in America can be traced to the Magna Carta. . . . Importantly, early American colonists believed the right to property, guaranteed in the Magna Carta, to be part of their birthright as English subjects. . . . Because private property existed before government, any legitimate government is based on a compact whereby people gave their allegiance to the government in exchange for the protection of their property. . . . Thus, the principal function of government is to ensure the sanctity of private property.<sup>72</sup>

The broad themes conveyed in support of the developer in *CBLA* echo those in *616 Croft Ave., LLC*: property rights predate the state; the role of the state is to protect those rights; those rights include the right to use and dispose of the property as the owner sees fit and to fix the price at which housing will be sold or rented.

Again, no amicus briefs were submitted on behalf of the city to the U.S. Supreme Court. At the lower appellate levels, a number of briefs had been submitted in support of the city's case. In all instances, as with the city's briefing at the U.S. Supreme Court level, no similarly robust conception of private property rights was put forth. Rather, the briefs relied primarily on data regarding the severity of housing challenges in the Silicon Valley area and technical precedential arguments about the inapplicability of *Nollan* and *Dolan* to the facts at hand. As in *616 Croft Ave., LLC*, the court denied certiorari in *CBLA*, leaving these issues ripe to return to the Supreme Court in the future.

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71. Brief for the Center for Constitutional Jurisprudence as Amicus Curiae Supporting Petitioner at 3–9, *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 136 S. Ct. 928 (2016) (No. 15-330) (internal citations omitted).

72. Brief for the Mountain States Legal Foundation as Amicus Curiae Supporting Petitioner at 7–11, *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 136 S. Ct. 928 (2016) (No. 15-330).

### 3. *A Progressive Property Theory Response*

The arguments in support of the petitioners in these cases are in harmony with the sort of strong private property rights regime that a Demsetzian-type of argument, outlined above in Section I.A. above, would encourage. Perhaps even more directly fitting, they draw upon a theoretical conception of property rights that is at once old and new again. The Blackstonian model of property as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe,”<sup>73</sup> is an ideal which—despite being more than two centuries old—continues to hold purchase in commonly-held notions of property rights. Modern property law scholarship has seen a resurgence in a related, if more nuanced, line of thought. “Exclusionists” argue that the core feature of property is the right to exclude.<sup>74</sup>

Modern property law already significantly deviates from the overly-simplistic Blackstonian approach in a variety of areas: in broad doctrinal fields like nuisance, zoning, servitudes, and takings; in specific topics like public accommodation laws,<sup>75</sup> the time-limited monopoly afforded to intellectual property owners, and rules disfavoring future restraints on alienation; as well as in individual one-off cases<sup>76</sup> that limit property rights in the face of broader public policies.<sup>77</sup>

73. See 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*2 (Univ. Chi. Press, 1st ed. 1979) (1765–1769). Thanks to Christopher Essert for noting that while this is the proposition often associated with Blackstone, his views on the subject were significantly more nuanced.

74. See, e.g., Smith, *supra* note 14, at 968 (discussing the “presumption in favor of property’s core right to exclude,” with exceptions at the periphery); see *infra* Section III.A. for further discussion.

75. See Joseph William Singer, *We Don’t Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, 95 B.U.L. REV. 929, 933 (2015) (“In effect, this line in the sand distinguishes the private home (where one can exclude people from one’s dinner party because of their race) from places of employment and, one assumes, places of public accommodation (where one cannot indulge in such discrimination). This means that the vision of property as under the control of the ‘owner’ and subject to the owner’s ‘sole and despotic dominion,’ as William Blackstone put it, cannot be the model for all property.”).

76. See, e.g., *State v. Shack*, 277 A.2d 369, 372, 373 (N.J. 1971) (holding no trespass where legal services attorney and health services worker entered property without permission to provide services to migrant farmworkers: “Property rights serve human values. They are recognized to that end, and are limited by it. Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises. Their well-being must remain the paramount concern of a system of law. Indeed, the needs of the occupants may be so imperative and their strength so weak, that the law will deny the occupants the power to contract away what is deemed essential to their health, welfare, or dignity. Here we are concerned with a highly disadvantaged segment of our society. . . . A man’s right in his real property of course is not absolute. It was a maxim of the common law that one should so use his property as not to injure the rights of others. Although hardly a precise solvent of actual controversies, the maxim does express the inevitable proposition that rights are relative and there must be an accommodation when they meet.”).

77. For additional examples of law’s deviation from the basic Blackstonian model, see Alexander & Peñalver, *supra* note 18, at 140. Commentators also have noted that far from being a passive protector of pre-existing property rights, the state has played an active role in creating and preserving property throughout the history of the United States, for example, in practices such as

What sort of alternative theoretical conception of property not only explains these deviations but also could have responded to the theoretical model set forth in support of the developers in these inclusionary zoning cases? Progressive property theory provides one compelling option.<sup>78</sup> The authors of the *Statement* and others have already considered progressive property theory in a variety of contexts.<sup>79</sup> A progressive property-style analysis similarly could be applied in housing justice campaigns, such as to the question of whether or not an inclusionary zoning ordinance impermissibly infringes on the property rights of the petitioners.<sup>80</sup>

The point of departure would be to dispute the notion that property rights exist prior to any consideration of the community in which they arise. As Alexander states:

Property rights and their correlative obligations are cognizable as social goods, worthy of vindication by the state, only insofar as they are consistent with community and human flourishing more generally. In the interest of human flourishing, the community, or more colloquially, the state, affords legal recognition to asserted claims to resources. Accordingly, the state *does not take away* when it abstains from legally vindicating asserted claims to resources that are inconsistent with human flourishing or with community itself. In such cases, the community does not merely give.<sup>81</sup>

In other words, to the extent certain rights would conflict with important underlying values, it is not the case that the state takes those rights away from property owners; rather, perhaps they were never given in the first place. Alternatively, property rights allocations are dynamic and may evolve over time as necessary to remain accountable to the values they serve.

Under such a formulation, whether an inclusionary zoning ordinance works a taking of an apartment owner's property hinges on how we define property rights, which itself requires an analysis of the competing values at stake. What are those values in this instance? Considering the specific values identified by the authors of the *Statement*, certainly inclusionary zoning ordinances of the type at issue in *616*

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redlining and the enforcement of exclusionary zoning regimes. See, e.g., RACE, REAL ESTATE, AND UNEVEN DEVELOPMENT, *supra* note 50; THE COLOR OF LAW, *supra* note 50.

78. Of course, progressive property theory is not the only option. The "human right" or "constitutional right" to housing frame is another that has recently seen renewed interest. See, e.g., Lisa T. Alexander, *Occupying the Constitutional Right to Housing*, 94 NEB. L. REV. 245 (2015).

79. See, e.g., John A. Lovett, *Progressive Property in Action: The Land Reform (Scotland) Act 2003*, 89 NEB. L. REV. 739 (2011); Christopher K. Odinet, *Of Progressive Property and Public Debt*, 51 WAKE FOREST L. REV. 1101 (2016); Jessica A. Shoemaker, *Complexity's Shadow: American Indian Property, Sovereignty, and the Future*, 115 MICH. L. REV. 487, (2017).

80. For additional discussion of progressive property as it relates to housing, see GREGORY S. ALEXANDER, PROPERTY AND HUMAN FLOURISHING 295–320 (2018) (discussing certain systemic housing problems and considering various policy solutions). See also Zachary Bray, *The New Progressive Property and the Low-Income Housing Conflict*, 2012 BYU L. REV. 1109 (2012) (arguing that the federal Section 8 program is a better example of the progressive property approach to addressing housing issues than rent control). For a discussion of Bray's argument, see *infra* note 94.

81. Alexander, *supra* note 5, at 749 (emphasis added).

*Croft Ave., LLC* and *CBLA* implicate the ability of low-income residents to obtain the “basic survival resource” of housing, as well as the protection of “physical security.” Decently stable housing has been shown to have significant implications for the “education of the young” and presumably is a significant factor in the “capability of sociality.”<sup>82</sup> On the other hand, imposition of an inclusionary zoning ordinance arguably also involves some loss by property owners of “freedom to live one’s life on one’s own terms.”

Progressive property theorists do not argue that an interrogation of these various values will lead to a single correct answer regarding whether or not an inclusionary zoning ordinance impermissibly infringes on the rights of property owners. And, of course, vigorous debate could be had with respect to competing visions of the relevant values in any given dispute. But the theory does provide a systematic theoretical response to the developer arguments in these cases: property rights do not exist in the abstract, severed from the communities in which they arise; the role of the state is a complex one, not only to protect absolute rights of owners to use and dispose but also to consider other important values at stake; and where a given property law regime leaves a sizeable swath of the community without basic survival means, such as decent shelter, perhaps certain policies, like inclusionary zoning, can help a property law system better achieve important normative ends.

Some of this may be implicit in the data-driven arguments made by the cities in these cases. Clearly, noting the high levels of rent burdens in the San Francisco Bay area contains an implied statement: this is a bad (or wrong) thing. But unlike the developers, the cities provide no explicit theoretical grounding for why this is or should be unacceptable in the eyes of the law. The data are left to stand alone. As such, the developers claim the entire theoretical space, offering an unchallenged rendering of property law and property rights and, unlike the cities, explaining why the given policy is offensive to such a rendering.

Similarly, some of what progressive property theory has to offer may be implicit in the technical precedential arguments made by the cities. After all, what is takings analysis—*Penn Central’s* balancing test, *Nollan’s* nexus, *Dolan’s* rough proportionately, and so on—if not an attempt to balance the liberty rights of property owners with other important underlying values served by property law. Yet, again, progressive property theory provides a systematic theoretical frame in which to understand the normative ends served by this doctrine.

What progressive property theory could add in these cases is not superior to data-driven or technical precedential arguments. Rather, it is complementary; an additional dimension that would help buttress the sorts of cases that cities like West Hollywood and San Jose are already making. Grounding their arguments in progressive property theory would push back directly against the deeply resonant,

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82. See *Housing and Child Health*, *supra* note 49.

yet fundamentally inadequate, conceptions of property rights that were proffered in support of the developers in these cases.

*B. Rent Control—Property Theory in the Context of a Political Initiative*

Inclusionary zoning is but one of many housing justice campaigns that have been waged in recent years. While other campaigns, or at least their modern incarnations, have yet to be appealed to the high court, echoes can be heard of the same sorts of arguments related to the fundamental nature of property rights, as seen in the briefing for *616 Croft Ave., LLC* and *CBLA*. Rent control provides an apt example.

Rent control, for decades a relatively dormant area of law, is seeing new life in various campaigns. Such laws have long been held up as the prototypical well-intentioned policies that hurt those they are intended to help. Rent control, or rent stabilization, typically refers to government limits on the rents that apartment owners can charge tenants.<sup>83</sup> The traditional argument against rent control is that capping rents will only lead to disinvestment, abandonment, or conversion to a different land use; loss of housing supply; and ultimately, an increase in prices as supply contracts.<sup>84</sup> Such arguments often ignore more sophisticated rent control proposals, that would, for example, couple rent limits with annual consumer price index (CPI) increases, the ability to recoup rehabilitation expenditures, allowance for a limited dividend to owners, eviction protections, strong implied warranty of habitability rights, vacancy decontrol, limitations on conversions, and exemptions for new construction.<sup>85</sup>

*1. The Prop. 10 Initiative in California*

For purposes of this Article, however, as stated previously, I am less concerned with efficacy arguments and more concerned with arguments about the appropriateness of rent control regimes in the face of competing conceptions about the fundamental nature of property rights. The history of rent control in California is instructive in this regard. Rent control saw its heyday in the 1970s, when many jurisdictions passed rent control ordinances, some of which survive today.<sup>86</sup> In

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83. While there is no perfect uniformity of definition, rent stabilization typically refers to laws that limit rent increases during the term of a single tenancy, but allow the landlord to reset rents to market levels between tenancies.

84. See, e.g., EDWARD L. GLAESER & JOSEPH GYOURKO, *RETHINKING FEDERAL HOUSING POLICY: HOW TO MAKE HOUSING PLENTIFUL AND AFFORDABLE* 60 (2008) (“If rent control lowers rents, it will also ensure less building of rental properties and more conversions of the rental stock to owner-occupied condominiums . . . . A second negative effect of rent control is that it limits landlords’ incentive to invest in building quality.”).

85. See Note, *Reassessing Rent Control: Its Economic Impact in a Gentrifying Housing Market*, 101 HARV. L. REV. 1835 (1988) (proposal suggested by Duncan Kennedy and Karl Case).

86. See Saul Gonzalez, *What You Need to Know About Rent Control*, KCRW (May 4, 2018), <https://www.kqed.org/news/11666426/what-you-need-to-know-about-rent-control> [<https://perma.cc/8LW5-VR9P>] (“There are more than 450 municipalities in California, but only 15 of them

1995, however, the state legislature passed the Costa Hawkins Rental Housing Act, which had at least two significant effects: (1) it prohibited the application of rent control to all new construction and (2) it provided for vacancy decontrol, a mechanism that allows owners to raise rents to fair market levels upon the transition from one tenancy to the next.<sup>87</sup>

Costa Hawkins led to decades of relative dormancy in the area of rent control in the state. However, 2018 saw the rise of a vigorous housing justice campaign to repeal Costa Hawkins. Opponents of the measure, including the California Apartment Association, dedicated nearly \$75 million to defeat the initiative. In the official voter guide, the first argument against Proposition 10 stated, “Prop. 10 could hurt homeowners by authorizing a new government bureaucracy that can tell homeowners what they can and cannot do with their own private residence.”<sup>88</sup> The competing argument in support of the proposition contained no similar conception of property rights but rather stated, “The rent is too damn high!”<sup>89</sup>

Similarly, in the media, both sides made arguments related to the likely effects of Prop 10. Opponents talked about the increased housing costs for veterans, effect on home values for retirees, and likelihood that housing will become less available and less affordable.<sup>90</sup> Opponents, however, grounded their opposition in a broader theoretical frame, based on the notion that it would infringe on fundamental private property rights: “Prop 10 is an attack on homeowners. Prop 10 eliminates protections for homeowners and allows regulators to tell homeowners how much they can charge to rent out even one room in their home. . . . Prop 10 will take away homeowners’ rights: Prop 10 eliminates protections for homeowners and allows regulators to tell single-family homeowners how much they can charge to rent out a single room in their homes.”<sup>91</sup>

By contrast, proponents’ arguments tended to highlight data-driven and pragmatic concerns:

Home prices and rents are higher in California than any other state except Hawaii. Rent hikes in the state are double the national average—even worse in Los Angeles, where apartments cost 100 percent more than the national average. Out of control housing costs, driven by corporate landlords and big real estate, have left many Californians living paycheck

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have rent control laws on the books. They include most of the state’s costlier cities, like Los Angeles, San Francisco, Berkeley, West Hollywood and Santa Monica.”)

87. Stats. 1995, Ch. 331, Sec. 1. (effective January 1, 1996) (incorporated as amended, CAL. CIV. CODE §§ 1954.50–54.535 (West 2018)). The law also exempted single-family homes and condominiums.

88. OFFICIAL VOTER INFORMATION GUIDE, CALIFORNIA GENERAL ELECTION NOVEMBER 6, 2018, CALIFORNIA SECRETARY OF STATE, <http://www.voterguide.sos.ca.gov/propositions/10/arguments-rebuttals.htm>. [https://perma.cc/E6UK-EN45]

89. *Id.*

90. See NO ON PROP 10, [Noprop10.org/the-facts/homeowners](http://Noprop10.org/the-facts/homeowners) [https://perma.cc/X9WH-JXFB] (last visited Sept. 21, 2019).

91. *Id.*

to paycheck, with the American dream of buying a home no longer within reach. Nearly 70 percent of households don't make enough to afford an average priced home, which runs \$538,640.<sup>92</sup>

Prop 10 ultimately would be defeated by an approximately 60–40 margin.<sup>93</sup>

## 2. *A Progressive Property Theory Response*

How could advocates or, when such matters reach the courtroom, litigants respond to the exclusionist rhetoric of the sort that helped defeat Prop 10? The notion that “the government can't tell you what to do with your property” resonates strongly. What competing theoretical frame could challenge this model? Again, progressive property theory could provide an answer. It reframes the question from, “*Does an absolute right to set prices at any level exist?*” to questions such as, “*What are the underlying, and potentially competing, multivariate values at stake?*”; “*In addition to the rights of landlords, what obligations do they owe members of their community?*”; and “*What sort of community life is enabled by supporting or rejecting a rent control regime?*”<sup>94</sup>

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92. YES ON 10, [voteyesonprop10.org/read-our-initiative/](http://voteyesonprop10.org/read-our-initiative/) [<https://web.archive.org/web/20181221000129/voteyesonprop10.org/read-our-initiative/>] (last visited Dec. 21, 2018) [on file with author].

93. Liam Dillon, *Voters Reject Proposition 10, Halting Effort to Expand Rent Control Across the State*, L.A. TIMES (Nov. 6, 2018), <https://www.latimes.com/politics/la-pol-ca-proposition-10-rent-control-20181106-story.html> [<https://perma.cc/2RDD-5L5N>] (noting a fifty-nine percent to forty-one percent final tally).

94. Zachary Bray argues that the federal Section 8 program, via which eligible low-income households receive rental payment assistance from the government, “fits the values and ends of the new progressive progressive-property approach better than rent control . . .” Bray, *supra* note 80, at 1109. In considering critiques of progressive property theory that it “cohere[s] as little more than a grab bag of largely unrelated values lacking practical consistency,” he argues that progressive property should be able to “provide relatively consistent and predictable answers” for choosing between alternative legal regimes that seek to serve the communitarian values of progressive property. *Id.* at 1114–15. To achieve this, Bray reintroduces what he describes as basic insights of law and economics to help answer such questions as, *Is rent control or Section 8 a better approach to low-income housing?* Law and economics instructs that landlords will attempt to maximize profit, a notion he uses to argue that rent control will lead to disinvestment in properties and under-the-table exploitation of tenants in ways that Section 8 assistance does not. *Id.* at 1124, 1154–55. He concludes that since Section 8 is both more efficient than rent control, and better serves the equitable and communitarian values of progressive property theory, a progressive property analysis would favor Section 8 over rent control. *Id.* at 1160–61.

Bray's well-articulated concern with the indeterminacy of progressive property theory, and his attempt to coordinate it with a law and economics approach, is consistent with other critiques of progressive property theory that I describe further in Section III.A. Here, addressing solely his conclusions about the relative merits of Section 8 and rent control: 1) he may well be right that Section 8 better serves the equitable and communitarian values of progressive property theory. Unfortunately, as noted above, federal rental assistance is not an entitlement in the U.S. and so programs like Section 8 are available only to approximately a quarter of all eligible households. *See* Bray, *supra* note 80; *see also* JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *THE STATE OF THE NATION'S HOUSING* 30 (2014). As such, Bray's argument would not dispute that the values and ends of progressive property theory might be served by a rent control campaign in a reality where Section 8 assistance is not universally available; 2) it may not be the case that Section 8 better serves the equitable and communitarian values of progressive property theory than all potential rent control regimes. Bray argues against a traditional version of rent control, as compared to, for example, the sophisticated model offered by Duncan

A progressive property analysis of the sort embraced by the authors of the *Statement* may also consider the liberty of the housing owner as one value worthy of consideration.<sup>95</sup> Clearly a rent control ordinance results in some limits on this liberty—e.g., the liberty to set the initial rental price for all units or, depending on the type of rent control ordinance at issue, the liberty to evict without good cause. This value would not necessarily be cast aside.

At the same time, a progressive property analysis would place the loss of liberty in context with other values at stake—for example, the physical security of potential low-income residents and their ability to obtain basic survival resources necessary to participate in the social and political life of the community. Progressive property theory thus provides a theoretical frame in which to respond to arguments such as those made by landlords in the Prop 10 campaign. Whether or not rent control infringes on basic property rights is not as simple as looking to whether it imposes limits on the “right to set prices” or the “right to exclude” liberty value of landlords. Rather, it requires a thorough evaluation of the underlying values at stake, which include a broader set than those suggested by anti-Prop 10 landlords.

That is a lot to put on a campaign poster. It is relatively easy to imagine what the reply briefs in *616 Croft Ave., LLC* and *CBLA* might have looked like had cities incorporated progressive property theory. It is less straightforward to translate the language of the theory into the parlance of the political initiative.<sup>96</sup> And perhaps its competing values approach is implicit in data on unwieldy rent burdens and statements like, “The rent is too damn high!”<sup>97</sup>

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Kennedy that would mitigate some of Bray’s concerns about the “anti-progressive effects” of rent control; *see* Note, *supra* note 85 and accompanying text; 3) there are also “anti-progressive effects” of Section 8—for example, the fact that, unlike with rent control, Section 8 voucher holders often suffer severe discrimination in attempting to utilize vouchers on the private market. *See* PRRAC, SECTION 8 DISCRIMINATION, *supra* note 8. Law and economics, like progressive property theory, classically suffers from similar problems of indeterminacy in the choice of which variables it attends to and the relative weights it assigns to them; and 4) Section 8 is a tax and transfer program and the notion that progressive property theory would support it on efficiency grounds over market-distortive regimes like rent control bears close resemblance to the very sorts of arguments that progressive property theory sought to address at the outset. All this notwithstanding, Alexander agrees with Bray’s conclusion. ALEXANDER, *supra* note 80, at 316 (“Bray correctly observes that Section 8 better fits ‘the values and ends of the new progressive-property approach . . . than rent control.’”).

95. Though query whether this sort of liberty implicates core flourishing-related concerns. And, of course, housing security also implicates liberty considerations of tenants.

96. Discussions of prior drafts of this Article have yielded suggestions for a variety of banners that might fly over a progressive property-infused campaign, including “This Is My Home” and ideas drawing on the “Open Housing” movement of the 1960s. My primary purpose here is not to wordsmith political slogans, nor is it to suggest how grassroots advocates should choose their words in speaking about matters as personal as the home. It is only to suggest that there may be value in framing the issue in terms that demonstrate coherence with deeply-rooted property theory, rather than allowing opponents to claim the theoretical space, with the attendant legal and moral force of argument. Also, effective messaging to courts, as in the inclusionary zoning examples, likely would look much different than effective popular campaign messaging.

97. Indeed, housing justice campaigns like Prop 10 are already rife with sentiments that could be interpreted as highly consistent with more formalized notions of progressive property theory. The

But, again, there is value in making explicit the implicit. Why—from the perspective of the law—does it matter that the rent is high? The Blackstonian model of property ownership is comfortable with the rent being high. This model has persisted for hundreds of years and continues to hold sway in commonly-held views of property rights. If it is to be replaced, compelling alternative models must be made accessible.<sup>98</sup>

When such campaigns, like the ones discussed in this Section, encounter challenges related to the fundamental nature of property rights, advocates should consider offering a competing model. This would not be in place of important data-driven and pragmatic arguments speaking to the severity of housing challenges in a region. Rather, this approach would take those arguments a step further and explain why such dire outcomes are relevant in the eyes of the law to an assessment of property rights. By drawing on progressive property theory, such campaigns would provide an explicit alternative to those antiquated models of property and ownership that are still in widespread circulation.

### *C. The Spectrum of Housing Justice Campaigns*

Inclusionary zoning and rent control are but two types of modern housing justice campaigns. In addition, cities and states across the country have been passing laws that prohibit discrimination against Section 8 voucher holders.<sup>99</sup> Legal disputes to define the contours of the implied warranty of habitability have been ongoing.<sup>100</sup> Local rental housing inspection programs to proactively address substandard conditions have also seen new support.<sup>101</sup> And there is a perennial debate at the federal level over the need for an expansion of federal rental assistance.<sup>102</sup>

Each of these initiatives in some way limits the liberty of landlords—yet, not all to the same extent. Take, for example, liberty with respect to the right to exclude people from one's own housing. Housing justice campaigns could be thought of as existing along a spectrum of least to greatest impact with respect to this value. At one end of the spectrum, simply providing additional federal assistance, either via increased taxation or reallocation of priorities, does little to intrude upon this liberty

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conversation here between theory and practice would best be a bilateral one, in which such campaigns are not only enriched through more systematic grounding in theory, but in which progressive property theory too could be refined through the experience of application to a particular context.

98. This is not to argue that the availability of alternative conceptions of property alone would have been sufficient to prevail over the well-financed anti-Prop 10 landlord lobby. I suggest simply that the availability of alternative conceptions is necessary to confront antiquated ideas of the homeowner's absolute property rights—ideas that proved central to the successful anti-Prop 10 campaign.

99. See PRRAC, SECTION 8 DISCRIMINATION, *supra* note 8.

100. *Kohner Properties, Inc. v. Latasha Johnson*, 553 S.W.3d 280 (Mo. 2018) (tenant challenge to rules requiring tender of rent to the court as a prerequisite to raising a breach of the implied warranty of habitability as a defense or counterclaim in a suit for rent and possession).

101. See *Turque*, *supra* note 9.

102. See *RICE*, *supra* note 10.

value. Local inspection programs, permitting entry by government inspectors to detect incidents where a landlord is falling below required standards, involve a somewhat more significant curtailing of this liberty value. Rent control, often coupled with good cause eviction protections, moves further in the direction of curtailing the right to exclude. The same goes for robust enforcement of the implied warranty of habitability, often preventing a landlord from evicting a tenant withholding rent. At the far end of the spectrum, not being able to deny occupancy to a Section 8 voucher holder perhaps most directly offends a strong right to exclude by forcing owners to permit occupancy by households they otherwise would deny.

Laying these various efforts along a spectrum from least to greatest impact on the liberty value of the right to exclude might look something like this:

	Type of Limitation on "Right to Exclude"	Type of Housing Initiative
Least Intrusive  Most Intrusive	No External Entry Required:	Expansion of Rental Assistance
	Limited External Entry Required:	Housing Quality Inspections
	Inability to Evict:	Rent Control + Good Cause Eviction Protections; Implied Warranty of Habitability
	Inability to Deny Original Access:	Anti-Discrimination Laws for Section 8 Voucher Holders

In each case, a progressive property analysis would have to contend with the impact of these housing initiatives on the liberty value of the property owner. And yet, as with inclusionary zoning or rent control, the basic structure of the argument would be the same: placing in context the limits on a landlord's freedom with other important values at stake.

III. WHAT MAKES A LEGAL THEORY INFLUENTIAL: THE SITUATIONAL  
ADVANTAGE OF LAW & ECONOMICS

Despite the significant potential of progressive property theory to have the sort of impact described above, ten years after the publication of the *Statement*, the theory is yet to have any demonstrable impact outside of legal academia.<sup>103</sup> Westlaw searches for “Progressive Property,” “Progressive Property Theory,” or for citations to the *Statement*, find zero federal or state cases citing to the theory.<sup>104</sup> This is in stark contrast to the hundreds of cases citing to, and infused with, law and economics theory. Alexander’s excellent supplementary article, *The Social-Obligation Norm in American Property*, has been cited by one court, the United States District Court of New Mexico, for the proposition that the right to exclude is the core feature of property rights in the minds of most people—not exactly the primary proposition the article intended to support.<sup>105</sup> A question thus arises: what accounts for this limited impact?<sup>106</sup>

*A. Hypothesis 1: Endogenous Factors*

A number of commentators have critiqued progressive property theory on the basis of its own terms. I will refer to such critiques as endogenous factors—i.e., reasons that relate to the content of the theory itself.

The *Statement* was originally published in a symposium alongside a number of other articles, some expanding on the principles and some challenging various aspects of the theory. Henry Smith, for example, does not disagree with the *ends* of progressive property theory but rather the *means*. “It is hard to be against human flourishing . . .”<sup>107</sup> Yet he argues that the sort of multivariate analysis suggested by the authors of the *Statement* “ignores the benefits of simple *ex ante* baselines”<sup>108</sup> and “would undermine property’s advantages of solving problems wholesale and coordinating the activities of often-anonymous actors.”<sup>109</sup> A strong presumptive right to exclude as a core feature of property reduces to manageable size the complexity of evaluating every flourishing-related value at stake in every minor property dispute. Smith argues that this presumption is rebuttable—in cases, for

103. For the purposes of this Article, I am primarily concerned with influence on laws and legal institutions, rather than, for example, influence on other academic fields.

104. Last searched July 3, 2018.

105. See *Arnoldo Carrillo v. Penn Nat’l Gaming Inc.*, 172 F. Supp. 3d 1204 (D.N.M. 2016).

106. Of course, lack of citation to the theory itself does not mean the ideas contained in the *Statement* have not exerted influence. One reader of a draft of this Article has suggested that courts may be hesitant to reference progressive property theory by name, given the modern political valence of “progressive” as a term. Also, commentators have noted that progressive property theory has perhaps had a greater influence in jurisdictions outside of the United States, for example, in places such as South Africa.

107. Smith, *supra* note 14, at 960.

108. *Id.* at 968.

109. *Id.* at 963.

example, of discrimination or necessity—but those are exceptions that should not swallow the rule.

Jedediah Purdy argues that progressive property theory's project of critiquing law and economics may be redirected to more fruitful ends. He reminds us that law and economics is itself built upon the moral tradition of utilitarianism. For philosophers like Bentham:

[T]he moral gravamen of the program was (in significant part) that it counted the well-being of all alike; those reformers scorned obscurantist modes of reasoning that they saw as preserving the inequitable privileges of elites. Utilitarianism, then, was in good part a view about equality, and as a mode of justification, it relied on the idea that all who participated in social life were obliged to respect that idea of equality—that is, to embrace a set of institutions and rules designed on the principle that the welfare (or, happiness) of each counted alike.<sup>110</sup>

To Purdy, the philosophical tradition upon which law and economics rests, and the welfare-maximizing approach it embraces, demands obligations related to equality that are at least in conversation with those espoused by the authors of the *Statement*. Implicit in his analysis is the notion that perhaps law and economics should not be so quickly cast aside, and rather should be considered as a model that, depending on the particular scholarly rendering, could help serve similar ends as progressive property theory.<sup>111</sup>

Katrina Wyman echoes this notion of not lumping all law and economics analysis together. She, too, notes the potential for certain breeds of law and economics to serve goals that may be in harmony with the ends of the *Statement*: “. . . it is noteworthy that there are economically oriented scholars who maintain that economic analysis, when properly applied, justifies a lot more government regulation than conventionally assumed.”<sup>112</sup>

Additional scholarship has emerged since the publication of the original symposium that further critiques and refines the concepts set forth in the original description of progressive property theory. For example, Ezra Rosser attacks from “the left flank” in arguing that despite its progressive aims, the theory does not go far enough.<sup>113</sup> He is particularly critical of the extent to which progressive property theory addresses issues of original acquisition of property and current distributional inequities, particularly as they relate to race: “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

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110. Purdy, *supra* note 15, at 955.

111. Zachary Bray similarly considers how law and economics might be used in conjunction with progressive property theory to serve its equitable and communitarian ends. *See* Bray, *supra* note 80, and discussion of his analysis in the context of rent control, *supra* note 94.

112. Wyman, *supra* note 15, at 995–96.

113. *See* Rosser, *supra* note 16, at 171.

powerful means of questioning the exclusionary force of ownership.”<sup>114</sup> Others, like Tim Mulvaney, are more optimistic about progressive property theory’s potential “to serve a role in furthering a progressive society.”<sup>115</sup> His prescription is for the theory to embrace an ethic of transparency, humility, and concern of economic identity.<sup>116</sup>

Do these various critiques of progressive property theory explain its failure to extend its reach beyond the realm of legal academia? Certainly, they raise interesting questions that could be debated at length. Smith’s pragmatic concerns about complexity of analysis and the cost-saving effect of default rules are important—though his explanation for how the analysis necessary to determine when such presumptions are rebuttable (e.g., in cases of necessity or antidiscrimination laws), and how the attendant secondary costs of such analysis do not swallow the prior cost savings, could complicate his critique.<sup>117</sup> As noted above, modern property law is littered with exceptions to a basic right to exclude—progressive property theory does not create this complexity, but rather provides a framework in which to better understand it. Nor must the theory be antithetical to default rules that provide helpful order—using progressive property theory as a method of analysis to uphold the legality of, or advocate for the passage of, a general land use regulation (like inclusionary zoning or rent control) has no less of a standardization effect on the law than using alternative theories to defeat such policies. As Alexander has put it, “The social-obligation norm does not signify the sacrifice of law-like predictability in the pursuit of purely ad hoc determinations about what social justice demands.”<sup>118</sup> Law and economics, too, could be deployed to reach outlandish conclusions or to raise infinitely complex computational problems.<sup>119</sup> If this were a disqualifying metric, both theories would be abandoned. The basic idea is that progressive property theory provides a helpful orientation from which to approach property-related questions.

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114. *Id.* at 111.

115. Timothy M. Mulvaney, *Progressive Property Moving Forward*, 5 CAL. L. REV. CIR. 349, 350 (2012).

116. *Id.* at 350–51.

117. For a similar point, see Alexander & Peñalver, *supra* note 18, at 139 (“As exclusion theorists recognize, in some situations exclusion is so costly that it is worth paying the price of governance . . . . The problem, from the perspective of exclusion theory, is that too many exceptions will undermine the informational efficiencies asserted on behalf of the open-ended right to exclude. But this raises a difficult question for the exclusion theorist. Apart from being able to rule out the extremes (unlimited exclusion power without exception and universal case-by-case utilitarian [re]calculation of each and every claimed right of access), how can we know what mode of decision making to employ in any given situation? How are we to know whether the costs of considering this particular exception to the core exclusion structure of property outweigh the benefits unless we actually carry out a full utilitarian calculus.”).

118. Gregory S. Alexander, *The Complex Core of Property*, 94 CORNELL L. REV. 1063, 1067 (2009).

119. *Id.* at 1069.

With respect to the other critiques mentioned above, the notion that law and economics, rather than a foil, could be in conversation with progressive property theory and serve some of the same goals certainly seems worthy of additional consideration. And the refinements offered by Rosser and Mulvaney seem to be fruitful next steps in the development of the theory. None of this commentary, however, appears fatal to the overall project—or at least no more defeating than the sorts of critiques that law and economics itself encounters.

*B. Hypothesis 2: Exogenous Factors*

I argue that a full explanation of why law and economics has thrived in ways that progressive property theory has not requires looking beyond the content of the theories themselves. Of course, law and economics has had much more time to impact U.S. law and legal institutions. Consideration of other exogenous factors—or reasons external to the theories themselves—sheds even more light.

Jon Hanson and co-authors have looked at the rise of law and economics in legal academia and beyond.<sup>120</sup> Rather than being a story of law and economics emerging victorious from the neutral battlefield of ideas,<sup>121</sup> he traces the concerted effort, funded by individuals and foundations, that led to the ascension of law and economics as a force in legal academia and, more broadly, American law.<sup>122</sup>

In looking at the impact of one such foundation—the John M. Olin Foundation—Hanson describes the tens of millions of dollars it has provided to establish centers at schools like Harvard, Yale, Stanford, the University of Chicago, Columbia, Georgetown, Duke, the University of Virginia, the University of Pennsylvania, and the University of Michigan.<sup>123</sup> He explains how Olin has attempted to alter the legal academic playing field:

[Olin money] has a significant influence not only in encouraging certain types of scholarship, but also in increasing the credibility of that scholarship. It establishes “centers” dedicated to law and economics theory, provides funding for journals through which law and economics scholarship can be stamped with the legitimacy of “peer review” by other legal economists, finances a series of workshops to encourage efficiency-oriented scholars to share and test their views at elite law schools, and gives scholarships and fellowships to top law students who participate in law and economics seminars and produce law and economics scholarship.<sup>124</sup>

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120. See, e.g., Hanson & Yosifon, *supra* note 17; Adam Benforado, Jon Hanson, David Yosifon, *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645 (2004) [hereinafter *Broken Scales*].

121. See *Broken Scales*, *supra* note 120, at 1729 (“Thus, by conventional accounts, the triumph of law and economics, presently the dominant legal-theoretic paradigm, appears to be simply the result of the best theory winning out in the most objective and meritocratic of arenas—academia. Upon closer examination, however, the success of law and economics may reflect less its objective superiority and more its axiomatic commitment to dispositionism and resultant faith in free choice and markets.”).

122. *The Situation*, *supra* note 17, at 272–84.

123. *Id.* at 273–74.

124. *Id.* at 274.

Hanson also notes the connection between the Olin Foundation and individuals with an agenda of altering not just legal academia, but national policy and society writ large.<sup>125</sup> And he traces how ideas generated at Olin Centers are connected with a network that extends beyond the walls of academia, to think tanks, industry and public relations firms, and policymakers.<sup>126</sup>

Needless to say, progressive property theory has been supported by no similar effort to alter the property law landscape.

#### IV. THE ROLE OF THE LAW SCHOOL CLINIC IN FURTHERING PROGRESSIVE PROPERTY THEORY

In order for progressive property theory broadly to influence the institution of American property law, and to bolster housing justice campaigns in specific, the theory needs to be the province of more than a select group of legal scholars writing about it in law journals. Specifically, it needs to connect with vehicles of mobilization that can infuse the theory into real world legal debates.

I suggest here that the law school clinic is one promising vehicle for furthering the impact of progressive property theory. Clinics are uniquely situated—with one foot in the university and one foot in the real world—to serve as a theory delivery mechanism. Others have argued for the importance of theory-infused clinics. Alina

125. See *Broken Scales*, *supra* note 120, at 1730 (“William Simon, one of the forces behind the John M. Olin Foundation . . . understood early on the need for business interests to actively promote a . . . worldview that celebrated markets . . . . Simon considered the knowledge being produced and taught at American universities in the early 1980s, when he first came to head the Olin Foundation, to be dangerously antithetical to those ends. For Simon, this problem was tantamount to a war of liberty versus totalitarianism—a war that in his view had to be waged simultaneously on several fronts:

‘(1) Funds generated by business . . . must rush by multimillions to the aid of liberty, in the many places where it is beleaguered.

. . . .

. . . [Foundations established by such funds must] serve explicitly as intellectual refuges for the non-egalitarian scholars and writers in our society who today work largely alone in the face of overwhelming indifference or hostility. They must be given grants, grants, and more grants in exchange for books, books, and more books . . . .

(2) Businesses must cease in the mindless subsidizing of colleges and universities whose departments of economics, government, politics, and history are hostile to capitalism and whose facilities will not hire scholars whose views are otherwise . . . . America’s major universities are today churning out young collectivists by legions, and it is irrational for businessmen to support them . . . .”

126. See *Broken Scales*, *supra* note 120, at 1731–33 (“Capturing legal academia, while a valuable first step, has only been the top layer of a multi-layered process . . . . Probusiness ideas emerging at Olin Centers around the country have found their way into think tanks with similar goals and funding sources . . . . [Public relations firm] Berman & Co. reports that it has engendered what it calls an ‘[a]cadmic research network’ to ‘commission more than a dozen major research projects each year to independent academics at leading research universities,’ including the University of Chicago, University of Texas, and Massachusetts Institute of Technology. This work is supported at another level by ‘building and maintaining sophisticated grassroots activation systems;’ ‘drawing industry allies from associations, think tanks, or the private sector;’ ‘providing data, information, and refined messages that others use to make their cases—and ours—in the policy arena;’ and the ultimate in credibility creation, ‘develop[ing] strong ties to individuals who are often perceived as ‘anti-industry’ but who agree with focused messages that we seek to publicize.”).

Ball makes a compelling argument from a pedagogical perspective for exposing students enrolled in business law clinics to critical theory.<sup>127</sup> She argues that incorporating critical legal theory into the process of client selection can deepen student learning by contextualizing client matters, encouraging creative lawyering, promoting higher order thinking, and developing professional character.<sup>128</sup> “Incorporating critical legal theory disrupts conventional legal education by exposing the students to literature that challenges not only existing distributions of power, but also envisions how the legal system could facilitate equity.”<sup>129</sup>

Introducing legal theory into the law school clinic can do more than achieve pedagogical goals. It can also help influence the campaigns in which clinics are engaged. How do beliefs like Blackstone’s and the property-related outcomes that they influence come to be changed? Through the filing of U.S. Supreme Court briefs in cases like *616 Croft Ave., LLC* and *CBLA* that push back against antiquated ideals? Through more local grassroots organizing efforts around political initiatives like Prop. 10? Important recent research has looked at the role of social movements and movement lawyering in helping to change “structural conditions of inequality” and “social attitudes and cultural norms.”<sup>130</sup> The longstanding debate that emerged from the era of legal liberalism and the litigation of cases like *Brown v. Board of Education* and *Roe v. Wade*, over the efficacy of law and lawyers to help effect change, is being looked at with fresh eyes.<sup>131</sup>

And what is emerging is a new paradigm of movement lawyering that includes, what Scott Cummings has referred to as, integrated advocacy.<sup>132</sup> In such efforts, “lawyers combine modes of advocacy—litigation, policy reform, transactional work, organizing support, media relations, and community education—in order to maximize political pressure and transform public opinion.”<sup>133</sup> The directionality of influence between litigation and broader grassroots campaigns runs both ways. What this research indicates is that, if done right, whether it be through the filing of court briefs or through more popular widespread initiatives, lawyers as partners engaged in housing justice campaigns hold the potential to help change attitudes and norms and to combat structures of inequality.

Law school clinics are well-positioned to, and already are, engaging in such multifaceted efforts—Cummings highlights a number of such clinical efforts

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127. See, e.g., Alina S. Ball, *Disruptive Pedagogy: Incorporating Critical Theory in Business Law Clinics*, 22 CLINICAL L. REV. 1 (2015).

128. *Id.* at 29.

129. *Id.* at 35.

130. See Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1653 (2017).

131. See Scott L. Cummings, *Rethinking the Foundational Critiques of Lawyers in Social Movements*, 85 FORDHAM L. REV. 1987 (2017).

132. Cummings, *supra* note 130, at 1695.

133. *Id.* at 1696. Under this model, lawyers do not do this work alone. See *id.* at 1697 (“Cross-disciplinary collaboration between lawyers and nonlawyers is a foundation of integrated advocacy. In this approach, lawyers build relations with nonlegal organizations to amplify their legal claims, connect to organizing campaigns, promote monitoring and compliance over time, and shift public opinion.”).

already underway.<sup>134</sup> With respect to progressive property theory in particular, community economic development clinics, housing law clinics, and a variety of related advocacy and transactional clinics, often work on issues that have at their center fundamental questions of property rights. The distributional questions at the core of progressive property theory are regularly of central concern to clinicians and their clients. Law school clinics thus are well positioned to draw upon progressive property theory to support their arguments about what property rights the courts should vindicate, and what property rights would conflict with important underlying values, such as “the ability of each person to obtain the material resources necessary for full social and political participation.”<sup>135</sup>

Consider, as an example, a community economic development clinic (the CED Clinic) that represents a nonprofit community development corporation (the CDC) developer of affordable housing. Suppose the CDC wants to develop government-subsidized housing in a certain affluent neighborhood but faces severe NIMBY (Not In My Backyard) resistance from local neighbors. The CED Clinic may find itself representing the CDC before a local planning and zoning commission (in a proceeding that may end up in litigation) and working with tenants, organizers, other local nonprofits, and government officials in a campaign to garner additional local support to bring the project to fruition. It would not be uncommon for property-rights related questions to arise: neighbors argue that the proposed complex will be a nuisance, dramatically diminishing property values in the area; opponents question the CDC’s entitlement to build the project under state and local land use laws. The general resistance to the project is captured by a sentiment that the proposed subsidized housing is just the government artificially meddling in the private housing market.<sup>136</sup>

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134. *Id.* at 1702–03 (“Law school clinics have been important organizational partners in movement campaigns. . . . These collaborations illuminate how law school clinical programs—with access to resources, control over case dockets, and incentives to participate in and thereby expose students to innovative advocacy—can serve as important organizational partners in social movement campaigns: playing the role of movement counsel as they train the next generation of movement lawyers.”).

135. *A Statement of Progressive Property*, *supra* note 1, at 744.

136. Note that under one characterization, this example differs from the inclusionary zoning and rent control examples discussed above, in that in those cases, progressive property theory would be deployed to argue for imposing certain *restrictions* on landowners (i.e., price controls). In this case, progressive property theory would be deployed to argue for allowing a landowner the *affirmative right* to use property in the manner it sees fit (i.e., allowing the CDC to develop its own land). Thus, true “exclusionists” seemingly should side with the CDC in this case. Of course, restrictions on Party A can be alternatively characterized as affirmative rights to Party B, and vice versa: the obligation of a price restriction on Party A being an affirmative right for Party B to rent at no more than a certain price; an affirmative right for Party B to build being a restriction on neighbors’ rights to enjoy their property free of, in their view, an adjacent nuisance. In all of these cases, the property law system is assigning property entitlements, and my argument is simply that progressive property theory could be deployed by housing advocates in efforts to influence such assignments.

In each instance, clinical instructors,<sup>137</sup> working with law students, and in conjunction with local partners and/or coalitions, could respond, not only with data, refuting the proffered impact on property values; not only with technical argument about the applicability of various land use laws; but also applying a progressive property frame that raises the broader sorts of questions discussed herein, such as: *What obligations exist to ensure that low-income residents have access to the basic survival resource of housing? What type of communal life is enabled by allowing communities to wall themselves off and become enclaves for the wealthy?* The clinic could deploy progressive property theory to frame the argument in a manner that demonstrates how, rather than being an assault on neighboring property rights, permitting the subsidized housing project to move forward is in harmony with what might be required of a just property law system.

Can law school clinics do for progressive property theory what organizations like the Olin Foundation have done for law and economics? Certainly not on their own. But the law school clinic could be a starting point for mobilizing the theory and moving it beyond the walls of legal academia and out into battlefields, like those upon which housing justice campaigns are being fought, where it could do some real good.

#### CONCLUSION

Progressive property theory marks a pivot in our theoretical understanding of the nature of property. It offers a framework that steps back from preference aggregating, dethrones the “right to exclude” from its preeminence, and instead asks more broadly, *What are the values served by our property rules and institutions?* Among them, it places key emphasis on human flourishing—an admittedly broad concept, but one that theorists use as a rough stand-in for the notion that everyone in a community should have an opportunity to thrive. Given that we develop in a communal context, the theory places a refreshing emphasis on the *obligations* of ownership—that property law should promote, for example, the ability of all people to obtain basic survival resources. Of course, property serves other values, such as liberty, which must be considered as well. The resulting analysis may not lead to a single determinate outcome and raises questions of complexity—but no more so than in a true attempt to tally aggregate welfare across a society or, necessarily, to determine when to override basic default rules. What progressive property theory does offer is a helpful theoretical reorientation.

Housing advocates concerned with ensuring that all people have access to decent housing opportunities engage in daily struggles that implicate the nature of property. Data about massive disparities are critical to making a case for change.

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137. One commentator has questioned the feasibility of asking clinicians to shoulder the burden of teaching legal theory in addition to all of their other responsibilities. Perhaps this is an area where the trend toward greater collaboration between “doctrinal” and clinical faculty could be beneficial in the teaching of clinical courses or offering any number of other experiential opportunities.

Technical legal arguments built on precedent can be extremely effective. A complementary tool would be providing a more robust theoretical framework through which judges, and society at large, could better understand that the legal interventions pushed by advocates are not deviations from appropriate property laws, but rather are highly consonant with what is required of a just legal system.

The purpose of this Article has been to point out that there is room for bilateral support here. Progressive property theory, which thus far has remained close to home in legal academia, could provide just the sort of theoretical grounding that would be of help to housing justice campaigns. These campaigns, in turn, with partners that include law school clinics, could help move progressive property theory beyond academia, out into courtrooms and political discourse, and, ultimately, mobilize the theory to impact the legal rules and institutions that it set its sights on in its earliest statement.

