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## Operationalising Progressive Ideas About Property: Resilient Property, Scale, and Systemic Compromise

Lorna Fox O'Mahony  
*University of Essex*, lfox@essex.ac.uk

Marc Roark  
*University of Tulsa*, marc-roark@utulsa.edu

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**OPERATIONALISING PROGRESSIVE IDEAS ABOUT PROPERTY:  
RESILIENT PROPERTY, SCALE, AND SYSTEMIC COMPROMISE**

*By: Lorna Fox O'Mahony<sup>†</sup> & Marc L. Roark<sup>‡</sup>*

*Abstract*

*Property theory is at a crossroads. In recent decades, scholars seeking to advance progressive ideas about property have embraced 'Progressive Property' theories that seek to advance the goals of social justice and the common good, offering a vital counter-weight to utilitarian and neo-conservative accounts of property. Progressive Property theories seek to correct an imbalance in American property discourse which—across the temporal scale—has sustained a range of narratives and normative commitments, but which has veered towards extreme acquisitive individualism and the rhetoric of property absolutism since the 1970s. The idea that individual property rights are not absolute but defined by the requirements of social justice is uncontroversial in many European jurisdictions, reflecting their normative foundations in traditions of European social welfarism and Catholic social teaching. In *Property Rights and Social Justice: Progressive Property in Action*, Walsh foregrounds a system designed for normative hybridity, and evaluates the practical possibility of balancing commitments to social justice within a system that upholds private property rights.*

*In this Article, we build on Walsh's account to consider the implications of her insights for scholars seeking to advance progressive ideas about property in the U.S. context across three registers of scale: rhetorical, jurisdictional, and physical. Applying Resilient Property Theory ("RPT"), we reflect on how the dominance of rhetorical methods in the last half-century has foregrounded ideological conflicts between competing normative commitments in U.S. property scholarship, locating scholars seeking to advance progressive ideas about property on a battleground that has been*

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<sup>†</sup>Professor of Law, Essex Law School, University of Essex, U.K.; Affiliate Research Associate Professor, Department of Private Law, University of Pretoria, South Africa.

<sup>‡</sup>Professor of Law, University of Tulsa College of Law; Affiliated Research Associate Professor, University of Pretoria, South Africa.

*prepared to benefit others. Building on Walsh’s approach of “widening the doctrinal lens,” we argue that RPT offers a new methodological toolkit for advancing progressive ideas about property: by widening the legal lens; widening the contextual lens; and widening the methodological lens. We argue that each of these approaches, as they engage with material and hierarchical scales, offers opportunities to identify and advocate for compromise positions between respect for private property rights and social justice considerations, enabling active political and legal engagement with normative diversity and respecting and taking seriously different legal conceptions of the good.*

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## I. INTRODUCTION

Theoretical accounts of property law that seek to advance “progressive” normative ideas have blossomed since the publication of *A Statement of Progressive Property* in 2008.<sup>1</sup> The normative positions set out in the statement were familiar to many scholars—not least because they built on a significant body of prior scholarship, including leading work by the four signatories. Nevertheless, its publication in the *Cornell Law Review* was an important symbolic and strategic point of departure for United States property theory discourse. Strategically, it offered a theoretical counterweight to what had become a dominant rhetorical and ideological discourse promoting the neoliberal triptych of strong property rights protections, a “small” or restrained state in aspects of social and economic life deemed to be “private,” and private power<sup>2</sup> as the source of individual

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

2. This is embodied in ‘the market’ and the methodological hegemony of law-

freedom and wealth maximisation. Symbolically, it carried the gravitas of established voices in property law, scaling up the rhetorical impact, scholarly weight, and visibility of progressive ideas about property.

In one sense, the necessity of the *Cornell* statement to develop a theoretical counterweight to extreme acquisitive individualism and narratives of property absolutism was characteristically “American.”<sup>3</sup> The idea that individual property rights are not absolute but defined by the requirements of social justice is reflected in the constitutional property clauses of many European jurisdictions, reflecting their normative foundations in political traditions of European social welfarism, Catholic social teaching, and concepts of the “common good.”<sup>4</sup> This canon of progressive ideas about property is reflected in Professor Walsh’s deep analysis of Irish constitutional property law as a case study of “progressive property in action.” Although the primary focus of *Property Rights and Social Justice: Progressive Property in Action* is on Ireland, the insights Walsh distils offer new opportunities for progressive property scholars focused on the United States and elsewhere to identify potentially productive new lines of inquiry.

Ireland offers a useful comparator for American property law. Ireland’s property system also shares a common law rootstock with English and American traditions of liberal individualism<sup>5</sup> and has adopted the hallmarks of neoliberal political policies in the last half-century. The place of Ireland’s economic model—and by extension its property politics—on the global political spectrum has been described as “somewhere between Boston and Berlin”<sup>6</sup>—a hybrid blend combining elements of American neoliberalism (minimal state, privatisation of public services, public-private partnerships, developer and speculator-led planning, low corporate and individual taxation, light or no regulation) with aspects of European social welfarism (developmental state, social partnership, welfare safety net, high indirect tax, and EU directives and obligations).<sup>7</sup>

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and-economics. *See generally id.*

3. Marc L. Roark, *American Squatter*, 85 ALBANY L. REV. 501, 502 (2022).

4. *See* RACHAEL WALSH, PROPERTY RIGHTS AND SOCIAL JUSTICE: PROGRESSIVE PROPERTY IN ACTION 13-15 (2021) (for an account of the influence of Catholic social teaching on the Irish Constitutional treatment of property).

5. Tom Allen, *Liberalism, Social Democracy and the Value of Property Under the European Convention of Human Rights*, 59 INT’L & COMPAR. L. Q. 1055, 1056 (2010).

6. Rob Kitchin et al., *Placing Neoliberalism: The Rise and Fall of Ireland’s Celtic Tiger*, 44 ENV’T & PLAN. A: ECON. & SPACE 1302, 1304 (2012).

7. *See* ROB KITCHIN & BRENDAN BARTLEY, UNDERSTANDING CONTEMPORARY

Walsh's book explains how these competing normative perspectives influenced and were reflected in the property clauses of Ireland's 1937 constitution and the development of Irish property law to the present day. Her account spans the political, economic, and legal history of property law and social justice in Ireland, from the historical context of the Irish independence movement to the compromises that underpinned the newly independent state after 1922 to the operationalisation of conservative and progressive—individual and collective—ideas about property through the twentieth century and the financial and economic downturns, political polarisation, and affordable housing crises of the twenty-first century. Throughout the book, Professor Walsh explains how competing narratives of property together produced a constitutional property order that simultaneously respects and upholds individual private property rights and the interests of social justice and the common good.

The idea that robust private property rights and state-backed support for social justice can work together to produce a stable and well-ordered property system defies the dominant rhetoric of United States property politics. The successful rhetorical performance of neoliberal property politics in the United States has produced a narrative and normative frame that fetishizes “free market” individualism over collective responsibility and mutuality. Crucially, on the rhetorical scale, these are portrayed as oppositional and non-commensurable. Against this political backdrop, the power of strong property rights narratives is compounded by the mechanisms through which ownership exercises its rhetorical power within neoliberal property law systems. By leveraging the *depoliticisation* of property rights, “private” property theories focused on interpersonal or corrective justice position questions of entitlement and the status quo of property above, or “prior to,” law.<sup>8</sup>

The paradox of property rights absolutism is that it simultaneously rides the crest of the political wave of neoliberalism and—by defining its source in natural law, not politics—disengages from political debates about property. In this way, its rhetorical strategies appear unassailable. By concealing the political role of private property as a

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IRELAND 1-26 (2007).

8. Underkuffler described: “[t]he promise of property law, and its critical social function [as] to *protect* what it identifies as ours. Whatever the distributional fairness or unfairness that may exist, whatever the vagaries of the moment, property law promises that entitlements will not change.” Laura S. Underkuffler, *Lessons from Outlaws*, 156 UNIV. OF PA. L. REV. 262, 267 (2007).

central institution of the liberal state, neoliberal accounts of property look away from the pragmatic practices and processes through which land and resources are governed. By locating property debates on the rhetorical scale, claims are elevated above the reach of state action, remote from the pragmatics of land resource governance. Progressive accounts of property that advance counternarratives through the same rhetorical register are tactically disadvantaged by the de facto power of individualism in United States property discourse. This is exacerbated in periods of political polarisation because the political tactics of polarised populism are not geared towards the pragmatics of “solving” problems<sup>9</sup> but to leveraging rhetorical advantage to exacerbate and exploit divisions—turning property problems into “wedge” issues.<sup>10</sup>

In this Article, our point of departure is the observation that arguments on the rhetorical scale have dominated United States property scholarship in the last half-century. When debates about property problems play out on this rhetorical scale, they foreground competing normative commitments while, arguably, scaling up ideological conflict. These rhetorical exchanges serve a range of purposes. For some scholars, advancing competing normative-rhetorical positions offers a meaningful “in principle” testbed for exchanging and exploring the analytical and normative strength of competing conceptual arguments. For others, the objective is to rhetorically perform a property ethos<sup>11</sup> to galvanise (political) support for preferred approaches or outcomes. Liberal property theories articulate competing normative visions of the state, society, and individuals: creating, validating, and challenging property law’s norms and structures as well as offering post hoc narrative accounts of ex ante distributions.<sup>12</sup>

To some degree, this style of rhetorical theory is a function of the unusually large physical scale of the United States jurisdiction, rendering the contrast with Ireland’s unusually small scale instructive.

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9. Marcuse and Madden noted that: “The actual motivations for state action in the housing sector have more to do with maintaining the political and economic order than with solving the housing crisis.”; DAVID MADDEN & PETER MARCUSE, IN DEFENSE OF HOUSING: THE POLITICS OF CRISIS 119-120 (2016).

10. See generally MOISES NAIM, THE REVENGE OF POWER: HOW AUTOCRATS ARE REINVENTING POLITICS FOR THE 21ST CENTURY (2022).

11. See generally Nicholas Blomley, *Performing Property: Making the World*, 26 CANADIAN J. L. & JURIS. 23-48 (2013).

12. See generally CAROL M. ROSE, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, in PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 25, 39-40 (1994).

While the United States is the fourth largest country in the world by territory, Ireland is similar in geographical scale to the American state of Indiana. The relative scale of each jurisdiction can also be measured in terms of population: Ireland is a small jurisdiction of just over 5 million people, compared to 332 million in the United States. The United States has about 66 times the population of Ireland, distributed across approximately 130 times as much territory. Walsh and Fox O'Mahony observed that—notwithstanding the high salience of property ideologies in national politics and in popular public discourse—the evolution of Irish land law was characterised by a more pragmatic approach.<sup>13</sup>

While high-scale economic and political ideas remain hotly contested in the Irish context, this Article suggests that the physical scale of Ireland's property system may be a factor in producing more pragmatic, less rhetorically driven property law and practice. Crucially, this Article argues that there are actionable insights to be drawn in respect of physical scale for United States property scholars. On the one hand, property problem-solving at a smaller physical scale may facilitate or allow for more outcome-focused pragmatic problem-solving because complexity is more *manageable* at a human scale. However, this depends, to some degree, on the ability of specific smaller-scale systems—for example, city-level zoning systems<sup>14</sup> or funding vehicles for affordable housing initiatives<sup>15</sup>—to cope with complexity. It may also reflect the power of “pragmatic localism”: low-scale, local-level laws and politics that flex and adapt to solve policy problems at the local level.<sup>16</sup> In *Resilient Cities and Housing*

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13. Rachael Walsh & Lorna Fox O'Mahony, *Land Law, Property Ideologies and the British-Irish Relationship*, 47 COMMON L. WORLD REV. 7, 23 (2018) (Adopting a contextualized historicized analysis, they “focuse[d] on the space between the abstract normativity of ‘grand theories’, and the ‘earthy pragmatism’ of doctrinal land law, seeking to better understand the practical, political, social and symbolic meaning and content of the law as it has evolved in local contexts. [This] mid-range view . . . reveal[ed] the complex, multi-scalar factors that shape the path by which land law evolves, reforms, or is re-imagined in a particular jurisdiction . . .”).

14. See Mariana Valverde, *Seeing Like a City: The Dialectic of Modern and Premodern Ways of Seeing in Urban Governance*, 45 L. & SOC'Y REV. 277, 287 (2011).

15. We explore this question in the U.S. context in Marc L. Roark & Lorna Fox O'Mahony, *Resilient Cities and the Housing Trust*, ARK. L. REV. (forthcoming 2024).

16. See Jon Coaffee & Nicola Headlam, *Pragmatic Localism Uncovered: The Search for Locally Contingent Solutions to National Reform Agendas*, 39 GEOFORUM 1585, 1587 (2008).

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*Trusts*,<sup>17</sup> the Authors examine how the use of housing trusts to advance pragmatic property problem-solving in pursuit of effective housing governance at the local municipal level sits in stark relief to the neoliberal political agenda in which it was created. Likewise, when national agendas are scaled down to the context of exigent local problems, successful narratives—and policy action—are more likely to connect to on-the-ground material realities (at least as they are experienced by some populations) over idealistic, untethered normative commitments. By applying Resilient Property Theory (“RPT”) to widen the lens of progressive property across different registers of scale, building on Walsh’s book and our own book, *Squatting and the State: Resilient Property in an Age of Crisis*,<sup>18</sup> the Authors argue that property scholars interested in understanding “what works” to advance progressive ideas about property in the American context might usefully embrace theoretical and methodological approaches that support closer connections to empirical, local, on-the-ground observations. RPT is rooted in lived experiences of property law, property politics, and property practices and geared to paying close attention to on-the-ground property outcomes.

While high-scale normative arguments compete on the rhetorical scale in a winner-takes-all contest, RPT draws on the registers of jurisdictional and physical scale to reflect on the operationalisation of progressive property theory to broker solutions and settlements. In doing so, the Authors argue that the implications of engaging with different registers of scale are both pragmatic and principled. In moving beyond the rhetorical register, the Authors describe the possibility, and advance the merits, of pragmatic “on-the-ground” compromises to solve property problems. For example, *Squatting and the State* describes how, against a backdrop of unresolved high-scale rhetorical conflict, the City of New York reached a pragmatic compromise with housing activists and squatters, resulting in the repurposing of derelict buildings in the lower east side as housing co-ops. While the journey to compromise was fraught with conflict (both physical and legal), the outcome demonstrated the importance of looking beyond national rhetoric or the outcomes of state-level litigation to understand how local actors, ultimately, reached for

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17. Roark & Fox O’Mahony, *supra* note 15.

18. LORNA FOX O’MAHONY & MARC L. ROARK, *SQUATTING AND THE STATE: RESILIENT PROPERTY IN AN AGE OF CRISIS* 1, 8-9, 12-13, 18-19 (2022).



pragmatic solutions to housing, homelessness, and squatting problems.<sup>19</sup>

## II. PROGRESSIVE PERSPECTIVES AND PRINCIPLED MORAL COMPROMISE

Walsh's account of progressive property in the context of Ireland's constitutional property system provides important insights for the operationalisation of progressive property because it demonstrates that, against the backdrop of a "deeply divided society,"<sup>20</sup> pragmatic and principled compromises are possible and, furthermore, that embracing strategies for brokering compromise offer a potentially fruitful avenue for property advocates advancing progressive ideas. The Irish case study and other European property systems that combine private property rights and social justice emerged from conditions of deep division and polarisation and, crucially, continue to function—to a greater or lesser degree depending on the viewer's conception of the good—to hold a balance between strong property rights and (neoliberal) free market economies on the one hand and state action to advance social justice and the common good on the other.

*Property Rights and Social Justice* is important, firstly, because it counters the assertion that operationalising progressive ideas about property in a common law jurisdiction, a free-market economy, and a

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19. It is important to note that both rhetorical and hierarchical framing of the problems in the lower east side not only shaped the initial views around the problem but also continued in some actors after the city and squatters came to a compromise. For example, William Sites describes how hierarchical limits on funding for the city of New York (both at the Federal Level and the State Level) were shaped by ideological commitments about what the city should spend money on. *See generally* WILLIAM SITES, REMAKING NEW YORK: PRIMITIVE GLOBALIZATION AND THE POLITICS OF URBAN COMMUNITY (2003). Later as the city's own financial fortunes shifted, the political environment that promoted a developer led demand-side approach to housing provision was also fueled by ideological commitments to property as an exclusionary asset. *See id.* Only after the city expended millions of dollars in conflict with the squatters of the lower east side did the city take a more reconciliatory approach to the housing challenges. Even still, ideological turf battles between actors on both sides of the ideological spectrum remained, even as the city moved on with providing housing through its co-op program. As ideologically-motivated squatters protested the city's efforts, the impetus to sustain the conflict was driven by ideological difference, and a failure to engage in pragmatic solutions. *See generally* AMY STARECHESKI, OURS TO LOSE: WHEN SQUATTERS BECAME HOMEOWNERS IN NEW YORK CITY 1 (2018) (describing the approach of some squatters to reject the city settlement on high ideological grounds).

20. *See generally* ADRIAN GUELKE, POLITICS IN DEEPLY DIVIDED SOCIETIES 30 (2012).

predominately neoliberal political culture risks destabilizing the institution of private property. The traditional narrative about property regulation warns against undermining private property rights, depleting confidence in markets, creating legal uncertainty or incoherence, or inhibiting the autonomy, freedom, and private sovereignty of (property-owning) individuals.<sup>21</sup> It is therefore notable, as an empirical account of “progressive property in action,” that Ireland is robust in its support for private property rights and free market economics:

Ireland has a global reputation as a jurisdiction wherein property rights are securely protected. For example, in 2020, Ireland was ranked the sixth freest economy globally in the Wall Street Journal/Heritage Foundation Index of Economic Freedom, 2<sup>nd</sup> amongst European states. It received a property rights index value of 86.6, against a global average value of 57.3. Therefore, on the ground, any marginal uncertainty in constitutional property law is not having the effect of reducing real-world confidence in Ireland’s ability to protect property rights.<sup>22</sup>

At the same time, the Irish case study demonstrates that strong protection for private property rights can co-exist with state responsiveness to social justice and material need. *Property Rights and Social Justice* offers a “proof of concept” case study, demonstrating how commitments to progressive ideas about property—in parallel with commitments to private property rights—are mediated in practice to produce principled and pragmatic compromises that navigate oppositional “high-scale” ideological commitments to private property and social justice to produce a hybrid normative system.<sup>23</sup> It establishes the empirical possibility of a

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21. On the shadow of legal unpredictability, uncertainty and incoherence, Walsh demonstrates that: “socially responsive constitutional protection of property rights is achievable, [and that while] a degree of unpredictability...is inevitable...[it is] largely confined to its margins, showing that a predominately contextual approach can be adopted in constitutional property rights adjudication without fundamental destabilising effects.”; WALSH, *supra* note 4, at 11-12

22. WALSH, *supra* note 4, at 248.

23. Henry Smith criticized Progressive Property theories for their lack of patience to examining how property actually works; and for focusing on ends over means. See generally Henry Smith, *Mind the Gap: The Indirect Relation between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959 (2009).

“qualified progressive” constitutional property order that does not make the “government the ultimate arbiter of property rights” or result in “property ceas[ing] to be property”<sup>24</sup>—rather, the constitutional order that respects and takes seriously different legal conceptions of the good.<sup>25</sup>

The emergence of constitutional and other institutional mechanisms to foster heterogeneity and plurality in European political systems emerged from periods of conflict and fragmented political cultures in these jurisdictions.<sup>26</sup> In reflecting on whether, and how, actionable insights can be drawn between progressive property in action in Ireland (or other European democracies) and the present day United States, it is notable that workable compromise positions between strong private property rights on the one hand and social justice and the common good on the other emerged from periods of historic conflict and deep division. Guelke described these “deeply divided societies” as “a special category of cases, in which a fault line that runs through the society causes political polarisation and establishes a force field.”<sup>27</sup> Guelke explained that “[i]n circumstances in which the outcome of elections repeatedly resembles an ethnic census, the danger is considerable that groups excluded from power will be alienated from the political system and the legitimacy of the system will be undermined.”<sup>28</sup> The consequence of deep division and extreme polarisation is that “[t]his divide makes establishing and sustaining democratic rule a huge challenge.”<sup>29</sup>

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24. McLeod’s critique of progressive property theories warned that the proposition “[t]hat governments should bury private property beneath a mountain of regulations is a given . . . even the core of property is in question . . . [Progressive property theorists] would like . . . to make government the ultimate arbiter of property rights. Owners would exercise sovereignty over their assets only as the state permits . . . If property rights are created by, and maintained at, the discretion of the state, then property ceases to be property.” Adam J. MacLeod, *Private Property and Human Flourishing*, PUB. DISCOURSE (Oct. 25, 2011), <https://www.thepublicdiscourse.com/2011/10/3648/> [<https://perma.cc/4GDJ-CAXE>]. Even Underkuffler, a signatory to the *Cornell Statement*, appeared to acknowledge the concern that implementing progressive ideas about property has the “potential ability to bankrupt government.” Laura S. Underkuffler, *Property and Change: The Constitutional Conundrum*, 91 TEX. L. REV. 2015, 2028 (2015).

25. See Smith, *supra* note 23, at 960 (arguing that conservative and progressive property scholars are in favour of virtue and human flourishing).

26. Abend Lijphart, *Typologies of Democratic Systems*, 1 COMPAR. POL. STUD. 3, 29 (1968).

27. GUELKE, *supra* note 20, at vi.

28. *Id.* at 114.

29. *Id.* at vi.

Guelke drew on a range of case studies to illustrate how problems of deep division and polarisation in fractured and fragmented political cultures are addressed through “a combination of political leadership and institutional design.”<sup>30</sup> He explained that:

in extreme cases of fragmentation in which the population was divided into two camps with very little overlapping membership, politics tended to resemble the changes that might take place between two rival states, and that in these circumstances breakdown of relations and instability were not just possible but probable. However, . . . conflict was by no means inevitable, since the leaders of the rival camps could act to counter the effects of fragmentation, especially if they were conscious of the likely consequences of their failure to do so.<sup>31</sup>

Lijphart later substituted the language of “fragmented societies” with “plural societies”<sup>32</sup> and developed his “theory of accommodation” to demonstrate how “consociational devices . . . [offer] such societies the prospect of achieving a measure of political stability and social peace despite their divisions and despite a previous history of violent conflict centred on these divisions.”<sup>33</sup> For many European democracies through the 19th century, in Ireland after 1922 and in South Africa after 1993, the question of institutional design and constitution redrafting was material because risings, revolutions, and civil conflicts that had led to the collapse of a state had opened up new spaces for political leaders to remake new democratic states and their institutions—conscious, with the recent memory of war and conflict, of the consequences of their failure to broker compromise positions between diametrically opposed conceptions of the good. Part V returns to the question of institutional design to reflect on examples of how the United States property system, viewed through the lens of scale,

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30. *Id.* at 4. Particularly through consociationalism democracy, a model adopted in some deeply divided societies to facilitate the transition from conflict to compromise to (relative) peace.

31. *Id.* at 5 (drawing on AREND LIJPHART, *THE POLITICS OF ACCOMMODATION: PLURALISM AND DEMOCRACY IN THE NETHERLANDS* (1975)).

32. AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION* 6 (1977).

33. GUELKE, *supra* note 20, at 7.

has enabled principled and pragmatic compromises to be reached on contentious property and housing problems.

For property scholars who are interested in progressive ideas, the process of pursuing compromise is important both for principled and pragmatic reasons. From a pragmatic, outcome-oriented perspective, advocacy and actions that offer the potential to broker better outcomes for excluded or marginalised people should be pursued.<sup>34</sup> From a principled perspective, a normative commitment to compromise is consistent with the tenets of progressive property theories.<sup>35</sup> Explicit commitments to principled moral compromise reflect our willingness to recognize that, in diverse liberal societies, “citizens . . . often have quite diverse reasonable conceptions of the good.” Weinstock argued that brokering these different conceptions of the good *in ways that foster trust between citizens* is an “empirical condition for the viability of liberal democracies’ main institutions.”<sup>36</sup> Because principled compromise builds trust between citizens who have “quite diverse reasonable conceptions of the good,” it encourages those who “lose” democratic debates to feel that those who “win” in democratic processes care, at least to some degree, about their interests and concerns. This promotes the democratic value of “political equality” and its role in sustaining the legitimacy of the democratic state.<sup>37</sup>

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34. ‘Principled moral compromise’ is distinguished from ‘pragmatic compromise,’ which is based on strategic rather than moral reasons; cf. Simon Căbulea May, *Principled Compromise and the Abortion Controversy*, 33 PHIL. & PUB. AFFS. 317, 320 (2005).

35. Daniel Weinstock, *Building Trust in Divided Societies*, 7 J. POL. PHIL. 287, 287-88 (1999) (in which Weinstock argues for a shift from focusing on how social institutions promote justice to consideration of how institutions might, within the limits set by liberal justice, promote unity, reasoning that “some degree of social unity is an empirical condition for the viability of liberal democracies’ main institutions”).

36. Weinstock offered four ‘principled reasons to compromise’: “First, compromises evince respect for persons we have reason to think of as our epistemic peers, and acknowledgment of our own finitudes as moral reasoners. Second, compromises are often made morally necessary by the shortfalls that unavoidably separate democratic institutions from democratic ideals. Third, compromises express a desirable form of democratic community. And fourth, compromises are often justified from a consequentialist point of view, in that they allow for the realization of values that would not be realized as well by the failure to compromise.” Daniel Weinstock, *On the Possibility of Principled Moral Compromise*, 16 CRITICAL REV. INT’L SOC. & POL. PHIL. 537, 537 (2013).

37. Reflecting on the conflict in Northern Ireland, Bourke explained that: “...every democratic *government* operating in the world today depends, for its success, upon the simultaneous existence of a democratic *state* in which the *entire* population is pledged to the common good...Democracies, in other words, are ordinarily formed *e pluribus unum*, as the motto on the Great Seal of the United

Principled moral compromise demonstrates respect for pluralism, which is a core progressive value:<sup>38</sup> it enables pluralist normative outcomes in contexts where consensus is not possible.<sup>39</sup> The Authors argue that, notwithstanding the current mood of high-scale rhetorical polarisation, the methodological toolkit developed in Resilient Property Theory—and, particularly, our use of scale theory to widen the lens of property problem-solving—has the potential to offer up new possibilities for progressive property scholars seeking to identify and advocate for pragmatic and principled compromise solutions.

### III. RESILIENT PROPERTY THEORY

In *Squatting and the State: Resilient Property in an Age of Crisis*, the Authors developed new techniques for understanding how normative ideas about property are operationalised, explicitly and implicitly, in different jurisdictional and historical contexts. Applying the concept of the legal *nomos* articulated by Robert Cover in his essay *Nomos and Narrative*,<sup>40</sup> the Authors revealed how competing, oppositional property narratives emerged and evolved in different jurisdictions—England and Wales, Ireland, Spain, South Africa, and the United States—to produce each jurisdiction’s distinctive “property *nomos*.” Recognising the contextualised, historicised, scaled complexity of the property *nomos* in each jurisdiction helped

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States is at pains to emphasise...In this context, it is of vital importance to grasp the essential difference in political analysis between democratic governments and democratic states...Democratic procedures of government like decision by the majority are expected to operate for the benefit of a community of citizens—for the benefit, in other words, of what we term a nation-state, not for a sectional interest in what might be called a ‘majority state.’” ROBERT BOURKE, *PEACE IN IRELAND: THE WAR OF IDEAS* xix-xx (2d ed. 2012).

38. See generally HANOCH DAGAN, *From Independence to Interdependence to the Pluralism of Property*, in *PROPERTY: VALUES AND INSTITUTIONS* 57, 57 (2011); HANOCH DAGAN, *Pluralism and Perfectionism in Private Law*, 112 COLUM. L. REV. 1409, 1421-22 (2012); JEDEDIAH S. PURDY, *Some Pluralism About Pluralism: A Comment on Hanoch Dagan’s “Pluralism and Perfectionism in Private Law”*, 113 COLUM. L. REV. SIDEBAR 9, 9-19 (2013).

39. Weinstock, *supra* note 35, at 289, 291. This aspect of ‘principled compromise’ resonates with Dyal-Chand’s argument for property solutions that promote sharing. See Rashmi Dyal-Chand, *Sharing the Cathedral*, 46 CONN. L. REV. 647, 650 (2013). On the shadow of legal unpredictability, uncertainty and incoherence, Walsh demonstrates that: “socially responsive constitutional protection of property rights is achievable, [and that while] a degree of unpredictability...is inevitable...[it is] largely confined to its margins, showing that a predominately contextual approach can be adopted in constitutional property rights adjudication without fundamental destabilising effects.” See WALSH, *supra* note 4, at 11-12.

40. Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 4-6 (1994).

demonstrate how hybridised, multi-scalar modes of governance emerged to address property problems, even against the backdrop of polarised political rhetoric and the dynamics of partisan antagonism that have characterised 21st-century property debates.<sup>41</sup>

In seeking to look beyond rhetorical partisan positioning, Resilient Property Theory (“RPT”) sidesteps the binary tropes of liberal property theorising (conservative or progressive),<sup>42</sup> which broadly align to underpinning political commitments on a left-right spectrum: for example, public sovereignty/private property,<sup>43</sup> property’s “essence”/plural values;<sup>44</sup> exclusion/sharing;<sup>45</sup> freedom/security,<sup>46</sup> private property rights/social justice; and the common good. These structural traits in rhetorical property theorising—aided by a narrow “private realm” doctrinal focus—reinforce the conservative-neoliberal

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41. PEW RESEARCH CENTER, POLITICAL POLARIZATION IN THE AMERICAN PUBLIC: HOW INCREASING IDEOLOGICAL UNIFORMITY AND PARTISAN ANTI-PATHY AFFECT POLITICS, COMPROMISES AND EVERYDAY LIFE 28, 33 (2014); see also Lawrence B. Solum, *Outcome Reasons and Process Reasons in Normative Constitutional Theory*, UNIV. VA. SCH. L. 1, 2 (2023).

42. This feature extends across the field, from morality or efficiency-based accounts to pluralist or progressive theories: Alexander et. al, *supra* note 1, at 743 (stating that property implicates pluralistic and incommensurable values, including individual, collective, social, and environmental interests, among others); but see Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CAL. L. REV. 107, 107 (2013) (arguing that progressive property’s failure to include distributional injustice in its set of policy concerns weakens progressive property’s claim to represent the full set of progressive values); and Stacy L. Leeds, *By Eminent Domain or Some Other Name: A Tribal Perspective on Taking Land*, 41 TULSA L. REV. 51, 52 (2005) (noting the tendency to discuss property problems by excluding the experience of people of color and indigenous persons).

43. Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. REV. 8, 8 (Dec. 1927); see also Thomas W. Merrill, *Property Sovereignty, Information and Audience*, 18 THEORETICAL INQUIRIES IN L. 417, 417 (2017).

44. Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, 112 COLUM. L. REV. 1409, 1409 (Oct. 2012); Gregory S. Alexander, *Pluralism and Property*, 80 FORDHAM L. REV. 1017, 1018 (Dec. 2011); Purdy, *supra* note 38, at 9.

45. Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 740 (1998); JAMES E. PENNER, THE IDEA OF PROPERTY IN LAW 68-69, 75-76 (2000); Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1890 (2007); Eric R. Claeys, *Labor, Exclusion, and Flourishing in Property Law*, 95 N.C. L. REV. 413, 416 (2017); compare e.g., JAMES Y. STERN, *What is the Right to Exclude and Why Does It Matter?*, in PROPERTY THEORY: LEGAL AND POLITICAL PERSPECTIVES 38, 57 (Michael H. Otsuka & James E. Penner eds., 2018) (questioning whether a property paradigm based on sharing truly excludes less than traditional exclusionary models of property), with Dyal-Chand, *supra* note 39 (describing sharing as the conceptual opposite of exclusion and as a traditional exception to the general rule of exclusion).

46. Joseph W. Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 1058-59 (1982).

world view, which, rhetorically at least, relies on binary distinctions to position *private* power—embodied in ownership, strong property rights, and “the market”—as the source of individual freedom and wealth maximisation, while *public* power, embodied in “the State,” is characterised as “oppressive, inefficient and [to] be restrained and limited at all costs.”<sup>47</sup>

The linear problem-solving methods typical to “private law” doctrinal case-law analyses—which themselves tend to reinforce adversarialism through a structural focus on adversarial litigants—reproduce binary models that simultaneously fail to account for the full spectrum of interests at stake in complex property problem solving and tend toward winner-takes-all outcomes over compromise solutions.<sup>48</sup> By focusing on the interactional effects of property problems on a wide range of stakeholders, RPT looks beyond transactional relationships to consider the implications of property law and policy for multiple actors, networks, and the state itself. RPT adopts a “methods assemblage” approach to map the whole topography of a problem-space and foregrounds state action in response to property problems. State responses to property problems are analysed in the context of the changing nature of post-liberal states and the changing pressures on state actors and institutions in each jurisdiction.<sup>49</sup> RPT recognizes that when states respond to property problems, they perform a dual role: as an “allocator” of resilience through the creation, recognition, and enforcement of entitlements, and at the same time, shoring up its own resilience, authority, and legitimacy in the face of conflict or crises. State responses to property problems are contextualised and constrained by factors that are both within and beyond the control of the state itself and the social

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47. Paul O’Connell, *The Death of Socio-Economic Rights*, 74 MODERN L. REV. 532, 535 (2011); see also GREG ALBO ET. AL., IN AND OUT OF CRISIS: THE GLOBAL FINANCIAL MELTDOWN AND LEFT ALTERNATIVES 28 (2010); see also DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 64-65 (2005); RAYMOND PLANT, THE NEO-LIBERAL STATE 96-97 (2010); Alfred C. Aman, Jr., *Law, Markets and Democracy: A Role for Law in the Neo-Liberal State*, 51 N.Y. L. SCH. L. REV. 801 (2007).

48. This echoes the conundrum that Dyal-Chand explores in Dyal-Chand, *supra* note 39, at 653.

49. To be sure, we are not the first to suggest ways to break a polarizing view of problems to reach common solutions. See, e.g., David A. McDonald, *Defend, Militate, and Alternate: Public Opinion in a Privatized World*, in POLARISING DEVELOPMENT: ALTERNATIVES TO NEOLIBERALISM AND THE CRISIS 125-26 (Lucia Pradella & Thomas Marois eds., 2015) (suggesting approaches that facilitate “context-based evaluations that acknowledge local norms but do not fetishize difference.”).



institutions it sustains (for example, the market). “State” (or government or legal) responses to property problems are dynamically shaped, and sometimes constrained, by a complex array of competing, at times overlapping, influences. For example, property systems are sustained by legal frameworks that are themselves shaped by a hinterland of (multiple or hybrid) property ideologies. The Authors demonstrated these relationships in *Squatting and the State* by comparing state responses to squatting across five jurisdictions (England, Ireland, South Africa, Spain, and the United States) and diving down to focus on cities like New York, Barcelona, and London to emphasise the role that local narratives played in the construction of property values and in progress toward compromise solutions that give effect, to some degree, to progressive ideas.

Resilient Property analyses are rooted in each jurisdiction’s historical, institutional, and constitutional contexts and narratives. While RPT aims to look beyond the rhetorical scale, a core tenet is that the rhetorical claims that animate property theories—and property politics—draw on the stories we tell about how property rights emerged in our societies.<sup>50</sup> RPT recognizes that each jurisdiction has a property *nomos* or “normative universe” in which legal texts, decisions, constitutions, and institutions are located and which “determine what law means and what law shall be.”<sup>51</sup> Each jurisdiction’s property *nomos* shapes and constrains state action (or restraint) with respect to property<sup>52</sup> and is a critical lens through which to advance comparative analyses and to seek actionable insights from the experiences of other jurisdictions.

In applying this lens, it is important to distinguish between the dominant narrative of the day and the *nomos* that builds and evolves across the property system over time. For example, while a 2023 reading of the United States Constitution might appear to suggest that the American property *nomos* is characterised by extreme individualism and a limited scope for social justice and the common good, Sunstein’s analysis of developments within the United States Supreme Court in the 1960s and 1970s revealed that “the Constitution means what the Supreme Court says that it means, and with a modest

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50. See FOX O’MAHONY & ROARK, *supra* note 18, at 86-87 for a detailed account of these property hinterlands as they emerged in the U.S., England, Ireland, Spain and South Africa.

51. Cover, *supra* note 40, at 7.

52. JOHN LAW, *AFTER METHOD: MESS IN SOCIAL SCIENCE RESEARCH* 33 (John Urry ed., 2004).

shift in personnel, the Constitution would have been understood to create social and economic rights of the sort recognized in many modern constitutions, and indeed in the constitutions of some of the American states.”<sup>53</sup>

The property *nomos* in each jurisdiction is not homogenous but a complex hybrid of multiple norms and commitments. It is “scaled,” both horizontally (across the institutions of law: private property law, housing law and policy, financial services regulation, tax law, succession law, land use regulation, environmental sustainability, criminal justice, etc.) and vertically (across the multi-layered state, from local authority/municipality/city-level laws and governance through to the national scale, and the influences of transnational political and legal trends). Building on insights from wicked problem theory, vulnerability theory, and equilibrium theories, RPT provides structuring methods to identify, understand, and delineate the whole of a “property problem” space.<sup>54</sup> By taking seriously the interests of all the stakeholders in property problems—such as individual interests (e.g., owners, neighbours, investors, mortgagors, tenants, trespassers), aggregated interests (e.g., neighbourhoods, market actors, cities, communities, and social movements), and institutional interests (e.g., housing systems, economic systems, market systems, ecological systems, the institution of private property, and the state itself)—RPT reveals the role of compromise in United States property law. Finally, by grappling with the complex webs of economic, cultural, political, social, and legal norms and values that define and determine what property is and how it works across the multiple levels of a legal order “position: respect for private property rights, appropriately delimited by social justice considerations.”<sup>55</sup> A similar feature can be observed in the South African constitutional property clauses, which (at least) aspire to operationalise progressive property.<sup>56</sup> In describing the process for *operationalising* new constitutionalism, André van der

53. Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1, 5 (2005).

54. See generally FOX O’MAHONY & ROARK, *supra* note 18, at 209-20.

55. Walsh & Fox O’Mahony, *supra* note 13, at 26.

56. See, e.g., Laura S. Underkuffler, *Property as Constitutional Myth: Utilities and Dangers*, 92 CORNELL L. REV. 1239, 1241 (2007); Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 782 (2009); Joseph W. Singer, *Property and Equality: Public Accommodations and the Constitution in South Africa and the United States*, 12 S. AFR. J. PUB. L. 53, 54-55 (1997); Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1312 (2013); *c.f.* FOX O’MAHONY & ROARK, *supra* note 18, at 376-78 (for a resilient property theory reading of the property *nomos* in South Africa).

Walt argued that “transformational constitutionalism” should not be understood as a linear process in which one (strong property rights) orthodoxy is replaced with another (progressive) orthodoxy but as an ongoing process of “integrative pluralism.” South African courts, he argued, should engage with the transition from apartheid-era “common law orthodoxy” to operationalising the dual commitments embedded in a new constitutionalism through a process of subjecting competing hierarchies or ideologies to continuous critical reflection.<sup>46</sup> The process of operationalising progressive ideas about property within a property system that respects and upholds private property rights, in ways that seek to heal divisions and promote social justice, requires a commitment to principled and pragmatic compromise.

#### IV. PROGRESSIVE PROPERTY IN CONTEXT: WIDENING THE DOCTRINAL LENS

In *Property Rights and Social Justice*, Walsh applied a “wide doctrinal lens” to delineate the conflicts and compromises that characterise the Irish constitutional property order. She reveals how the creation and evolution of the Irish property system produced a complex, but relatively uncontroversial, fusion of respect for both liberal private property rights and state intervention to regulate the exercise of private property rights in the interests of social justice and the common good. She explains that, under the Irish constitutional property order, the classical liberal view of individual private property rights is tempered by ongoing processes of legislative, judicial, and administrative balancing between the “individual” and the “social” aspects of property.<sup>57</sup> The interpretation and application of this constitutional framework has shaped how Irish law (legislation and adjudication) has encouraged the brokering of “principled compromises” between private property rights and social justice. In evaluating its success, Walsh observed that Irish judges, on the whole, have succeeded in “maintaining the constitutional tension” between

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57. Walsh analyses the implementation and interpretation of two core normative ideas about property law embedded in the Irish Constitution: (1) respect for the institution of private property and individual private property rights and (2) the state’s responsibility to with respect to the needs of social justice. See WALSH, *supra* note 4, 8-11. While the institution of private ownership, and some of its core features (for example, powers of alienation and bequest) were guaranteed under Article 43.1, the ‘absoluteness’ of private property sovereignty in the form of individual private property rights was qualified. *Id.* Article 43.2 indicated that Article 43.1 was subject to the State’s power to restrict the *exercise* of such rights to secure ‘the principles of social justice’ and ‘the exigencies of the common good.’ *Id.*

private property rights, the institution of private property, the protection of individual property holdings, and limitations on such holdings in the public interest.<sup>58</sup>

While the book's subtitle is *Progressive Property in Action*, Walsh describes the Irish Constitution's property rights provisions as a "qualified progressive approach."<sup>59</sup> It does not guarantee progressive outcomes in every case or circumstance; rather, it enables processes of negotiation between competing views. In Chapter 3, she explores the "seemingly contradictory effort, cast in the form of constitutional obligations, simultaneously to exclude others from our property and to care for others using our property."<sup>60</sup> In explaining how this apparent contradiction works in practice, Walsh sets out three distinct meanings of property that are extant within Ireland's constitutional *nomos*: (1) property as ideology, (2) property as an individual right, and (3) the institution of private property. She explains the compromise at the heart of the constitutional "double lock": that the Irish Constitution simultaneously protects *ex ante* individual private property rights *and* the institution of private property—which includes, crucially, the right of all citizens to *participate* in the institution of private property.<sup>61</sup>

This feature opens an important seam of analysis focused on what it means to protect and promote the institution of private property within the Irish property *nomos*. The importance of *participation* in the institution of private property can be understood as a legacy of the conquest of Ireland by Britain and the colonial-era Penal Laws, which barred native Irish Catholics from participation in various aspects of economic life, including ownership of land. Even after these laws were formally repealed, colonial-settler land ownership patterns endured, with native Irish land occupiers holding land under (sometimes absentee, Anglo-Irish, Protestant) landlords. The Irish Land Wars—which became the proximate trigger for the independence

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58. WALSH, *supra* note 4, at 235 (citing A. J. Van Der Walt, *The Constitutional Property Clause: Striking a Balance Between Guarantee and Limitation*, in PROPERTY AND THE CONSTITUTION 109, 128 (Janet McLean ed., 1999)).

59. "[T]hey protect property rights against 'unjust attack,' subject to delimitation by the State to secure 'the exigencies of the common good' and 'the principles of social justice.'" WALSH, *supra* note 4, at 236.

60. A.J. Van Der Walt, *The Protection of Property under the Irish Constitution*, in THE IRISH CONSTITUTION: GOVERNANCE AND VALUES 398, 400 (Eoin Carolan & Oran Doyle eds., 2008).

61. WALSH, *supra* note 4, at 11; A.J. Van Der Walt, 'Double' Property Guarantees: A Structural and Comparative Analysis, 14 S. AFR. J. ON HUM. RTS. 560, 562 (1998).

movement—were driven by the native Irish desire for the *restoration* of property rights.<sup>62</sup> The Irish experience of material insecurity was deepened by the impact of the Great Hunger,<sup>63</sup> fueling a national, collective concern with secure possession of land. In this sense, the *positive* commitment to the institution of private property in the Irish Constitution can be understood as a way of reckoning with the legacies of dispossession.<sup>64</sup> It resonates with Rosser’s emphasis on reckoning with the legacies of dispossession underpinning the United States property law system<sup>65</sup> and with Amar’s argument (also cited by van der Walt)<sup>66</sup> that “[p]rivate property is such a good thing that every citizen should have some.”<sup>67</sup>

Crucially, Walsh explained that while “the motivations of the politicians who introduced land reform measures were primarily conservative and concerned with consolidating or enhancing power,” the Irish people were—notwithstanding the role of land reform in driving the independence movement<sup>68</sup>—less concerned with rhetorical or ideological considerations than they were with making material progress toward on-the-ground security. Walsh notes that

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62. Walsh & Fox O’Mahony, *supra* note 13, at 12.

63. See generally CATHAL POIRTIER ET AL., *THE GREAT IRISH FAMINE* 9-17 (1995); CHRISTINE KINEALY, *A DEATH-DEALING FAMINE: THE GREAT HUNGER IN IRELAND* ch. 1 (1997).

64. Walsh explained that the Land Acts of 1903, 1909, 1923, 1933, 1936 and 1939 gave the Irish Land Commission powers to compulsorily acquire land for redistribution to tenant farmers and owners of uneconomically small farms. Transfers were enabled by acquisition loans funded by the state, and compensation was paid to dispossessed owners on progressively more attractive terms to encourage cooperation. WALSH, *supra* note 4, at 50. Historian Philip Bull claimed that the process: “. . . succeeded in addressing what was symbolically at the heart of the long dispute over land tenure, namely the question of who were the rightful possessors of the soil.” PHILLIP BULL, *LAND, POLITICS AND NATIONALISM: A STUDY OF THE IRISH LAND QUESTION* 159-60 (1996).

65. Rosser, *supra* note 42, at 127-39.

66. A.J. Van Der Walt, *The Modest Systemic Status of Property Rights*, 1 J. L. PROP. & SOC’Y 15, 38 n.50 (2014).

67. “Indeed a minimal entitlement to property is so important, so constitutive and so essential for both individual and collective self-governance that to provide each citizen with that minimal amount of property the government may legitimately re-distribute property from other citizens who have far more than their minimal share.” Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J. L. & PUB. POL’Y 37, 37 (1990). The Irish land restoration/redistribution project did not aim for ‘universal’ property rights but progressed incrementally between 1885 and 1999 (for discussion of the work of the Irish Land Commission, see WALSH, *supra* note 4, at 48-52, 172-174) providing loans for tenants to purchase freehold and compensation for dispossessed owners on attractive terms.

68. See Walsh & Fox O’Mahony, *supra* note 13, at 14-17.

“property rights were valued by right-holders not in the abstract, but rather for the economic security that they would bring to precarious occupiers.”<sup>69</sup> She describes how this “laid the foundations for a complex Irish attitude to private ownership embracing both private ownership as a means of ensuring individual material security and State intervention to secure social justice,”<sup>70</sup> as well as influencing the future trajectory of the Irish welfare system. At the same time, by creating a subpopulation of new land owners, the paradox of leasehold enfranchisement was that “the most effective socio-political movement of collective action in modern Irish history . . . [led to] the entrenchment of a decidedly individualistic system of farm ownership”<sup>71</sup> and became a bulwark against further radical transformation.<sup>72</sup> This paradox—which is rooted in the lived experiences of land in Ireland—is reflected in the dual commitment to complex conceptions of the good that simultaneously value private property ownership and state-backed social justice.

The United States Constitution was also a product of its time and context: for example, it reflected the events of the American Revolution; the concerns of late 18th-century political philosophies (“first generation” civil and political rights);<sup>73</sup> the limited scope of political equality in that period (for propertied white men); and the experiences and interests of proto-federalist Framers like Marshall, Washington, and Madison, who were themselves established property owners.<sup>74</sup> While there was still considerable scope for acquisition of land in the expanding American territories when the American Constitution was drafted, by 1937 (when the Irish Constitution was drafted) much of the post-revolution redistribution of land had been completed—and the new native Irish owning class had experienced the benefits of this. Just as the American Framers consolidated their propertied position by elevating and advancing the protection of private property rights through the Fifth Amendment and in American legal doctrine,<sup>75</sup> Walsh described the (white, primarily male, but

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69. WALSH, *supra* note 4, at 50-51.

70. *Id.* at 52.

71. Gearóid Ó Tuathaigh, *Irish land questions in the state of the union*, in *LAND QUESTIONS IN MODERN IRELAND* 17 (Fergus Campbell & Tony Varley eds., 2013).

72. TOM GARVIN, *1922: THE BIRTH OF IRISH DEMOCRACY* 153 (1996).

73. Sunstein, *supra* note 53, at 3. Later, as other nations began to draft written constitutions, these were influenced by evolving international conceptions of the content of rights (civil and political, and—later—social and economic), as well as by the different local political, historical and legal contexts of each nation state.

74. FOX O'MAHONY & ROARK, *supra* note 18, at 42.

75. *See*, for example, Justice Marshall's opinions in *Fletcher v. Peck*, 10 U.S.

native Irish and Catholic) political leaders who implemented, and were early beneficiaries of, the Irish land reform movement as “primarily conservative and concerned with consolidating or enhancing power.”<sup>76</sup>

Land redistribution to restore property rights to the native Irish people was central to the social and economic policy of the post-independence Irish state,<sup>77</sup> and the 1937 Constitution was drafted in the back of the work of the Irish Land Commission to redistribute and *restore* land through compulsory purchase or expropriation (with compensation) of land to enable sale transfers to tenant farmers or holders of unprofitably small agricultural holdings, with support from state subsidised loans. The “dual protection” of private property (the state’s positive role in promoting the right of any citizen to acquire property and participate in ownership and the “negative” protection of established rights) reflected the cultural and symbolic importance of what had already been achieved as much as it augured further redistribution.<sup>78</sup>

This contextual difference between Ireland and the United States goes to the heart of Rosser’s concern that progressive property theories that do not confront the legacies of Native American displacement from land and black Americans’ exclusion from land offer limited ambition and transformative potential. Rosser argued that advocates of progressive ideas about property must reckon with the legacies of dispossession underpinning the United States property law system and include distributive injustice within its set of policy concerns.<sup>79</sup> It is notable that Thomas Mitchell’s work to reform “heir’s property,”<sup>80</sup> arguably the most impactful intervention to address legacies of black displacement from land in American property law, was rooted in on-the-ground advocacy. Starting from a task force of half a dozen attorneys and building a coalition of “local, State and regional grassroots and non-profit organisations,”<sup>81</sup> in the face of a widespread

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87, 137-38 (1810) (solidifying ‘vested rights’ doctrine to limit the reach of the state into private property sovereignty); FOX O’MAHONY & ROARK, *supra* note 18, at 28-44 (discussion of the formation of early American property doctrine).

76. WALSH, *supra* note 4, at 50.

77. *See* WALSH, *supra* note 4, at 9-10, ch. 3.

78. The Land Commission re-distributed 13.5 million acres between 1885 and 1920, and a further 807k acres between 1923 and the 1970s.

79. Rosser, *supra* note 42.

80. *See generally* HEIRS’ PROPERTY AND THE UNIFORM PARTITION OF HEIRS PROPERTY ACT: CHALLENGES, SOLUTIONS AND HISTORIC REFORM (Thomas W. Mitchell & Erica Levine Powers eds., 2022).

81. THOMAS MITCHELL, HISTORIC PARTITION LAW REFORM: A GAME CHANGER

lack of political support on the issue for over 200 years, the project progressed through local engagement, demonstrating the viability and empirical impact of reform and then gradually and systematically scaling up to achieve national impact and visibility.

Reflecting on the key to its success, Mitchell emphasised the inclusive frame the reformers adopted to persuade a diverse group of local stakeholders that the initiative would build resilience in their communities:

[I]t has been helpful that we have been able to point out quite explicitly in a very upfront way that partition law has negatively impacted many different types of heirs' property owners. These owners include African Americans, White Americans, Hispanics/Latinos, Native Americans, and Native Hawaiians . . . the racial and ethnic diversity of the impacted owners helps explain why State legislatures and governors in states such as Iowa and Montana have enacted the UHPA law to help heirs' property owners in those States and why the acts have been well received in those States.<sup>82</sup>

Mitchell also pointed to the way the reformers leveraged respect for private property rights and the institution of private property while advancing social justice and the common good. He explained that:

[T]hose of us who advocated for enactment of the UHPA also have been able to frame the reform effort as an effort to protect vital property rights and to help families preserve their real estate wealth. This alternative framing is one that we had not focused on as much when we first began work on drafting the UHPA as we did not fully appreciate the resonance it would have with many State legislators. Without question, as a very pragmatic matter, emphasizing the UHPA's features of protecting property rights/preserving family real estate wealth has been very helpful in advocating to get the UHPA enacted into law in several States, including in several States in the South.<sup>83</sup>

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FOR HEIRS' PROPERTY OWNERS 65, 77 (Cassandra J. Gaither et al. eds., 2019).

82. *Id.* at 77-78.

83. *Id.* at 78.



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This resonates with the three distinct meanings of property that are extant within Ireland's constitutional *nomos*: (1) property as ideology, (2) property as an individual right, and (3) the institution of private property. As noted above, Walsh's commitment to widening the doctrinal lens revealed how the Irish Constitution, and judges and legislators applying its provisions, found compromises that simultaneously respected and protected *ex ante* individual private property rights *and* the institution of private property—by promoting the right of all citizens to *participate* in the institution of private property.<sup>84</sup>

Reflecting on the lessons that can be learned from the Irish experience, the Authors recognize that advocacy advancing progressive ideas about property, from arguments about land redistribution to theories distilling the “meaning(s) of ownership,” from doctrinal analyses to policy proposals, must be anchored in a realistic reading of the jurisdiction's property *nomos*. In the United States context, this includes traditions of respect for individual private property rights embedded in the American Constitution, as well as lived experiences of colonial dispossession and (racial) exclusion. While the proximate cause of American dissatisfaction with their colonial overlords was the state's punitive approach to taxing the (private property) wealth of colonial settlers (“no taxation without representation”), the Irish land question was focused on the entitlements of native occupiers to tenure on the lands they had historically held and which had, through colonial conquest, been confiscated by settler, and often absentee, English or Anglo-Irish “landlords”—or where native Irish occupiers who had remained on the land were subject to punitive terms (for example, rent demands) and tenure insecurity. The proximate cause of Irish dissatisfaction was their treatment at the hands of the colonial landlord class and with the way that the principle of private property sovereignty had empowered non-native landlords to “own” lands, against the precepts of native customary laws. Crucially, however—in the aftermath of an avowedly socialist independence movement and revolution, and a draft 1922 constitutional property clause that appeared to draw heavily on the Communist Constitution of the U.S.S.R.—the Irish Framers were pragmatic in recognising the value of private property rights in obtaining and protecting their security and material needs. The

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84. WALSH, *supra* note 4, at 11; *see generally* Van Der Walt, *supra* note 61.

property clauses in the Irish Constitution reckoned with and reconciled those complex competing ideas to produce a legal and constitutional framework that has brokered the ongoing work of principled compromise.<sup>85</sup>

In describing the Irish property system as adopting a “qualified progressive approach,” Walsh distinguishes between “public” property law, where the default position is deference to legislative and executive determinations of the limits of private ownership (noting the “primacy afforded by judges to political determinations of the appropriate mediation of property rights and social justice, whether through legislative or administrative decision making”),<sup>86</sup> and “private” or interpersonal property law (whether through new legislative measures that would interfere with existing property rights or doctrinal private law, where judges have adopted a liberal common law approach to property without much debate). Describing Ireland’s private property law as “hav[ing] experienced consistently high levels of political conservatism in respect of property rights,”<sup>87</sup> Walsh suggested that “Nedelsky’s description of the US experience is equally applicable in the Irish context: ‘. . .judicial practice does not seem as yet to have shaken the popular force of the idea of property as a limit to the legitimate power of government.’”<sup>88</sup> What is different, however, in the Irish context is the “division of labour” embedded in the 1937 Constitution, and largely respected by Ireland’s legal institutions, which charges courts with protecting private property rights while leaving the interpretation and application of the “social aspect” of ownership as primarily a matter for the legislature.<sup>89</sup>

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85. This was aided by the fact that, in the Irish case, public sovereignty over territory and private sovereignty over property were aligned. The landlord class that was overthrown was seen as the on-the-ground manifestation and economic agents of the British state’s territorial claims. In this frame, the native Irish occupiers who recovered territory and property through independence are more analogous to dispossessed Native Americans whose customary titles were overridden by transplanted ideas of private property law.

86. WALSH, *supra* note 4, at 236.

87. *Id.* at 243.

88. *Id.* (citing Jennifer Nedelsky, *American Constitutionalism and the Paradox of Private Property*, in CONSTITUTIONALISM AND DEMOCRACY 241, 263 (Jon Elster & Rune Slagstad eds., 1988)).

89. WALSH, *supra* note 4, at 15. Walsh highlighted an ambiguity within progressive property theories, as to whether they place relative priority on legislative reform or private law adjudication. *Id.* at 249-50. Much ‘property law’—in the U.S. and elsewhere—is derived from legislation and codes. Indeed, the legitimacy of democratic decision-making as a mechanism for operationalizing ideas about property is accepted by conservative and progressive property theorists alike: *Id.* at

Viewed through a *sufficiently narrow lens* (that is, the “private realm” of transactional property law), the progressive elements of Irish property law would be occluded. An analytical frame that focuses on interpersonal property transactions between private individuals—that is, focused on and “bounded” by *the institution of private property law*—offers only a partial picture of a property law system. Furthermore, when—adopting the doctrinal method—litigation and case law are adopted as the primary legal sources,<sup>90</sup> this lens skews towards conservatism in the United States, as it does in Ireland. This can be understood as a structural effect: privileged “property insiders” seeking to exercise exclusionary powers and to protect the property status quo are better placed to pursue litigation-based justice because of their ability to access legal advice and fund litigation.<sup>91</sup> When we centre case law in analytical and theoretical accounts of property law, the organizing concepts that emerge are inevitably geared to overrepresent the interests and claims of privileged insiders.<sup>92</sup>

Another consequence of this methodological orientation is its tendency not to focus on the role of “the state.” In *Squatting and the State*, the Authors explained that while private property is a central institution of the liberal state, the role of the state has been necessarily, and paradoxically, de-centred in accounts of liberal property law.<sup>93</sup> Blomley explained that Western liberal property systems, with their emphasis on the “ownership model” and private property rights, tend not to pay attention to the “practical work of property’s territory, the historical moment in which it was produced, the powerful metaphors that work through it, and the habits and everyday practices it induces.”<sup>94</sup> Blomley described “territory” as “quintessentially state space” and argued that by separating, and obscuring, (inherently

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90. See, for example, Dagan’s justification for focusing property theory on case law analysis: that “because the judicial drama is always situated in a specific human context, lawyers have constant and unmediated access to human situations and to actual problems of contemporary life. This contextuality of legal judgments ensures lawyers a unique skill in capturing the subtleties of various types of cases and in adjusting the legal treatment to the distinct characteristics of each category.” HANOCH DAGAN, *PROPERTY: VALUES AND INSTITUTIONS* xxi (2011).

91. Lorna Fox O’Mahony, *Property Outsiders and The Hidden Politics of Doctrinalism*, 67 *CURRENT LEGAL PROBS.* 409, 409 (2014). See HAZEL GENN, *PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW* 101, 1, 263 (1999) for discussion of access, and lack of access, to law and justice.

92. Fox O’Mahony, *supra* note 91, at 427.

93. FOX O’MAHONY & ROARK, *supra* note 18, at 146.

94. Nicholas Blomley, *The Territory of Property*, 40 *PROGRESS IN HUM. GEOGRAPHY* 593, 605 (2015).

“statist”) ideas of territory from property, property theories that are narrowly focused on private law adjudication are limited in their capacity to reflect the realities of how property works. In this frame, private law property theories are essentially “non-statist”; to the extent that normative property theories (progressive or conservative) focused on private law litigation pay attention to the state, it is typical to advance arguments *for* or *against* state action (or restraint)—often through doctrinal analyses.<sup>95</sup>

Because the Irish property systems includes *constitutionally explicit normative hybridity*, Walsh engages directly with the operational realities of hybrid property norms across judicial and legislative spheres and through periods of more or less conservative or progressive political will, against a backdrop of a hybrid conservative and progressive property culture.<sup>96</sup> In doing so, she observes that, while public and private law contexts “involve different, albeit related and at times overlapping, legal *means*,” there “may well be correspondence between the[ir] normative values.”<sup>97</sup> The breadth of her doctrinal lens matters because

[t]he appropriate choice of legal means from a progressive property perspective will likely vary depending on the issue being addressed and the broader social, economic and legal culture in which it arises.<sup>91</sup>

This foregrounds the role of tactical choices in operationalising progressive ideas about property and the risk that narrower frames artificially delimit the role of, and scope for, progressive ideas about property across the horizontal and vertical scales of property systems.

#### V. OPERATIONALISING PROGRESSIVE IDEAS ABOUT PROPERTY: RHETORICAL, JURISDICTIONAL AND PHYSICAL SCALE

The approach and methods of RPT support the identification and advancement of progressive ideas about property, as well as enabling scholars to engage more fully with questions of how, and why, property works. Building on Walsh’s technique of “widening the doctrinal lens,” this Part focuses on (1) widening the legal lens (looking beyond the private property doctrine and adjudication to pay attention to the wide range of legal principles and provisions that are brought to bear on property problems); (2) widening the contextual lens (locating property theories and property law in their normative,

95. FOX O’MAHONY & ROARK, *supra* note 18, at 19, 206.

96. WALSH, *supra* note 4, at 237-45.

97. *Id.* at 250.

jurisdictional, and constitutional contexts), and (3) widening the methodological lens (adopting RPT methodology to consider how the needs and interests of *all* stakeholders, including owners, non-owners, markets, communities, and claims advanced on behalf of the institution of private property and other societal institutions are mediated in state responses to property problems). Each of these approaches produces significant opportunities to identify and promote more balanced accounts of the compromises that are made across property systems between respect for private property rights and social justice considerations.

Our emphasis on widening legal, contextual, and methodological lenses on property is consistent with “operationalisation” techniques developed in other legal contexts, which have highlighted the need for legal actors (and legal scholars) to understand the conditions and contexts in which theoretical ideas and arguments are put into practice.<sup>98</sup> For example, in developing a framework for operationalising international human rights theory, McGregor emphasised the importance of openness to methodological diversification and change<sup>99</sup> to a “wider, multidisciplinary approach” that enables “adaptation to new contexts.”<sup>100</sup> McGregor observed that effective implementation “relies on operationalisation . . . within the wider strategies, policies, and agendas of key actors that have the power and ability to effect change . . . [integrating theoretical ideas and arguments] within the strategic and operational approaches of such actors.”<sup>101</sup> RPT widens property’s methodological lens, applying scaling techniques to describe the relationships between competing individual interests (e.g., owners, neighbours, investors, mortgagors, tenants, trespassers), aggregated interests (e.g., neighbourhoods, market actors, cities, communities, and social movements), and

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98. See Lorna McGregor, *Looking to the Future: The Scope, Value and Operationalization of International Human Rights Law*, 52 VAND. J. TRANSNAT’L L. 1281, 1300 (2019) (describing this as the ‘methodological question’ that bridges from analyses of “what the content of IHRL [international human rights law] should be, [to] how human rights actors understand and work on the conditions in which the (non)realisation of rights are set.”).

99. *Id.* “While the current trend tends to be against the creation of new instruments, for a range of principled and practical reasons, gaps of different types will still open up. IHRL continues to be a work in progress and one that has to evolve with the context in which it applies, which includes new forms of challenges in which human rights are put at risk, and new power bases beyond the original state focus. In this regard, IHRL needs to be open to the possibility of gaps emerging that may need to be filled, rather than assume a static position.”

100. *Id.*

101. *Id.* at 1301-02.

institutional interests (e.g., housing systems, economic systems, market systems, ecological systems, the institution of private property, and the state itself). Finally, RPT pays attention to the whole property system across the levels of the multilayered state, utilising concepts of physical and jurisdictional scale to understand how state actors and agencies at different jurisdictional levels (national, regional, city) respond to property problems in different ways. As McGregor argued, operationalisation within states “is not only a horizontal question but also relates to local and municipal governmental authorities . . . because local governments take many decisions that affect economic and social rights, such as education, housing and social care.”<sup>102</sup>

The property *nomos* in each jurisdiction is not homogenous but a complex hybrid of multiple norms and commitments that compete, shift, and evolve over time. They are scaled, both horizontally (across the institutions of law—private property law, housing law and policy, financial services regulation, tax law, succession law, land use regulation, environmental sustainability, criminal justice, etc.) and vertically (across the multi-layered state, from local authority/municipality/city-level laws and governance through to the national scale, and the influences of transnational political and legal trends). By focusing on the interactional effects of property problems on a wide range of stakeholders, and using concepts of rhetorical, jurisdictional, and physical scale, RPT recognizes the interconnectedness of legal doctrine, statutory interpretation, public policy, and the hinterland of each jurisdiction’s legal cultures.<sup>103</sup> Widening the contextual lens to pay attention to the normative historic and constitutional foundations of the property *nomos* in each jurisdiction also responds to Rosser’s appeal for progressive property scholars to engage with the norms and legacies of the United States property law system, property distribution, and property politics.<sup>104</sup> Across the three scales of (1) rhetoric, (2) jurisdiction, and (3) physical resource, the United States is a complex hybrid landscape of ideological myths, doctrinal realities, cultural perceptions, and policy-pragmatism.

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102. *Id.* at 1303.

103. On the expressive power of law, see Fox O’Mahony, *supra* note 91; see also WALSH, *supra* note 4, at 255 (“...a complex symbiosis exists between the interpretation of property rights in legal doctrine and broader cultural assumptions and intuitions about the strength of those rights.”).

104. Rosser, *supra* note 79, at 127-39.

*Rhetorical scale* refers to how aspects of each jurisdiction's "normative universe" are "scaled up" to justify or explain responses (or non-responses) to property problems; against the backdrop of the "Overton window" of political possibility in each jurisdiction, discursive scale measures the spectrum of popular, acceptable, radical, or unthinkable narratives about private property in each jurisdiction in specific historical moments.<sup>105</sup> For example, Alexander's landmark book, *Commodity and Propriety: Competing Visions of Property in American Legal Thought 1776-1970*, revealed the normative hybridity of property thought in American history;<sup>106</sup> and in *Squatting and the State*, the Authors considered how the early federal agenda for land, including the civic republican role of the owning class in securing order across the territory of the expanding state and the role of commercialism and competitiveness in establishing a national economy, shaped the early American property *nomos*.<sup>107</sup>

Property theories "perform" an important role in developing and promoting narratives about property relations through practices of rhetorical "upscaling." Indeed, the Progressive Property movement—and, specifically, the *Cornell* statement—can be understood as a "rhetorical upscaling" project, creating a counterweight and counternarratives to the successful rhetorical upscaling of extreme individualism and strong private property rights claims under neoliberal globalisation.<sup>108</sup> Blomley captured the role of

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105. Known as the 'Overton window' after policy analyst Joseph P. Overton, this describes the range of legitimate policy options that are acceptable to societies in any given time. While other policy ideas exist beyond the Overton window, politicians risk losing popular support if they champion these ideas. The Overton window can move, expand or contract, adjusting the range of acceptable policy ideas as societal values and norms change. For an application of the concept to global environmental challenges, see generally Antonina Suzdaleva, *Ecological Globalistics and the Paradigm of World Civilization Development*, 217 E3S WEB OF CONFS. 11003 (2020).

106. See generally GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970* 186–87 (1999). At their core, both variants of republicanism relied on the narrative that preserving individual freedom was an essential component of the common good. On the one hand, individual freedom was safeguarded by the sovereignty of private property rights against the state (to the benefit of established property-owning proto-federalists such as Marshall, Washington, and Madison). Yet, at the same time, the pursuit of individual freedom provided the conceptual apparatus for removing barriers to the acquisition of "new" land by propertyless-people – thus, enabling (white, male) newcomers to stand on equal footing with their more established property-owning counterparts.

107. FOX O'MAHONY & ROARK, *supra* note 18, at 28-34.

108. See, e.g., MARY MANJIKIAN, *SECURITIZATION OF PROPERTY SQUATTING IN*

“performance” in producing property narratives, and—in turn—the role of those narratives in creating and sustaining (aspects of) the normative world of property when he explained that accounts of property are not merely descriptive representations of property law’s external realities but that they “help to bring reality into being.”

Certain conceptions of property are dominant, on this view, because of their ability to enroll resources and arrange other representations. In so doing, they can help constitute a world in which they become true.<sup>109</sup>

Blomley urged scholars advocating progressive ideas about property to pay attention to how realities are brought into being through diverse and varied “performative acts,” looking not only at property performances that are “consciously persuasive” but at those which are “routinized and quotidian.” Examples of performative acts range from the “high-scale” ideological realm of Constitutions, legislation, and Supreme Court or state-level decisions, to the “low-scale” pragmatism of how individuals and communities access and use land.

The implications of hierarchical or jurisdictional scale for performances of property are explored by James C. Scott (who focuses on the high-scale perspective of “seeing like a state”)<sup>110</sup> and Mariana Valverde (who adopts low-scale or “local” perspectives, “seeing like a city”).<sup>111</sup> Scott argued that national-level state actors simplify<sup>112</sup>

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EUROPE (2015) describing changing approaches to property in the UK, France, Denmark and the Netherlands after 9/11. *See also* FOX O’MAHONY & ROARK, *supra* note 18, at ch. 4 discussing transnational trends of scaling back, scaling up and scaling down of states’ relationships with property rights and property problems. The success of the neoliberal project on the rhetorical scale was significant even in relatively ‘progressive’ jurisdictions, where it dampened down confidence in the potential to advance progressive approaches within domestic private law adjudication, and in the justiciability of socio-economic rights as a counter to political retrenchment. *See* O’Connell, *supra* note 47, at 532-54. And under European ‘social democratic’ constitutions. Allen, *supra* note 5; THOMAS MURRAY, *CONTESTING ECONOMIC AND SOCIAL RIGHTS IN IRELAND: CONSTITUTION, STATE AND SOCIETY 1848–2016* (2016).

109. Blomley, *supra* note 11, at 25.

110. JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* 2 (1998).

111. *See* Valverde, *supra* note 14.

112. *See* SCOTT, *supra* note 110, at 80. Scott argues that this simplification “project of legibility” has five characteristics. First, they are utilitarian facts or facts of official state interest. Second, they are nearly always written or documented facts. Third, they are typically static. Fourth, most stylized facts are aggregate facts or at least facts that are capable of being aggregated. Fifth, they tend to be facts that are capable of being objectified.



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policy problems to make institutions “legible” because this enables the state to exercise control over populations and efficiently manage the allocation of resources (taxation, census taking, and property transfers) at scale.<sup>113</sup> Scott’s narrative of *large-scale* state decision-making also highlighted the susceptibility of high-scale activities to ideological capture—favouring particular groups or vested interests within the state over others. In Blomley’s terms, the successful performance of property and its power to constitute reality is “always derivative, taking hold and becoming real in the world to the extent that it successfully cites other performances and, in so doing, compels future similar performances.”

In the United States, the successful performance of progressive ideas about property at the “high-ideological scale” of rhetorical narrative faces three distinct challenges when compared to the Irish context delineated in Walsh’s book. First, as noted above, a critical feature of the Irish constitutional context is the “explicit textual recognition of the state’s power to regulate the exercise of property rights.”<sup>114</sup> The United States constitutional framework is not explicit about the positive role of the state *either* in promoting participation in the institution of private property for all citizens or the role of the state in promoting social justice and the common good. Second, the successful performance of high-ideological rhetoric about property in the United States in the current temporal and political period has been dominated by the successful rhetorical performance of neoliberalism. The tactics of polarisation and populism, which are not geared towards solving problems<sup>115</sup> or brokering compromises, bolster this effect. Rather, this ideological performance has focused on segmenting people into groups, exacerbating and exploiting divisions and turning property problems into “wedge” issues.<sup>116</sup> Finally, the United States is a larger geographic territory where urban problems can be very far away from rural constituents (even in the same state) and where narrative-making about far-removed places and people with whom fellow citizens may have little personal contact or experience can trump the realities as they exist—and are understood—on the ground. Mitchell’s work on heirs’ property reform demonstrates how these

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113. *Id.* at 3.

114. WALSH, *supra* note 4, at 241.

115. Marcuse & Madden noted that: “The actual motivations for state action in the housing sector have more to do with maintaining the political and economic order than with solving the housing crisis.” MARCUSE & MADDEN, *supra* note 9, at 119.

116. NAIM, *supra* note 10.

second and third issues were overcome, against a backdrop in which the Constitution is not explicit on the role of the state to advance social justice and the common good but where, historically, this has not necessarily been an obstacle to progress where initiatives are propelled from other parts of the property ecosystem and framed to support the resilience needs of local and state-level power-holders.<sup>117</sup>

Widening the lens to consider the operationalisation of progressive ideas about property on the rhetorical, jurisdictional, and physical scales allows more scope for tactical choices—taking account of “wider strategies, policies, and agendas of key actors that have the power and ability to effect change.”<sup>118</sup> It puts the relative significance of high-scale rhetoric into context and perspective. As Walsh explained, in Ireland the rhetorical power of “myths” about property absolutism remains strong.<sup>119</sup> Yet, at the same time, she observes that property adjudication is “more nuanced than the polarized academic debate on complexity would suggest”<sup>120</sup> and concludes that “the balance of outcomes over time in Irish constitutional property adjudication has favored the public interest, not property rights.”<sup>121</sup>

A third factor that distinguishes the United States from Ireland is the division of powers across the multilevel federal state, which constitutes a complex matrix of interacting institutions and actors. In federal systems like that of the United States, powers are shared across federal and state or regional scales, while state and regional institutions grant devolved powers to the local and municipality level.<sup>122</sup> Different levels of the state’s multilayered apparatus view

117. Sunstein, *supra* note 53; see discussion *infra* Part III.

118. Lorna McGregor, *supra* note 98, at 1301-02.

119. WALSH, *supra* note 4, at 245.

120. *Id.* at 246.

121. *Id.* at 247-48.

122. Michael Brown notes in his work on the autonomy of the local government that the U.S. state is divided between tiers of the state. “The locality is a creature of the state. Municipal budgets are constrained by variable federal and state funding. The centralized power of the state leaves local government as largely a bureaucratic apparatus.” Michael Brown, *The Possibility of Local Autonomy*, 13 *URB. GEOGRAPHY* 257, 257 (1993). In the U.S., Dillon’s Rule has captured the general statement regarding how municipalities receive power vis-à-vis other levels of the state:

It is a general undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and not others: first, those granted in express words; second those necessary or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation – not simply convenient but indispensable. Any fair, reasonable, substantial

property problems in different ways depending on their specific powers to act (competencies), the resources available to them to deploy (capabilities), and the burdens (costs) of action. These factors determine how differently-situated state actors and agencies perceive and respond to property problems and are recognized in RPT by paying attention to hierarchical or jurisdictional scale. Hierarchical scale refers to the allocation of powers to regulate and govern property to specific agencies and actors across the multilevel state—for example, powers to tax property interests; to levy fines for harmful uses of property; to enact and implement property policies, e.g., a zoning policy; to facilitate the acquisition and securitisation of property interests; and to determine property disputes.

While not always visible on the face of private property adjudication or made explicit in “high-level” property theories, the reality of hybrid property norms and values is accommodated, in part, through the United States’ multi-scalar approach to governance. This approach was developed during the early period of the state to mediate competing narratives of democratic accountability and concerns about the accountability of the state to the people. Although the drafters of the United States Constitution were anxious about potential overreach and interferences with individual freedom by an overly powerful centralised state, they remained committed to principles of good government and order. These tensions were resolved by vesting significant control over individuals in the hands of state governments.<sup>123</sup> By leaving large areas of the development of American law—including the exercise of “police powers,” housing, and land use—within the jurisdiction of states,<sup>124</sup> the multilevel legal system was scaled to accommodate normative hybridity.

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doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.

JOHN DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 448 (1911). This view was captured by the U.S. Supreme Court in *Trenton v. New Jersey*: The City is a political subdivision of the State, created as a convenient agency for the exercise of such of the governmental powers of the state as may be entrusted to it... The State, therefore, at its pleasure may modify or withdraw all such powers... expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the character, and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme. 262 U.S.182, 195-96 (1923).

123. KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 5 (1989).

124. U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people”);

Property was central to this process, as the power and functions of the city were crafted to shape a new urban legal order.<sup>125</sup> Under the amended Constitution, the state became, at once, multi-scalar in every sense of the word: not only was state power vertically distributed, but multiple official narratives and rationales for action relating to land were distributed across the institutions of the state. This was critical in countering some of the structural limitations of the United States constitutional and political system and enabling more pragmatic, solution-focused modes of property governance. Valverde's account of multilevel land governance in the United States highlighted the importance of local authorities who enjoy significant leeway to enact controls on private land use in ways that would likely be deemed suspicious or contentious state infringements of private property sovereignty if enacted at higher levels of the state apparatus.<sup>126</sup>

While the rhetorical narratives that perform property stories seek to define an *essence* of property, attention to the hierarchical or jurisdictional scale reveals how different norms are scaled across the multilevel state. It is the mediation of these different perspectives on property problems that has the potential to produce the conditions for compromise. For example, during squatting conflicts in New York City's Lower East Side ("LES") in the 1980s, competing parties (public authority owners and long-term squatters) advanced rhetorical claims about the propriety of their claims to buildings—squatters drawing on narratives of homesteading and the city leaning on its status as property owner. Crucially, both sides "lost" in their court fights to claim the LES buildings as their own: squatters lost the litigation contest, and the city lost nearly \$1 million in legal fees contesting squatter claims over buildings worth a fraction of that amount. The conflict was only resolved when the city and squatters came to a negotiated compromise that led to using some of the buildings as affordable housing co-ops. Each having given some

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U.S. CONST. Amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people").

125. HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730–1870 (1983).

126. Valverde, *supra* note 14. Valverde argued that "the power of municipalities to impose limitations on private property rights through the coercive and/or paternalistic 'police power of the state' has long been seen as legitimate as long as it remains local." MARIANA VALVERDE, EVERYDAY LAW ON THE STREET: CITY GOVERNANCE IN AN AGE OF DIVERSITY (2012); *see also* Mariana Valverde, *Jurisdiction and Scale: Legal Technicalities as Resources for Theory*, 18 SOC. & LEGAL STUD. 139 (2009).

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ground on points of principle and having yielded on the battle to establish their preferred narrative, they recognized, pragmatically, that both had limited resources to continue pursuing their full objectives. In this context, they came to see that making a local compromise was both possible and would produce the best achievable outcome for both sides.<sup>127</sup>

The small scale on which Ireland's property system operates arguably allows for a more pragmatic, less bureaucratic kind of property law and property politics: a "pragmatic localism." But so does the city-level or local scale in the United States. Tackling property problems at the local scale—where the costs of ongoing conflict are felt most keenly—allows for greater attention to "not just 'what works, but what works here.'"<sup>128</sup> For example, in the wake of federal retrenchment of public housing resources, American cities developed tools like housing trusts and impact fees to protect funding for affordable housing, circumventing powerful ideological obstacles to (quietly) solve problems on the ground and achieve affordable housing outcomes that would have been more difficult to reach through explicit policy rhetoric.<sup>129</sup>

Because Ireland is small on the national scale, ideology and pragmatism are more closely intertwined, in contrast to the vast geographical scale of the United States. Yet, even in Ireland, the property and housing *nomos* is differentiated across the territorial scale between national, city, and rural contexts. As in many jurisdictions, the people-to-land ratio is not consistent across the territory but highly skewed by concentrations of population in high-density urban settings. Ireland's capital city, Dublin, has a population of 1.25 million compared to New York City's nine million—which is almost twice the total population of Ireland. A quarter of Ireland's five million people live in Dublin, while the United States' largest city, New York City, is home to 2.7% of the United States population.

Patterns of population density in urban areas create distinctive challenges compared to rural areas, requiring different approaches to land use, service provision, and public budgetary challenges. Collective action to assert and advocate rights manifests at the

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127. The historic role of the federal government in supporting housing co-ops provided a pathway of opportunity for the city to see the co-op plan as a legitimate outcome. For a detailed discussion of this case, see FOX O'MAHONY & ROARK, *supra* note 18, at 352-53.

128. Coaffee & Headlam, *supra* note 16.

129. For a detailed case study focusing on the development of Housing Trusts in U.S. cities, see Roark & Fox O'Mahony, *supra* note 15.

neighbourhood level<sup>130</sup> and at the city-level through urban activism<sup>131</sup> or collaboration.<sup>132</sup> On-the-ground advocates put pressure on local- and city-level state actors and agencies to exercise their jurisdictional capacities and capabilities in ways that favour pragmatic solutions over high-scale ideology. Others work around the law to establish and embed “subversive property” practices that transcend the formal scales of legal categories and rights and, through sustained on-the-ground action, cause the spaces around them to adapt and reshape to fit relationships of belonging.<sup>133</sup> This echoes Blomley’s argument that property is brought into being through diverse and varied performative acts, which may be “consciously persuasive . . . as well as routinized and quotidian.”<sup>134</sup> Widening the methodological lens enables us to recognize and respond to progressive property practices on the ground, where the pragmatics of social justice are most impactful on people’s lives.

## VI. CONCLUSION

In *The Construction of Property*, Lehari argued that property theory does not—for definitional purposes—inherently require that we subscribe to core content, asserting that while the concept of property

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130. Lorna Fox O’Mahony & Marc L. Roark, *Property as an Asset of Resilience: Rethinking Ownership, Communities and Exclusion Through the Register of Resilience*, 36 INT’L J. FOR THE SEMIOTICS OF L. (2023). See also LEE ANNE FENNELL, *THE UNBOUNDED HOME* 175 (2009).

131. DAVID HARVEY, *REBEL CITIES: FROM THE RIGHT TO THE CITY TO THE URBAN REVOLUTION* (2012); RAQUEL ROLNIK, *URBAN WARFARE: HOUSING UNDER THE EMPIRE OF FINANCE* (2019); MIGUEL A. MARTINEZ, *SQUATTERS IN THE CAPITALIST CITY: HOUSING, JUSTICE AND URBAN POLITICS* (2020); HENRY LEFEBVRE, *The Right to the City*, in *WRITING ON CITIES* (Elizabeth Kofman & Elizabeth Lebas eds., 1968). (describing the tensions that spatial politics present in the course of ordinary city life, and how property outsiders form coalitions and networks to advance their claims, power and standing in urban spaces).

132. RASHMI DYAL-CHAND, *COLLABORATIVE CAPITALISM IN AMERICAN CITIES: REFORMING URBAN MARKET REGULATIONS* (2018) (demonstrating how community-based businesses in American urban cores develop collaborative sharing techniques to overcome legal and economic barriers).

133. SARAH KEENAN, *SUBVERSIVE PROPERTY: LAW AND THE PRODUCTION OF SPACES OF BELONGING* 61-62 (2015). Keenan argued that: “For property...to operate as an instrument of meaningful political change, it must first be conceptualised in a way that pays attention to how propertied subjects come to be constituted, and the relationship between property and space, rather than just arguing that pre-existing propertied subjects should act with a greater sense of responsibility towards pre-existing social space.”

134. Blomley, *supra* note 11, at 16.

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has structural and institutional traits, it has no “inherent essence.”<sup>135</sup> Rather, Lehari argued that property law’s essence flows from whatever each society’s institutions choose to promote as values and goals. The structural traits of property provide the frameworks for translating these ideals from moral and social concepts into legal concepts, working through the interactions of legislatures, courts, and the professional organisations of civil society (legal and social institutions) that create property norms. Lehari shifted the focus from natural, morality- or rights-based content to the political and social institutions that create property norms. Resilient Property Theory builds on this insight by focusing on how the “choices” that states and other social institutions make—to promote particular normative agendas based on prior normative commitments—are contextualised and constrained by a range of factors that are both within and beyond the control of the state itself or the social institutions it sustains (for example, the market). It observes that state responses to property problems are dynamically shaped, and sometimes constrained, by a complex array of competing, and at times overlapping, influences—from multiple or hybrid property ideologies to the implications of property practices on the ground, in the context of national and international events and externalities.

Through this lens, the Authors acknowledge the difficulties that even progressively-motivated state actors, agencies, and institutions encounter in the face of the high-scale rhetorical dominance of neoliberalism. Walsh explains that her articulation of Ireland’s constitutional property adjudication system as “progressive property in action”

is not to suggest that Irish constitutional property law provides a gold standard example of progressive property in action that should be replicated in other jurisdictions. Rather, the focus is on analyzing the response of Irish judges to the key questions in constitutional property law to expose tensions in the mediation of property rights and social justice that resist easy or predictable resolution even where progressive property ideas have a clear constitutional foothold.<sup>136</sup>

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135. AMNON LEHAVI, *THE CONSTRUCTION OF PROPERTY: NORMS, INSTITUTIONS, CHALLENGES 2* (2013).

136. WALSH, *supra* note 4, at ch. 1.

In 2023, Dublin continues to face acute property inequalities, including an enduring and deepening affordable housing crisis,<sup>137</sup> and Ireland has the highest rate of (market) income inequality in Europe (although this is flattened by a progressive tax and welfare regime). Housing unaffordability and income inequality are major problems in many jurisdictions. Nevertheless, recognizing the scale of property exclusion in Ireland, notwithstanding its “qualified progressive property” order, serves as an important reminder of potential gaps between “progressive” law in books—or even in property law practice—on the one hand and progress towards addressing the material realities of poverty, inequality, and lack of access to housing or shelter on the other. Likewise, progressive property scholars often cite South Africa (following the collapse of the apartheid state and the implementation of the 1996 Constitution) as a paradigmatic example of progressive property law in action at the same time as it remains one of the world’s most unequal societies.<sup>138</sup>

In making this observation, the Authors do not suggest or imply that law in books is not important but recognize that law exists in a recursive relationship with social narratives and norms which, in turn, frame attitudes to law, legal interpretation, and adjudication. Resilient Property Theory seeks to understand the dynamic interactions between legal decisions, analyses, and discourses, the actions of state actors and agencies, and on-the-ground realities in shaping property outcomes. The *rhetorical* scale—the simplified stories that are told about what property is and how property works—offers one lens on the property system: “up-scaling” ideological norms and narratives about property, aligning to and countering the dominant mood, and promoting different currencies and conceptions of the good.<sup>139</sup> While the rhetorical or ideological scale is arguably the most visible, especially on the national scale of American property theorising—and has a powerful impact on how we *feel* about property law and property politics—it offers only a partial view of the property system. By also paying attention to hierarchical or jurisdictional scale and *physical* or

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137. Barra Raontree et al., *Poverty, Income Inequality and Living Standards in Ireland: Second Annual*, ECON. & SOC. RSCH. INST. 1 (2022) described a large decline in housing affordability over the last decade.

138. In 2023, we are launching a project that applies RPT to analyze the gaps between constitutional property law and lived realities of housing and home in South Africa, in partnership with Emory University’s Centre for International and Comparative Law and the Faculty of Law at the University of Pretoria.

139. For example, certainty versus flexibility, predictability versus adaptiveness, property rights versus social justice and the common good.



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*resource* scale, RPT relocates our understanding of the balances struck between private property and the common good within the normative hybridity of the multilayer state.

*Property Rights and Social Justice* demonstrates the potential for progressive ideas about property to be operationalised within contemporary property systems, debunking assertions about destabilising effects on the institution of private property for advanced capitalist economies and on the autonomy, freedom, and private sovereignty of (property-owning) individuals. Walsh demonstrates that “socially responsive constitutional protection of property rights is achievable, [and that while] a degree of unpredictability . . . is inevitable . . . [it is] largely confined to its margins, showing that a predominately contextual approach can be adopted in constitutional property rights adjudication without fundamental destabilising effects.”<sup>140</sup> Across the breadth of the Irish property law system, compromises between competing conceptions of the good with respect to property (between private property rights and social justice and the common good)—while complex—have proven to be possible without destabilising the private property system, the security of private property rights, or Ireland’s free market economy.

Perhaps most importantly, it has opened up spaces within Irish law, politics, and society for an ongoing debate about private property and social justice. Following a prolonged economic crisis and recession from 2008, the social movement “Take Back the City” has campaigned for affordable housing and the “right to a home.” As the movement gained traction, in 2018 the Irish Government announced a €1.25 billion investment through a new Land Development Agency that promised to build new homes on underutilised sites, and local authorities were vested with new powers to levy fines on owners of vacant or derelict properties. As progress in bringing properties back into use remained frustratingly slow, in 2022 the Government launched the Irish Housing Commission, which has led a series of projects including a consultation on a potential constitutional amendment to recognize rights to housing or a home. At the same time, the Irish Government has been distinctive for its extension of pandemic-period eviction bans<sup>141</sup> into the post-pandemic cost-of-

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140. WALSH, *supra* note 4, at 11-12.

141. Marc L. Roark & Lorna Fox O’Mahony, *Comparative Property Law and the Pandemic: Vulnerability Theory and Resilient Property in an Age of Crises*, 82 LA. L. REV. 789, 825 (2022).

living crisis.<sup>142</sup> As the state comes under renewed rhetorical pressure to respond to urgent property problems, an ongoing conversation about property and housing, home and homelessness, and the need to negotiate towards workable compromises continues. It is notable, nevertheless, that these debates are taking place.

Walsh's *Property Rights and Social Justice* offers insights that have applied relevance for property scholars seeking to advance progressive ideas in the United States context. Widening the analytical frame of property theory and diversifying the methodological tools we use to advance property problems could refocus the advancement of progressive ideas about property from the (national) rhetorical scale to target opportunities across the jurisdictional and physical scales. Ireland's "qualified progressive" property ecosystem commends the possibilities for compromises between private property rights and social justice, even under extreme pressures and political division. Indeed, this systemic openness can be understood as an indicator of "resilience."<sup>143</sup> Sisk described democratic resilience as "the property of a social system to cope with, survive and recover from complex challenges and crises that present stress or pressure that can lead to systemic failure."<sup>144</sup> Resilient systems are open to adapting and improving in the face of challenges or crises.<sup>145</sup>

The systemic importance of normative pluralism and the functional capacity to seek out compromises in moments of stress or crisis are not fully reflected in rhetorical narratives of property law or the simplified stories they tell about property but tend to be crowded out by the dominant political mood in any given moment.<sup>146</sup> Van der Walt

142. Residential Tenancies (Deferment of Termination Dates of Certain Tenancies) Act 2022 (Act No. 34/2022) (Ir.); see Rachel Walsh, *Eviction ban is likely to survive court challenge*, IRISH TIMES (Oct. 19, 2022), <https://www.irishtimes.com/opinion/2022/10/19/eviction-ban-is-likely-to-survive-court-challenge/> [https://perma.cc/DJ6N-AUZ2].

143. BRIAN WALKER & DAVID SALT, *RESILIENT THINKING: SUSTAINING ECOSYSTEMS AND PEOPLE IN A CHANGING WORLD* 124 (2006).

144. Timothy Sisk, *Democracy's Resilience in a Changing World*, in *THE GLOBAL STATE OF DEMOCRACY: EXPLORING DEMOCRACY'S RESILIENCE* 36, 38 (2017).

145. Jack Ahern, *From Fail-Safe to Safe-to-Fail: Sustainability and Resilience in the New Urban World*, 100 *LANDSCAPE & URB. PLAN.* 342 (2011); LAWRENCE J. VALE & THOMAS J. CAMPANELLA, *THE RESILIENT CITY: HOW MODERN CITIES RECOVER FROM DISASTER* 22 (2005).

146. See A.J. Van Der Walt, *Resisting Orthodoxy – Again: Thoughts on the Development of Post-Apartheid South African Law*, 17 *S. AFRICAN PUB. L.* 258, 259 (2002); see also A.J. Van Der Walt, *Dancing With Codes—Protecting, Developing and Deconstructing Property Rights in a Constitutional State*, 118 *S. AFRICAN L.J.*

argued that dominant normative orders and the orthodoxies they advance “can only be established by violently suppressing some of the energy and diversity that is at work in a legal system.”<sup>146</sup> Yet, examples from the United States context, including the use of housing trusts to direct city-level funding into affordable housing projects, or the heirs’ property reform movement, reveal how that energy and diversity can be unlocked through pragmatic action at the local level that simultaneously advances social justice and shores up the political resilience of local-level decisionmakers and political actors. By demonstrating how active political and legal engagement with normative diversity, nurturing compromises that respect and take seriously different legal conceptions of the good, that has produced a “qualified” progressive property system in Ireland “at scale,” we can apply the insights from *Property Rights and Social Justice* to open up new lines of inquiry for identifying and advancing progressive ideas about property in other jurisdictions.

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258, 270 (2001).

<sup>146</sup> *Id.* at 271.