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Destabilizing Property

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Property theory has entered into uncertain times. Conservative and progressive scholars are, it seems, fiercely contesting everything, from what is at the core of property to what obligations owners owe society. Fundamentally, the debate is about whether property law works. Conservatives believe that property law works. Progressives believe property law could and should work, though it needs to be made more inclusive. While there have been numerous responses to the conservative emphasis on exclusion, this Article begins by addressing a related line of argument, the recent attacks information theorists have made on the bundle of rights conception of property. This Article goes on to make two main contributions to the literature: it gives a new critique of progressive property and, more fundamentally, shows how distribution challenges in property call for a third path forward. Conservative scholarship is scholarship for *property, defending traditional views of property against the influence of new realist-inspired deconstruction. Progressive scholarship works* with *property, showing how doctrine supports expanding property law to reach those who would otherwise be excluded. But missing from this debate is the possibility that, instead of working* for *or* with *property, the rise in inequality and the calcification of advantages defined at birth of the current economic and legal environment calls for work* against *property. Expanding the range of answers to the broad questions being asked of property to include deliberately destabilizing property would add to the academic debate and to the possible policy responses to the emerging threat of oligarchy. Working* for, with, *and* against *property are all answers to the question of how to respond to the property crisis of our time, the problem of inequality. This Article seeks to give some content to the neglected* against *portion of the spectrum.*

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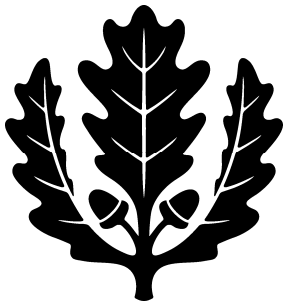

Destabilizing Property

EZRA ROSSER*

I. INTRODUCTION

Property theory has entered into uncertain times. Conservative and progressive scholars are, it seems, fiercely contesting everything, from what is at the core of property to what obligations owners owe society. This contest is not a matter of happenstance, of decontextualized scholarly pontification. Instead, the scholarly debates mirror similar upheavals in the role property plays in the lives of many Americans. The Great Recession is but a stark reminder that the American Dream is fragile. Working-class families have not seen significant welfare improvements in over a generation, even as the wealthy have consolidated their economic advantages. The New Gilded Age is defined largely by rising inequality, but it should not be surprising that property law scholarship has become more contentious and has taken on bigger questions as the clouds surrounding property's role in society darken. There is a place for purely theoretical scholarship, but a field that does not engage in the questions of the day would be neglecting an important aspect of the academic exercise. When it comes to property, the questions of the day revolve around inequality, and this is reflected in the broad nature of the questions scholars are asking of property law. But, while the questions are broad, the answers are too narrow.

The back-and-forth between conservatives and progressives formally centers on whether property law is best understood in terms of clear-cut rules or messy, multi-layered standards and exceptions. But, more fundamentally, the debate is about whether property law works. Conservative information cost theorists believe that property law works. Progressives believe property law could and should work, though it needs to be made more inclusive. Scholarship from both camps is shaped

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accordingly. Conservative scholarship is scholarship *for* property, defending traditional views of property against the influence of realist-inspired deconstruction. Conservative scholars argue that their models better describe property law and draw upon that descriptive accuracy to ground normative claims that celebrate the status quo through declarations that the current rules are efficient, good rules.[1] Progressive scholarship works *with* property, showing how doctrine supports expanding property law to reach those who would otherwise be excluded, and highlighting areas in which social values have created exceptions that deviate from an exclusion-centric understanding of property law. Put differently, while conservative scholars gaze upon the edifice of property law and applaud it, progressive scholars seek improvements to the law rather than retrenchment.[2] But missing from this debate is the possibility that, instead of working *for* or *with* property, the rise of inequality and the calcification of advantages defined at birth of the current economic and legal environment calls for work *against* property. Working against private, exclusion-based property can take many forms, including selectively leveraging doctrine in support of broad market access and in defense of poor communities. Where the doctrine proves inadequate, confrontation and resistance to the oppressive features of the law may be required. Expanding the range of answers to the broad questions being asked of property to include deliberately destabilizing property would add to the academic debate and to the range of possible policy responses to the emerging threat of oligarchy.

The idea of destabilizing property is not inherently radical. The relationship between property law and the capitalist market that is taken for granted today itself contains features that were seen as radical when they were first introduced. Feudalism gave way to capitalism, in part, because use rights and alienation of land went from things that were sharply limited, to matters of individual freedom that were expected "sticks" in the bundle of rights.[3] Similarly, the economic system built around slave labor was undone, in part, because of a rejection, first by activists and later by politicians, of the idea that Southerners could own humans as property. Destabilizing property is only radical from a vantage point that privileges

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[1] *See* Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1692 (2012) (arguing that "traditional baselines . . . are very worthy of explanation and a good deal of respect"). *But see* Hanoch Dagan, *The Craft of Property*, 91 CALIF. L. REV. 1517, 1560 (2003) (arguing that "[t]o avoid the pitfalls of essentializing the existing repertoire of property forms, however, we must avoid according these forms overwhelming normative authority").

[2] *See* Jane B. Baron, *The Contested Commitments of Property*, 61 HASTINGS L.J. 917, 923 (2010) (arguing that progressive scholars are "far more open to quick interventions to improve the system").

[3] *See* Nadav Shoked, *The Duty to Maintain*, 64 DUKE L.J. 437, 456–57 (2014) (explaining that feudal property was replaced by "allodial" property, or property that is free of any obligation of fealty to a lord or superior).

existing institutions and understandings of property. But if that is the vantage point, then, yes, there is something radical about the argument that the extent to which the property of the wealthy is protected ought to depend upon the availability of similar benefits to the rest of the population. Much less radical is the observation that property law occupies a troubling space in the ongoing crisis of capitalism and the distribution of property. If property law is built, in part, upon the premise that its benefits either are widely shared or are available to all who strive for them, the problems plaguing the current economic structure—inequitable opportunities, wage and wealth stagnation or decline, persistent multi-generational poverty, and lack of economic mobility—raise the possibility that property law serves a sliver of the population well, but does not serve society well. Working *for*, *with*, and *against* property are all answers to the question of how to respond to the property crisis of our time: the problem of inequality. This Article seeks to give some content to the neglected *against* portion of the spectrum.

As is true of American politics generally, the conservative-progressive binary in property theory does a disservice to the legitimacy of the points being made by all sides and serves to truncate the range of alternatives that are considered. Although this Article takes a more skeptical view on what property law can and cannot accomplish in its current form, it also builds upon the foundation laid by both conservative and progressive scholars. For many good reasons, economic analysis plays a significant role in property scholarship,[4] and the same can be said for efforts to show that property law can, and has, accommodated societal values that are not and should not be reducible to economic values.[5] More importantly, scholars who are generally concerned about the same thing—how property law can best serve society today—can reach very different conclusions. Though there is disagreement about whether the focus should be on ends or means,[6] progressives and conservatives alike care that property rules serve valuable functions in society, including the pursuit of distributive justice.[7] Stated differently, progressives do not have a monopoly on thinking that property should serve human values.[8] Although progressive scholars have taken on

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[4] *See, e.g.*, Daniel H. Cole, *The Law and Economics Approach to Property*, 3 PROP. L. REV. 212 (2014).

[5] *See, e.g.*, Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 743–44 (2009).

[6] *See, e.g.*, Smith, *supra* note 1, at 1718–20.

[7] Robert C. Ellickson, *The Affirmative Duties of Property Owners: An Essay for Tom Merrill*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 43, 65 (2014); *see also* Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 300 (1998) (observing that proponents of strong property rights and those who argue that property rights reflect human values both believe their version of property "structure[s] social relations in the best way possible").

[8] *See* State v. Shack, 277 A.2d 369, 372 (N.J. 1971) ("Property rights serve human values.").

the mantle of a socially minded understanding of property,[9] the idea that property law should be a certain way because it is best for society also lies at the heart of efficiency-based arguments. But the property distribution crisis of the New Gilded Age and the related academic questions surrounding the nature of property are at risk of only being partially addressed. Both the conservative bias in favor of the status quo and the progressive view that the tools necessary can be found in existing doctrine are inward looking and as such are unlikely to greatly upset settled notions. The conservative view is nostalgic and divorced from the challenges development and inequality create for property.[10] The progressive view, in contrast, is optimistic about the possibility of property law being transformed from within and believes in incorporating social values into an institution designed to resist change.[11] But conservative and progressive views alike prioritize the extent to which their solutions or responses map onto established doctrine, and though their conclusions differ, the goal is the same: strengthening property law.[12] As a result, only those alternatives that do not break too far from past practices or that build upon past practices are considered. Missing is the possibility that past understandings of property law—especially as they provide security for some while denying it for many others—may be inadequate for the current task. The way that property operates today requires that we "consider the possibility of fundamental challenges to the very foundations of the existing property regime."[13] Across political lines there is growing awareness that society is being adversely impacted by the rise in inequality and the related forty-year stagnation in the well-being of most working Americans.[14] Property law is a crucial site of conflict about how to respond and, as comforting as it is to either *cling to* (a negative take on the conservative position) or *rely upon* (a negative take on the progressive position) existing rules, responding to the challenge presented by the emerging oligarchy may

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[9] *See, e.g.*, Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009).

[10] *See, e.g.*, Roderick M. Hills, Jr. & David Schleicher, City Replanning 61 (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2477125.

[11] Baron, *supra* note 2, at 957–62.

[12] *See* Derek Fincham, *The Distinctiveness of Property and Heritage*, 115 PENN. ST. L. REV. 641, 644 (2013) (noting the "strong descriptive component" of perspectives on property).

[13] A J VAN DER WALT, PROPERTY IN THE MARGINS 14 (2009).

[14] *See* JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE 3 (2012) ("Members of America's middle class have felt that they were long-suffering, and they were right. For three decades before the crisis, their incomes had barely budged. Indeed, the income of a typical full-time male worker has stagnated for well over a third of a century."); STANDARD & POOR'S RATINGS SERVS., HOW INCREASING INCOME INEQUALITY IS DAMPENING U.S. ECONOMIC GROWTH, AND POSSIBLE WAYS TO CHANGE THE TIDE 3 (2014), http://www.ncsl.org/Portals/1/Documents/forum/Forum_2014/Income_Inequality.pdf [http://perma.cc/922V-X2ZH] ("[I]nequality in the U.S. is dampening GDP growth . . . .").

require weakening, not strengthening, property law.[15]

Property protections can be weakened in different ways, but, broadly speaking, destabilization involves either *selective use of existing law* or, where existing law does not provide sufficient leverage, *pragmatic resistance* to exclusionary elements of property law. As a mechanism to undermine false stratifications, structural inequality, and exclusion, destabilization can be used as a lever to promote more sustainable and inclusive forms of property law and economic growth. Destabilization can be meaningful in and of itself; in other words, in some circumstances, weakening the expectations of property owners is the end goal. For example, when black college students protested segregated lunch counters by staging a sit-in at the Greensboro, North Carolina Woolworth's, their goal was to force the store to become more inclusive, despite there being settled property expectations that owners had the right to exclude on the basis of race.[16] But destabilization can also find its meaning through politics, lessening or threatening to lessen property protections because of the instrumental value in doing so. When workers engage in sit-down strikes, the property rights of factory owners are diminished relative to a default, exclusion-based understanding of those rights.[17] The goal of the union usually is not to occupy the factory, but instead is to improve working conditions, especially worker pay. This lesson can be applied more broadly in that there can be political value in undermining or threatening to undermine the property rights of owners, even if the goal is not necessarily to take away those rights or to redistribute property. Weakening property protections—even where there is recognized value in exclusionary rights—can make it difficult on a personal and political level for those who benefit from the property system to be indifferent to the needs of those excluded from such benefits.

For those who rely on property or hope to join the propertied class, the

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[15] Put differently, it may require taking cues from housing activists and "challenging local property entitlements." Lisa T. Alexander, Occupying the Constitutional Right to Housing 21 (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2497695.

For more on the emerging oligarchy in a rare example of an academic study that "went viral," see Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564, 576–77 (2014) (concluding that American democracy is threatened because a small number of affluent Americans dominate policymaking, even when the majority of citizens disagree with them); *see also* John Cassidy, *Is America an Oligarchy?*, NEW YORKER (Apr. 18, 2014) http://www.newyorker.com/news/john-cassidy/is-america-an-oligarchy [http://perma.cc/8A7C-PQZM] (discussing the Gilens and Page study); Lucille A. Jewel, *Merit and Mobility: A Progressive View of Class, Culture, and the Law*, 43 U. MEM. L. REV. 239, 244 (2012) (discussing the possibility "that the structure of American society is trending toward oligarchy").

[16] EDUARDO M. PEÑALVER & SONIA K. KATYAL, PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTORS IMPROVE THE LAW OF OWNERSHIP 1–3 (2010).

[17] *See* Jim Pope, *Worker Lawmaking, Sit-Down Strikes, and the Shaping of American Industrial Relations, 1935–1958*, 24 LAW & HIST. REV. 45 (2006) (giving a history of sit-down strikes).

notion that property can function largely as a protector of the status quo is troublesome. But for those excluded, often at birth, from sharing in most of the benefits of the strong expectation that property will, and should, be protected, destabilizing property is much less threatening. By leveraging points of conflict or tension already built into institutions that protect private property, communities can undermine structures that reinforce false stratifications. Even where there are advantages to the current rules, by credibly threatening to unsettle expectations and the status quo, excluded communities or individuals increase their ability to claim compensating payments for the harms associated with those rules. The point of destabilizing property is not, in every instance, to replace the structure or the rules, but to advance the interests of the excluded by questioning the existing rules and changing or threatening to change them where their benefits are inequitably shared. While it may be impossible to reconcile the positions of those with property and those without, where the law serves to limit the enjoyment of property to the fortunate few at the expense of the excluded, it should be subject to an ongoing effort to find better institutional arrangements.

This Article begins, in Part II, by exploring information cost explanations of property rules. Over a long series of articles, Professors Thomas Merrill and Henry Smith have advanced an understanding of property law that emphasizes information cost advantages to owners and to the public of the exclusionary rule.[18] An equally extensive literature has developed that critiques their theory as a truncated version of property law that fails to take into account all of the limitations on the right to exclude and that overlooks non-economic rationales behind different doctrines.[19] Because there is such a well-developed literature responding to the information cost model, Part II concentrates on elements of Merrill and Smith's model that have received less attention; namely, their attack on the bundle of rights conception of property rights and what I argue is their status quo bias. Information cost theory should not be understood as synonymous either with conservative or with law and economics scholarship. Conservative property scholarship is not always grounded in law and economics.[20] Similarly, while there are conservative law and economics scholars, there are also scholars who employ law and

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[18] The choice to focus on Merrill and Smith is not random. *See* John A. Lovett, *Progressive Property in Action: The Land Reform (Scotland) Act 2003*, 89 NEB. L. REV. 739, 746 (2010) ("Thomas Merrill and Henry Smith's versions of this exclusion oriented view of property are the most vital and influential.").

[19] *See* JESSE DUKEMINIER ET AL., PROPERTY 222 (8th ed. 2014) (collecting several sources and summarizing their various critiques of the view held by Merrill and Smith).

[20] *See, e.g.*, Eric R. Claeys, *Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights*, 85 NOTRE DAME L. REV. 1379 (2010).

economics approaches in support of progressive goals.[21] Part II focuses on information cost theory because it is perhaps the most important branch of conservative law and economics property theory today and is a great example of scholarship that works *for* property.

Part III explores the ways that progressive scholars seek to improve property law by extending property protections to vulnerable or excluded people. One of the most important contributions of progressive property scholars has been to show that people may gain property rights through extended use even where they lack formal rights. Part III explores these contributions and the related tendency among progressives to work *with*, rather than *against*, property. It draws upon Charles Reich's *The New Property*[22] and Joseph Singer's *The Reliance Interest in Property*[23] because of the importance of these articles in progressive theory. The progressive inclination to work *with* property is then illustrated by exploring David Super's use of property concepts to respond to the rise in economic inequality in his article, *A New New Property*.[24]

The underlying question of how property law scholars have or should respond to a class society in which many people have little to no access to property is addressed in Part IV. Although it risks sounding hyperbolic, these are, or should be, trying times for the country's economic system and for its support mechanisms, including property law. Inequality measures and poverty rates are at or near historic highs;[25] the American Dream seems quite remote for a whole generation who are graduating into the Great Recession, facing un- and under-employment; and there is growing awareness of the country's relative lack of economic mobility.[26] Progressives and conservatives alike are recognizing the way that the ladder between classes seems to be broken and the place of individuals is predictively defined not by merit or effort, but by the lottery of birth.[27]

Property scholars concerned about the growing gap between what property law looks like in theory and how it operates in practice in light of poverty and inequality tend to gravitate towards one of two paths. The first

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[21] *See, e.g.*, Lee Anne Fennell, *Properties of Concentration*, 73 U. CHI. L. REV. 1227 (2006).

[22] Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

[23] Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988).

[24] David A. Super, *A New New Property*, 113 COLUM. L. REV. 1773 (2013).

[25] *See infra* notes 406–12 and accompanying text.

[26] *See, e.g.*, STIGLITZ, *supra* note 14, at 265 ("America is no longer the land of opportunity."); Priya S. Gupta, *The American Dream, Deferred: Contextualing Property After the Foreclosure Crisis*, 73 MD. L. REV. 523, 523 (2014) ("In a few short years, the American Dream has dried up like a raisin in the sun."); Adam J. Levitin & Susan M. Wachter, *Why Housing?*, 23 HOUSING POL'Y DEBATE 5, 21 (2013) ("Our current upheaval is so great that contemporary accounts refer to it as the end of the American Dream.").

[27] *See* Jason DeParle, *Harder for Americans to Rise from Lower Rungs*, N.Y. TIMES (Jan. 4, 2012), http://www.nytimes.com/2012/01/05/us/harder-for-americans-to-rise-from-lower-rungs.html (reporting on bipartisan concern about America's relatively low level of economic mobility).

path is to focus on doctrine. From this perspective, the scholarly role is to show the myriad ways that property law already provides mechanisms for a better, more inclusive society. Doctrine provides the moorings, but property doctrine is sufficiently elastic and comes in enough forms that one can build a hopeful vision.[28] That these doctrine-based possibilities might be mere ripples in the larger ocean of law that protects the status quo is glossed over. The doctrinal perspective defines property narrowly—as a discrete field of study and not something that should be understood as highly contextual—and can only shrug, disclaiming responsibility, when alternatives that might have provided the foundation for a more inclusive society are neglected.

The second path is to double-down on property. According to this perspective, the problem is not too much but too little property. Unlike the doctrinal path, here, property and property law are understood expansively. Whole areas of law and human experience can be understood in terms of property law and the path forward is to ensure the benefits of property are shared by the poor and the formerly excluded. An inclusive version of property law from this perspective serves as a form of salvation, expanding what counts as property and how people can claim a property interest, all the while reaffirming the edifice of property law. By doubling-down on property, scholars from Charles Reich forward have embraced property even as they emphasize the need to share the benefits of property more widely.[29] The problem with doubling down is that it requires a perhaps unwarranted optimism or faith that those seeking a more inclusive version of property law will end up with the best hand and not those who seek a continuation of the status quo.

A third path, albeit one largely ignored, is for those concerned about the relationship between property law and the linked problems of inequality and poverty to seek to undermine, not support, property. According to this perspective, there is a need for an alternative to the two dominant reactionary modes, both of which buy into the potential of property. The call for creative use of existing doctrine and the call for the needs of the poor to be covered in property's protective blanket both move in the right direction, but they are unlikely to result in meaningful change unless they are coupled with credible threats to the status quo. Moving from what is to what is possible requires an appreciation of the challenges associated with the New Gilded Age. Existing institutions, including forms of distributing and protecting property, must be continually questioned. In

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[28] For one version of such a hopeful vision, see JEDEDIAH PURDY, THE MEANING OF PROPERTY: FREEDOM, COMMUNITY, AND THE LEGAL IMAGINATION (2010).

[29] *See* Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL'Y 37, 39 (1990) (explaining an inclusionary approach to property that would provide each person with a right to shelter and sustenance).

order to enable positive change, the tremendous security enjoyed by those who benefit disproportionately from the existing exclusionary rules and property rights regime must be diminished or threatened. The problems of inequality and poverty, especially as they relate to the acquisition and distribution of property, demand that we explore a third path, one that adopts a critical and skeptical stance towards property protections.

II. THE INFORMATION COST REFRAIN

A standard starting point for progressive writing on property law over the last decade has become an overview of and attack on information cost theory. Indeed, that this is so common among progressives raises the question of whether such critiques are based on the strengths of information cost theory or because the theory is such a convenient foil. In a series of path-breaking articles, Professors Thomas Merrill and Henry Smith argued that the advantages of property law are best understood in terms of enforced simplicity.[30] In particular, the centrality of the exclusionary rule and limits on the forms property can take generate tremendous information cost advantages to society, primarily because they simplify information demands upon third parties.[31] Unlike contract law where parties can negotiate individualized sets of rights and obligations, property law limits the acceptable types of property in ways that are readily understood by third parties. Moreover, the exclusionary rule, which Merrill and Smith argue lies at, or near,[32] the heart of property law, makes it relatively easy to enforce and understand property rights while providing owners latitude to use their property effectively. The information cost theory acts as a lightning rod for progressive responses.[33] It is attacked for giving an overly economic explanation to property law and for ignoring

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[30] Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1850–51 (2007) [hereinafter Merrill & Smith, *The Morality of Property*] (suggesting that property rights are rooted in simple morality); Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 776 (2001) [hereinafter Merrill & Smith, *The Property/Contract Interface*] (describing property law as a fixed system of mutually accepted rules); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1, 3 (2000) [hereinafter Merrill & Smith, *Optimal Standardization*] (explaining that property law is a relatively limited field, constrained by strict standardizations); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 733 (1998) [hereinafter Merrill, *Right to Exclude*] (explaining that property law contains particular rights that are dependent upon an institutional authority to create and enforce them).

[31] For a good summary of information-cost theory, see Jerediah Purdy, *Some Pluralism About Pluralism: A Comment on Hanoch Dagan's "Pluralism and Perfectionism in Private Law,"* 113 COLUM. L. REV. SIDEBAR 9, 11–15 (2013), http://www.columbialawreview.org/wp-content/uploads/2013/02/9_Purdy.pdf [http://perma.cc/JCA4-X3TP].

[32] *See* Henry E. Smith, *The Thing about Exclusion*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 95, 96 (2014) (asserting that the right to exclude is central, if not the linchpin, in property law).

[33] *See, e.g.*, *id*. at 95.

exceptions that undermine the claimed simplicity of the system.[34] These responses have not stopped Merrill and Smith, both prolific scholars, from repeating the main idea of their theory in article after article, for over a decade and a half in somewhat of a refrain.[35]

An extensive literature explores information cost theory's strengths and weaknesses. Merrill and Smith's insightful work on the *numerus clausus* principle captured an important and under-appreciated aspect of property law; namely, that in contrast with contract law, property comes in a standard and closed set of forms. Their work helped establish that the *numerus clausus* principle applies under the common law as a matter of practice just as it exists explicitly in the civil law.[36] For scholars who have internalized Hohfeld's bundle of rights concept,[37] the idea that property law only allows some bundle forms and not others is eye-opening. Similarly, Merrill and Smith, separately and as co-authors, showed the importance, and for them the *singular* importance, of the right to exclude.[38] In their treatment of the exclusionary rule, Merrill and Smith make a fairly strong case that not all sticks are created equally—some rights lie more at the core of what is property than other rights. Exclusion operates as a widely understood bright line rule that is so important that Merrill and Smith equate it with "classic property rights."[39] The connection between their *numerus clausus* and exclusionary rule work can be found in the information cost explanation they give for the bounded and simple nature of property rules. And it is in their explanation, arguably, that they move from description to theory.

Merrill and Smith argue that property law is simple—it has a limited number of allowable forms and is based on the easily understood exclusionary rule—because simplicity minimizes the information costs to

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[34] *See* Meredith M. Render, *Complexity in Property*, 81 TENN. L. REV. 79, 98–118 (2013) (presenting a catalogue of many of these critiques).

[35] Gregory S. Alexander, *The Complex Core of Property*, 94 CORNELL L. REV. 1063, 1063 (2009).

[36] Merrill & Smith, *Optimal Standardization*, *supra* note 30.

[37] For the articles in which Hohfeld developed the concept, see Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917) [hereinafter Hohfeld, *Fundamental Legal Conceptions 1917*]; Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913); *see also* Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 544–46 (2005) (giving a quick intellectual history of the bundle concept); Henry E. Smith, *Property Is Not Just a Bundle of Rights*, 8 ECON J. WATCH 279, 279–81 (2011), http://econjwatch.org/articles/property-is-not-just-a-bundle-of-rights [http://perma.cc/8S46-SKD9] (same).

[38] *See, e.g.*, Merrill, *Right to Exclude*, *supra* note 30, at 730 ("[T]he right to exclude others is more than just 'one of the most essential' constituents of property—it is the *sine qua non*."); *see also* Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics*, 111 YALE L.J. 357, 360 (2001) (explaining that property rights have historically been in rem because of our right to exclude); Smith, *supra* note 37, at 281 (describing the right to exclude as "*how* property works" (emphasis in original)).

[39] Merrill & Smith, *The Property/Contract Interface*, *supra* note 30, at 792.

third parties. Contract law is concerned with the rights between two parties, which means that through contract, parties can create rights and obligations that are both complex and nuanced. In contrast, the in rem nature of property law—the fact that property law defines rights a person has against the whole world—means that property law needs to economize on concepts and complexity. By their very nature, many items of property are distinct: one plot of land may be different from other plots of land in terms of everything from its physical dimensions and existing uses to the minerals found under the surface and its location relative to services.[40] But if every item or plot of land was subject to individually distinct legal characteristics as well, the information costs borne by third parties and society could be tremendous. Complexity, Merrill and Smith argue, would frustrate the exchange of property and the functioning of markets. In small societies—Merrill and Smith use the example of *Robinson Crusoe*—rights can be kept in personam; but in larger societies, contract rights are unwieldy and in rem property rights are required.[41] By reducing the set of allowable forms for holding property (*numerus clausus*) and by using a simple boundary rule to establish the rights between owners and non-owners (exclusion), property law reduces information costs.

While I have provided only a thumbnail sketch of information cost theory, the centrality of efficiency-based reasoning to Merrill and Smith's understanding of property comes across even in this quick overview. Whether looking at real property or intellectual property, Merrill and Smith use their information cost theory to explain why some rights are protected by a bounded set of simple exclusionary rules and others by more complex and more information-dependent governance rules.[42] Although they should not be faulted for their conviction and belief in their own thesis, information cost theory claims to be more than just another way of looking at property law but as *the* way it should be understood. The idea that there are information cost advantages to simple rules is undoubtedly true and by itself not that controversial. Merrill and Smith's repeated insistence that property law should be guided by this single efficiency-based goal, however, invites critique.

Most of the criticism of information cost theory centers on the fact that property law does more than just enhance efficiency. Non-economic value

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[40] *See* Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 828–29 (2009) (discussing the complexity of different parcels of land and how each property is unique because of this).

[41] Merrill & Smith, *The Property/Contract Interface*, *supra* note 30, at 793 ("The unique advantage of in rem rights—the strategy of exclusion—is that they conserve on information costs relative to in personam rights in situations where the number of potential claimants to resources is large, and the resource in question can be defined at relatively low cost.").

[42] *See, e.g.*, Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742 (2007); Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453 (2002).

judgments also shape property law rules. As multiple scholars convincingly show, politics cannot be excised from our understanding of property law simply because aspects of the existing system are arguably efficient.[43] The form and content of rules reflect political choices and property law cannot avoid politics simply by resorting to an efficiency approach, for that too is a choice. Understanding property rules as being based on societal choices rather than deriving somehow, in an inevitable fashion, from economic theory creates space for critical scholarship with alternative normative perspectives. Into this space, progressive property scholars Gregory Alexander, Eduardo Peñalver, and Joseph Singer, for example, advocate, respectively, for property law to be grounded on social obligations, value ethics, and democracy-enhancing concerns.[44] A broader strain of reactionary scholarship takes aim at law and economics approaches in property law in general, with the information cost theory simply being the most prominent of the targets.[45]

A related critique of information cost theory is that it offers a falsely simplified vision of property law. Merrill and Smith's theory depends on property rules being standardized and easily understood because the information cost advantages disappear if they are not. If property law is complicated, to make sense of property rights third parties have to know too much and property rights cannot be easily protected or transferred. Merrill and Smith deal with this challenge by focusing on the rules alone, ignoring or treating dismissively exceptions to the rules that undermine the simplicity of the system.[46] Critics of information cost theory run in the opposite direction, arguing that rules and their exceptions cannot be cleanly separated—that to understand the rules, you have to know and understand the exceptions.[47] Additionally, given that information cost theory is in part based on the idea that exclusion lies at the heart of what it means for something to be property (or at least that it is *very* important), responses, not surprisingly, tend to be skeptical about the singular importance of exclusion.[48] By showing the complex nature of property

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[43] *See, e.g.*, Dagan, *The Craft of Property*, *supra* note 1, at 1558–65; Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1597 (2008); Avihay Dorfman, *Private Ownership and the Standing to Say So*, 64 U. TORONTO L.J. 402 (2014).

[44] Alexander, *supra* note 9; Peñalver, *supra* note 40; Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009 (2009); *see also* Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. 107 (2013) (presenting an overview of progressive property arguments).

[45] *See, e.g.*, Lynda L. Butler, *The Resilience of Property*, 55 ARIZ. L. REV. 847 (2013); Eric T. Freyfogle, *Private Land Made (Too) Simple*, 33 ENVTL. L. REP. 10155 (2003); Peñalver, *supra* note 40.

[46] *See, e.g.*, Singer, *supra* note 44, at 1025–26 (arguing that our current estates system is one example of Merrill and Smith oversimplifying property rights).

[47] *See, e.g.*, Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369, 1428–29 (2013); Singer, *supra* note 44, at 1026–27.

[48] *See, e.g.*, Alexander, *supra* note 35, at 1064.

even in light of the *numerus clausus* principle and the exclusionary rule—consider, for example, the multiple overlapping property rights that parties can have in a single parcel by dividing the property into use rights such as easements and equitable servitudes or into time segments such as life estates and reversionary interests—critics challenge Merrill and Smith's reductionist presentation of property law.[49]

Moving away from the core elements of information cost theory and the vast literature it has spawned in response, I turn now to Merrill and Smith's more recent works. Although somewhat at the periphery of information cost theory, the recent attacks by Merrill and Smith on the bundle of rights conception of property and on legal realism flow naturally from the larger argument and indeed can be found throughout their scholarship.[50] In place of the bundle of sticks, Smith offers up an alternative modular theory of property.[51] For his part, Merrill first suggests property is similar to a prism,[52] and then argues for a narrow understanding of what he calls the property strategy.[53] I believe the works of both scholars shed light on the malleability of property institutions, but also overstate the danger that the bundle of rights poses to traditional property rights. More importantly for my purposes, a defensive bias in favor of the status quo can be seen in their efforts to depose the legal realist bundle-of-sticks conception of property and replace it with less dynamic, more fixed versions of property.

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[49] *See, e.g.*, Henry Hansmann & Reiner Kraakman, *Property, Contract and Verification: The* Numerus Clausus *Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. S373, S374 (2002); *see also* Dagan, *supra* note 1, at 1565–70 (examining Hansmann and Kraakman's critique of Merrill and Smith); Davidson, *supra* note 43, at 1599–600 (seeking to add "structure and content" to the standardization of *numerus clausus*); Render, *supra* note 34, at 108–10 (observing the two main challenges to Merrill and Smith's claim that information costs are not actually reduced with *numerus clausus*, and that it does not restrict the enforcement of property interests); Anna di Robilant, *Property and Democratic Deliberation: The* Numerus Clausus *Principle and Democratic Experimentalism in Property Law*, 62 AM. J. COMP. L. 367, 394–402 (2014) (examining Merrill and Smith's reductionist approach in a larger discussion on *numerus clausus* and "deliberative democracy").

[50] Though I focus on their most recent attacks in this Article, Merrill and Smith have been attacking the bundle for some time. *See, e.g.*, Thomas W. Merrill & Henry E. Smith, *Making Coasean Property More Coasean*, 54 J.L. & ECON. S77, S77–78 (2011) ("In his seminal writings, Coase assumes a picture of property as ad hoc bundles of government-prescribed use rights. This assumption is deeply misleading in critical respects and is out of sync with both classical and much contemporary economic thought."); Merrill & Smith, *supra* note 38, at 357–58 (2001) (stating that property is more than simply distribution of "things").

[51] Henry E. Smith, *On the Economy of Concepts in Property*, 160 U. PA. L. REV. 2097 (2012) [hereinafter Smith, *The Economy of Concepts*]; Smith, *supra* note 1.

[52] Thomas W. Merrill, *The Property Prism*, 8 ECON J. WATCH 247 (2011), http://econjwatch.org/articles/the-property-prism [http://perma.cc/Y8V3-4GT6].

[53] Thomas Merrill, *The Property Strategy*, 160 U. PA. L. REV. 2061 (2012).

A. *Living in Legoland*

Legos are great. Who can object to a legal theory built around Legos? In two recent articles, *Property as the Law of Things* and *On the Economy of Concepts in Property*, Professor Henry Smith analogizes his theory of property to the connections made possible by the popular childhood toy.[54] Rejecting the bundle-of-sticks understanding of property, Smith develops what he calls a "modular theory of property."[55] But the part of my childhood that the articles most reminded me of was not playing with Legos but playing a board game called "Rail Baron." Following Smith's lead in using toy metaphors, let me first explain Rail Baron. The goal of the game is simple: make money faster than your opponents can make money. You do this by buying railroads and traveling between cities based on the roll of the dice. Think hardcore Monopoly. Luck plays a role (excuse the pun), but in order to win you need to convince the other players that you are losing so that when they have to ride on someone else's railroad, they choose your line and not the line of an opponent. My father was amazing at convincing everyone else that he was losing, even when all the evidence should have told us that he was winning. Similarly, Smith describes himself as the underdog,[56] even though he and others who share his perspective on property are winning. Put differently, property law in the United States is amazingly stable, and therefore, the status quo does not need defending.

Smith's argument in both articles is fairly abstract and, with a few oblique exceptions contained in the footnotes, avoids singling out particular scholars for attack. But the underlying message is clear: information cost theories have more explanatory power than the theories offered up under the bundle-of-sticks/progressive property perspective. It is a point Smith echoes in a third article, a brief piece aptly titled, *Property Is Not Just a Bundle of Rights*.[57] Opposite Smith are progressive scholars who are more inclined to accept the legal realist bundle-of-rights metaphor and to embrace progressive context based decision-making.[58] Although still marshaling troops and harder to pin down in part because of an express embrace of pluralism, the progressive bundle-of-rights camp includes a who's who of leading property professors.[59] *The Law of Things* attacks these scholars by launching a trial balloon for the modular theory of

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[54] Smith, *supra* note 1, at 1708; Smith, *The Economy of Concepts*, *supra* note 51, at 2119.

[55] Smith, *supra* note 1, at 1695.

[56] *Infra* notes 107–09 and accompanying text.

[57] Smith, *supra* note 37.

[58] *See* Smith, *supra* note 1, at 1716 (describing ways in which the opposing camp believes sticks can be detached from the bundle, customized, and interact with one another).

[59] A partial list of active participants would include professors Gregory Alexander, Hanoch Dagan, John Lovett, Eduardo Peñalver, Jedediah Purdy, Joseph Singer, and Laura Underkuffler.

property. Layering on additional support grounded in a theory of linguistics and the mind, *The Economy of Concepts* furthers the argument that property is marked by simplicity of design and rules. Judging by the responses that have already been published, the modular theory has either already been shot down, or is at least on life support. The irony, of course, is that the respondents to date could not have been better selected to agree with the article. Smith's frequent co-author, Merrill, spends the bulk of *Property as Modularity* highlighting points of agreement and the strengths he sees in Smith's modular theory.[60] Similarly, Professor Eric Claeys, although he launches into his critiques more quickly, begins by writing that Smith and Merrill's series of articles developing the information and exclusion centered approach to property "have been more original and influential in American property scholarship than has work by anyone else in his and my cohort"[61] and noting his general agreement with Smith on "how private property should be structured in practice."[62] But by the end of both responses, I imagine Smith thinking to himself, "with friends like these . . . ."[63]

Smith's most obvious contribution in these three articles is his argument that the bundle-of-rights understanding, by treating the sticks in the bundle in an isolated and easily disaggregated fashion, does a poor job describing property law.[64] Merrill's view is that the modular theory provides a better snapshot of property but is still incomplete because it fails to explain the incentivizing effects of property.[65] Both *The Law of Things* and *The Economy of Concepts* take property law as it is and offer modular theory as a better description of what it is. As Claeys points out, such a descriptive theory does not address the more important question: is what is what should be?[66] To return to Legoland, when you look around at how property works in the United States, it is possible to see all sorts of good

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[60] Thomas W. Merrill, *Property as Modularity*, 125 HARV. L. REV. F. 151 (2012), http://cdn.harvardlawreview.org/wp-content/uploads/pdfs/forvol125_merrill.pdf [http://perma.cc/F4KY-NMEG].

[61] Eric R. Claeys, *Exclusion and Private Law Theory: A Comment on* Property as the Law of Things, 125 HARV. L. REV. F. 133, 133 (2012), http://cdn.harvardlawreview.org/wp-content/uploads/pdfs/forvol125_claeys.pdf [http://perma.cc/6RXA-8EHE].

[62] *Id*. at 134.

[63] Many of my friends probably had similar thoughts after I published my critique of progressive property. *See* Rosser, *supra* note 44, at 108 ("The goal of this Essay is to pick a fight with progressive property scholars.").

[64] *See, e.g.*, Smith, *supra* note 37, at 286 ("In a bundle of sticks the sticks do not interact; you can add or subtract them at will, and still you will have a bundle with roughly the same properties. Not so with property."). This is an argument that Smith and Merrill have made before. *See* Merrill & Smith, *The Morality of Property*, *supra* note 30, 1867–68 (suggesting that the bundle-of-sticks theory is misleading in property law and critiquing various academics who have recently written in support of it).

[65] Merrill, *supra* note 60, at 159–63.

[66] Claeys, *supra* note 61, at 139–40.

things. As Smith and Merrill have pointed out numerous times, limits on the forms of property, a principle embodied in *numerus clausus*, serve important informational values. Standardization lowers transaction costs, enhancing alienability and the settlement of disputes.[67] The "blocks" (modules) of limited property types work well with exclusionary "blocks" to provide owners with security, a degree of liberty, and the incentive to create or capture ownership gains.[68] Because of these advantages, information theorists such as Smith and Merrill "value *stability* over change," Professor Jane Baron observes, in contrast with progressive scholars who "are far more receptive to change."[69] Smith acknowledges as much in *The Law of Things*, arguing in support of "traditional baselines that, while in need of constant improvement, are very worthy of explanation and a good deal of respect."[70]

If proposing an alternative to the bundle is the most obvious contribution, there is as much to be gleaned from Smith's natural inclination to respect traditional baseline rules. After all, Smith is hardly the first scholar to attack the bundle-of-rights metaphor.[71] Similarly, it is not as if progressive property scholars do not acknowledge the importance of the right to exclude; they simply deny its place as the *sine qua non* of property.[72] Smith seems to agree, explaining, "[t]here is no interest in exclusion per se. Instead exclusion strategies, including the right to exclude, serve the interest in use."[73] But his agreement only goes so far: Smith claims that "[t]he exclusion strategy is the starting point in property."[74] Claeys faults *The Law of Things* for not focusing more on use,[75] joining a number of property scholars who have prioritized use rights in recent articles.[76] But such a critique, like the critique that descriptions of

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[67] *See, e.g.*, Merrill & Smith, *Optimal Standardization*, *supra* note 30, at 14, 24–25 (using estates law to show how standardization can promote alienability).

[68] Smith, *The Economy of Concepts*, *supra* note 51, at 2115; Smith, *supra* note 37, at 281.

[69] Baron, *supra* note 2, at 944–45 (emphasis in original).

[70] Smith, *supra* note 1, at 1692.

[71] *See* Baron, *supra* note 2, at 922 n.8 (collecting sources); Rashmi Dyal-Chand, *Useless Property*, 32 CARDOZO L. REV. 1369, 1373–74 n.24 (2011) (same).

[72] *See, e.g.*, Alexander, *supra* note 35; *see also* Baron, *supra* note 2, at 919 n.4 (collecting sources).

[73] Smith, *supra* note 1, at 1693; *see also* Smith, *The Economy of Concepts*, *supra* note 51, at 2115 n.69; Smith, *supra* note 32, at 95.

[74] Smith, *The Economy of Concepts*, *supra* note 51, at 2115; *see also id*. at 2123. Making a relatively fine distinction, Smith argues first that "[a]t the core of [the] architecture [of property] is exclusion because it is a default, a convenient starting point." Smith, *supra* note 37, at 282. He then goes on to argue, "[t]his does not mean that exclusion is the most important or 'core' value." *Id*.

[75] Claeys, *supra* note 61, at 143.

[76] *See generally* Dyal-Chand, *supra* note 71; Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275 (2008) (arguing that property theory should emphasize the idea of exclusion as the owner's use of an agenda-setting authority); Adam Mossoff, *What is Property? Putting*

property's recurring structural or architectural features neglect the dynamics internal to those features,[77] is arguably a matter of emphasis. *The Law of Things* and, especially, *The Economy of Concepts* operate at a high level, providing a new way of conceiving the general features of property that does have certain explanatory advantages over the straw man versions of the bundle and legal realism Smith attacks.[78] I am not convinced that the modular theory will find traction among legal scholars, even though it may be superior in some respects to the bundle-of-rights metaphor. But I am convinced that modular theory reflects a level of comfort with the status quo and an indifference to contextual concerns that I do not share.

Gregory Alexander argues that "it takes a theory to beat a theory."[79] Indeed, part of the goal of Alexander's article, *The Social-Obligation Norm in American Property Law*, was to "offer an alternative" theory to the law-and-economics approach to property scholarship.[80] As a professor, I find Alexander's position quite appealing. It offers the promise of validating scholarly work. But is Alexander right? The gap between the two scholarly camps seems less about theoretical disagreement than about emphasis and appetite for change.[81] This is not to say that there are not important differences. There are. But differences in theory provide, at best, a partial explanation of these important differences. Over the years, progressive scholars have advanced a whole range of theories that push back against exclusion-centric understandings of property.[82] Influential works, such as those discussed in Part III, Charles Reich's *The New Property*, and Joseph Singer's *The Reliance Interest in Property*, offer, in their own way, theories regarding the nature and characteristic of property that go beyond the right to exclude.[83] Yet, what Singer calls the "castle model of

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the Pieces Back Together, 45 ARIZ. L. REV. 371 (2003) (arguing for a revised understanding of property theory that emphasizes a combination of acquisition, use, and disposal of property).

[77] *See, e.g.*, Gregory S. Alexander, *Governance Property*, 160 U. PA. L. REV. 1853, 1854–60 (2012); Davidson, *supra* note 43, at 1610–15.

[78] As Michael Heller writes, "the overwhelming evidence suggests that the notion of an open-ended bundle of property rights is wrong." Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1192 (1999).

[79] Gregory S. Alexander, Remarks at 2012 Law and Society Annual Meeting (June 8, 2012) (notes on file with author); Email from Gregory S. Alexander to Ezra Rosser (Aug. 17, 2011 7:59 PM EST) (on file with author).

[80] Alexander, *supra* note 9, at 750.

[81] In recent works, scholars in both camps have gone out of their way to acknowledge that the distance between them is not as great as it might seem. *See, e.g.*, GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY 137, 205–07 (2012); Merrill, *supra* note 53, at 2063, 2088–89; Smith, *The Economy of Concepts*, *supra* note 51, at 2128.

[82] *See, e.g.*, Rosser, *supra* note 44, at 116–23 (presenting Alexander's social obligation theory, Peñalver's virtue theory, and Singer's democratic model).

[83] Reich, *supra* note 22; Singer, *supra* note 23.

property"[84] continues its hold on the general public and limits the possibility of radical change.

For Smith, radical change is something to be avoided. The bundle metaphor seems to welcome change, begging as it does questions such as "what would happen if we took this stick out of the bundle or rearranged property rights in this way?" Rejecting this invitation, *The Law of Things* highlights "[t]he importance of explaining why structures are not otherwise than they are."[85] The article continues by arguing that the features of property "can be tweaked, but are not as detachable as the bundle view would have it."[86] Traditional rules, Smith suggests, are generally good rules that at most should be reformed, not ripped apart in ways suggested by legal realists.[87] *The Economy of Concepts* frames this reification of traditional rules in terms of a defense of formalism.[88] According to Smith, "[t]he most useful notion of formalism . . . is relative indifference to context."[89] Formal rules are subject to the critique that "they are not responsive enough to societal needs,"[90] but Smith deals with this critique by arguing that it would be costly to move from formalism to context-based law.[91] Even changing isolated rules so that they better reflect particular values is dangerous because the impact of such changes may be felt by the larger structure and may threaten stability.[92] If there is to be more radical change, or what Smith terms "remodularization," then such changes should be "channeled to the legislatures."[93] Locating the authority for substantive change in the legislative bodies reflects an appreciation for democratic decision-making but also serves to narrow the field of changes realistically on the table. Change is bad, according to Smith, because the means employed by the existing system do a good job reducing transaction and information costs. Smith explains that the bundle-of-rights theory of property, by ignoring "delineation cost," makes it "deceptively attractive to move in the direction of more governance style contextualized inquiry."[94]

Of course, that is an essential question: whether the gains of moving from a starting assumption of respect for traditional rules to an approach

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[84] Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309, 314–22 (2006); *see also* di Robilant, *supra* note 49, at 403–06; Gupta, *supra* note 26, at 530–32.

[85] Smith, *supra* note 1, at 1699.

[86] *Id*. at 1700.

[87] *Id*. at 1714.

[88] Smith elsewhere notes that "[u]nreflective conceptualism or formalism is a nonstarter," but then advocates in a form of what might be called reflective formalism. Smith, *supra* note 37, at 281.

[89] Smith, *The Economy of Concepts, supra* note 51, at 2105.

[90] *Id.*

[91] *Id*. at 2127.

[92] Smith, *supra* note 1, at 1719.

[93] *Id*. at 1724.

[94] *Id.* at 1717.

more open to contextualized inquiry will exceed the costs of such a move.[95] And it is that question, not theory, per se, that I believe best explains many of the debates currently animating property scholarship. Even though Smith attacks declarations by fiat that defend ad hocery,[96] the same criticism can be leveled against the assumption that "[p]romoting the promiscuous employment of contextual information in property" amounts to ignoring the information cost of moving away from traditional rules.[97] Moving away from traditional rules will impose costs, but those costs are likely to not be distributed evenly. Instead, such costs are likely to be borne by those who have traditionally benefitted or stand to benefit from such rules. Maintaining the status quo, however, also imposes costs, primarily on those required to honor the property rights of others even though they enjoy far less benefit from the existing structure. The assumption that the costs of change will exceed the benefits is just that, an assumption.[98]

Fortunately for information theorists, this assumption is widely shared. Although lawyers observe many ways in which property must accommodate the interests of neighbors, of non-owners, and of society, public understanding of property is more in line with Blackstone's "sole and despotic dominion."[99] And though even information theorists will acknowledge that property is more complex than that, caveats aside, their emphasis on the centrality of exclusion is not far removed from the castle model.[100] Put differently, if we consider the debate as more than an academic exercise and instead an attempt to influence public debate and understanding of property, information theorists have a huge advantage. As Smith highlights in *The Economy of Concepts*, simple theories that "capture known facts in a shorter description" are attractive, in part because they are generalizable.[101] Moreover, the status quo and existing

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[95] To return to information cost theory, excessive focus on limited forms of property might impose costs that exceed the transaction cost reduction benefits. *See* Lee Anne Fennell, *The Problem of Resource Access*, 126 HARV. L. REV. 1471, 1474 (2013); *see also* Pierre Schlag, *Coase Minus the Coase Theorem—Some Problems with Chicago Transaction Cost Analysis*, 99 IOWA L. REV. 175, 212 (2013) (highlighting the need for law and economics' scholars to "provide . . . some theoretically cogent criterion capable of application to serve as the conceptual pivot for deciding when to economize on the cost in question by tweaking the legal regime and when to instead leave the market and the firms to adjust on their own").

[96] Smith, *supra* note 1, at 1720 n.112.

[97] *Id*. at 1717; Smith, *supra* note 37, at 283.

[98] ALEXANDER & PEÑALVER, *supra* note 81, at 137–43.

[99] 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (facsimile ed. 1979) (1765–69). For an excellent related discussion, see Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601 (1998).

[100] *Compare* Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 971–74 (2009), *with* Alexander, *supra* note 35, at 1066 (arguing that common sense morality extends further than Smith envisions).

[101] Smith, *The Economy of Concepts*, *supra* note 51, at 2107; *see also* Smith, *supra* note 37, at 282.

distributions of property have tremendous pull on people. The possibility of change-induced loss generally outweighs the possibility of offsetting gains in all but rare moments of crisis.[102] Behavioral economists might explain a status quo bias in terms of risk aversion or the endowment effect,[103] but for whatever reason, the demand for meaningful change in property law is generally muted.[104] But reading *The Law of Things* and *The Economy of Concepts* makes it seem as if the status quo—finding form here as a celebration of simple exclusionary rules—needs defending.

The odd part is that both camps seem to think that they are losing. *A Statement on Progressive Property*, written by Alexander, Peñalver, Singer, and Underkuffler, begins, "[t]he common conception of property as protection of individual control over valuable resources is both intuitively and legally powerful."[105] It continues with an explanation of why the common conception is "inadequate."[106] Similarly, Smith bills the modular theory as a "clear contrast with conventional property theories."[107] According to Smith, the idea that property law is the law of things "suffers from a serious image problem."[108] Smith presents traditional rules in general as under siege by legal realists and post-realists. Smith complains, "The burden is shifted to anyone who wants to deny the relevance of context, and when using context can be shown to be congruent with a virtuous purpose, objections are labeled as formalistic or worse."[109] As in Rail Baron, both progressives and conservatives seem to be attempting to claim that they are losing. In one sense they both may be right: information theorists arguably have the support of the masses (and they know it[110]), while progressive property scholars are likely to find their theories better received at most academic conferences. But in the larger sense, my team (to admit the obvious) is losing. Change in property law is slow and, given public sentiment, information theorists command the high ground.

But instead of admitting defeat or pleading for mercy, I want to

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[102] *See, e.g.*, Nestor M. Davidson, *Property and Identity: Vulnerability and Insecurity in the Housing Crisis*, 47 HARV. C.R.-C.L. L. REV. 119, 131 (2012). The importance of crisis to inspire political change is perhaps best exemplified by the Great Depression and President Roosevelt's progressive, experimental responses. *See, e.g.*, David M. Kennedy, *What the New Deal Did*, 124 POL. SCI. Q. 251 (2009).

[103] *See* Jeffrey Douglas Jones, *Property and Personhood Revisited*, 1 WAKE FOREST J.L. & POL'Y 93, 115–16 (2011) (summarizing risk aversion and endowment effect studies).

[104] *See generally* Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 546 (1989) (describing change in the American legal system as reactive, not proactive).

[105] Alexander et al., *supra* note 5, at 743.

[106] *Id*.

[107] Smith, *supra* note 1, at 1716.

[108] *Id*. at 1691.

[109] *Id*. at 1718; Smith, *supra* note 37, at 283 (same quote).

[110] *See* Smith, *supra* note 37, at 287 (arguing that in contrast with the bundle-of-rights perspective, the "architectural," or modular, view of property "takes lay views seriously"); Smith, *supra* note 32, at 114 (arguing in favor of "lay intuition").

question the value of continuing to rationalize and justify the status quo. Even though Smith claims that "the architectural view raises the overlooked question of why things *could not* be otherwise,"[111] my impression is that it does an admirable job explaining why things are the way they are but does very little to disprove the possibility of change for the better. Why could things not be otherwise? For Smith, the exclusionary rule works because it leaves implicit "many of the protected privileges of use."[112] By placing such significant weight on the value of simplicity, Smith fails to consider the costs of "*shortcut*[*s*]" to non-owners of a static system that keeps property rights implicit and uncovered.[113] In his response to modular theory, Claeys criticizes economic-based legal scholarship for having a purely instrumentalist view of normative categories and for "bootstrapping" on existing doctrine.[114] I would take this critique a step further and argue that economic rationalizing theories confuse descriptions of the way the world is and the predictive value of models for normative value.[115] The fact that we have a certain set of building blocks, or modules, does not mean that other blocks would not work or that the arrangement of the existing blocks is necessarily best. Smith's effort to read out the exceptions and to construct a simplistic model of property[116] ends up reading as an attempt to justify the status quo and to praise the system. It is fun to think about things in terms of Legos, but the real world and the law of property are much more complex. The modular theory provides a novel and interesting way of thinking about and describing the importance of "things" in property and the law as it exists. But Smith's concern that the bundle of rights "downplays the cost of innovation" is overly speculative in light of existing problems in the architecture of property and distribution.[117] The status quo is fully capable of defending itself and the problems of property and distribution need proposals for improvement and not further elaboration on how great the rules work together.

B. *A Narrow Vision*

Thomas Merrill's recent scholarship offers an alternative to the modular analogy as part of an attack on the bundle of rights that stands as both an ode and an elegy to property. Merrill sings property's praises,

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[111] Smith, *supra* note 1, at 1694 (emphasis added).

[112] Smith, *The Economy of Concepts*, *supra* note 51, at 2104.

[113] Smith, *supra* note 37, at 282 (emphasis in original).

[114] Claeys, *supra* note 61, at 135, 147.

[115] *See* Peñalver, *supra* note 40, at 860.

[116] *See* Adam Mossoff, *The False Promise of the Right to Exclude*, 8 ECON J. WATCH 255, 258 (2011) (highlighting the reductionism of information cost theory), http://econjwatch.org/articles/the-false-promise-of-the-right-to-exclude [http://perma.cc/FQV6-GU5N].

[117] Smith, *supra* note 37, at 288.

doing so in a way that attempts to reduce property from a system with different goals and modes of governance to a more narrow understanding of what Merrill labels the "property strategy."[118] He also argues that the bundle should be replaced by a prism, the advantage of which is that a prism metaphor highlights the importance of one's perspective when considering property.[119] Merrill's reductionist project boils away the role of governance, equity, and even the state, leaving a condensed, more pure, version of property. His purpose seems to be to draw a smaller circle around what counts as "property." In contrast to more holistic understandings of property that prioritize the role of the state and recognize that property is regulated in many different and sometimes conflicting ways, Merrill offers a narrow vision of property's "elemental features."[120] Although Merrill's emphasis is on what makes the property strategy work and how it operates in various settings, his closing acknowledgment of the disadvantages of the property strategy is fairly damning to his larger reductionist project. The disadvantages are significant enough that they convert what was intended to be a celebration of simple property rules into an elegy.

Framed as a descriptive argument, Merrill argues that the property strategy is used by all human societies and consists of a limited set of characteristics. Merrill notes that "[p]roperty law is highly complex, and all of its details cannot be reduced to the elemental features of the property strategy," but he goes on to argue that the best way to understand property is to "consider what makes property work in its most elemental applications."[121] For those familiar with his prior work, Merrill's answer to "what makes property work" is not exactly new,[122] though it is introduced in a surprising way. In order to deflect the attacks on exclusion-centered approaches to property, Merrill adopts a conciliatory tone, writing, "[r]ather than joust over whether exclusion entails other attributes, or whether it is or is not compatible with various qualifications, it is more profitable to specify the central characteristics with greater precision."[123] While such language suggests a move away from the scholarly debates of the past decade, readers are disabused of that idea in the very next paragraph. Merrill asserts, "two prerogatives characterize ownership in all of its manifestations . . . *residual managerial authority* . . . [and] *residual accessionary rights*."[124] Merrill later acknowledges that resources can be

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[118] Merrill, *supra* note 53.
[119] Merrill, *supra* note 52, at 247.
[120] Merrill, *supra* note 53, at 2063.
[121] *Id*.
[122] *See* Merrill, *Right to Exclude*, *supra* note 30.
[123] Merrill, *supra* note 53, at 2067.
[124] *Id*. (emphasis in original).

subjected to a range of obligations and rights that do not fit neatly into these two prerogatives, but claims that "[t]he property strategy requires that the obligations imposed on the owner be sufficiently limited in number and scope."[125] Picking up the lance once more, Merrill explains that residual managerial authority and residual accessionary rights are but more precise characterizations of the right to exclude.[126]

As an idea that is not tethered to the U.S. legal system, the property strategy theory, although not based on natural law, is a simplified proclamation about the nature of property itself, not about property as it is found in any particular country. According to *The Property Strategy*, property law differs across societies as a matter of degree but not in its fundamental traits. Merrill argues that "the basic architecture of the strategy—owner, object, residual authority, and accessionary rights—is the same in all contexts and defines the property strategy relative to other strategies for organizing the use of resources."[127] The examples that Merrill chooses—a family farm, Native American tribes, and the household—support the idea that there is a basic architecture, but do so with the tendency, found in most efficiency-based models of the law, to overlook counter-narratives. Thus, Merrill's stylized family farm is just that, a family farm, not a gigantic agribusiness defined by its corporate form. The family farm's accessionary gains or losses are residual for Merrill in that they come after the farm has met its obligations, but they are not products of state support such as infrastructure improvements and farm subsidies. The same sort of reductionism informs Merrill's treatment of Indian tribes. By now it is well documented that, despite claims to the contrary by outsiders, Indians historically employed what Merrill calls the property strategy, albeit in ways that are often distinct from non-Indian expectations regarding ownership.[128] But by quickly establishing that Indians and other indigenous peoples often have used rights to goods or land, any differences across tribes are treated as irrelevant.[129] Similarly, the household is treated in a summary fashion that shows the property strategy at work but does not bother to discuss complications to the general observation that property rights are at work, even in the intimate setting of the household.[130] Yet,

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[125] *Id*. at 2069.

[126] *Id*. at 2068. *But see* James Y. Stern, *Property's Constitution*, 101 CALIF. L. REV. 277, 301–02 (2013).

[127] Merrill, *supra* note 53, at 2071.

[128] ROBERT J. MILLER, RESERVATION "CAPITALISM": ECONOMIC DEVELOPMENT IN INDIAN COUNTRY 9–10 (2012); Terry L. Anderson, *The Property Rights Paradigm: An Introduction*, *in* PROPERTY RIGHTS AND INDIAN ECONOMIES 1–3 (Terry L. Anderson ed., 1992).

[129] *See generally* Ezra Rosser*, Ambiguity and the Academic: The Dangerous Attraction of Pan-Indian Legal Analysis*, 119 HARV. L. REV. F. 141 (2006) (arguing that scholars and the law should recognize tribal differences).

[130] Merrill's account of household property draws heavily upon ROBERT C. ELLICKSON, THE HOUSEHOLD: INFORMAL ORDER AROUND THE HEARTH 60–61 (2008) (using basic concepts from the

property rights in the household have shifted dramatically over the last two centuries and, in many respects, remain contested as society continues its long move away from rigid patriarchy. In all three examples, the basic architecture can be seen, in part because the description is kept basic and does not show where similarities in regulating property break down or are subject to constant change.

The takeaway lessons Merrill draws from his examples are surprising and not entirely supported. As isolated observation points, Merrill's three examples do support the idea that "the property strategy is at work" in many contexts where resources are subject to exclusionary control by an individual.[131] But he goes on to state that "neither the state, nor the right of alienation is a necessary feature of the property strategy."[132] Merrill acknowledges that many scholars see property as wholly a product of the state, but Merrill argues that, because the property strategy can be observed in informal settings and tribal societies without a modern (Western) government, the state can be useful, but is not required. In discussing this independent grounding for property law, Merrill's view of the role of the state is squarely laissez-faire. Property rights are good and the role of the state is to support the property strategy and the authority of owners—Merrill's examples are permitting self-help and facilitating market exchange.[133] Tellingly, Merrill adds that "the state has a role in staying its own hand from interfering with the prerogatives of owners."[134] Although Merrill calls this government "forbearance," it is also transparently a call for a laissez-faire approach by the government, with an emphasis on "protect[ing] the expectations of owners."[135]

The problem with these takeaways—that the state is not required for the property strategy and that forbearance should be emphasized—is that they do not necessarily flow from the observation that a property strategy can be observed in many contexts. A rich and nuanced description of informal norms regarding property rights can make the state seem unimportant, but the operation of informal control may depend on the state's background rules and protections.[136] Put differently, the state's role may be hidden or seem to be of secondary importance in Shasta County,[137]

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theory of the ownership of enterprise and transaction cost considerations to frame his inquiry into powers of household owners).

[131] Merrill, *supra* note 53, at 2076.

[132] *Id*.

[133] *Id*. at 2077–78.

[134] *Id*. at 2078.

[135] *Id*.

[136] *See* Stephen Clowney, *Rule of Flesh and Bone: The Dark Side of Informal Property Rights*, 2015 U. ILL. L. REV. 59, 62 (arguing that the "rosy view" of private ordering has largely ignored the amount of violence that occurs in the absence of a centralized enforcement mechanism).

[137] *See* ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991) (the classic U.S. legal scholarship on informal property rights).

on a family farm, among Native Americans, or around the family dining room, but that does not mean the state is unimportant or that the property strategy exists independently of the state.[138] Similarly, Merrill argues that "the property strategy will be severely tested" by "bandit state[s that] expropriate productive effort by citizens to enrich those who control the state apparatus."[139] But this argument is based on the assumption that the property strategy is good. Does progressive taxation of property owners in favor of the propertyless amount to banditry? Or is the reverse true: can calls for government forbearance by wealthy property owners and state support of the property strategy amount to expropriation (of labor if not property)? Without delving into context, into the details of each society, it is impossible to know whether "threatening the security of property rights" is a bad or good thing.[140] Though Merrill's language suggests an answer to this question regardless of context, to take an extreme example, consider slavery (secure property rights in another person). Or, less extreme but also an example of a constructive threat to the security of property, consider rigid forms of extreme social and wealth inequality coupled with limited mobility and a frayed safety net.

Merrill's presentation of the advantages and disadvantages of the property strategy is quite insightful and compelling. He shows how the property strategy: (1) is derived from local knowledge; (2) provides incentives for owners to maximize the value of resources; (3) allows for scalability of inputs; (4) goes a long way towards avoiding the tragedy of the commons; (5) is a necessary precondition for exchange because it reduces transaction costs; (6) can serve to diffuse political power; and (7) helps individuals find personal meaning and fulfill life goals.[141] These advantages are real and would be acknowledged by most property scholars, regardless of their progressive or conservative leanings. Unfortunately, they are also subject to qualification, and in certain contexts these advantages, especially numbers six and seven, may not materialize. Put differently, the disadvantages of the property strategy may overwhelm some of the advantages. Because the advantages identified by Merrill are less controversial, I will spend more time exploring the disadvantages

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[138] The discussion of states and Native American tribes found in *The Property Strategy* is problematic for an additional reason: it seems to suggest that only certain types of states (western, centralized, and modern) count as states. This position discounts the legitimacy and wisdom of alternative tribal governance forms and seems to require that tribal governance resemble non-Indian forms of government for their authority to be acknowledged as more than simply governance through informal norms. *See* Merrill, *supra* note 53, at 2063–64, 2071. For a great discussion of the historical origins and modern relevance of such discounting, see ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1992).

[139] Merrill, *supra* note 53, at 2078.

[140] *Id.* at 2077.

[141] *Id.* at 2081–88.

presented by Merrill.

First, the property strategy, according to Merrill, can create new externalities. These externalities can be positive or negative, but by dividing the world into separate spheres, the strategy may create incentives to pass along costs (where there are negative externalities) or to not act for the benefit of others (where there are positive externalities). The second disadvantage Merrill identifies is that "granting property rights can create monopolies with troublesome social consequences."[142] Third, private property can interfere with services that require networks and linkages (public access networks), which add value to private property, albeit by compromising on the use of the property strategy.[143] Fourth, the exclusionary aspect of property—that it gives authority over property and concentrates gains and losses in the hands of owners—means that the property strategy "enhances the risk individual owners face."[144] Finally, Merrill acknowledges that the property strategy "tends to promote inequality."[145] In the case of all these disadvantages, Merrill acknowledges that the solution may be greater state involvement in regulating property or in limiting the property strategy.[146]

The last two disadvantages are the most damning. As Merrill observes, "[s]ome would see the tendency for the property strategy to produce inequality as sufficient grounds to condemn the institution as a matter of distributive justice."[147] In a move that progressives are all too familiar with, Merrill immediately moves from this observation to raise the idea that property is theft and Marx and Engels's position that private property should be abolished.[148] Though this might be considered a mild form of red-baiting, Merrill goes on to note that many others "still find property's tendency to generate inequality troubling."[149] Merrill argues that the welfare state in the form of "government safety nets" can mitigate the downsides of risk associated with property, but funding such social insurance through taxation amounts to a further qualification on the property strategy.[150] Though Merrill's discussion of inequality does not include discussion of safety nets, his argument logically includes the possibility that the welfare state can reduce systematic inequality in a similar way to how it lessens the downside risks associated with a property strategy. Merrill concludes *The Property Strategy* by noting that because of

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[142] *Id.* at 2090.
[143] *Id.* at 2091–92.
[144] *Id.* at 2092.
[145] *Id.* at 2093.
[146] *Id.* at 2094–95.
[147] *Id.* at 2094.
[148] *Id.*
[149] *Id.*
[150] *Id.* at 2093.

the disadvantages associated with it, "we are unlikely to see any society adopt an unadulterated property strategy."[151]

Though framed as a celebration of the property strategy, Merrill's account of the connection between property and inequality overwhelms the rest of his argument explaining and celebrating the strategy's ubiquity. When the pervasive inequality in the United States is read into Merrill's theoretical argument, a passage whose tone is intellectual ends up serving as an elegy for property. Merrill writes:

> Extreme inequality in the distribution of property undermines all the reasons previously advanced as strengths of the property strategy. If only a small number of people own property, then the property strategy loses its advantage of tapping into dispersed local knowledge. Further, incentives to be productive will exist for only a few, there will be no reduction in external transaction costs due to the presence of large numbers of potential partners for exchange, and the institution of property will offer little in the way of checks and balances against concentrated power. In other words, the tendency toward inequality should be disturbing to the friends of property, as well as to the more conventional egalitarians animated by considerations of distributive justice.[152]

Reconciling this statement on the dangers of inequality with the generally positive view of property found in the rest of the article is only possible if one imagines that inequality is not a significant concern. Otherwise, as Merrill acknowledges, inequality could undermine all of property's advantages.[153] Friends of property (in which category I place myself, despite the likelihood that my argument to destabilize property will be read as a rejection of property) should be disturbed by the connection between inequality and property. But judging by the inattention to property's tendency to promote inequality, and to inequality in general, at best such friends have been fairly silent. There are, of course, scholars who are concerned about inequality, but their interventions tend to be indirect or limited. Whether because the system is taken for granted or because of justifiable skepticism about the value of theory, few property scholars consider the way inequality undermines the justifications and nature of the property system at large.

Although not intended to do so, Merrill's attack on the bundle of rights offers a partial explanation for scholarly inattention to inequality. Similar

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[151] *Id.* at 2094.
[152] *Id.*
[153] *Id.*

to Smith, Merrill argues that the bundle is a poor metaphor because it fails to provide answers to the questions we ask of property.[154] The "formless" bundle, Merrill explains, "highlights the complexity of the institution without offering any views about its nature or content."[155] One could respond by noting that this statement reveals its own fallacy; namely, the fact that the bundle highlights property's complexity itself says something about the nature of property, especially when contrasted with Merrill's own effort to distill property into its essential characteristics, most prominently exclusion.[156] In place of the bundle, Merrill proposes that a prism is a better metaphor because it captures the idea that property "takes on a different coloration when viewed from different angles."[157] The first two sides of Merrill's four-sided prism are not surprising, as they closely track Merrill's prior work. From the perspective of "strangers", Merrill's first side of the prism, property can be reduced to an easily understood exclusionary command.[158] If the first perspective is a version of Merrill's 1998 *Right to Exclude* article,[159] the second side of the prism corresponds with Smith and Merrill's pioneering article from 2000 on *numerus clausus*.[160] The perspective of "potential transactors" is a bit more nuanced, but mandatory standardization of forms ensures that information costs are kept in check.

The information cost theory loses its punch when it comes to the third and fourth sides of the prism described by Merrill. On the prism's third side, property, as perceived by those within the zone of privity, allows for "a tremendous diversity of rules and practices."[161] Merrill argues that even here, information cost theory explains the abundance of forms because those within the zone of privity can learn the particular contract-like rules easily.[162] But such an argument is fairly analogous to Merrill's own critique of the bundle in that it says nothing about the forms property will take when information costs are not controlling.[163] Merrill faces the same

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[154] Merrill, *supra* note 52, at 247.

[155] *Id*. at 249.

[156] *See* Jane B. Baron, *Rescuing the Bundle-of-Rights Metaphor in Property Law*, 82 U. CIN. L. REV. 57, 60 (2013) (arguing that the bundle concept remains useful both descriptively and normatively); *see also* Fennell, *supra* note 95, at 1500 (arguing that because optimal property entitlements are contingent on "social, economic, and technological conditions," there may be the need to change the composition of the bundle over time).

[157] Merrill, *supra* note 52, at 250.

[158] *Id.* at 247.

[159] Merrill, *Right to Exclude*, *supra* note 30.

[160] Merrill & Smith, *Optimal Standardization*, *supra* note 30.

[161] Merrill, *supra* note 52, at 251.

[162] *Id.*

[163] *Id.* at 250; *see also* Davidson, *supra* note 43, at 1630 (arguing that reductionist accounts of property such as those offered by information theorists "fail to account for the dynamic aspect of the internal content of the standard forms").

challenge when attempting to squeeze the fourth side of the prism—the perspective on property of neighbors, or more broadly, "anyone who experiences significant external effects from the way . . . property is managed"—into the information cost theory.[164] Here too, there are "relatively high information costs."[165] This broad category does not lend itself to a simple exclusion-based theory of property, unless the effects are thought to invade protected property rights,[166] or to a contractual relationship since the parties are not in contract. In a move open to contestation by those who see exceptions as integral to how rules are understood, Merrill argues that on this side of the prism, "[w]here external effects are concerned, *context is everything*."[167]

In many respects, Merrill's prism proposal signals a willingness to enter into peace negotiations with progressive scholars. Although it seems to stand at odds with the neo-natural law aspects of *The Property Strategy*, Merrill describes property as "a social institution."[168] Merrill minimizes the distance between essentialists who emphasize exclusion and nominalists who reject the idea that property can be simplified in this way by arguing that the disagreement "reduces to one stick."[169] By focusing as much as he does in *The Property Prism* on elements of property that do not rest as comfortably with the information cost theory, on the sides of the prism that do not embody the property strategy but instead are complex and contextual, Merrill creates space to reconcile conservative descriptions of property with progressive critique. Put differently, the status quo bias observable in celebrations of existing rules without regard either to how those rules are experienced by those excluded from enjoying property or to the possibility of improving on the existing structure, may be a matter of choice, not oversight. With the final two perspectives on property found in *The Property Prism*, and especially with the acknowledgement of the disadvantages of property discussed in *The Property Strategy*, the choice of information theorists to focus on describing the system and applauding how it works cannot be dismissed as ignorance of the costs of the system. Instead, this choice signals a belief that overall the rules work, or that there is a need, as a normative matter, to fight against the possibility that the rules will be further degraded by the long shadow of legal realism. By acknowledging the different perspectives one can have on property and

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[164] Merrill, *supra* note 52, at 251.

[165] *Id.* at 252.

[166] *Id.*

[167] *Id.* (emphasis added).

[168] *Id.* at 249.

[169] *Id*. On the other hand, from Merrill's earlier work, it is clear he considers this a very important stick: "[T]o the extent one has the right to exclude, then one has property; conversely, to the extent one does not have exclusion rights, one does not have property." Merrill, *Right to Exclude*, *supra* note 30, at 753.

property's disadvantages, Merrill invites both agreement with regard to his description of property and disagreement about the power existing rules should hold over the imagination.[170]

III. OVERRELIANCE

It is difficult to identify a single strand of scholarship as important to progressive thought as information cost theory has recently been for conservative approaches to property. But arguably, at the heart of progressive property scholarship is the idea that those without title but with a history of enjoying particular forms of property have some sort of right to such property. Whereas conservatives have turned to formalism, progressives emphasize the ways in which access to resources or a long history of use can, and sometimes *should*, be graced with the property label.[171] Published nearly fifty years ago, Charles Reich's *The New Property* argued that government largess, including everything from business licenses to welfare, should be associated with property protections.[172] A quarter century ago, Joseph Singer published *The Reliance Interest in Property*, in which he argued that a reliance on property—focusing on workers' rights to a steel mill—can mature into a recognized property right.[173] These two works stand as two of the most important contributions to progressive property scholarship since Felix Cohen's work on legal realism earlier in the twentieth century.[174] Though the two articles were written at different historical moments, they propose similar solutions to the problems faced by the poor and the vulnerable. They argue that some of the poor already have rights that should be recognized as property rights, with the goal being incorporation into the existing structure. These articles were radical in a sense: arguing that new property and reliance interests should be recognized as part of the generally accepted law pushes against the boundaries of property law. But these arguments are also limited in that they embrace property law's vocabulary and legitimacy.[175] Escaping this limit requires extending the

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[170] The same is arguably true for Smith who, though generally favoring an exclusion strategy, acknowledges that a governance strategy may be appropriate when the stakes are high enough. Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1757 (2004). One could agree with his description of property rules as largely exclusionary yet disagree about whether exclusion or governance is best depending on whether one sees the stakes as routinely high or routinely low.

[171] *See, e.g.*, Alexander, *supra* note 9.

[172] Reich, *supra* note 22.

[173] Singer, *supra* note 23.

[174] *See, e.g.*, Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

[175] *See* GREGORY S. ALEXANDER, COMMODITY & PROPERTY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970, at 370–77 (making a similar argument about *The New Property*); Williams, *supra* note 7, at 324 (same).

insights from both works such that entrance is available even to those who cannot ground their rights to basic security on property-type claims of right.[176]

Given their canonical status, I am going to be brief in my overview of *The New Property* and *The Reliance Interest in Property*. According to Reich, property is important because it protects individuals from the state.[177] With the rise of the modern bureaucratic state, more and more people are dependent on the government for their livelihood.[178] Grouping everything from broadcast rights and professional licensing to government contracts and welfare, Reich argues that government largess should be treated as a new form of property and protected as such.[179] By showing that there is not much difference between new property and traditional property, Reich paved the way for the U.S. Supreme Court to recognize procedural rights connected with welfare receipt.[180] The promise of *Goldberg*, contained in a case footnote citing Reich for the idea that welfare is a form of property, was not taken up in subsequent cases and was finally rejected when President Clinton signed welfare reform into law.[181] Despite this revealed limitation, Reich had made his scholarly mark.[182] New property was here to stay and it forced a reconceptualization of property generally, opening up entire new areas to property scholarship and showing the overlap between old and new property.

Singer's masterful *The Reliance Interest in Property* similarly inspired a generation of progressive scholarship. The hornbook version of the article shows how a history of use of particular properties by non-owners

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[176] Put differently, escaping this limit requires adopting an approach that more extensively "wipes the intellectual slate clean and reimagines property afresh." Eric T. Freyfogle, *Private Ownership and Human Flourishing: An Exploratory Overview*, 24 STELLENBOSCH L. REV. 430, 452–53 (2013).

[177] Reich, *supra* note 22, at 733.

[178] *See id.* at 737 (detailing the scope of governmental employment and the state's "vast intangible wealth," which have created a society in which "[h]ardly any citizen leads his life without at least partial dependence on wealth flowing through the giant government syphon").

[179] *Id.* at 744–46.

[180] *Compare* Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970), *with* 42 U.S.C. § 601(b) (2012) (illustrating the Court's treatment of public assistance as akin in some respects to entitlements whereas through welfare reform that characterization was specifically eliminated).

[181] As Professor James Stern explains, the Supreme Court "balked at the idea of extending takings protection" to new property. Stern, *supra* note 126, at 281; *see also* Christopher Serkin, *Passive Takings: The State's Affirmative Duty to Protect Property*, 113 MICH. L. REV. 345, 357–59 (2014) (detailing the Court's refusal to "expand affirmative federal constitutional obligations to provide welfare rights" after *Goldberg*). Merrill dismisses new property cases as "outliers," arguing that "the concept of property has been fudged." Merrill, *Right to Exclude*, *supra* note 30, at 752. The welfare-reform bill President Clinton signed in August 1996, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, was an "end to the statutory entitlement to cash assistance, replacing it with a block grant." PETER EDELMAN, SO RICH, SO POOR: WHY IT'S SO HARD TO END POVERTY IN AMERICA 86–87 (2013).

[182] *See* Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 767 tbl. I (1996) (listing *The New Property* as the fourth most-cited article of all time).

can, with time, become the foundation for legal rights associated with those properties.[183] Framed as a story about the reliance interests of workers and their community in the context of the closing of steel mills in Youngstown, Ohio,[184] Singer argues that judges could have used existing strains of property law doctrine to protect the reliance interests of union workers.[185] Though U.S. Steel asserted a right to unilaterally control the destiny of the plants, including the right to destroy the plants, Singer argued that the law could have and should protect the right of workers to buy the plants in order to keep them operational.[186] The article in many ways serves as a blueprint for progressive property scholarship: it attacks the idea of the free market,[187] draws attention to the social obligations of ownership,[188] and emphasizes recognized positive rights.[189] These ripples have spread across the scholarly horizon. A less frequently observed aspect of *The Reliance Interest in Property* is that it is grounded; it presents a new theory for understanding property but does not lose sight of how the law impacts people. Its lengthy discussion of the political economy of plant closings could have been spun off into a separate article. But by building his reliance interest argument around the historical moment, Singer shows how theory can inform practice and, perhaps more unusual among property scholars where theory is often divorced from practice, how context can inform theory.

Together, Reich and Singer show the importance of labels, of identifying something as "property." Whether the subject is denial of welfare benefits or plant closings, classifying something as "property" can lead to greater legal protection. Though Reich and Singer deployed it to advocate for the vulnerable, the idea that defining something as a property right can provide individuals additional legal protection is neither inherently progressive nor conservative. For example, Richard Epstein employs the power of the "property" label to defend against state regulation.[190] By embracing all the sticks of the bundle as "property"

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[183] *See* Joseph William Singer, *The Reliance Interest in Property Revisited*, 7 UNBOUND: HARV. J. LEGAL LEFT 79, 79 (2011), http://legalleft.org/wp-content/uploads/2015/09/Singer_Reliance-Interest-Revisited.pdf [http://perma.cc/L3TQ-LS4Y].

[184] For more on plant closings, see Fran Ansley, *Standing Rusty and Rolling Empty: Law, Poverty, and America's Eroding Industrial Base*, 81 GEO. L.J. 1757, 1758 (1993), and Staughton Lynd, *Towards a Not-For-Profit Economy: Public Development Authorities for Acquisition and Use of Industrial Property*, 22 HARV. C.R.-C.L. L. REV. 13, 13–14 (1987) (focusing on *Youngstown*).

[185] Singer, *supra* note 23, at 621.

[186] *Id.* at 617–21.

[187] *Id.* at 633.

[188] *Id.* at 659–60.

[189] *Id.* at 663.

[190] *See* Richard A. Epstein, *Bundle-of-Rights Theory as a Bulwark Against Statist Conceptions of Private Property*, 8 ECON J. WATCH 223, 224 (2011), http://econjwatch.org/articles/bundle-of-rights-theory-as-a-bulwark-against-statist-conceptions-of-private-property [http://perma.cc/MQH7-7NRV]

subject to the Takings Clause, Epstein challenges the idea that the bundle's disaggregating potential gives more space for progressive interventions in private property.[191] Saying someone has a "property right" to something, whether to an object or to a state of affairs, suggests that that person has a legally protected expectation. For those for whom the status of their right is a question, ascribing the label can be empowering and can be used to defend against the operations of the state or the market.[192] But there is a downside to this move as well. If the vulnerable are incorporated into the system using theories such as new property or the reliance interest, it arguably serves to reaffirm and support the existing structure. This is especially true where the argument is not that the theories are novel but that they reflect existing law, or at least that existing law provides ample space for them.

Whether the incorporation strategy evident in *The New Property* and *The Reliance Interest in Property* is a good or bad thing depends crucially on context. Are the claims that rights should be treated as property legitimate? Does incorporation arrest broader challenges to the structure? Are property rights the proper form of protection or are other avenues more appropriate? Even under a property law regime that accepts claims to rights tied to theories of new property or reliance interests, what groups remain excluded and how should their rights be recognized? The answers to these questions are necessarily context specific and, as such, defy all-encompassing claims. Taking as a given a commitment to the idea that the law should work for all, not just the privileged, the promise and limits of Reich's and Singer's works raise the broad question of whether property law is something you should work with or work against.

Of course, one response to these questions is to try to limit the discussion, to reduce the scope of acceptable scholarship. James Stern ends his recent article, *Property's Constitution*, with a call for "renewed emphasis on doctrinal consistency and symmetry," which he explains, "may supply a route through the tangled maze of normative argumentation that surrounds the institution of property and reduce the occasions for unfettered moral theorizing."[193] At first glance, Stern's article itself seems to do just this. Stern offers a theory for the Court's takings jurisprudence

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(arguing the "bundle-of-rights image" of property "offers the best path to preserving the institution of limited government").

[191] *Id.*

[192] Notably, critical race theory scholars faulted the critical legal studies movement for treating rights dismissively for this reason. *See, e.g.*, Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 404–05 (1987); *see also* John Hardwick, *The Schism Between Minorities and the Critical Legal Studies Movement: Requiem for a Heavyweight?*, 11 B.C. THIRD WORLD L.J. 137, 154–55 (1991) (describing the split between critical race scholars and critical legal studies scholars).

[193] Stern, *supra* note 126, at 326.

that, as an explanation, arguably accomplishes his stated goal: "to make sense of the law we have."[194] But in doing so, Stern argues that no compensation is owed when the government takes away "new property" entitlements such as welfare.[195] While this position may accord with the Supreme Court, Stern's argument is not simply descriptive. Instead, Stern argues, "[i]f a person loses a property right and the right does not then shift to the government or to another private party, the person has been deprived of property but has not suffered a taking."[196] Moreover, in its embrace of doctrine as the limits of inquiry, *Property's Constitution* ends up advocating a normative vision of property as control over things, a concept that Stern argues should be treated separately from "the distribution of material wealth."[197] Again, the problem with this position is not that it is inaccurate—as a description of the Supreme Court's treatment of property, it seems fairly accurate—but that it stakes out a normative position even as it seeks to silence other perspectives on the morality of property. Stern may be right, but a theory that sees property primarily as a tool to protect wealth inequality, not as a tool separate from distribution, seems equally plausible.[198] Answering theory with formalism is comforting for those seeking explanations but not if the goal is to understand what property should become.

The argument that concerns about social obligations ought to be channeled almost entirely through tax-and-transfer programs amounts to a similar effort to take issues of inequality off the table. In *The Affirmative Duties of Property Owners*, Robert Ellickson attacks the idea that property law is the proper arena for tackling issues of redistribution.[199] Citing "[c]onsiderations of efficiency, horizontal equity, and relative institutional competence," Ellickson argues that distributional goals are best addressed through tax-and-transfer programs, not property law.[200] Although not framed as such, Ellickson's position can be summarized as a property-centric version of Louis Kaplow and Steven Shavell's earlier and well-

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[194] *Id.* at 285.

[195] *Id.* at 317.

[196] *Id.* at 284.

[197] *Id.* at 285. *But see* Jane B. Baron, *Property as Control: The Case of Information*, 18 MICH. TELECOMM. & TECH. L. REV. 367, 416–17 (2012) ("Even physical property is far less amenable to consolidated control than is sometimes thought. Most ownership rights are qualified. . . . In the eyes of some theorists, these limits are exceptional; in the eyes of others, these limits are the norm. Either way, property does not always or necessarily entail control." (footnotes omitted)).

[198] *See* Christopher Serkin, *Affirmative Constitutional Commitments: The State's Obligations to Property Owners*, 2 BRIGHAM-KANNER PROP. RTS. CONF. J. 109, 115 (2013) (explaining that to reduce the role of the state to protecting private ordering amounts to "benefitting the rich at the expense of the poor—the wealth of the few over the welfare of the many").

[199] Ellickson, *supra* note 7, at 44.

[200] *Id.* at 66.

cited tax-not-legal-rules argument.[201] And it suffers the same flaws. A recent article by Zachary Liscow does an excellent job laying these out.[202] Liscow shows that even taking the efficiency-through-taxation solution on its own terms, it does not serve as a generalizable rule because of tax-based inefficiencies. Liscow explains, "redistribution through legal rules may be inefficient and costly, but so is redistribution through taxation."[203] The idea that redistributive legal rules should not be implemented because of problems of horizontal equity, Liscow notes, "amounts to holding the desperately needed aid for the poor hostage to the desire to help all of the poor."[204] But the biggest flaw in Kaplow and Shavell's, and now Ellickson's, taxes-are-more-efficient argument is the framing of the choice. Claiming that scholars should abandon distributive concerns when it comes to setting legal rules because of the possibility of a tax solution does little more than make tax the *deus ex machina* solution to distribution and property. It sounds nice in theory but breaks down in politics.[205] Professors

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[201] *See* Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 667 (1994) (developing the argument that "redistribution through legal rules offers no advantage over redistribution through the income tax system"); Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821, 821–22 (2000) (addressing qualifications to the argument that legal rules should not be readjusted to redistribute income); *see also* Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 993 (2001) ("[M]any legal rules probably have little effect on the distribution of income.").

[202] Zachary Liscow, *Reducing Inequality on the Cheap: When Legal Rule Design Should Incorporate Equity as Well as Efficiency*, 123 YALE L.J. 2478, 2480–82 (2014); *see also* Daphna Lewinsohn-Zamir, *In Defense of Redistribution Through Private Law*, 91 MINN. L. REV. 326, 327 (2006) (similarly deconstructing and critiquing Kaplow and Shavell's argument).

[203] Liscow, *supra* note 202, at 2482; *see also* Kenneth J. Arrow, *The Trade-off Between Growth and Equity*, *in* 1 KENNETH J. ARROW, COLLECTED PAPERS OF KENNETH J. ARROW: SOCIAL CHOICE AND JUSTICE 190, 196–98 (1983) (detailing the range of costs associated with tax and transfer based redistribution); Christine Jolls, *Behavioral Economics Analysis of Redistributive Legal Rules*, 51 VAND. L. REV. 1653, 1677 (1998) ("[T]he question whether redistributive legal rules or taxes cause greater distortion in work incentives is ultimately an empirical one and cannot be definitively resolved by the sort of analytic argument offered in the existing law and economics literature . . . .").

[204] Liscow, *supra* note 202, at 2501.

[205] In politics, redistribution to the poor remains politically contentious. Trends, though, seem to be away from redistribution. *See, e.g.*, MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH 3 (1st ed. 2005) (describing the movement to lessen estate taxes despite such taxes' only being collected from the wealthiest estates); JOEL F. HANDLER, THE POVERTY OF WELFARE REFORM 3 (1995) (discussing the anti-poor political environment that led to welfare reform); CHARLES LEWIS & BILL ALLISON, THE CHEATING OF AMERICA: HOW TAX AVOIDANCE AND EVASION BY THE SUPER RICH ARE COSTING THE COUNTRY BILLIONS—AND WHAT YOU CAN DO ABOUT IT 6 (2002) (describing the tax evasion methods of wealthy individuals and corporations, as well as the country's permissive approach to such practices). Moreover, redistribution through legal rules may, in some circumstances, be less politically costly than accomplishing the same through taxes and transfers. Lee Anne Fennell & Richard H. McAdams, *Fairness in Law and Economics: Introduction* 5 (Coase-Sandor Inst. for Law & Econ., Working Paper No. 704, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2504819 [http://perma.cc/BE6N-4S59].

Lee Fennell and Richard McAdams argue convincingly that "[a]ttention to the reality of political action costs should mark an end to categorical, empirically unsupported advice against pursuing distributive objectives outside of the tax system."[206] As Lascow writes, "if transfers are unavailable in practice, their theoretical availability is irrelevant; as a result, the legal rule should adopt the second-best policy of taking equity directly into account."[207] Suggesting otherwise may be intellectually satisfying but it requires considerable distance from the limited American political appetite for taxation and redistribution.

Rather than avoiding moralizing about property, progressive property scholars embrace the connection between the law as it is and the law as it could be. They answer the broad question on whether to work with property to achieve progressive goals affirmatively. Although it is tempting for skeptics, including myself, to see this as a case of property scholars seeing nails all around, progressive scholars have offered new interpretations of existing doctrine and traditions in property law as a way of creating space for property law to better serve human values. Having previously written a summary and partial critique of progressive property, in this Article I am not going to present in detail Alexander's social-obligation norm theory, Peñalver's virtue ethics approach, or Singer's democratic model.[208] Instead, my goal here is to suggest some reasons to question the "work with" answer in light of property law's tendency to resist change.[209] To further explore the "work with" stance towards property, this next sub-Part considers a recent "property"-based argument about how the law should respond to injustice and inequality: David Super's attempt to bring *The New Property* to bear directly on issues of poverty and inequality in the wake of the Great Recession.[210] Super's *A New New Property* illustrates both the power of property and the risk that channeling progressive visions through a property-law framework will limit them.

In *A New New Property*, Super argues that property law needs to be expanded to secure the community and family rights of the poor in ways that mirror the protection currently enjoyed by the wealthy. As the article's title suggests, Super's proposal serves in many ways as an update and an

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[206] Lee Anne Fennell & Richard H. McAdams, The Distributive Deficit in Law and Economics 5 (Sept. 4, 2015) (unpublished manuscript) (on file with author); *see also* Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 420 (1981).

[207] Liscow, *supra* note 202, at 2508.

[208] For a detailed review of these contributions, see Rosser, *supra* note 44, at 116–23.

[209] For a strong counter-argument "express[ing] slightly more confidence in property's progressive bona fides," see Timothy M. Mulvaney, *Progressive Property Moving Forward*, 5 CALIF. L. REV. CIRCUIT 349, 358 (2014), http://www.californialawreview.org/wp-content/uploads/2014/11/MULVANEY_349.pdf [http://perma.cc/2R9S-966P].

[210] *See* Super, *supra* note 24, at 1781–82.

effort to reanimate aspects of Reich's *The New Property*. Super shows that while the legal response to *The New Property* was largely confined to a layer of procedural protections for the poor, Reich originally was skeptical that procedural rules alone would be enough to protect individuals, particularly the poor, from the state.[211] Super observes that "the dramatic growth of inequality" in the fifty years that passed since the publication of *The New Property*, was something Reich could not have fully anticipated.[212] Accordingly, *A New New Property* tackles the implications of this rise in inequality on the role of property in society, or as Super explains, "[w]hereas Reich's primary focus was the subjugation individuals face without property rights, this Article's concern is the consequences of extending property law's protection to one segment of the population but not another. . . . [T]his Article is concerned primarily with property's role in stratifying society."[213] Despite the difference in focus, the prescription offered by Super is the same as that offered by Reich half a century before: extend property protections to the poor.

The basic problem that Super identifies with property law's role in society today is that it operates almost solely for the benefit of the privileged.[214] Super writes, "[o]ur nation is, again, a house divided, with one segment of the population enjoying the freedom that property rights bring and the other lacking those protections."[215] Super establishes this claim through a two-part argument. First, Super presents the widening gulf since the 1970s between low-income people and the rich.[216] As is appropriate in a property article, Super emphasizes wealth disparities, showing not only a racial component, but also how such disparities negatively impact low-income people in everything from life choices to political power.[217] Second, Super extensively discusses four important aspects of the lives of low-income people and their communities that lack protection and could be extended such protection through the application, directly or by analogy, of established property law concepts. Super uses such examples as: the right of family integrity in the case of immigrants; the protection of low-income communities from displacement; the work that equity could do on behalf of the poor in the mortgage foreclosure crisis; and the applicability of the Takings Clause to government support

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[211] *Id.* at 1780, 1785.

[212] *Id*. at 1781.

[213] *Id.*

[214] *See id.* at 1782 (discussing how the nation operates more favorably to the wealthy).

[215] *Id.*

[216] *See id.* at 1786–98 (exploring the disparities in property ownership, including the racial dimension to the disparities, the social impacts resulting from the disparities, the importance that property ownership adds to the heath of democracy, and, finally, the difficulty in implementing public policies to reduce wealth inequality).

[217] *Id.*

for the poor. By the end of the article, it is clear both that, because of inequality, the country is in a precarious position and that the lives of low-income people are unnecessarily vulnerable, especially in contrast with the security enjoyed by the wealthy.

Property is arguably an odd choice of mechanism for the protection of low-income people given the extent of its shortcomings, as Super notes. As a leading poverty law expert, Super is perhaps uniquely situated to see the limitations of property doctrines.[218] Emphasizing that these limitations are not just applicable to those below the poverty line, *A New New Property* consistently refers to the affected population as "low-income people," not as poor people.[219] This choice is not merely stylistic, as it not only prevents the article from being drawn into the perennial battles over how poverty is defined,[220] but also highlights the connections between the poor, near poor, and lower-middle class. Although I have adopted the shorthand, "poor," in this Article, as opposed to the preference for "low-income," Super draws a larger circle of concern, avoiding the negative connotations that often attach to the poor.[221] Super successfully drums home two related, but not synonymous, points about property and low-income people. First, that courts and policymakers are "disposed to protect the property interests of the more affluent over those of low-income people despite the latter's greater dependence on that property."[222] And second, "that the law values the kinds of interests affluent people typically have far more than those upon which lower-income people depend."[223] These two points raise related but not identical issues. If the problem is the first, that the property interests of the poor are not adequately protected, then the solution is straightforward: protect those interests. If the problem is the second, however, to protect lower-income people's interests as property, they first have to be redefined as property. The first is the stuff of conventional property law scholarship—indeed, in many respects it could be treated as a

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[218] For example, in an earlier article, he brought to light the hurdles that poor people face when they try to raise an implied warranty of habitability defense in the context of an eviction for non-payment of rent. David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389, 405–13 (2011) [hereinafter Super, *The Rise and Fall of the IWH*]. Super's poverty law work is wide-ranging but focuses on privatization and the state of the welfare system following welfare reform. *See, e.g.*, David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541 (2008); David A. Super, *Privatization, Policy Paralysis, and the Poor*, 96 CALIF. L. REV. 393 (2008); David A. Super, *The Quiet "Welfare" Revolution: Resurrecting the Food Stamp Program in the Wake of the 1996 Welfare Law*, 79 N.Y.U. L. REV. 1271 (2004).

[219] Super, *supra* note 24, at 1785, 1798, 1818.

[220] For a brief overview of alternative ways to measure poverty, see JULIET BRODIE ET AL., POVERTY LAW, POLICY, AND PRACTICE 1–24 (2014).

[221] *See, e.g.*, JOEL F. HANDLER & YEHESKEL HASENFELD, BLAME WELFARE, IGNORE POVERTY AND INEQUALITY 150–85 (2007) (giving a history of the demonization of poor single mothers).

[222] Super, *supra* note 24, at 1871.

[223] *Id.* at 1798.

way of understanding progressive property scholarship in general. But the second point is more akin to Reich's pioneering discussion of new property, and it is here that Super pushes the line on what counts as property.

Standard fare among property law scholars consists of a fairly lean diet of equitable servitudes, the *numerus clausus* principle, and similar doctrine-heavy material that litter the property law canon. Reich, by sewing together everything from the bar requirements for practicing law and broadcast privileges, to welfare and military contracts, showed the insight that could be gleaned by taking a broad perspective on what fits within the property category.[224] Super, in his first two examples continues where Reich left off. It is not that property scholars have not written about immigrant families, or social capital and poor communities,[225] but these examinations tend to discuss how traditional property topics intersect with those groups, and do not, for example, argue that immigration law should be understood in terms of a property right for families to remain intact. Although the reasoning is tautological, precisely because these interests—that of an immigrant family in remaining intact or that of a low-income community in not being displaced—are not thought of as property, it is hard to think of these interests as property. Super's discussions of equity and mortgages and of expanding the Takings Clause to protect low-income people are a bit more conventional, but even there his proposals fall on the radical side of property scholarship (though they likely will be more quickly accepted among poverty scholars). In discussing what counts as property, my goal is not to critique Super for employing a wide perspective. But the need to have such a broad understanding raises once more the question: why property?

Though *A New New Property* comes down on the side of supporting, not undermining, property, Super is quite critical of property law. In a passage worth quoting at length, Super highlights all that is wrong about property:

> Although . . . creative destruction still exists in economic life—with particular businesses failing when they cease to be efficient—much less of it remains in the body of property law itself. Modern property law has lost much of the vitality that long kept it at the center of Anglo-American law. *Property has overwhelmingly become the law of stability*, a drag on change in other areas. And as social and economic

[224] *See* Reich, *supra* note 22, at 734–37 (examining categories of government-created wealth).

[225] *See, e.g.*, Stephanie M. Stern, *The Dark Side of Town: The Social Capital Revolution in Residential Property Law*, 99 VA. L. REV. 811 (2013); Allison Brownell Tirres, *Ownership Without Citizenship: The Creation of Noncitizen Property Rights*, 19 MICH. J. RACE & L. 1 (2013).

> change has driven demands for legal change, all too often the legal system has not adapted property law but merely shoved it out of the way. The mustiest, stodgiest aspects of property law have come to dominate the field. Innovation is confined to a few relatively insular areas such as intellectual property.[226]

This passage from the article's introduction expresses eloquently my views and frustrations surrounding property.[227] Taking a more optimistic view of property, however, *A New New Property* ends by arguing that it would be a mistake to lose faith in property. Super notes, "[t]he legal concept of property has been at the heart of some of the most shameful episodes in U.S. history. Those hoping for a brighter future could be forgiven for wanting to dispense with property as a system of individualistic trumps against the will of the state."[228] But Super goes on to say that just as the civil rights movement made use of constitutional law despite its "speckled history," so to "the troubling aspects of property law's history should not prevent legal scholars from seeing its potential to protect vulnerable people's most important relationships."[229]

But are there no other options; either latch on to property law protections, albeit expanded versions of them, or be an unrealistic utopian who fails to see the potential that lurks below the troubled history? Super observes that the "disparities in property rights between the rich and poor" can be addressed through redistributive transfers, which he—correctly—rejects as politically infeasible or by expanding property to recognize additional property right forms.[230] I agree with both the idea that the rise in inequality presents a tremendous challenge for property law and the related observation that "[a]s long as property law single-mindedly emphasizes stability in a dynamic world, it will become increasingly marginalized."[231] Where I part company with Super is in the notion that there are only two options, and that those concerned about low-income people must therefore seek to strengthen property. A third possibility is to weaken property

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[226] Super, *supra* note 24, at 1776 (emphasis added).

[227] *See* Rosser, *supra* note 44, at 141–42 (critiquing property scholars' treatment of intellectual property as a realm of innovation while being fairly conservative when it comes to considering radical changes related to distribution of real property).

[228] Super, *supra* note 24, at 1878; *see also* Larissa Katz, *Governing Through Owners: How and Why Formal Private Property Rights Enhance State Power*, 160 U. PA. L. REV. 2029, 2030–31 (2012) (arguing that formalizing property rights can make owners more vulnerable to the state); Edward L. Rubin, *The Illusion of Property as a Right and Its Reality as an Imperfect Alternative*, 2013 WIS. L. REV. 573, 604 (describing the concept of property as a trump against the state as "a difficult argument to take seriously" because "we are a long way past the time . . . when only property holders had liberty rights").

[229] Super, *supra* note 24, at 1878.

[230] *Id.* at 1782–83; *see also supra* text accompanying notes 205–07.

[231] Super, *supra* note 24, at 1776.

protections for the rich or, at least, to condition the existing high level of protection given the rich[232] on expanding property protections, to reach low-income people in ways they do not currently. There are points in *A New New Property* that open the possibility for selectively weakening property rights. For example, Super briefly acknowledges that, in some contexts it might be appropriate to increase the property rights of the poor and simultaneously deny those same rights to the non-poor:

> Thus, instead of sardonically noting that "the majestic equality of the laws . . . forbid[s] [the] rich and poor alike to sleep under the bridges, to beg in the streets, and to steal . . . bread," this more nuanced vision would protect a homeless person's right to sleep outdoors while finding no corresponding right for an owner of a conventional home to sleep in public places.[233]

This acknowledgment is followed later in the article by an entire section on reviving equity as a way to create space for selective enforcement of the law.[234] Although Super does not frame it as such, by arguing that equity should protect borrowers facing foreclosure, he is also arguing to weaken the property rights of lenders. From the perspective of lenders whose rights would be trampled through Super's revival of equity, that equity does not abrogate "the underlying legal rule . . . it is simply denied effect in a particular case," providing little comfort.[235] But the overall push of *A New New Property* is to bring the property rights of low-income people up to the level enjoyed by the wealthy, not the inverse, to push the protections enjoyed by the privileged down.

Some readers of this Article, and of *A New New Property*, I suspect will reject the very idea that property right protections depend on one's class position. The claim though that property law is neutral, something that can be taken up by anyone and therefore is not subject to class analysis, strips our understanding of property from its context in terms of the inequitable benefit it gives those with higher incomes.[236] I raised the possibility of weakening property rights briefly in my last article,[237] but it remains unclear to me why the property protections that the wealthy

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[232] *See* Fennell, *supra* note 95, at 1488 (noting the societally incurred costs of "defining and enforcing property entitlements").

[233] Super, *supra* note 24, at 1784.

[234] *Id.* at 1840–68.

[235] *Id.* at 1851.

[236] *See* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987) (advocating "[l]ooking to the bottom—adopting the perspective of those who have seen and felt the falsity of the liberal promise" to better understand the law and find solutions to societal problems).

[237] *See* Rosser, *supra* note 44, at 148–49 (exploring the possibility of diminishing the advantages often associated with traditional property).

disproportionately enjoy are held sacrosanct, even by those driven to advocate for the poor. Perhaps my favorite quote in *A New New Property* is one Super credits to his clinic supervisor when he was a law student: "Nothing gets people where they live like getting them where they live."[238] It is a brilliant insight, and one that suggests a more radical approach to property law when coupled with Super's observation that "the last four decades have shown that substantial new antipoverty programs are not enacted, *except as the result of major political upheavals*."[239] This echoes the oft-repeated observation among progressive scholars that significant changes to improve the lives of the poor or of minority populations come about rarely and only as a result of tremendous push or circumstances that create a crisis. Property does provide real benefits to people who have access to it and whose interests are defined as property. This perhaps explains Super's hope of ratcheting up the property rights of low-income people, so that their interests are protected in ways akin to the protections afforded higher-income people. But getting there may require selectively reversing the direction of the ratchet on the force of existing property protections. Ratcheting downward can either equalize downward or generate a crisis, such that low-income people find the support largely denied them in the ordinary course of politics.

Perhaps it is unfair to critique the idea of trying to incorporate vulnerable peoples into property law rather than challenging the law. But underlying the belief that the system needs some reform while keeping the basic structure intact is the idea that overall the law works. The response accordingly is to suggest modifications to the law, not more radical departures from it. This perspective could be characterized negatively as that of the propertied or those who expect in the future to benefit from the structure. But a more fair characterization is to describe it as the perspective of those who see value in extending the structure.[240] It is a perspective that discounts the possibility that, for many people, property might be primarily a constraint, rather than a way of protecting their interests.

Can property law be otherwise? Laura Underkuffler writes, "[p]roperty is, *by definition*, the protection of the status quo; it cannot, of itself, answer the question of when there is a justified change in that status quo."[241]

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[238] Super, *supra* note 24, at 1840 n.439 (crediting Marilyn Mullane, a former executive director of Michigan Legal Services, with the quote).

[239] *Id.* at 1875 (emphasis added).

[240] As Zachary Bray explains, "the new progressive property is at least partially descriptive insofar as it contends that American property law, at times, already recognizes the goals it endorses." Zachary Bray, *The New Progressive Property and the Low-Income Housing Conflict*, 2012 BYU L. REV. 1109, 1113.

[241] Laura S. Underkuffler, *Property and Change: The Constitutional Conundrum*, 91 TEX. L. REV. 2015, 2034–35 (2013) (emphasis in original); *see also* VAN DER WALT, *supra* note 13, at 215–21.

Underkuffler's idea, that property "has *no meaning apart* from the idea of protection,"[242] is an idea shared by other scholars who emphasize how property is different from other rights because the right itself is not to something independently valued, such as free speech, but is instead a right to claim rights.[243] Underkuffler explains:

> Property, as an idea, is the establishment of entitlements. . . . It is the recognition, and protection, of the individual's rights in land; or rights in chattels; or rights in any identified source of wealth. It is a right to the continuation of the legal status quo. It has no other meaning.
>
> As a result, property's meaning—as an abstract constitutional right—is threatened, profoundly, by the reality of change, the inevitably of change, and the recognition of the often-justified claims of competing public interests.[244]

If Underkuffler is right, and property has no other meaning outside of protection of the status quo, then one can imagine two different roles for the property law scholar. First, a scholar might embrace property law and see his or her purpose as supporting property law, in the process providing intellectual support for the status quo. Or, second, a scholar might see his or her role differently, as being primarily concerned with change and be open to deliberately threatening status quo's vassal, property law. Progressive property scholarship does not fit this dichotomy in that it attempts to show how inclusionary theories can fit strains of property law.[245] As such, progressive scholarship is oddly situated in that it is both opposed to the status quo, while generally supportive of the overall structure of property law (and property doctrine). If, however, these two positions are not compatible, perhaps more can be accomplished by those seeking inclusion through active resistance to the property framework.

IV. APPLYING PRESSURE

If one looks at property not from the perspective of those who have property, but from the perspective of those who are excluded and have little chance of meaningful inclusion in the present system, the existing law loses its luster.[246] From such a vantage point, property law is less of a means of protection against the state as much as it is a means of oppression

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[242] Underkuffler, *supra* note 241, at 2030 (emphasis in original).

[243] *See, e.g.*, Dorfman, *supra* note 43.

[244] Underkuffler, *supra* note 241, at 2016.

[245] *See* Bray, *supra* note 240, at 1117–19 (providing an overview of recent progressive-property accounts and how these fit within the overall property law configuration).

[246] As van der Walt explains, "those on the margins of society experience the law differently from those who hold privileged property positions." VAN DER WALT, *supra* note 13, at 214.

sanctioned by the state and disproportionately enjoyed by the few.[247] As Professor Eric Freyfogle notes, "private property empowers some people to harm, dominate or otherwise control other people—even if only by insisting that they stay away."[248] To correct for such power when taken too far may require pragmatic destabilization of property law. Breaking down the class and caste system in the United States may require pragmatically undermining the security provided through property. Working against property, rather than for or with property, is only radical in that it strikes against the reification of property rights in our society.

Property rights are not ends in themselves and, accordingly, the level of protection afforded property owners can, and should, be adjusted as society changes.[249] Hidden in the back-and-forth between conservatives and progressives on the nature of property and the significance of rules versus exceptions is the idea—championed by scholars of law and economics for whom "the legal system [is] . . . up for grabs"—that property rights are "malleable."[250] Emphasizing the idea that property rights can change opens up the possibility of creating space to work against the status quo—against traditional property law. While the position that those concerned about poverty and inequality ought to leave property law alone because tax-and-transfer programs are more efficient is attractive as a theoretical matter, in practice such a position does little to respond to the challenges of poverty and inequality.[251] The United States is an outlier, in the negative sense, compared to other developed countries when it comes to using tax-and-transfer programs to lift people, including children, out of poverty.[252] Their security provided through property, the privileged can remain indifferent or, worse, antagonistic towards low-income people. Property scholars and property law should not remain on the sidelines as the country continues down the path towards a rigid, largely non-porous, class system.[253] Indeed, as a pragmatic matter, lessening or threatening to

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[247] For the classic theoretical statement of this difference in perspective, see Hohfeld, *Fundamental Legal Conceptions 1917*, *supra* note 37 (distinguishing between a right in personam as against a distinct few, and a right in rem as against all). Hohfeld adds, "the reasons are equally great for recognizing exclusively equitable rights against [in personam rights] . . . and . . . rights in rem." *Id.* at 765 (emphasis omitted).

[248] Freyfogle, *supra* note 176, at 441.

[249] *See* Rubin, *supra* note 228, at 605–06 (concluding that the purposes of property rights have changed as the goals of society have changed).

[250] Fennell, *supra* note 95, at 1482, 1488; *see also* Bell & Parchomovsky, *supra* note 37, at 535 (arguing that law and economics scholars view property as being essentially the same as contract, a collection of transferable but not special rights).

[251] *See supra* text accompanying notes 199–207 (describing the deficiencies of tax-and-transfer systems).

[252] BRODIE ET AL., *supra* note 220, at 25–26.

[253] *See* Freyfogle, *supra* note 176, at 448 (noting how "little is said in economic writing about property as a tool of domination . . . unequal property distributions, or about the ways markets contribute to increased inequality and multiple social ills").

lessen the extent to which property rights are protected may be a uniquely effective response.

Applying pressure to the existing structure may require destabilizing property. Charles Sabel and William Simon explain, "[d]estabilization rights are claims to unsettle and open up public institutions that have chronically failed to meet their obligations and that are substantially insulated from the normal processes of political accountability."[254] Property law, especially as it serves to protect a status quo marked by inequality and inequity, I would argue, is this sort of institution. Whether more explicitly, in the case of information cost theory, or more subtly, in the case of progressive property scholarship, the status quo has a hold on property law and may even define it. Moreover, as an institution that is thought of as being somehow apart from politics and made up of complicated background rules, it is fairly insulated from correction through the political process even though it serves to protect the interest of an increasingly small and self-perpetuating ownership class to the detriment of the excluded. Destabilization may be the best path forward. Sabel and Simon explain, "[d]estabilization induces the institution to reform itself in a process in which it must respond to previously excluded stakeholders."[255]

Roberto Mangabeira Unger first developed the idea of "destabilization rights" in his 1987 work, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy*.[256] Unger advocated breaking apart traditional property rights and reallocating portions of those rights across government bodies and economic actors.[257] Such a proposal could be interpreted as merely an aggressive embrace of ripping apart the bundle of sticks. As the author of one of the definitive texts on Critical Legal Studies,[258] Unger might predictably be inclined to draw upon New Realism's skepticism regarding absolute and traditional notions of property. Destabilization rights according to this construction of Unger's attack on traditional property serve to tear property down but do little to build up an alternative role for property.

If destabilizing property is nothing more than pulling out individual sticks from the bundle, then, arguably, a cautious approach to the idea is called for in light of both the concerns of information theorists and recent events. As a brief reminder, Smith and Merrill fault the bundle-of-rights conception of property because it suggests that the bundle can be torn apart

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[254] Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1020 (2004).

[255] *Id.* at 1056.

[256] ROBERTO MANGABEIRA UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY 530–33 (new ed. 2001).

[257] *Id.* at lxxi.

[258] ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (2d ed. 1986).

at will, which they claim misses the interdependent nature of many of the sticks and fails to recognize the centrality of exclusion. The collapse of the housing market and financial crisis of 2007–2008 arguably attest to the problems with the bundle conception identified by Smith and Merrill. Examples of moving from absolute property rights to more disaggregated forms of property can be seen in collateralized debt obligations and similar novel forms of property that pushed the housing market over a cliff. Professor Heather Hughes argues that the crisis shows that to protect third parties, *numerus clausus* principles arguably should guide limits placed on the forms financial products can take.[259] Others have gone further, blaming fragmentation for the crisis and advocating a "closed set of forms" based on the *numerus clausus* principle as a way to stabilize markets.[260] The apparent association between disaggregation and collapse is also highlighted in a recent scholarly critique.[261] Cristie Ford and Carol Liao write, "[r]ecent events suggest that, somewhat contrary to Unger, power relationships will reassert themselves in malleable social and economic space, such as that created by a breakdown in traditional property rights. The absence of formal ownership rights will make people more, not less, vulnerable to nontransparent exercises of power."[262] Even though Ford and Liao note that "[d]estabilization rights continue to play an essential, and instinctively attractive, role in responding to the anti-democratic entrenchment of powerful interests,"[263] they see the proliferation of property forms leading up to the Great Recession as a reason to stick with traditional property.[264] Ford and Liao's view is that destabilizing property ends up harming the vulnerable because "the disaggregation of property seems to exacerbate inequality and allow for greater power to amass among the already powerful."[265]

The anti-bundle interpretation of Unger's destabilization rights,

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[259] Heather Hughes, *Financial Product Complexity, Moral Hazard, and Private Law*, 20 STAN. J.L. BUS. & FIN. (forthcoming 2015) (manuscript at 33–37).

[260] Note, *The Perils of Fragmentation and Reckless Innovation*, 125 HARV. L. REV. 1799, 1821 (2012).

[261] Cristie Ford & Carol Liao, *Power Without Property, Still: Unger, Berle, and the Derivatives Revolution*, 33 SEATTLE U. L. REV. 889, 913 (2010) ("[I]t is clear in the wake of the global financial crisis that the disaggregation of property . . . upset the normal market conditions for the exchange of goods and services. Thus, market prices did not reflect the economy but rather a bubble . . . .").

[262] *Id.* at 890.

[263] *Id.* at 929.

[264] *See id.* at 890–91 (adding that the "absence of formal ownership rights [in property] will make people more . . . vulnerable to nontransparent exercises of power" and that "power, not property is the core of [Unger's works]"); *see also* Donald J. Kochan, *Certainty of Title: Perspectives After the Mortgage Foreclosure Crisis on the Essential Role of Effective Recording Systems*, 66 ARK. L. REV. 267, 282 (2013) ("Serious questions concern whether the legal infrastructure in the United States is capable of handling the bundle concept taken to its extreme (with mortgage-backed securities as our best test case).").

[265] Ford & Liao, *supra* note 261, at 897.

however, is unfairly narrow. It contains elements of truth,[266] but Unger's original idea of destabilization rights was as much about orientation as it was about property forms. Unger argued destabilization is required precisely in order to prevent the powerful from capturing the legal apparatus.[267] Destabilization rights "serve not to embody specific ideals of human association but to ensure that, whatever the enacted forms of human association may be, they will preserve certain minimal qualities: above all, the quality of being readily replaceable."[268] *False Necessity* lays out a vision for an alternative economic and political order, albeit a vision that Unger later acknowledged was largely ignored.[269] But the vision was more a response to power relationships than a detailed set of plans. Put differently, disaggregation of property rights was just the mechanism Unger saw as a way to implement his large vision. Destabilization rights were one part of Unger's vision and they operate alongside with what Unger calls "immunity rights"—basic individual rights and protections.[270] Unger's vision is therefore built around providing a basic level of security and independence while also providing a mechanism to "break[] open . . . insulated hierarchies of power and advantage."[271] In contrast with this vision, property currently operates to preserve the status quo, preventing effective challenges to hierarchical advantages and granting property holders a great deal of independence and protection, but not making such protection universal. Rejecting the notion of rights as rights to be free from the state (in property, the castle model of ownership), Unger argues that "[t]he point of destabilization rights is . . . to prevent recurrent, institutionalized relationships among groups from falling into certain prohibited routines of closure and subjugation."[272]

If orientation is understood as being more important than form when it comes to destabilization rights, one can think about ways of destabilizing property that do not rely upon further disaggregating it. As critics of the bundle are all too aware, even with the *numerus clausus* principle, property can already be disaggregated, separated, and recombined in many ways.[273] Unless property is understood in its most general sense as protection of the status quo, it is hard to talk about property as being inherently conservative

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[266] *See, e.g.*, UNGER, *supra* note 256, at 492 (stating that the "germ" of the idea can be seen in loose government regulation and in the capital market); *see also id.* at 502 (noting that disaggregation of property rights is not a novel idea and has been the norm in many societies throughout history).

[267] *Id.* at 508 ("To prevent the emergency of economic entitlements that enable individuals to control large amounts of labor, property must be disaggregated . . . .").

[268] *Id.* at 532.

[269] *Id.* at xx.

[270] *Id.* at 530.

[271] *Id.*

[272] *Id.* at 535.

[273] *See, e.g.*, Dagan, *supra* note 1, at 1568–69.

or progressive. Limited equity co-ops exist alongside the fee simple,[274] the right to exclude is paired with cases limiting that right,[275] doctrines such as the implied warranty of habitability coexist with the American rule on delivery of possession.[276] The variety of possible forms property can theoretically take does not, however, undermine the need to destabilize property where property operates along a narrower range in practice. To use a bad analogy, the fact that McDonald's offers healthy options—milk, salad, fruit—does not make McDonald's a healthy option. Even though progressive scholars are right to point out the existence of beach access rules and the social aspects of ownership, the burgers and fries of property law continue to be fee simple absolute and the right to exclude.[277] Since property law already allows for many forms of disaggregation, offering a proliferation of such forms by itself will not destabilize the institution. Instead, because of property law's social and legal context, destabilization involves seeking to undermine the role property protections play in our society. In what follows, Part IV shows how property law can be destabilized in two ways: through the selective use of existing law or through pragmatic resistance to entrenched inequality. The goal of this Part is not to make the definitive case for an *against* property strategy. Given where the debates are taking place today, between conservatives who largely work *for* property and progressives who work *with* property, it is enough if this Part shows that destabilization should be included among the alternative approaches considered for how the law can and should respond to the challenges of poverty and inequality in the New Gilded Age.

A. *Selective Use of Doctrine*

In 1966, Frances Fox Piven and Richard A. Cloward argued for a mass

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[274] For more on the mechanics and progressive potential of limited equity co-ops, see Duncan Kennedy, *The Limited Equity Coop as a Vehicle for Affordable Housing in a Race and Class Divided Society*, 46 HOW. L.J. 85, 85 (2002) (arguing that limited equity co-ops are a "vehicle for subsidized low-income housing"); Julie D. Lawton, *Limited Equity Cooperatives: The Non-Economic Value of Homeownership*, 43 WASH. J.L. & POL'Y 187, 201–07 (2013) (describing the history of housing co-ops as well as its two forms—market rate co-ops and limited equity co-ops).

[275] *Compare* Jacque v. Steenberg Homes, 563 N.W.2d 154, 160 (Wis. 1997) (recognizing "the individual's legal right to exclude others from private property"), *with* State v. Shack, 277 A.2d 369, 371–72 (N.J. 1971) (noting that the right to exclude "does not include the right to bar access to governmental services available to migrant workers").

[276] *Compare* Park W. Mgmt. Corp. v. Mitchell, 391 N.E.2d 1288, 1294 (N.Y. 1979), *superseded by statute*, N.Y. UNIFORM CITY CT. ACT §§ 203, 209 (McKinney 2006), *as recognized in* Tardibone v. Hopkins, 842 N.Y.S.2d 864, 865 (2007) (defining the implied warranty of habitability as "an implied promise on the part of the landlord that . . . premises . . . are fit for human occupation at the inception of the tenancy"), *with* Hannan v. Dusch, 153 S.E. 824, 830 (Va. 1930) (adopting the American Rule in which a landlord need only deliver constructive possession to a tenant).

[277] *See* JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW § 9.05(B)(1) (2012) (noting that the fee simple accounts for more than ninety-nine percent of privately owned land). The author thanks Lee Fennell for this point.

enrollment effort in public benefits in order to overwhelm the welfare system.[278] Piven and Cloward observed that only about half of those eligible were receiving welfare and their hope was that an enrollment campaign would force nationalization and expansion of welfare benefits.[279] The strategy was designed to "precipitate a profound financial and political crisis" and "produce bureaucratic disruption in welfare agencies and fiscal disruption in local and state governments."[280] By generating a crisis, which Piven and Cloward defined as "a *publicly visible* disruption in some institutional sphere," welfare rights advocates and recipients could pressure politicians in Washington to support the right to a basic income for poor people.[281] Of course, in hindsight the record is mixed on Piven and Cloward's mobilization strategy. In the short-term, arguably lasting a full generation, increasing numbers of eligible individuals and families got access to needed benefits. But the longer-term record is more problematic. Thirty years after *The Nation* published Piven and Cloward's advocacy piece, President Clinton, a Democrat, signed welfare reform into law.[282] The expansion in enrollment, coupled with racist notions of recipients and changing expectations regarding mother's obligations, generated a crisis after all, but one marked by popular backlash *against* welfare.[283] As Piven and Cloward recognized at the time, "[n]o strategy, however confident its advocates may be, is foolproof."[284]

Lots of lessons have been drawn from Piven and Cloward's strategy, but one important component of the strategy was that the crisis came out of the law itself. A crisis could be created using the existing eligibility categories, leveraging the "vast discrepancy . . . between the benefits to which people are entitled under public welfare programs and the sums which they actually receive."[285] The tools necessary to generate the crisis were available through existing law; the trick was to call upon and make

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[278] *See* Frances Fox Piven & Richard Cloward, *The Weight of the Poor: A Strategy to End Poverty*, NATION, May 2, 1966, at 510.

[279] *Id.*

[280] *Id.*

[281] *Id.* at 514 (emphasis in original).

[282] *See, e.g.*, EDELMAN, *supra* note 181, at 86–87 (explaining that President Clinton helped secure his re-election by signing welfare reform into law).

[283] *See, e.g.*, Michele Estrin Gilman, *The Return of the Welfare Queen*, 22 AM. U. J. GENDER, SOC. POL'Y & L. 247, 256–64 (2014) (giving a political history of the "welfare queen"); Amy L. Wax, *Rethinking Welfare Rights: Reciprocity Norms, Reactive Attitudes, and the Political Economy of Welfare Reform*, 63 L. & CONTEMP. PROBS. 257, 275–80, 283 (2000) (connecting changing expectations regarding women's, specifically mother's, work with political backlash).

[284] Piven & Cloward, *supra* note 278, at 517; *see also* Ariana R. Levinson, *Founding Worker Cooperatives: Social Movement Theory and the Law*, 14 NEV. L.J. 322, 340–41 (2014) (summarizing Piven and Cloward's assessment of the limitations of mass defiance).

[285] Piven & Cloward, *supra* note 278, at 510.

full use of the law, not to change it.[286] To return to Unger's formulation of destabilization rights, Piven and Cloward recognized that destabilization of the status quo could occur through selective use of the law.[287] In partial contrast with Unger's elaborate redrawing of property forms, the mobilization strategy drew upon existing categories to expand the class of rights claimants.

This sub-Part of the Article looks at how existing features of property law doctrine can be used to destabilize property holdings. Since property forms already permit a great degree of variation on how property is held, the focus is on weakening property protections to support a more inclusive society, not on adding to the list of ways property can be held. I explore two examples of using the law to destabilize settled property law expectations. First, this sub-Part shows how the law helps create and protect an inclusionary version of the market, in part by blocking monopolistic holdings of property. Second, it presents ways the law can be used to increase the power of vulnerable populations. As was true of Piven and Cloward's attempt to precipitate a welfare crisis, in each of these cases the record is mixed, but they also illustrate the potential power of using existing doctrine to destabilize property.

1. *Democratizing the Market*

While it is fairly easy to find property law doctrines that seem to confirm or at least be based upon John Locke's justification for private property, the same cannot be said with regard to Locke's proviso. Locke famously argued that "[w]hatsoever, then, he removes out of the state that nature hath provided and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property."[288] And whether looking at original land claims in a wilderness, adverse possession, or intellectual property rights to newly created items or ideas, societal recognition of ownership seems to parallel Locke's argument. But Locke also limited his claim to an "unquestionable" right to property to cases "where there is enough, and as good left in common for

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[286] Outside of the property context, the same strategy underlies the "Hands Up, Don't Shoot" protests that erupted in the wake of the fatal shooting of Michael Brown by Ferguson, Missouri police. Emanuella Grinchberg, *Why 'Hands Up, Don't Shoot' Resonates Regardless of Evidence*, CNN (Sept. 30, 2015, 9:15 PM), http://www.cnn.com/2015/01/10/us/ferguson-evidence-hands-up/ [http://perma.cc/753C-F5JR].

[287] *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1386–87 (1988) (connecting the Piven and Cloward strategy with Unger's theory of change, concluding that "the strategy toward meaningful change depends on skillful use of the liberating potential of dominant ideology," and explaining how during the Civil Rights movement, Blacks "attempt[ed] to manipulate elements of the dominant ideology to transform the experience of domination").

[288] JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT § 27 (1690), *reprinted in* THE NATURE AND PROCESS OF LAW 376, 377 (Patricia Smith ed., 1993).

others."[289] While it can be hard to come up with examples of the law operating perfectly in line with Locke's proviso, many market shaping rules reflect an overarching concern with the effects of a concentration of property holdings on society. Although property law often emphasizes the importance of protecting individuals from both the state and from the larger society, limitations on ownership help ensure that the economy is not monopolized by powerful interests and, at times, limitations even deliberately work towards democratizing markets.

Antitrust and anti-monopoly laws designed to protect the market—and consumers—from monopoly firms are largely taken for granted today, even though they do some violence to laissez-faire ideas regarding private property and the role of the state.[290] It is treated as a matter of course that the merger of large companies should be subject to government review. Similarly, when it comes to essential products that rely upon economies of scale and that face few competitors, the government plays a significant role in defining everything from level of service to price.[291] What is perhaps most remarkable about antitrust law and heavily regulated industry is how unremarkable it all seems. Such limits become background rules rather than sites of contention. That is not to say that they should always be immune from politics. The trust-busting of the Progressive Era under President Theodore Roosevelt helped bring the Gilded Age to heel. The government has been comparatively weak when it comes to checking the power of the New Gilded Age's "too big to fail" companies, banks, and hedge funds.[292] But the larger point is that when it comes to concentrated holdings that threaten competition or that could otherwise dominate markets, the government's responsibility to protect against these evils of amassed holdings of property and power is generally accepted.

Similar concerns, arguably in line with Locke's proviso, lie behind limits on how owners and investors can develop real property. Instead of Blackstone's "sole and despotic dominion,"[293] owners and developers confront an array of zoning restrictions and permitting requirements. As numerous scholars have shown, the effect of these processes is often

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[289] *Id.*

[290] *See* Arrow, *supra* note 203, at 193 (using anti-monopoly policy as an example of interference with the market that can "improve both efficiency and equity").

[291] *See* George J. Stigler, *Monopoly*, CONCISE ENCYCLOPEDIA ECON., http://www.econlib.org/library/Enc/Monopoly.html [http://perma.cc/2DKE-5ADU] (last visited Sept. 12, 2015) (providing examples of monopolies or near-monopolies that rest on government policies).

[292] *See generally* ANDREW ROSS SORKIN, TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM—AND THEMSELVES (2009) (providing a narrative of the financial crisis of 2008, including the agreements reached with major financial institutions in order to stabilize the U.S. financial system).

[293] 2 WILLIAM BLACKSTONE, COMMENTARIES *2.

exclusionary.[294] But zoning also can protect against monopolization of space by elites. Inclusionary Zoning, though typically viewed as merely a form of government extraction, can also be viewed as a way to make sure that attractive areas are not monopolized by the wealthy. The critique that inclusionary zoning is not efficient[295] does not address this separate value of inclusionary zoning. Is inclusionary zoning destabilizing?[296] From the perspective of an owner accustomed to being able to do whatever he or she wants with the property, it is incredibly destabilizing.[297] But once inclusion becomes a standard part of development, investor expectations take into account the inclusionary requirement.[298] When a developer seeks to convert a large farm into palatial homes, inclusionary zoning can prevent the entire area from being turned into McMansions.[299] Inclusionary units are not the same as the mythical commons, but a claim can be made that the right of McMansion owners to their property is stronger because of the existence of the inclusionary units. After all, inclusionary units reflect to some extent the idea that property claims are strongest "where there is enough, and as good left in common for others."[300]

Homesteading and developer remedies provide two complicated examples of how property law can protect against monopolies and democratize the market. Complicated only insofar as the settlement of the Midwest relied upon dispossessing Indians, homesteading rules sharply limited the size of individual claims. The U.S. government could have sold off the frontier to the highest bidder, but instead it helped create a robust and deep system of family farming.[301] This commitment to the ideal of the

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[294] *See, e.g.*, Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, 33 FORDHAM URB. L.J. 877, 888–89 (2006); David Ray Papke, *Keeping the Underclass in Its Place: Zoning, the Poor, and Residential Segregation*, 41 URB. L. 787, 804–06 (2009); Christopher Serkin & Leslie Wellington, *Putting Exclusionary Zoning in Its Place: Affordable Housing and Geographical Scale*, 40 FORDHAM URB. L.J. 1667, 1667–73 (2013).

[295] For the classic critique of inclusionary zoning, see Robert C. Ellickson, *The Irony of "Inclusionary" Zoning*, 54 S. CAL. L. REV. 1167 (1981).

[296] Notably, Sabel and Simon answer this question affirmatively and use the Mount Laurel litigation as an example of judicial destabilization. Sabel & Simon, *supra* note 254, at 1050–52.

[297] Despite this destabilization, concern for such investors arguably should be limited: "As for the claim that the landowner was surprised by the legal change and didn't consider the danger, this is mostly a plea of ignorance about how property works." ERIC FREYFOGLE, ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND 103 (2007).

[298] *See* URBAN INST., EXPANDING HOUSING OPPORTUNITIES THROUGH INCLUSIONARY ZONING: LESSONS FROM TWO COUNTIES (2012) (giving examples of how inclusionary zoning programs can work and discussing the need to give developers clear program guidance).

[299] *See* Andrew Rice, *The Suburban Solution*, N.Y. TIMES, Mar. 5, 2006, at E114 (discussing such a situation in Montgomery County, Maryland).

[300] LOCKE, *supra* note 288, at 377.

[301] *See* Eric T. Freyfogle, *Property Law in a Time of Transformation: The Record of the United States*, 131 S. AFR. L.J. 883 (2014); Eric T. Freyfogle, The Enclosure of America 28 (Oct. 26, 2007) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1024846 [http://perma.cc/8VGY-8R9K] ("During the days of Theodore Roosevelt, early in the twentieth century, forester

yeoman farmer has not always led to the best policies,[302] but in the homesteading example it served as a hedge against property becoming overly concentrated in the hands of industrial employers and land barons.[303] Conceptually more complicated, the developer remedies that arose out of challenges to local exclusionary practices in New Jersey also create access and democratize markets. Depending on perspective, developer remedies either expand the rights of property owners or limit them. Created in response to the *Mount Laurel* decision,[304] which required suburbs not to foreclose the possibility of moderate and low-income housing, developer remedies provide a path through permitting processes where the development includes affordable housing.[305] For developers stymied by local red tape, the remedy amounts to an expansion of their rights as owners of the land to be developed. But for neighbors who had long used their property interests in the community as a not-in-my-backyard shield against undesirable developments and newcomers, the developer remedy lessens the de facto exclusionary power that previously was associated with homeownership. Similarly, rights to place mobile homes or to build accessory dwelling units can lessen the rights of neighbors even as they increase the development rights associated with ownership of particular parcels. In all these cases, such development rights, to the extent that they bypass cumbersome local processes and permit the construction of more affordable housing, positively destabilize property-

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Gifford Pinchot used this same rhetoric to justify getting the federal government involved in conservation, particularly in the business of building dams and big irrigation works to open-up new lands for families to settle.").

[302] *See* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995) (discussing the impact of allotment on Indian tribes).

[303] *See* Note, *Distributive Liberty: A Relational Model of Freedom, Coercion, and Property Law*, 107 HARV. L. REV. 859, 871 (1994) ("Most of the restraints on accumulation, alienation, and use that the Reformers proposed can be understood as attempts to counteract the withholding capacity of large landowners and to extend the staying power of settlers in order to make small freehold farming a viable alternative life plan."). The relative ease of incorporating business entities in the United States provides a similar example of how the law can protect against undue concentrations of wealth. Where the right to incorporate is either extremely limited—as it was when corporate charters had to originate from the crown—or subjected to endless red tape, competition is either stifled or driven underground. But where incorporation is routine, is largely a given, and is not overly burdensome, the state preserves "enough" market participation rights. Though not within the traditional ambit of property law, fair and fast incorporation mechanisms can reduce the power of entrenched interests. Though in the United States the ability to assume the corporate form is taken for granted, the experience of other countries shows the nexus between property rights and Locke's proviso when it comes to incorporation. *See* HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 209–17 (2000) (discussing the difficulty of getting rights recognized in developing countries).

[304] S. Burlington Cnty. NAACP v. Twp. of Mount Laurel, 336 A.2d 713, 716 (N.J. 1975).

[305] *See* DAVID L. KIRP ET AL., OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA (1996) (giving a detailed history of the political and legal fight to build low-income housing in Mount Laurel, New Jersey).

based expectations.

It is one thing to create broad-based markets or distribute rights in a more egalitarian manner; it is another to take away advantages and holdings that are already enjoyed by a select few. *Hawaii Housing Authority v. Midkiff* illustrates the extra complications associated with the latter.[306] *Midkiff* involved an effort by the state of Hawaii to use its eminent domain authority to transfer land, involuntarily, from a private landowner to private lessees.[307] Hawaii passed a land-reform act that provided for this transfer of land in order to, in the words of the U.S. Supreme Court, "reduce the perceived social and economic evils of a land oligarchy."[308] In this case, the "land oligarchy" was land formerly held by the Hawaiian monarchy.[309] Though the *Midkiff* Court's holding that eminent domain can be used to transfer land from one private party to another if there is a legitimate public purpose foreshadowed the decision in *Kelo v. New London*,[310] the holding was unanimous and straightforward.[311] As the Court in *Midkiff* noted, "[r]egulating oligopoly and the evils associated with it is a classic exercise of a State's police powers."[312] The Court concluded by declaring that "to attack certain perceived evils of concentrated property ownership" is a legitimate use of state authority.[313]

What this sub-Part shows is that when property law takes seriously Locke's proviso, it can play a destabilizing role, acting as a check on the power of elites. The legal mechanism can take many forms: preventing monopolies from being established, ensuring that emerging markets or new resources are broadly distributed and accessible, and even using the law to take away rights from property owners where holdings are too concentrated.[314] Seeing the destabilizing element in some of these examples is difficult because the relevant laws and principles have become sufficiently established that they move into the background. Yet, thinking about areas where these principles could be applied reveals the potential

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[306] 467 U.S. 229, 231–34 (1984) (explaining the complications that the Hawaii legislature faced when it intended to transfer land ownership from the few to the many).

[307] *Id.* at 233–36.

[308] *Id.* at 241–42.

[309] *Id.* at 242.

[310] *Id.* at 245; *see* Kelo v. City of New London, 545 U.S. 469, 483–84 (2005) (holding that New London's comprehensive economic rejuvenation plan constituted a public purpose required to exercise the power of eminent domain).

[311] *See Kelo*, 545 U.S. at 482 (clarifying that "'it is only the taking's purpose, and not its mechanics,' . . . that matters in determining public use" (quoting *Midkiff*, 467 U.S. at 244)).

[312] *Midkiff*, 467 U.S. at 242.

[313] *Id.* at 245.

[314] *See Kelo*, 545 U.S. at 483 (concluding that legislatures are afforded "broad latitude in determining what public needs justify the use of the takings power"). For a discussion of the background and impact of the *Kelo* decision by some of the attorneys who participated in the litigation, see Bethany Berger et al., *Selected Proceedings of the Twentieth Annual Thomas R. Gallivan Jr. Conference*—Kelo: *A Decade Later*, 47 CONN. L. REV. 1433 (2015).

destabilizing effects of a commitment to democratizing markets.[315] The motivated state might do more to limit the power of concentrated wealth, as in the case of brick-and-mortar giants such as Wal-Mart at a national level and particular manufacturers at a local level, as well as new economy monopolists such as Amazon and Apple. Though demand to curb the power of firms such as Goldman or the Blackstone Group is limited largely to fringe protest movements,[316] property law has the potential to be used as a tool to rein in powerful entities in order to shape an inclusive form of capitalism.

2. *Turning Representation into Power*

Given the inequities in access to lawyers, simply ensuring that the poor have legal representation can be destabilizing. This is especially the case when representation and advocacy are undertaken strategically. An ongoing debate among poverty lawyers involves whether or not legal aid offices should focus on individual representation ("access") or on systematic change.[317] The common ground in this debate, and the crucial point when it comes to destabilization, is that lawyers matter.[318] And they can matter for whole groups of people, even where lawyers are forced to be selective in terms of which clients and what types of cases they take on.[319] The idea that lawyers matter is such a simple observation that it can be hard to see the destabilizing aspects of representation. After all, the job of a poverty lawyer is often simply to help in the assertion of rights, including property rights, and often does not involve the assertion of novel claims of right.[320] Even where the anti-poverty lawyer pushes for an expansion in the protection of the poor, the claims generally are fairly straightforward; *this would not be permitted if these people were not poor so it should not be*

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[315] *See, e.g.*, Douglas S. Massey, *Race, Class, and Markets: Social Policy in the 21st Century*, *in* POVERTY AND INEQUALITY 126–29 (David B. Grusky & Ravi Kanbur eds., 2006) (presenting more radical ways of creating and shaping markets so that they are inclusive of racial minorities and the poor).

[316] *See* Andrew R. Sorkin, *Occupy Wall Street: A Frenzy that Fizzled*, N.Y. TIMES, Sept. 18, 2012, at B1 (highlighting the Occupy Wall Street movement).

[317] *See, e.g.*, BRODIE ET AL., *supra* note 220, at 641 ("The . . . right to counsel movement is not uncontroversial even among poverty lawyers and those unquestionably committed to advocacy for the poor."); Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1053 (1970) (arguing that poverty lawyers should focus on changing the system instead of simply representing their clients).

[318] *See* Debra Gardner & John Pollock, *Civil Right to Counsel's Relationship to Antipoverty Advocacy: Further Reflections*, *in* BRODIE ET AL., *supra* note 220, at 643 ("[T]he mere presence of a guaranteed attorney in indigent tenants' cases and landlords' awareness of that presence should cause a seismic shift in the treatment of tenants . . . .").

[319] *See* Wexler, *supra* note 317, at 1055–56 (explaining that though "[t]urning people away is difficult," there are several ways lawyers can help poor groups of people).

[320] *See* Edgar S. & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317, 1338 (1964) ("The assertion of a right in even a single case can have community-wide ramifications . . . .").

allowed. The police should not burst into welfare recipients' homes late at night to search for an undeclared man in the house.[321] An applicant for public assistance should not have to pay for a drug test as part of the application.[322] A person should not lose his or her home because their grandchildren or caretaker uses drugs.[323] The government should not take away support it provides for people's basic needs without a hearing.[324] Children should not receive a substandard education just because of their race and where their parents live.[325] People should not have to pay rent if the unit is not fit for human habitation.[326] It is only in the context of a society as enamored with the linked ideas—that America is the land of opportunity and that the poor are largely undeserving—that such straightforward claims are seen as matters of law reform instead of self-evident truths.

Even where the claims are unlikely to reach the Supreme Court, simply affording representation to the poor can destabilize the property owners' ordinary expectations. When the norm is that the poor do not have legal assistance, effective assertions of rights by the poor can diminish the property protections enjoyed by owners.[327] For example, a tenant facing eviction fares much better when assisted by counsel.[328] Not only does the legal services attorney in this example protect the rights of the tenant, but he or she also lessens the de facto power the owner has over the unit.[329]

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[321] *See* King v. Smith, 392 U.S. 309, 333 (1968) (invalidating an Alabama regulation that removed federally funded assistance for impoverished children if a substitute father was present in the household).

[322] *See* Lebron v. Fla. Dep't of Children & Families, 710 F.3d 1202, 1217–18 (11th Cir. 2013) (holding that a mandatory drug test for public assistance applicants is unconstitutional under the Fourth Amendment).

[323] *But see* Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 136 (2002) (concluding that public housing authorities have discretion "to terminate the lease of a tenant when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should have known, of the drug-related activity").

[324] *See* Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (explaining that procedural due process rights require a pre-termination evidentiary hearing when welfare is discontinued).

[325] *But see* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 54–55 (1973) (upholding Texas system of school financing based on property taxes that led to unequal expenditures between children in different districts).

[326] *See* Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1072–73 (D.C. Cir. 1970) (implying a warranty of habitability in all leases governed by the District of Columbia's housing regulations).

[327] *See* Cahn & Cahn, *supra* note 320, at 1339–40 (recounting a time when the presence of lawyers asserting rights in a tenant-landlord dispute provided enough bargaining leverage to induce settlement).

[328] *See* Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L.J. 37, 48 (2010) ("One variable that often can halt the swift judgment for the landlord is representation for the tenant, with the likelihood of eviction dropping precipitously.").

[329] *See* Deborah Hodges Bell, *Providing Security of Tenure for Residential Tenants: Good Faith as a Limitation on the Landlord's Right to Terminate*, 19 GA. L. REV. 483, 483 (1985) (stating that traditionally landlords have had control over rental homes because of their termination power).

One can imagine the transformative power of expanding the right to counsel for the indigent to civil cases.[330] Though the goal of the "civil *Gideon*" movement is often framed in terms of individual rights, it is easy to see that such a right likely would have a structural impact on how property law operates in practice.[331] In light of the blows the Supreme Court has dealt right-to-counsel claims and predictable underfunding of legal aid by Congress, however, a national flood-the-courts strategy belongs largely in the realm of the imagination.[332] But the country's lack of commitment to broadening the right to counsel for the indigent does not mean that property law cannot be destabilized through representation, only that doing so involves acting strategically.

What this sub-Part shows is that targeted interventions in the ordinary workings of property law can be used to protect vulnerable populations by changing the power dynamics of the market. The interventions can take a number of forms and involve different actors, but the goal is to weaken the ability and power of owners to use property rights to their advantage. Three types of interventions through coordinated representation stand out: place-based, party-based, and claim-based.[333] In the first, lawyers agree to focus their efforts on a geographically defined space.[334] The goal is not necessarily to change the overarching laws affecting their clients, but to change the market dynamics operating within that space by rigorously advocating for people within the area.[335] In the second, legal assistance is directed not to the poor in general but to particular parties who have shared characteristics.[336] This strategy can be based on particular characteristics or needs of the poor, their employment, their legal status, their race, or their gender, and the strategy is designed to challenge how the law treats that issue. Again, the goal is not explicitly to change the law, only to change

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[330] *See* Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1799 (2001) (arguing that "opportunities for legal [civil] assistance are crucial to the legitimacy of the justice system").

[331] *See* Clare Pastore, *A Civil Right to Counsel: Closer to Reality?*, 42 LOY. L.A. L. REV. 1065, 1081–82 (2009) (considering the potential systematic concerns over extending the right to counsel to civil cases).

[332] *See* Turner v. Rogers, 131 S. Ct. 2507, 2520 (2011) (failing to extend *Gideon* to the civil-contempt-with-imprisonment context); Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 770–71 (2015) (detailing the "woeful underfunding" of legal services).

[333] *See* Nestor M. Davidson, *Reconciling People and Place in Housing and Community Development Policy*, 16 GEO. J. ON POVERTY L. & POL'Y 1, 1 (2009) (categorizing people-based strategies as those that "invest in individuals, often with the explicit goal of allowing those individuals to move to a better life" and place-based strategies as those that "target specific communities or locations, often with the explicit goal of revitalizing entrenched pockets of poverty"); Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 GEO. L.J. 1529, 1538 (1995) (explaining the goal of a claim-based strategy as those that "seek to advance the interests of a number of poor persons by 'reforming' some widespread practice or abuse").

[334] Davidson, *supra* note 333, at 1.

[335] *See id.*

[336] *See id.*

how the law is enforced through a concentrated effort to ensure the poor get the full benefit of existing laws in a way that does not occur in the absence of legal assistance.[337] In the third type of intervention, representation is not based on geography or the particulars of individual clients, but on the nature of the claims that can be brought. To some degree, of course, the third type incorporates elements of the previous two types, but the strategy can be distinguished because here the goal *is* to change the law.[338] Commonly described as impact litigation, the hope is to find just the right client, just the right defendant, and a practice or law that calls for judicial correction rather than simply attempting to alter enforcement costs.[339]

These strategies need not operate independently, though frequently they do because of the ways institutions are organized along lines that mirror these intervention types. Thus, lawyers working for or with a geographically-based community economic development (CED) organization are likely to adopt approaches that are defined by the area served by the organization.[340] This silo effect can also be observed in party-based entities, such as those created and funded to be, for example, employment justice centers or immigration defense clinics. Similarly, the expertise and capacity of claim-based organizations—best exemplified perhaps by those trying to advance racial justice such as the NAACP, MALDEF, NARF, and AALDEF—are often focused on appellate advocacy in the hopes a single case will have a big impact.[341] But whether operating independently or as part of a larger strategy, these three types of interventions can all destabilize how—in the absence of legal assistance—property law ordinarily works against vulnerable or disadvantaged populations. This sub-Part focuses on ways selective use of the law, drawing upon one or more of these types of interventions, can help secure poor communities against market forces that would otherwise make their housing unaffordable. Similar forms of destabilization through targeted representation can be identified across many other areas of law—labor law,

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[337] *See, e.g.*, Mark H. Lazerson, *In the Halls of Justice, the Only Justice Is in the Halls*, *in* 1 THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE 121 (Richard L. Abel ed., 1982) (describing this in terms of "a strategy of using every available procedural technicality and objection . . . transforming an extremely inexpensive and brief legal proceeding into a very costly and time-consuming one").

[338] Feldman, *supra* note 333, at 1528.

[339] *See id.* at 1537–38 (distinguishing service and impact cases).

[340] *See* David J. Barron, *The Community Economic Development Movement: A Metropolitan Perspective*, 56 STAN. L. REV. 701, 720–25 (2003) (reviewing WILLIAM H. SIMON, THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT: LAW, BUSINESS, AND THE NEW SOCIAL POLICY (2001)) (critiquing the CED movement for being too locally focused).

[341] *See* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 472–77 (1976) (reviewing the NAACP's litigation strategy to achieve desegregated school systems).

immigration law, family law, discrimination law, etc.—that are seen as separate from property law even though they have significant property implications. But a focus on communities and housing is both convenient and appropriate, drawing as it does upon examples solidly within the property law sphere.

In practice, these interventions involve selective use of property law to protect the well-being of the poor by helping to secure communities against market forces. Through targeted and aggressive defense of tenants facing eviction, lawyers can fight against market forces that would otherwise operate to displace low-income people.[342] Property law already provides tenants with a right to not have to live in terrible conditions through the implied warranty of habitability (IWH).[343] In areas where claiming a violation of the IWH is not conditioned on paying rent into an escrow account, the IWH can be an effective defense against eviction for non-payment.[344] Yet, the likelihood that tenants will raise eviction defenses effectively is closely linked to whether they have legal assistance.[345] Without knowledge of the IWH or legal assistance, the IWH can become merely a paper right that does little to slow down the eviction machine.[346] Targeted and aggressive representation, however, can "make the eviction process expensive and difficult for the landlord, thereby slowing gentrification and blocking displacement."[347] This is not a new idea; during the 1980s and 1990s, eviction free zones (EFZs) were pushed as a matter of practice and scholarship by Harvard Law School professors, students, and alumni.[348] As a leading article on EFZs explained, "[t]he point of the strategy is to launch a form of legal guerilla warfare. . . . [T]he lawyer uses any legal means at hand to bring about the desired result of increasing the

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[342] *See, e.g.*, Lazerson, *supra* note 337, at 128–35, 148–56, 160 (showing how aggressive use of legal formalism by legal aid attorneys can change the nature of evictions proceedings).

[343] For an overview of the development of the IWH, see Donald E. Campbell, *Forty (Plus) Years After the Revolution: Observations on the Implied Warranty of Habitability*, 35 U. ARK. LITTLE ROCK L. REV. 793, 795–809 (2013).

[344] *But see* Super, *The Rise and Fall of the IWH*, *supra* note 218, at 432–33 (explaining that in jurisdictions that require escrow payments, "very few low-income tenants appear to receive relief based on the implied warranty of habitability and related doctrines").

[345] *See* D. James Greiner et al., *The Limits of Unbundled Legal Assistance: A Randomized Study in a Massachusetts Court and Prospects for the Future*, 126 HARV. L. REV. 901, 927 (2013) (analyzing a study in which representation in eviction proceedings most likely reduces the probability a tenant ends up vacating a dwelling by between twenty-five to thirty-five percent).

[346] *See* Super, *The Rise and Fall of the IWH*, *supra* note 218, at 406–07 (considering how low-income tenants know about the warranty of habitability).

[347] Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L.J. 699, 763 (1993).

[348] *See* Gary Bellow & Jeanne Charn, *Paths Not Taken: Some Comments on Feldman's Critique of Legal Services Practice*, 83 GEO. L.J. 1633, 1664–65 (1995) (explaining the Eviction Free Zone Project in Boston).

time and expense needed to evict tenants."[349] What is important for this Article is that EFZs demonstrate the destabilizing power existing doctrines can have when they are employed creatively, in this case, through geographical targeting. EFZs attack the expectation landlords have that they will be able to convert their units from low- to high-rent units or to sell off their units as the neighborhood improves. Positively, EFZs can help slow or block gentrification, preventing market changes from displacing whole communities. But the strategy does so at some cost to ordinary expectations regarding the significance of property ownership.[350] From the owners' perspective, this targeted use of IWH allows lawyers to undercut owners' rights to control and freely alienate their property.

Housing advocates responding to the expiring use problem in public housing use a similar type of legal guerilla warfare. The expiring use problem is the result of federal programs that provided financial and tax incentives for the construction of rental housing in return for developers agreeing to house low-income tenants for an agreed upon period of time ranging from twenty to forty years in new or newly renovated complexes.[351] At the end of that period, the developer's obligations under the contract are met and, if the local market conditions will support it, those units can be turned around and rented at a much higher market rate.[352] Of course, calling the expiring use phenomenon a "problem" is arguably misleading because the "problem" is built into the public/private agreement: the restrictions were time-limited to begin with. But that has not stopped housing lawyers from aggressively fighting to keep low-income tenants in these complexes and from fighting to convince complex owners to agree either to extend the use restriction or to sell the properties, at a discount, to non-profit housing providers. Legislation designed to

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[349] Lawrence K. Kolodney, *Eviction Free Zones: The Economics of Legal Bricolage in the Fight Against Displacement*, 18 FORDHAM URB. L.J. 507, 518 (1991).

[350] *See* Aya Gruber, *Public Housing in Singapore: The Use of Ends-Based Reasoning in the Quest for a Workable System*, 38 HARV. INT'L L.J. 236, 265 (1997) ("The argument is that legal service centers, by vigorously enforcing the warranty of habitability as an anti-eviction measure [in EFZs], are using immoral, or at least improper, methods to achieve the positive goal of housing the poor.").

[351] For an excellent summary of the relevant programs as well as newer programs designed to keep units in the programs through additional subsidies, see EMILY P. ACHTENBERG, LOCAL INITIATIVES SUPPORT CORP., STEMMING THE TIDE: A HANDBOOK ON PRESERVING MULTIFAMILY SUBSIDIZED HOUSING 8 (Neil Carlson & Vincent F. O'Donnell eds., 2002); *see also* Lawrence Geller, Note, *Expiring Use Restrictions: Their Impact and Enforceability*, 24 NEW ENG. L. REV. 155, 157–67 (1989) (explaining the background of expiring use programs); Michael Quirk, Note, *Preserving Project-Based Housing in Massachusetts: Why the Voucher Discrimination Law Falls Short*, 30 REV. BANKING & FIN. L. 651, 656–67 (2011) (detailing the history of various federal affordable housing programs).

[352] For example, the Community Economic Development Assistance Corporation (CEDAC) estimates that in Massachusetts alone, over seven thousand low-income units expired during 2014 and over nine thousand units are at risk of expiration in 2015. CEDAC, EXPIRING USE INVENTORY REPORT 1 (2014).

support non-profit or government buyouts of such housing projects provided additional support for this tactic by imposing additional terms on developers long after the original investment and construction contract was signed.[353]

The work of public interest lawyers in both the EFZs and expiring use contexts involves using existing tools to actively destabilize the property rights of landlords and developers. Richard Thompson Ford describes such work as "'informal justice', a legal practice quite distinct from that imagined by traditional jurisprudence."[354] Ford explains that "[i]nformal justice uses legal argument as a strictly tactical device, with no regard for the formal purposes underlying the law."[355] Ford's explanation, which goes on to highlight the distinction between traditional individual representation and "a larger strategy to stall gentrification,"[356] is arguably a bit inaccurate in the case of the use of the IWH to support the community rights of low-income tenants living in either an EFZ or a project with use restrictions set to expire. After all, when Judge Skelly Wright invented the IWH in *Javins*, he did so in part because of the larger social context.[357] But Ford's general description of the manipulative work of such a "radical lawyer" seems fair: "She takes the legal system and the legal culture as given and attempts to manipulate the outcome of cases to further her ideologically based goals."[358] This approach destabilizes property holdings and the expectations surrounding ownership using existing doctrine, without inventing new categories or forms of property.

An understandable response to the above discussion of EFZs and the expiring use problem is to see these examples as dated, and perhaps irrelevant, to property law today. But several of the borrower-side responses to the foreclosure crisis show the continued reach of informal justice. The Great Recession began with property, with problems in the housing market tied to the bursting of the housing bubble,[359] yet

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[353] *See* Geller, *supra* note 351, at 167 (describing the Emergency Low Income Housing Preservation Act of 1987, which prohibited developers from exercising their prepayment rights in order to get out of the use restrictions); William H. Simon, *The Community Economic Development Movement*, 2002 WIS. L. REV. 377, 396 (citing 12 U.S.C. § 4110(b) and describing a requirement that developers give non-profits, government entities, and residents an exclusive right to bid for an initial period before the project is fully put into the market).

[354] Richard Thompson Ford, *Facts and Values in Pragmatism and Personhood*, 48 STAN. L. REV. 217, 238 (1995) (reviewing MARGARET JANE RADIN, REINTERPRETING PROPERTY (1993)).

[355] *Id*.

[356] *Id.* at 238–39.

[357] *See* Letter from J. Skelly Wright to Professor Edward H. Rabin (Oct. 14, 1982), *reprinted in* Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 549 (1984) (discussing the social and economic dynamics that influenced landlord-tenant law).

[358] Ford, *supra* note 354, at 239.

[359] *See* Nestor M. Davidson & Rashmi Dyal-Chand, *Property in Crisis*, 78 FORDHAM L. REV. 1607, 1610 (2010) (noting that the current economic crisis is grounded in property).

government efforts initially focused on "shoring up the banking system even if this means subsidizing the very institutions that caused the financial crisis in the first place."[360] Bank bailouts protected lenders from losses associated with bad mortgages, risks of which were held in a variety of forms including securitized debt obligations and credit default swaps. In contrast, little federal support reached individual borrowers.[361] As Nobel laureate Joseph Stiglitz observed, "the bailout strategy put the interests of the banks (and especially the large banks) and bankers ahead of the rest of our economy."[362] Lacking a similar government bailout to individuals, borrowers and their attorneys had to come up with creative ways of blocking or slowing down the foreclosure machine.

One set of proposals sought to impose new terms on lenders, essentially trying to cram down the mortgages, forcing lenders to accept rewritten contracts at a fraction of their face value or with additional rights for borrowers.[363] Although the idea of rewriting mortgages received considerable attention, ultimately it went nowhere.[364] Anti-borrower sentiment ("why should irresponsible borrowers be let off the hook")[365]

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[360] Singer, *supra* note 183, at 81.

[361] *See* Gupta, *supra* note 26, at 549–53 (noting the unsuccessful attempts of the federal government to address the housing crisis); Dan Immergluck, *Too Little, Too Late, and Too Timid: The Federal Response to the Foreclosure Crisis at the Five-Year Mark*, 23 HOUSING POL'Y DEBATE 199 *passim* (2013) (discussing the inadequate federal response to the foreclosure crisis).

[362] STIGLITZ, *supra* note 14, at 245.

[363] Robert Hockett advocates, over a number of articles, the use of eminent domain as the solution to the problem of underwater mortgages. *See* Robert Hockett & John Vlahoplus, *A Federalist Blessing in Disguise: From National Inaction to Local Action on Underwater Mortgages*, 7 HARV. L. & POL'Y REV. 253, 266–69 (2013) (stating that cities and states can easily use their eminent domain authority to ultimately modify loans and thus make them payable); Robert Hockett, *Accidental Suicide Pacts and Creditor Collective Action Problems: The Mortgage Mess, the Deadweight Loss, and How to Get the Value Back*, 98 CORNELL L. REV. ONLINE 55, 66–71 (2013) (advocating that state and municipal governments comprise the collective agent best equipped to address collective action problems preventing principal write-downs); Robert Hockett, *It Takes a Village: Municipal Condemnation Proceedings and Public/Private Partnerships for Mortgage Loan Modification, Value Preservation, and Local Economic Recovery*, 18 STAN J.L. BUS. & FIN. 121, 149–67 (2012) (detailing the Municipal Plan, which is designed to "sidestep all of the unnecessary impediments that presently block meaningful debt revaluation and attendant value maximization"). Other proposals include expanding homeowner bankruptcy rights in foreclosure against mortgage holders. *See* Melissa B. Jacoby, *Home Ownership Risk Beyond a Subprime Crisis: The Role of Delinquency Management*, 76 FORDHAM L. REV. 2261, 2265 (2008) (considering "mortgage delinquency management tools through the lens of purported ends of housing policy, including whether they honor and further the goals of wealth building, positive social-psychological states, and community development").

[364] *See, e.g.*, Butler v. Deutsche Bank Trust Co. Americas, 748 F.3d 28, 30–31 (1st Cir. 2014) (discussing the issue of rewriting mortgages). *But see* Robert Hockett, *"We Don't Follow, We Lead": How New York City Will Save Mortgage Loans by Condemning Them*, 124 YALE L.J. F. 131, 131–34 (2014) (suggesting that eminent domain proposals may still be attempted).

[365] *See* Gupta, *supra* note 26, at 544–47 (noting that blame has often been placed on homeowners); Joseph William Singer, *Foreclosure and the Failures of Formality, or Subprime Mortgage Conundrums and How to Fix Them*, 46 CONN. L. REV. 497, 510, 537 (2013) (discussing social perceptions of risky borrower behavior).

and the lobbying power of the banks[366] staved off legislative change, and courts were generally reluctant to undo or alter valid contracts simply to aid one party (the borrower) to the contract.[367] After an initial burst of legislative changes, the imposed solution turned out to be largely a dead end.[368] But the informal justice approach—using the law as a means to an end regardless of the purpose of the original rule—has found some success.[369] Waves of foreclosures hit the housing market just prior to and throughout the Great Recession, yet by drawing on formal law regarding the foreclosure process, lawyers on the borrower side managed to dampen the force of some of these waves.[370] Recording and filing requirements—long neglected by banks, courts, and lawyers—were deployed and succeeded in slowing down the foreclosure machine.[371] The very liquidity of commercial paper—largely in the form of the bundled mortgages that helped drive up the housing market and led to the crisis[372]—created a situation in which, for example, mortgage holders could not produce original loan documents. Lawyers and their clients "started questioning whether the bank bringing foreclosure action was entitled to recover the property."[373] The scale of the problem in the mortgage markets led banks and their lawyers to try to use shortcuts, such as, most famously, robosigning documents.[374] Borrower-side lawyers rightly attacked such practices.[375] As Nestor Davidson highlighted, the end result was a

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[366] *See* Tracie R. Porter, *Pawns for a Higher Greed: The Banking and Financial Services Industry's Capture of Federal Homeownership Policy and the Impact on Citizen Homeowners*, 37 HAMLINE L. REV. 139, 163–66, 176–79 (2014) (discussing banking, financial services and insurance companies' success in lobbying the government for favorable regulations).

[367] *See* Shoked, *supra* note 3, at 460–61 n.133 (collecting cases in which banks successfully defeated challenges to lending practices in urban areas).

[368] *See* Aleatra P. Williams, *Foreclosing Foreclosure: Escaping the Yawning Abyss of the Deep Mortgage and Housing Crisis*, 7 NW. J.L. & SOC. POL'Y 455, 458–59, 483–87, 491–501 (2012) (stating that various government reform efforts have failed).

[369] *See id.* at 481–83, 494–95 (discussing the courts' more stringent approach to foreclosure laws); Raymond H. Brescia, *Leverage: State Enforcement Actions in the Wake of the Robo-Sign Scandal*, 64 ME. L. REV. 17, 34–38 (2011) (discussing the broad and remedial nature of Unfair and Deceptive Acts and Practices laws).

[370] For a list of possible legal strategies to resist foreclosure and an argument that state courts should be more receptive to these moves, see Andrew J. Kazakes, *Protecting Absent Stakeholders in Foreclosure Litigation: The Foreclosure Crisis, Mortgage Modification, and State Court Responses*, 43 LOY. L.A. L. REV. 1383, 1396–99 (2010).

[371] *See* Kochan, *supra* note 264, at 283–97 (presenting ways banks ignored or tried to get around formal recording requirements).

[372] For an explanation of what lay behind the glut of mortgage finance, see Adam J. Levitin & Susan W. Wachter, *Explaining the Housing Bubble*, 100 GEO. L.J. 1177, 1181 (2013).

[373] Singer, *supra* note 365, at 518.

[374] *See* Dustin A. Zacks, *Robo-Litigation*, 60 CLEV. ST. L. REV. 867, 869–70 (2013) (discussing the lawyers involved in the expedited foreclosure processes associated with the robo-signing scandals).

[375] *See* Gregg H. Mosson, *Robosigning Foreclosures: How It Violates Law, Must Be Stopped, and Why Mortgage Law Reform Is Needed to Ensure the Certainty and Values of Real Property*, 40 W. ST.

resurgence of formalism among progressive public interest lawyers.[376] A borrower-side strategy of pushing for strict enforcement of process requirements found support in a series of cases brought by state Attorneys General that alleged that banks had engaged in discriminatory and deceptive lending practices.[377] Together they undermined the concentrated property interests of banks, destabilizing their holdings as well as their expectation that the law would favor them over defaulting borrowers. Though the title "homeowner" is usually given to borrowers immediately following purchase, regardless of how much is owed to the lending institution, in practice, the defense of these borrower-homeowners amounts to a claim-based attempt to secure homeowner communities that is fairly analogous to how eviction defense can secure tenant communities.

These are property-centric examples of the larger lesson that jaded students and professors sometimes forget: lawyers matter. They show that legal assistance for vulnerable people and communities can disrupt normal expectations regarding ownership and power. The lesson is not one that has gone unheeded by defenders of the status quo. As David Luban showed in his essay, *Taking Out the Adversary: The Assault on Progressive Public Interest Lawyers*, the very success of attorneys advocating for the poor inspired a reactionary response designed to squeeze out and "muzzle" public interest lawyers and their clients.[378] It is only because legal aid attorneys are effective that Governor Ronald Reagan demonized them, President Reagan gutted their funding, and Congress in 1996 handcuffed legal aid offices with arguably unethical restrictions on how they can practice law.[379] Even with these restrictions, there is still space for lawyers for the poor to make a difference. Providing access to legal assistance itself makes a difference, but, as Gary Smith argues, advocates for poor communities can, and perhaps should, reclaim some of the transformative ambitions of the early mission of legal services during the War on Poverty.[380] Or, to frame this in terms of the argument in this Article,

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U. L. REV. 31, 70 (2012) (highlighting the role plaintiff-side lawyers played in "bringing robosigning to light").

[376] *See* Nestor M. Davidson, *New Formalism in the Aftermath of the Housing Crisis*, 93 B.U. L. REV. 389, 394–96 (2013) (explaining that the emerging mortgage jurisprudence ironically underscores pluralist conceptions of property).

[377] *See* Brescia, *supra* note 369, at 30–34 (2011) (summarizing the cases and resulting settlements).

[378] David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CALIF. L. REV. 209, 245 (2003).

[379] *See* ALAN W. HOUSEMAN & LINDA E. PERLE, SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES 14–16, 29–34, 36–37 (2007) (discussing government frustration of legal aid services goals).

[380] *See* Gary F. Smith, *Poverty Warriors: A Historical Perspective on the Mission of Legal Services*, 45 CLEARINGHOUSE REV. 34 *passim* (2011) (stating that advocates may revisit the original mission of the first legal services program).

creatively using existing law to destabilize the ordinary working of property is another way lawyers matter, even if doing so involves working *against* property.

B. *Pragmatic Resistance*

Sometimes more is needed. Property law and the economic stratification of our society are both remarkably resilient and resistant to meaningful change. The current period of our history is a good illustration of these complementary—and mutually reinforcing—features of the law, of economics, and of their interaction. Since roughly the oil shocks of the 1970s, productivity gains and the incomes of most workers have diverged.[381] After World War II, the United States enjoyed a period of phenomenal and broadly shared economic growth. But since the 1970s the wealthiest one (and especially 0.1) percent of Americans have captured most of the rewards of productivity gains, which have continued to rise much as they did before the 1970s.[382] In contrast, working-class Americans have barely seen their incomes rise. Where households have gotten ahead it has been the result not of income gains but of switching from a single wage earner to the expectation that all adults, regardless of parental obligations, participate in the wage economy.[383] The Great Recession put an exclamation point on the problems of the New Gilded Age. Young people, even relatively privileged college graduates, including law school graduates, face a difficult job market marked by unemployment and underemployment.[384] Moreover, they can expect a prolonged period of lower earnings as a consequence of the state of the economy when they are entering the workforce.[385] It is no wonder that they are delaying what had

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[381] *See, e.g.*, Frank Levy & Peter Temin, *Inequality and Institutions in 20th Century America* 2 (Nat'l Bureau of Econ. Research, Working Paper No. 13106, 2007), http://www.nber.org/papers/w13106.pdf [http://perma.cc/Q4VB-EM9C] (stating that it is "problematic that recent productivity gains have not significantly raised incomes for most American workers").

[382] *See* Lawrence Mishel et al., *Wage Inequality: A Story of Policy Choices*, NEW LABOR F., Aug. 4, 2014, at 4–5 ("Much of the increase in equality has taken place in the top 1 percent."); *see also* Josh Bivens et al., *Raising America's Pay: Why It's Our Central Economic Policy Challenge*, ECON. POL'Y INST. (June 4, 2014), http://www.epi.org/publication/raising-americas-pay/ [http://perma.cc/4XV4-Z83M] (emphasizing the urgency of addressing unequal wage growth in the United States). Perhaps the best resource on understanding income inequality over the last several decades is the State of Working America website, http://www.stateofworkingamerica.org/, and the associated report which was last published in print form in 2012 and is now presented through interactive charts. *See generally* LAWRENCE MISHEL ET AL., THE STATE OF WORKING AMERICA 53–138 (12th ed. 2012) (addressing the centrality of income inequality for American families and households).

[383] *See generally* ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE-CLASS PARENTS ARE GOING BROKE 97–122 (2003).

[384] *See* STIGLITZ, *supra* note 14, at 265 (illustrating the economic challenges for twenty-year-olds).

[385] *See* Lisa B. Kahn, *The Long-Term Labor Market Consequences of Graduating from College in a Bad Economy*, 17 LABOUR ECON. 303 (2010); Philip Oreopoulos et al., *The Short- and Long-Term*

been typical life stages such as moving out of their parents' houses,[386] marrying,[387] having kids, and purchasing a first home.[388] It is not just the young whose prospects are bleak. Many seniors have been unable to find new jobs following layoffs at the start of the recession.[389] Some sectors in the economy are doing well, but the strength of others, such as retailers of luxury goods and high-end car companies, speaks volumes about the rise of inequality in the country.

The problem of inequality is not necessarily new nor news, but the Great Recession has been instrumental in bringing attention to these issues. As early as 2008, Julie Nice observed, "[a]t this particular moment in American history, poverty is making a rare appearance as an urgent concern on the political radar screen."[390] The Occupy movement, which began in September 2011, brought the idea of the 1% into the popular and political lexicon and helped spur a national dialogue about poverty and inequality.[391] In 2014, a 700-page work by a French economist, Thomas Piketty's *Capital in the Twenty-First Century*,[392] attacking the inequality of

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Career Effects of Graduating in a Recession: Hysteresis and Heterogeneity in the Market for College Graduates 19 (Nat'l Bureau of Econ. Research, Working Paper No. 12159, 2006), http://www.nber.org/papers/w12159.pdf [http://perma.cc/W49W-3GCQ] ("Graduating during a recession leads to significantly lower earnings at the beginning of an individual's labor market . . . .").

[386] *See, e.g.*, RAKESH KOCHHAR & D'VERA COHN, FIGHTING POVERTY IN A TOUGH ECONOMY, AMERICANS MOVE IN WITH RELATIVES 1 *passim* (2011), http://www.pewsocialtrends.org/files/2011/10/Multigenerational-Households-Final1.pdf [http://perma.cc/QRZ6-WXBV] (acknowledging the popular choice of Americans to live with relatives); Adam Davidson, *It's Official: The Boomerang Kids Won't Leave*, N.Y. TIMES MAG. (June 20, 2014), http://www.nytimes.com/2014/06/22/magazine/its-official-the-boomerang-kids-wont-leave.html?_r=0 (discussing the prevalence of young adults living with their parents).

[387] Poverty and inequality are not only changing when people marry, but they are also making marriage's meaning and experience differ across classes. *See, e.g.*, JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY (2014); KATHRYN EDIN & MARIA J. KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE 111 (2011) (illustrating that while women may still be interested in marriage, many are putting it off in favor of economic stability and other factors).

[388] *See* JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., THE STATE OF THE NATION'S HOUSING 2014, at 12–16 (2014) (discussing how the difficult economy has contributed to young adults' reluctance to purchase homes).

[389] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-445, UNEMPLOYED OLDER WORKERS: MANY EXPERIENCE CHALLENGES REGAINING EMPLOYMENT AND FACE REDUCED RETIREMENT SECURITY (2012) (discussing the employment challenges faced by older workers).

[390] Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, & Dialogic Default*, 35 FORDHAM URB. L.J. 629, 664 (2008).

[391] *See* Sarah Leberstein & Anastasia Christman, *Occupy Our Occupations: Why "We Are the 99%" Resonates with Working People and What We Can Do to Fix the American Workplace*, 39 FORDHAM URB. L.J. 1073, 1073–75 (2012) ("The experts have named 'Occupy' 2011's word of the year.").

[392] THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (2013).

modern capitalism, became a best seller.[393] Yet in many respects very little has changed, despite both forty years of relative wage stagnation for the median worker and the increased attention that issues of poverty and inequality have received since the start of the Great Recession. Proposals to change the law have largely gone nowhere. On the finance side, tax incentives continue to flow to hedge fund managers, "too big to fail" institutions remain too big to fail, wrongdoing has been largely swept under the rug through settlements instead of criminal punishment,[394] and, perhaps most troubling, stock market returns seem to no longer be tied to what is happening on Main Street. Property law has remained equally resistant and resilient to change in the face of economic challenges. In 2010, Nestor Davidson and Rashmi Dyal-Chand observed that the economic crisis "made basic questions about the nature of property a daily aspect of our cultural and political dialogue."[395] They continued, "[i]t is too early to draw definitive conclusions about the residue that this crisis will leave on property doctrine."[396] Five years later, definitive conclusions perhaps are still difficult, but it appears as if, at most, only minor residue will be left. The crisis, and the opportunity to make significant changes, seems to have been wasted after all.[397] Or perhaps more accurately, property law once again showed its resilience.

While the last sub-Part showed that property law can be a destabilizing tool, this sub-Part looks at a more radical alternative—destabilizing property through confrontation and resistance. Given the state's role in protecting private property, challenges to how property is held often must approach or even cross criminal lines for destabilization to occur. But without confrontation, those with privilege may choose to ignore those who are excluded from the benefits of property or may not see the benefits of changing the role property plays in society.[398] My argument is heavily indebted to the pioneering work of Eduardo Peñalver and Sonia Katyal, whose book, *Property Outlaws*, showed how rule violators can improve property law.[399] Using an expansive range of examples, Peñalver and Katyal argue that property law is and can be improved by paying attention

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[393] Sam Tanehaus, *Hey, Big Thinker: Thomas Piketty, the Economist Behind 'Capital in the Twenty-First Century' Is the Latest Overnight Intellectual Sensation*, N.Y. TIMES, Apr. 27, 2014, at ST1.

[394] *See* BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 1–2 (2014) (exploring the pattern of settlement and non-prosecution that occurs when powerful corporations that are valuable to the economy have committed crimes).

[395] Davidson & Dyal-Chand, *supra* note 359, at 1609.

[396] *Id.* at 1610.

[397] *See id.* at 1611 (discussing the opportunity afforded by the crisis to re-evaluate the nature of property law).

[398] As Lee Anne Fennell and Richard H. McAdams note, "the decision to ignore distribution [is] a distributive choice." Fennell & McAdams, *supra* note 205, at 3.

[399] PEÑALVER & KATYAL, *supra* note 16.

to a wide range of "outlaw" behavior, from the lunch counter sit-ins of the civil rights movement to the widespread copyright infringement of illegal music downloading.[400] When they are frequent or are tied to a valid moral claim, violations of the law may reflect a need to revisit the law. Having shown the value of such outlaw behavior, Peñalver and Katyal conclude by arguing that property protections and enforcement mechanisms should not become so effective that they foreclose all space to violate or challenge the law.[401] Though they do not frame their argument in the same way, Peñalver and Katyal's masterful work and the examples they collected are in line with the idea that the law must be periodically destabilized and open to such challenges. My point of departure from Peñalver and Katyal is that I see more radical potential of rule breaking to destabilize property holdings and protections than envisioned by their more reasonable approach.

One of the most damaging myths regarding low-income people and communities is that they are powerless to resist oppressive structures. In fact resistance and rule violations occur all the time, in subtle and not-so-subtle ways. In his description of the all-encompassing nature of the law as it relates to and controls the lives of poor people, Austin Sarat explained that "being on welfare means having a significant part of one's life organized by a regime of legal rules invoked by officials to claim jurisdiction over choices and decisions which those not on welfare would regard as personal and private."[402] But even with the law playing such a large role in their lives, Sarat went on to note that "[r]esistance exists side-by-side with power and domination."[403] These two linked observations are found throughout the literature on the lives of the poor. Examples of people resisting structural oppression, including oppression done under the color of property law, are found throughout history. Indeed, there has been a major effort by contemporary scholars to unearth these resistance stories. And while the goal of such resistance sometimes is to incorporate the concerns of the subordinated into the law, it is often to fight against or overthrow the oppressive system completely. As rights scholars have pointed out in the civil rights and social movement areas, channeling such resistance through the law—here, working with property law—may wrongly blunt demands for change and alter the nature of the demands. But what would resistance, working against property law, look like and what could it accomplish? Though one can imagine many answers to these questions, from, at one extreme, the idea that destabilization would accomplish very little to, at the opposite extreme, that it would lead to

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[400] *Id.* at 64–70, 84–86.

[401] *Id.* at 143.

[402] Austin Sarat, *". . . The Law Is All Over": Power, Resistance, and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 343, 344 (1990).

[403] *Id.* at 346.

anarchy, I suggest a more optimistic view of deliberate efforts to destabilize property protections. In this sub-Part I argue that working against property law may be the best way to mobilize Americans and to force a national debate about the role property law plays in maintaining the status quo. Resistance can be a tool to generate a political response—something a work-with-property approach may not be able to accomplish.

Progressives have long argued that the national "ideology" of what is required for success, which focuses on individual hard work, is not accurate.[404] Arguably, the country is reaching a tipping point when it comes to rejecting the Horatio Alger myth in favor of broad-based recognition of the importance of class and inequality.[405] Confrontation and resistance to existing power structures such as the exclusionary power of property may be the best tools to provide the final necessary push. Issues of inequality and opportunity are pressing enough across the ideological spectrum that two large conservative think tanks, the American Enterprise Institute and the Heritage Foundation, joined in an unlikely partnership with two more progressive think tanks, the Brookings Institute and the Urban Institute, to form the Economic Mobility Project.[406] The project's reports, as well as the work of other scholars working on economic mobility, make for sobering reading. Among their findings, "Americans raised at the bottom and top of the family income ladder are likely to remain there as adults, a phenomenon known as 'stickiness at the ends.'"[407] The same report notes "[b]lacks are more likely to be stuck in the bottom and more likely to fall from the middle of the family income and wealth ladders than are whites."[408] After introducing the American idea that hard work leads to economic success, another report notes "[the] rags-to-riches story is more prevalent in Hollywood than in reality. In fact, 43 percent of Americans raised at the bottom of the income ladder remain stuck there as adults, and 70 percent never even make it to the middle."[409] To get a good overall understanding of economic mobility in the United States, it is worth

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[404] *See* JOHN CHRISTMAN, THE MYTH OF PROPERTY: TOWARD AN EGALITARIAN THEORY OF OWNERSHIP 97 (1994) ("That popular ideology—that what one earns is commensurate with one's value or effort and hence just—is pervasive and dangerous.").

[405] *See* Richard H. McAdams, *Economic Costs of Inequality*, 2010 U. CHI. LEGAL F. 23, 41 (discussing the effects of material inequality).

[406] *See Economic Mobility Project: Partners*, PEW CHARITABLE TRUSTS, http://www.pewtrusts.org/en/archived-projects/economic-mobility-project/partners [http://perma.cc/F7CN-8KLB] (last visited Sept. 5, 2015). The Economic Mobility Project is now hosted by the Pew Charitable Trusts. *See Financial Services and Mobility: Overview*, PEW CHARITABLE TRUSTS, http://www.pewtrusts.org/en/projects/financial-security-and-mobility [http://perma.cc/95GA-HJXG] (last visited Sept. 5, 2015).

[407] PEW CHARITABLE TRUSTS, PURSUING THE AMERICAN DREAM: ECONOMIC MOBILITY ACROSS GENERATIONS 2 (2012).

[408] *Id.* at 20.

[409] PEW CHARITABLE TRUSTS, MOVING ON UP: WHY DO SOME AMERICANS LEAVE THE BOTTOM OF THE ECONOMIC LADDER, BUT NOT OTHERS? 1 (2013).

quoting Jared Bernstein at length:

> These two concepts—intra- and intergenerational mobility—both shed light on the fluidity, or lack thereof, of class in America. The evidence presented here shows some degree of mobility: families do change [relative positions], and the correlation between parents and children is far from one. Yet two important points emerge. First, there is not as much mobility as American mythology might lead one to expect. Most families end up at or near the same relative income position in which they start, and, as noted, when it comes to parent/children income correlations, the apple does not fall very far from the tree. Second, the rate of mobility has not increased and may have fallen. The United States is a more unequal society, yet Americans have not become more mobile.[410]

This is a damning conclusion, but the idea of American mobility has one final line of defense. Even if we accept that the United States is not perfect, if the economic structure is more permeable than other alternatives, it can be celebrated. Unfortunately, this is not the case: "the relationship between parental socioeconomic advantage and child outcomes is the strongest" in the United States compared to similar developed countries.[411] As the American Enterprise Institute recently noted, economic mobility in the United States is significantly lower than in other countries.[412]

The mismatch between the country's fairly rigid class/caste structure and public perceptions regarding economic opportunity creates the potential for resistance strategies to resonate politically. It is hard prospectively to say what sort of challenges to property protections will arise and which will be successful. But past examples of resistance that

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[410] Jared Bernstein, *Economic Mobility in the United States: How Much Is There and Why Does It Matter?*, *in* ENDING POVERTY IN AMERICA: HOW TO RESTORE THE AMERICAN DREAM 23, 26 (John Edwards et al. eds., 2007).

[411] PEW CHARITABLE TRUSTS, DOES AMERICA PROMOTE MOBILITY AS WELL AS OTHER NATIONS? 2–5 (2011) (comparing mobility in the United States with mobility in the United Kingdom, France, Germany, Sweden, Italy, Australia, Finland, Denmark, and Canada); *see also* Julia B. Isaacs, *International Comparisons of Economic Mobility*, *in* JULIA B. ISAACS ET AL., GETTING AHEAD OR LOSING GROUND: ECONOMIC MOBILITY IN AMERICA (2008) (reviewing the literature and reaching the same conclusion); Markus Jäntti et al., *American Exceptionalism in a New Light: A Comparison of Intergenerational Earnings Mobility in the Nordic Countries, the United Kingdom and the United States* 2 (IZA Discussion Paper No. 1938, 2006), http://ftp.iza.org/dp1938.pdf [http://perma.cc/4WVE-64YK] (reporting that the United States is less mobile than the United Kingdom and the Nordic countries).

[412] APARNA MATHUR & ABBY MCCLOSKEY, AMERICAN ENTER. INST., FOSTERING UPWARD ECONOMIC MOBILITY IN THE UNITED STATES 9 (2014).

succeeded in destabilizing property demonstrate that challenges to accepted property right protections can be transformative. The most well-known examples of such resistance are perhaps the Civil Rights, Women's Rights, and, more recently, Gay Rights movements. In each of these cases, the claims were and are deeply unsettling to many established expectations, including exclusionary property-based expectations. The central claim of these movements—that all men and women are equal regardless of skin color or sexual orientation—is seen as so self-evidently true that it is easy to lose sight of the profoundly disruptive nature of both these movements and their claims.[413] All three of these movements challenged the existing power structure, prying open things like public accommodations, public and private benefits, and rights to hold property. They did so in the face of counterarguments that tradition, private rights of association, and long-standing state preferences should not be undermined. One can see their successes in two ways. First, as the natural result of the country's founding principles, a point that Martin Luther King, Jr. drove home in his *I Have a Dream* speech. King drew upon the Declaration of Independence, expressing his hope that "this nation will rise up, [and] live out the true meaning of its creed: 'We hold these truths to be self-evident, that all men are created equal.'"[414] Second, the successes show the importance of mobilization. African-Americans did not just ask the nation to "cash a check," as King put it; they demanded it in demonstrations across the country.[415] Resistance took many forms—yes, bus boycotts and marches, but also sit-ins and voter registration drives—and while King's non-violent approach is rightly celebrated, it was not the only form of resistance in the movement.[416] Furthermore, non-violence is not the same as law-abiding, as is powerfully attested to by King's many arrests and his *Letter from a Birmingham Jail*.[417] An honest assessment would acknowledge that successes that have occurred—not only for the civil rights movement but also for the women's and gay rights movements—were a result of the coming together of both of these strategies.

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[413] *See, e.g.*, Trina Jones, *Occupying America: Dr. Martin Luther King, Jr., The American Dream, and the Challenge of Socio-Economic Inequality*, 57 VILL. L. REV. 339, 341–42 (2012) (discussing the risks and violence that civil rights workers faced in their work).

[414] Martin Luther King, Jr., Address at Lincoln Memorial (Aug. 28, 1963).

[415] For an especially poignant account of the Civil Rights Movement that highlights the importance of organized mobilization and resistance, see TAYLOR BRANCH, AT CANAAN'S EDGE: AMERICA IN THE KING YEARS 1965–68 (2006); TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954–63 (1988); TAYLOR BRANCH, PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963–65 (1998).

[416] *See, e.g.*, CHARLES E. COBB JR., THIS NONVIOLENT STUFF'LL GET YOU KILLED: HOW GUNS MADE THE CIVIL RIGHTS MOVEMENT POSSIBLE (2014) (detailing the use of weapons and violence in the civil rights movement).

[417] Martin Luther King, Jr., Letter from a Birmingham Jail (Apr. 16, 1963) (on file with the Martin Luther King, Jr. Research and Education Institute at Stanford University).

Mobilization and resistance forced changes in part by taking advantage of the space provided by societal structures such as the popular understanding of the nature of the country. Successful resistance campaigns will have to find similar sweet spots to challenge the systematic exclusionary effects of property.

I want to suggest that one possible strategy for destabilizing property is focusing mobilization on exposing the contrast between the protection of the property interests of the wealthy compared to the lack of protection provided to low-income people and communities. Such a demand by the subordinated is relatively straightforward; your property rights do not deserve protection if my rights are not going to be protected. What is destabilizing about this demand is that it inverts the ordinary political demand that property rights enjoyed by others be extended. Progressive property is an example of an ordinary political demand in that it advocates for the excluded, for non-owners, and for community or social interests, but it does so without showing how the politics around property are to change. The destabilization claim is more radical (or more "realist"[418]) but it can be seen in numerous recent protest movements. Though the Occupy movement spread, it began by claiming space in the financial heart of America. Union workers who picket or engage in sit-down strikes aim to block customer and employer access to the very facilities that are being protested. The housing affordability advocates in San Francisco who blocked "Google Buses" did so to target the people who are seen as pricing them out of the city.[419] And when the tenants of entire buildings band together, refusing to pay a rent increase, their financial vulnerability suddenly becomes felt in a personal and financial way by the property owner. The point of these examples of "property disobedience"[420] is not to suggest that any one of these strategies is the best route forward but to show that resistance can create political possibilities that might not exist absent confrontation. Resistance can take many forms, including threatened actions or protests: credible threats may serve a politically galvanizing role similar to more active destabilization efforts.

Destabilization involves lessening the inequities involved in respecting property rights. As the legal realists understood, to say someone has a property right to something is to say that he or she has a right to that thing

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[418] *See* Smith, *supra* note 37, at 287 (noting that "[a r]ealist might want to treat [stability] as yet another detachable feature or lever to be dialed up or down").

[419] *See* Heather Knight, *Google Riders—'Under Siege' or 'Alien Overlords'?*, S.F. GATE (Dec. 14, 2013), www.sfgate.com/bayarea/article/Google-riders-under-siege-or-alien-5065290.php [http://perma.cc/W5NK-YGK9] (describing how anti-eviction activists that associate the expeditious growth of technology to rising housing prices blocked Google buses that shuttle employees to Silicon Valley from San Francisco).

[420] Alexander, *supra* note 15, at 20.

and that others are obligated to respect that right.[421] But where economic mobility is such that the lottery of birth plays a largely determinative role in peoples' access to property throughout their lifetimes, asking that the property rights of others be respected is asking a lot. Selectively not respecting, or threatening not to respect, all property rights may force owners to recognize the extent to which their claims rely upon the social contract. Where that contract is broken—as, I would argue, it is when people are denied meaningful and equal access to property—it may be appropriate to lessen or even imperil property rights. And it is in destabilization's ability to force recognition that the protection of property rights is premised on some degree of fairness that destabilization offers something not offered by approaches that work *for* or *with* property. Working *against* property may sound radical, but the alternative, leaving in place an inequitable system and locking in place inequality through strict forms of property protection and adherence to property law, is surely just as radical.[422]

V. CONCLUSION

My hope in writing this Article is not to disparage existing property scholarship. Despite the critiques of progressive property contained in this Article, I am largely in agreement with the progressive property agenda and agree with the scholars writing from that perspective. Similarly, although it is no doubt clear that I would not classify myself as conservative, I find the work of information theorists enlightening and largely agree with their descriptive characterizations of property law. But until we recognize the extent to which status quo bias informs our views on both the structure of the law and how well the law works, we will continue to tinker, looking for ways to work with property law rather than recognizing the need for more radical change. The hope is that challenging the status quo will "release[] the mental grip of conventional structures on the capacity to consider alternatives."[423] Although there are libertarian gripes about our system and occasional spikes in public concern about the security of property rights,[424] property ownership in general is quite secure and owners rightly have little concern that their property rights will be diminished in any significant way. Perhaps in the interests of those

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[421] Serkin, *supra* note 198, at 114 ("[R]ights are generally zero sum. Expanding one person's right to exclude means limiting another's right to be included (or to access a resource).").

[422] *See* Fennell, *supra* note 95, at 1474 (making a similar argument about an information cost approach compared to an efficient welfare maximizing system); Purdy, *supra* note 31, at 11–15 (arguing that property should be measured by how far it falls short of its ideal).

[423] UNGER, *supra* note 256, at 1075.

[424] *See, e.g.*, Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100, 2108–14 (2009) (discussing the public outcry that followed *Kelo*).

excluded it is time to selectively destabilize property.