

Progressive Property in Action:

Widening the Doctrinal Lens

1.1 Introduction

Property theory spans a wide range of overlapping issues, including addressing private ownership's moral justification,¹ its core features and scope as a matter of private law,² and its status as a matter of public law,³ often without distinguishing sharply between the applicability of the concepts and arguments developed at the level of theory in these various contexts.⁴ The complex relationship between property rights and social justice is a theme that cross-cuts these issues.

Duguit famously described property as a social function rather than a subjective right,⁵ an approach that proved particularly influential in

¹ See, e.g., J. Waldron, *The Right to Private Property* (Oxford: Oxford University Press, 1991) and S. M. Munzer, *A Theory of Property* (Cambridge: Cambridge University Press, 1990).

² See, e.g., J. Penner, *The Idea of Property in Law* (Oxford: Oxford University Press, 1997); E. J. Weinrib, *The Idea of Private Law* (Oxford: Oxford University Press, 2012) and A. Ripstein, *Private Wrongs* (Cambridge, MA: Harvard University Press, 2016).

³ See, e.g., L. S. Underkuffler, *The Idea of Property: Its Meaning and Power* (Oxford: Oxford University Press, 2003).

⁴ See, e.g., J. W. Harris, *Property and Justice* (Oxford: Oxford University Press, 2002), H. Dagan, *Property: Values and Institutions* (Oxford: Oxford University Press, 2011), addressing issues of both legal structure and justification, G. S. Alexander, *Property and Human Flourishing* (Oxford: Oxford University Press, 2018), A. J. van der Walt, *Property in the Margins* (Oxford: Hart, 2008), P. Gerhart, *Property Law and Social Morality* (Cambridge: Cambridge University Press, 2013); J. W. Signer, *Entitlement: The Paradoxes of Property* (New Haven: Yale University Press, 2000), J. Purdy, *The Meaning of Property: Freedom, Community and the Legal Imagination* (New Haven: Yale University Press, 2010), all expounding property theories that are applied to both private law and public law issues.

⁵ L. Duguit, 'Les transformations générales du droit privé depuis le Code Napoléon' (Paris: Félix Alcan, 1912), reproduced and translated in J. H. Wigmore, E. Borchard, F. Pollock, L. B. Register and E. Bruncken, *Progress of Continental Law in the Nineteenth Century* (Boston: Little, Brown and Company, 1918), p. 65, p. 74. For useful overviews, see M. C. Mirow, 'The Social-Obligation Norm of Property: Duguit, Hayem, and Others' (2010) 22 *Florida Journal of International Law* 191, L. van Vliet and A. Parise, 'The Development of

civilian jurisdictions.⁶ Honoré identified ownership as having a ‘social aspect’ that was recognised ‘[e]ven in the most individualistic ages of Rome and the United States’.⁷ For Honoré, ownership’s ‘social aspect’ was reflected in the susceptibility of property rights to limitation, for example through taxation or expropriation procedures. That ‘social aspect’ has come to be widely accepted by property scholars of all schools of thought.⁸ It is also central to both judicial decision-making and legislative law-making – as Gray puts it, ‘...all modern jurisdictions are actively and inevitably engaged in defining (and redefining) the social boundaries of the institution of property.’⁹

Scholarly debate has shifted to the parameters of the ‘social aspect’ or ‘social function’ of ownership.¹⁰ It has also turned to consider the appropriate legal means of giving effect to that ‘social aspect’ or ‘social function’. Considering these debates, Baron distinguishes two broad ‘camps’ in property theory: ‘progressive property’ theorists and

the Social Function of Ownership: Exploring the Pioneering Efforts of Otto van Gierke and Léon Duguit’ in G. Muller et al., eds., *Transformative Property Law* (Cape Town: Juta, 2018) p. 265.

⁶ See, e.g., A. dos Santos Cunha, ‘The Social Function of Property in Brazilian Law’ (2011) 80 *Fordham Law Review* 1171; M. C. Mirow, ‘Origins of the Social Function of Property in Chile’ (2011) 80 *Fordham Law Review* 1183; C. Crawford, ‘The Social Function of Property and the Human Capacity to Flourish’ (2011) 80 *Fordham Law Review* 1089; T. T. Ankerson and T. Ruppert, ‘Tierra y Libertad: The Social Function Doctrine and Land Reform in Latin America’ (2006) 19 *Tulane Environmental Law Journal* 69; N. M. Davidson, ‘Sketches for a Hamiltonian Vernacular as a Social Function of Property’ (2011) 80 *Fordham Law Review* 1053 and D. Bonilla, ‘Liberalism and Property in Colombia: Property as a Right and Property as a Social Function’ (2011) 80 *Fordham Law Review* 1135. Van Vliet and Parise note a degree of impact in the UK and the US: ‘The Development of the Social Function’, (n 5), pp. 270–71.

⁷ A. M. Honoré, ‘Ownership’, in A. G. Guest (ed.), *Oxford Essays in Jurisprudence* (First Series) (Oxford: Oxford University Press, 1961), p. 107, pp. 144–45. See also Kevin Gray, arguing ‘[t]here remain today few true property absolutists’: K. Gray, ‘Land Law and Human Rights’ in L. Tee (ed.), *Land Law: Issues, Debates, Policy* (Devon: Willan Publishing, 2002), p. 211, pp. 222–23.

⁸ See E. Rosser, ‘Destabilizing Property’ (2015) 48 *Connecticut Law Review* 397, 402; S. Hamill, ‘Community, Property, and Human Rights: The Failure of Property-as-Respect’ (2017) 27 *Journal of Law and Social Policy* 7, 13 (available at: <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1264&context=jlsp>) and A. J. van der Walt, ‘The Protection of Private Property Under the Irish Constitution: A Comparative and Theoretical Perspective’ in E. Carolan and O. Doyle (eds.), *The Irish Constitution: Governance and Values* (Dublin: Thomson Roundhall, 2008), pp. 398, 399.

⁹ Gray, ‘Land Law and Human Rights’ (n 7), p. 245.

¹⁰ See, e.g., Crawford, ‘The Social Function of Property’ (n 6), 1134 describing property’s social function as ‘hotly disputed’, and Ankerson and Ruppert, ‘Tierra y Libertad’ (n 6), 120, noting ‘...its contours remain obscure and its character evolutionary.’

‘information theorists’.¹¹ Whereas progressive property theorists accept a significant degree of contextual decision-making in property law in light of owners’ social obligations, information theorists prioritise rule-based enforcement of owners’ rights to exclude as a more efficient means of ensuring simplicity and predictability in property law. Progressive property and information theorists also diverge on the appropriate division of institutional responsibility for the mediation of property rights and social justice. Progressive property scholars ascribe a larger role to judges in adapting property rights to the needs of social justice on an evolving basis; information theorists argue that such adaptation, where necessary, should be predominantly via legislative reform.

This scholarly debate about means and about the relative priority of judicial and legislative decision-making in mediating property rights and social justice has so far largely occurred at the level of theory, with limited connection to legal doctrine.¹² Doctrinal analysis can undoubtedly pay insufficient attention to theory – in particular, to ideas and intuitions about the value of private ownership that influence judicial decision-making, often unconsciously and almost always implicitly.¹³ As Alexander and Peñalver put it, ‘...at the base of every single property debate are competing theories of property – different understandings of what private property is, why we have it, and what its proper limitations are.’¹⁴ Those debates influence adjudication and as such appropriately inform doctrinal analysis. However, property theory can also benefit from attending more closely to legal doctrine as a means of grounding and testing theoretical arguments.¹⁵ Particularly where property theory aims to improve the law for some purpose or for the benefit of some cohort of people, that theory should be assessed in part by reference to its impact on legal doctrine and outcomes. This is particularly important in

¹¹ J. Baron, ‘The Contested Commitments of Property’ (2010) 61 *Hastings Law Journal* 917.

¹² For example, Ankerson and Ruppert note ‘...a marked paucity of English-language literature’ on the social function doctrine: Ankerson and Ruppert, ‘Tierra y Libertad’ (n 6), 119.

¹³ On this point, see K. Gray and S. F. Gray, ‘The Idea of Property in Land’ in S. Bright and J. Dewar (eds.), *Land Law Themes and Perspectives* (Oxford: Oxford University Press, 1998), p. 15.

¹⁴ G. S. Alexander and E. M. Peñalver, *An Introduction to Property Theory* (Cambridge: Cambridge University Press, 2012), p. xi.

¹⁵ On doctrinal legal research see, e.g., T. Hutchinson and N. Duncan, ‘Defining and Describing What We Do: Doctrinal Legal Research’ (2012) *Deakin Law Review* 83 and C. McCrudden, ‘Legal Research and the Social Sciences’ (2006) 122 *Law Quarterly Review* 632.

the context of constitutional property law, which necessarily involves judges in distributive matters usually left to the elected branches of government.¹⁶ As Alvaro points out, empowering judges to strike down legislation based on constitutional property rights raises the possibility of divergence between judges and legislative majorities on the extent to which property rights are appropriately subordinated to democratic will.¹⁷

At its most basic, constitutional property law concerns ‘...the regulation of state actions that have a direct or indirect impact on private property rights’.¹⁸ It can involve legislative interferences with property rights, but also administrative action or even on occasion the application of private law rules.¹⁹ Guarantees for individual property rights in both domestic constitutions and international conventions and treaties are increasingly in the spotlight,²⁰ responding to the rapid expansion that has occurred in regulatory control of private ownership.²¹ Underkuffler points to constitutional property rights as having ‘...immediate and powerful relevance to the vast majority of citizens’, as well as the ‘...potential ability to bankrupt government.’²² However, the function of property rights guarantees is often ambiguous, at least beyond paradigm cases such as compulsory acquisition of land.²³ The individual and

¹⁶ F. I. Michelman, ‘Liberties, Fair Values, and Constitutional Method’ (1992) 59 *University of Chicago Law Review* 91, 99.

¹⁷ A. Alvaro, ‘Why Property Rights Were Excluded From the Canadian Charter of Rights and Freedoms’ (1991) 24 *Canadian Journal of Political Science* 309.

¹⁸ A. J. van der Walt and R. Walsh, ‘Comparative Constitutional Property Law’ in L. Smith and M. Graziadei (eds.), *Research Handbook on Comparative Property Law* (Oxford: Elgar Publishing, 2017), p. 193.

¹⁹ Ibid.

²⁰ On property rights as human rights, see T. Allen, *The Right to Property in Commonwealth Constitutions* (Cambridge: Cambridge University Press, 2000); T. Allen, *Property and the Human Rights Act* (Oxford: Hart Publishing, 2005); T. Allen, ‘Liberalism, Social Democracy and the Value of Property under the European Convention on Human Rights’ (2010) 59 *International and Comparative Law Quarterly* 1055; Gray, ‘Land Law and Human Rights’ (n 7), p. 211 and R. Cruft, ‘Are Property Rights Ever Basic Human Rights?’ (2010) 12 *British Journal of Politics and International Relations* 142.

²¹ On the impact of the expansion of the regulatory state on property rights, see K. Gray, ‘Can Environmental Regulation Constitute a Taking of Property at Common Law?’ (2007) 24 *Environmental and Planning Law Journal* 161 and C. Serkin, ‘Penn Central Take Two’ (2016) 92 *Notre Dame Law Review* 913, 941.

²² L. S. Underkuffler, ‘Property and Change: The Constitutional Conundrum’ (2015) 91 *Texas Law Review* 2015, 2028.

²³ For analysis of the function of constitutional property clauses see, e.g., F. I. Michelman, ‘The Property Clause Question’ (2012) 19 *Constellations* 152; T. Allen, ‘The Right to

social values that influence the application of such guarantees are complex and at various times overlapping or conflicting.²⁴ That complexity is heightened by the fact that in common law jurisdictions, constitutional or human rights guarantees interact with private law protection of property rights. Van der Walt argues, '[a]s a rule the tension between constitutionalism and democracy or between the constitutional guarantee of private property and the need for social restructuring and affirmative action geared towards greater social equality becomes the central point for discussion of most theories of property.'²⁵ Legal responses to that tension cannot be effectively analysed by property scholars absent a perspective that places ownership's 'social aspect' at its centre and that carefully considers both theory and doctrine. A better understanding of the function and impact of constitutional property rights can be gained by analysing how legal decision-making about such rights is influenced, often under the surface, by ideas of the merits of private ownership and social justice.

A core aim of this book is to highlight some of the advantages of such an approach by exploring how progressive property, which foregrounds questions about the appropriate mediation of property rights and social justice, could be developed through fresh doctrinal analysis. By analysing the legal interpretation and application of the Irish Constitution's property rights guarantees, which in many respects illuminate how progressive property theory can manifest in constitutional property rights adjudication, the book reveals pitfalls and opportunities for the progressive property research agenda. It aims to contribute to both comparative constitutional property scholarship and property theory: Irish constitutional property law is illuminated by being considered through the prism of progressive property theory; that theory in turn is grounded by

Property', in T. Ginsburg and R. Dixon (eds.), *Comparative Constitutional Law* (Oxford: Edward Elgar Publishing, 2011), p. 504; J. Nedelsky, 'Should Property be Constitutionalized? A Relational and Comparative Approach' in G. E. van Maanen and A. J. van der Walt (eds.), *Property Law on the Threshold of the Twenty-first Century* (Antwerp: Maklu, 1996), p. 417; B. Bryce, 'Property as a Natural Right and as a Conventional Right in Constitutional Law' (2007) 29 *Loyola of Los Angeles International and Comparative Law Review* 201; G. S. Alexander, 'Constitutionalising Property: Two Experiences, Two Dilemmas' in J. McLean (ed.), *Property and the Constitution* (Oxford: Hart Publishing, 1999), p. 88.

²⁴ G. S. Alexander, 'Property's Ends: The Publicness of Private Law Values' (2014) 99 *Iowa Law Review* 1257; Alexander, 'Constitutionalising Property' (n 23).

²⁵ A. J. van der Walt, 'Comparative Notes on the Constitutional Protection of Property Rights' (1993) 19 *Recht en kritiek* 39, 40.

being analysed in the context of a constitutional property law framework that broadly fits the progressive property mould. The analysis embraces the broad tenets of progressive property (considered further in the next chapter), but highlights challenges presented by such an approach in constitutional property rights adjudication. As such, it offers a friendly critique of progressive property focused on identifying new directions for scholarship within that school of thought.

Section 1.2 of this chapter develops the rationale for a renewed focus on doctrine and outcomes in progressive property scholarship and signposts some of the insights that such an approach yields. Section 1.3 establishes the foundations of Irish constitutional property law upon which the analysis in subsequent chapters builds and highlights why the Irish example provides a particularly illuminating example of progressive property ‘in action’. Section 1.4 outlines the structure of the rest of the book.

1.2 Widening the Doctrinal Lens

1.2.1 *The Status of Doctrinal Analysis in Progressive Property*

Rosser points out that both progressive property theorists and information theorists care about how their arguments map onto doctrine.²⁶ He identifies two ways progressive property has deployed doctrinal analysis to advance its arguments: first, to demonstrate the potential for greater social inclusion; second, to highlight legal exceptions to owners’ exclusion rights that advance other social values. As he puts it, ‘...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.’²⁷ Alexander characterises this as a central aim of progressive property theory, arguing, ‘[u]sing property to help the lives of marginalized people is, after all, what makes progressive property *progressive*.’²⁸ To that end, doctrinal analysis is a necessary element of progressive property’s research agenda.

Rosser criticises progressive property for working *with* the existing property law framework through doctrinal analysis rather than seeking to disrupt it. A different concern about progressive property’s treatment of

²⁶ Rosser, ‘Destabilizing Property’ (n 8), 402.

²⁷ *Ibid.*, 434.

²⁸ Alexander, *Property and Human Flourishing* (n 4), p. 320.

legal doctrine, to which this book responds, is its narrow focus. Overall, progressive property's arguments have not been tested or grounded through comprehensive doctrinal analysis, whether domestic or comparative.²⁹ As Lovett points out, the debate between information and progressive theorists has largely centred around a small set of US property law decisions.³⁰ There has also been occasional consideration of select German and South African examples.³¹

However, two trends in progressive property scholarship point to a renewal of interest in doctrinal analysis. Some progressive property scholars in the US have engaged in comparative analysis that considers relevant constitutional property law examples from other jurisdictions.³² At the same time, non-US property scholars are developing independent, doctrinally grounded progressive property approaches to particular

²⁹ For criticism of the narrow range of examples employed by 'progressive property', see e.g.: J. A. Lovett, 'Progressive Property in Action: The Land Reform (Scotland) Act 2003' (2011) 89 *Nebraska Law Review* 739, 740; E. Rosser, 'The Ambition and Transformative Potential of Progressive Property' (2013) 101 *California Law Review* 107, 111.

³⁰ Lovett, *ibid.*, 740. As Lovett notes, the decision of the New Jersey Supreme Court in *State v. Shack* 58 N. J. 297, 277 A.2d 369 (1971) is a recurring example in progressive property. Other decisions that he identifies as receiving attention include *Jacque v. Steenberg v. Homes, Inc.* 563 N.W.2d 154 (Wis. 1997); *Matthews v. Bay Head Improvement Ass'n* 471 A.2d 355 (N. J. 1984); *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club*, 879 A.2d 112 (N. J. 2005); *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996), and the decisions of the US Supreme Court on whether certain regulatory interventions go so far as to trigger the Takings Clause of the Fifth Amendment of the US Constitution (so-called 'regulatory takings' jurisprudence).

³¹ From South Africa, *Modderklip East Squatters v. Modderklip Boerdery (Pty) Ltd* (2004) 3 All SA 169 (SCA), 2005 5 SA 3 (CC)) has received attention. See, e.g., G. S. Alexander, *The Global Debate Over Constitutional Property: Lessons for American Takings Jurisprudence* (Oxford: Oxford University Press, 2012); G. S. Alexander, 'The Social Obligation Norm in American Property Law' (2009) 94 *Cornell Law Review* 745; G. S. Alexander and E. M. Peñalver, 'The Properties of Community' (2009) *Ten Theoretical Perspectives on Law* 127. German decisions that receive comparative attention include *The Hamburg Flood Control Case* (1968) BVerfGE 24, 367 (389); *The Co-Determination Case* (1979) BVerfGE 50, 290 (339); *The Small Garden Plot Case* (1979) BVerfGE 52, 1. See Alexander, 'Constitutionalising Property' (n 23); G. S. Alexander, 'Property as a Fundamental Constitutional Right? The German Example' (2003) 88 *Cornell Law Review* 733; Alexander, *Property and Human Flourishing*, (n 4), pp. 218–29; R. Lubens, 'The Social Obligation of Property Ownership: A Comparison of German and US Law' (2007) 24 *Arizona Journal of International Law & Comparative Law* 289 and A. J. van der Walt, *Constitutional Property Law*, 3rd ed. (Cape Town: Juta Publishing, 2011).

³² See notably Alexander, *Global Debate Over Constitutional Property* (n 31); Alexander, 'The Social Obligation Norm' (n 31) and Alexander and Peñalver, 'The Properties of Community' (n 31).

property law problems.³³ This book builds on these nascent trends in progressive property scholarship by bringing the theory and doctrine of constitutional property law together ‘...as part of a shared project to understand the working of law in action.’³⁴ It combines insights from property theory with fresh, illuminating doctrinal analysis of the interaction between constitutional property rights and social justice in Irish constitutional property law.³⁵ Like other emerging non-US progressive property scholarship, the approach adopted is problem-focused and locally-focused.³⁶ Specifically, it considers the insights that can be drawn from judicial responses to constitutional property law’s core dilemmas formulated in the context of a framework that broadly fits the progressive property model. In doing so, it responds to Ran Hirschl’s injunction that comparative constitutional law should move beyond ‘the usual suspects’.³⁷

1.2.2 *Benefits of a Wider Lens*

Van der Walt advocates more ‘marginality thinking’ in property law, in part on the basis that ‘...it forces one to look for the paradox and the contradiction rather than for broad theory and grand narrative, for diversity rather than uniformity, for dissent rather than consensus, for conflict and chaos rather than consent and order.’³⁸ Davidson captures the challenges of mediating property rights and social justice as follows:

Every society must confront certain recurring points of tension inherent in private property. These include the balance between individual

³³ See, e.g., Gray and Gray, ‘The Idea of Property in Land’ (n 13); Gray, ‘Land Law and Human Rights’ (n 7); A. J. van der Walt, *Property in the Margins* (Oxford: Hart, 2008); S. Blandy, S. Bright, and S. Nield, ‘The Dynamics of Enduring Property Relationships in Land’ (2018) 81 *Modern Law Review* 85 and L. Fox, *Conceptualising Home* (Oxford: Hart, 2007). Rob van Gestel and Hans-Wolfgang Micklitz note that doctrinal legal research is more firmly rooted in European scholarship than in US scholarship: R. van Gestel and H. W. Micklitz, ‘Why Methods Matter in European Legal Scholarship’ (2014) 20 *European Law Journal* 292, 294.

³⁴ G. Davies, ‘The Relationship between Empirical Legal Studies and Doctrinal Legal Studies’, (2020) *Erasmus Law Review* doi: 10.5553/ELR.000141.

³⁵ In this way, it combines elements of what Siems labels traditional and contextual legal research: M. M. Siems, ‘Legal Originality’ (2008) 28 *Oxford Journal of Legal Studies* 147, 148.

³⁶ On the merits of a problem-focused, locally attuned approach to comparative property law scholarship, see R. Walsh and L. Fox-O’Mahony (2018) ‘Land Law, Property Ideologies, and the British-Irish Relationship’ 47 *Common Law World Review* 7.

³⁷ R. Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford: OUP, 2014), p. 192, 205–23.

³⁸ van der Walt, *Property in the Margins* (n 33), p. 245.

freedom, collective responsibility, and limitations on harm, as well as incentives for productive activity, recognition of personal connection to property, and others. Society confronts these tensions through the resolution of individual disputes, with legal institutions that inherently draw on the values and imperatives of a given historical context. As a result, there is no singular social function – there cannot be – and no possibility of a transcendent, unified theory of what that function should be.³⁹

The analysis in subsequent chapters is guided by these perspectives, working on the basis that ‘broad theory’ and ‘grand narrative’ are unlikely to capture the full range of influences in constitutional property law. Rather, this book shows that a fuller understanding can be gained from exploring how ‘the paradox and the contradiction’ that constitutional property law embodies is manifested in the doctrine and outcomes generated by constitutional property rights adjudication, and from striving to better understand the drivers of incoherence and unpredictability where such doctrinal patterns emerge.⁴⁰

This demands a local perspective, involving: ‘...close attention to jurisdictional differences, and to broader social, economic and cultural considerations not always apparent from the face of constitutional texts, legislative provisions, or even judicial decisions’.⁴¹ As Davidson puts it, ‘[t]here may be some continuity and stability in the institutional arrangements instantiated through property, but as with material resources and local conditions in architecture, the process of contestation leaves a vernacular residue on those structures that reveal starkly localised resolutions’.⁴² Such localised responses are informative from a comparative perspective, since most jurisdictions with constitutional property rights encounter the same legal problems in their application.⁴³ Accordingly, this book aims to contribute to both comparative constitutional property law and property theory by analysing the distinctive Irish response to the difficult doctrinal questions raised by constitutional property rights. That analysis is informed by, and attends to, the evolving legal, political, and cultural contexts in which constitutional property rights adjudication

³⁹ Davidson, ‘Sketches for a Hamiltonian Vernacular’ (n 6), 1058.

⁴⁰ In this respect, the approach adopted loosely reflects what Robert K. Merton famously described as a theory of ‘the middle range’ that ‘...captures the twin concern with empirical inquiry and theoretical relevance.’ R. K. Merton, *Social Theory and Social Structure* (New York: Free Press, 1968), p. 59. For application of this approach to comparative analysis of land law, see also Walsh and Fox-O’Mahony, ‘Land Law, Property Ideologies, and the British-Irish Relationship’ (n 36).

⁴¹ van der Walt and Walsh, ‘Comparative Constitutional Property Law’ (n 18), p. 214.

⁴² Davidson, ‘Sketches for a Hamiltonian Vernacular’ (n 6), 1058.

⁴³ van der Walt and Walsh, ‘Comparative Constitutional Property Law’ (n 18), p. 193.

takes place.⁴⁴ It is also informed by the theoretical ideas about private ownership that are identifiable influences in the text of the Irish Constitution and in the instincts that judges bring to bear in constitutional property rights adjudication, which are unearthed from constitutional property doctrine and outcomes in the chapters that follow.⁴⁵

As is discussed further in the next chapter, much faith has been placed by the progressive property school of thought in concepts such as social justice, social obligation, community, and human flourishing in seeking to reconcile legal protection of property rights with the regulatory freedom necessary to ensure a fair and proper functioning democratic society.⁴⁶ In doing so, progressive property theory has faced criticism for failing to pay sufficient attention to the ‘means’ of property law as distinct from its ends, in particular to how such complex, value-laden concepts might be interpreted judicially, and through such interpretation impact on the predictability, stability, and efficiency of property law.⁴⁷ This book shows that an important step for progressive property in responding to such criticism is to analyse the doctrinal impact of progressive property theory in jurisdictions where its ideas have a formal legal foothold. Such analysis provides a means of uncovering patterns of predictability in the application of the fairness-based standards favoured in progressive property theory.⁴⁸

⁴⁴ As Michael Diamond puts it, ‘[t]he content of the term [property] depends on the culture in which it is employed and, within any particular culture, very often upon the period in which the concept is being discussed’: M. Diamond, ‘The Meaning and Nature of Property: Homeownership and Shared Equity in the Context of Poverty’ (2009) 29 *St. Louis University Public Law Review* 85, 86. See also Alexander, *Global Debate Over Constitutional Property*, (n 31), p. 245.

⁴⁵ In this respect, the book responds to Harris’ injunction that, ‘...the underlying justice reasons ought to be unearthed, much more often than they are when, in legal reasoning “ownership” is invoked as a principle.’ Harris, *Property and Justice* (n 4), p. 368.

⁴⁶ See, e.g., J. W. Signer, *Entitlement: The Paradoxes of Property* (New Haven: Yale University Press, 2000); J. W. Singer, ‘Property as the Law of Democracy’ (2014) 63 *Duke Law Journal* 1287; G. S. Alexander, ‘Ownership and Obligation: The Human Flourishing Theory of Property’ (2013) 43 *Hong Kong Law Journal* 451; G. S. Alexander, E. M. Peñalver, J. W. Singer, L. S. Underkuffler, ‘A Statement of Progressive Property’ (2009) 94 *Cornell Law Review* 743.

⁴⁷ H. E. Smith, ‘Mind the Gap: The Indirect Relation between Ends and Means in American Property Law’ (2009) 94 *Cornell Law Review* 959.

⁴⁸ J. W. Singer, ‘The Rule of Reason in Property Law’ (2013) 46 *UC Davis Law Review* 1369, 1389, M. Poirier, ‘The Virtue of Vagueness in Takings Doctrine’ (2003) 24 *Cardozo Law Review* 93, 175.