Texas A&M Journal of Property Law

Volume 10
Number 1 *Symposium Edition*

Article 3

3-23-2024

Constitutional Property and Progressive Property's Compatibility: A Reappraisal

Rachael Walsh
Trinity College Dublin, rachael.walsh@tcd.ie

CONSTITUTIONAL PROPERTY AND PROGRESSIVE PROPERTY'S COMPATIBILITY: A REAPPRAISAL

By: Dr. Rachael Walsh[†]

Abstract

Progressive property theory is driven by a desire to improve the law, and legal outcomes, for those on the margins of society. At the same time, it largely assumes the compatibility of constitutional property rights with its aims. However, constitutional property doctrine is often ambiguous on the core question of what distribution of collective burdens is susceptible to invalidation. Such ambiguity in turn can support political over-inflation of the strength of constitutional protection for property rights. Given the resulting chilling effect that constitutional property rights can have on measures that interfere with property rights, the Article argues that progressive property should be more sceptical of property rights guarantees that are interpreted judicially as having anti-redistributive effects. At the very least, it should more closely analyse and account for the political effects of such rights.

DOI: https://doi.org/10.37419/JPL.V10.I1.3

[†]Early drafts of this article were presented at the Oxford Property Law Group (November 2021), the University of Amsterdam's Transformative Private Law lecture (March 2022), and the Association of Law, Property, and Society's annual conference (May 2022). I am grateful for all the very helpful comments received from participants at these events, as well as from all of the participants at the symposium on *Property Rights and Social Justice* hosted by the Texas A&M Journal of Property Law in November 2022.

I. INTRODUCTION

The symposium on *Property Rights and Social Justice: Progressive Property in Action*[1] hosted by the Texas A&M University School of Law and the articles developed out of that symposium that are published here highlight a range of important trends and debates in constitutional property law and theory, including: the value of comparative analysis in legal scholarship; the challenges of developing and delivering progressive property outcomes; the impact of background cultural, political, and judicial ideas about property on legal doctrine and regulatory innovation; and the relationship between property theory and doctrine.

Through showing the context-specificity of progressive approaches to property "in action", Peter Byrne's contribution to this volume on cultural property underscores the political will that is ultimately required to implement a progressive property agenda through legislation. He demonstrates that progressive property has a higher likelihood of successful realisation in property contexts that are relatively self-contained than in contexts with system-wide impacts and far-reaching information costs. As Byrne astutely notes, "[t]he recognition of the cultural interests of non-owners does not threaten central organs of power in the society, like banks, corporations, and wealthy individuals."[2] His contribution also shows that approaches to constitutional property within jurisdictions are not unitary or cohesive; rather, progressive property may be more or less ascendant within a jurisdiction on different issues, and in different ways over time. Cultural property is a fascinating case study in part because, as Byrne notes, it is an instance of progressive property blossoming in the face of broader judicial conservativism on property issues in the United States.[3]

Lorna Fox O'Mahony and Marc Roark highlight the importance of both complex local factors and global dynamics in dictating the fate of progressive property agendas in different jurisdictions over time, a theme that is central to *Property Rights and Social Justice*. As they put it, "the contextualised, historicised, scaled complexity of the property *nomos*" in each jurisdiction is key to understanding the approaches

1. RACHAEL WALSH, PROPERTY RIGHTS AND SOCIAL JUSTICE: PROGRESSIVE PROPERTY IN ACTION (2021).

2. J. Peter Byrne, *Cultural Property: "Progressive Property in Action"*, 10 TEX. A&M J. PROP. L. 1, 4 (2023).

3. *Id.* at 9.

adopted to property problem-solving.[4] The property *nomos* is not homogenous. Rather, it operates on both vertical and horizontal scales and is evolving and complex. This emphasis on the importance of identifying and considering the impact of any given property *nomos* resonates with the "excavation of intuitions" undertaken in *Property Rights and Social Justice* as a key dimension of doctrinal analysis—uncovering the (often unspoken) drivers of the exercise of judicial discretion in constitutional property rights adjudication to better understand all dimensions of the property *nomos*.[5]

Overall, the responses herein and the other contributions at the symposium all generously responded to *Property Rights and Social Justice*'s core aim—namely, to reconnect constitutional property doctrine and property theory and to reprioritise practical implementation sensitive to jurisdictional and subject-specific nuances as a key objective in the future development of progressive property theory. The contributions identified the "qualified progressive" approach to constitutional property in Ireland as more generally illuminating in showing how competing interests and values can be mediated to achieve a broadly progressive approach to property.[6] Finally, they embraced the call for greater attention to detail—both legal and political—in unlocking property problem-solving and in driving forward the progressive property agenda. This Article, inspired by the symposium and the other contributions to this issue, aims to deepen the initial contribution made on this issue in *Property Rights and Social Justice* through a closer focus on the political effects of constitutional property doctrine and how those effects may influence the realisation of a progressive property agenda. It assesses structural features of constitutional property doctrine that tend to generate unpredictability, which may in turn deter progressive lawmaking on property issues.

Constitutional or human rights protections for private ownership implicate a complex array of overlapping public and private values, which are overlayered with the interaction between such public law guarantees for private ownership and long-standing private law traditions of protecting property rights in both civilian and common

4. Lorna Fox O'Mahony & Marc L. Roark, *Operationalising Progressive Ideas About Property: Resilient Property, Scale and Systemic Compromise*, 10 TEX. A&M J. PROP. L. 38, 50 (2023).

5. The phrase "excavation of intuitions" is borrowed from Joan Williams, *Recovering the Full Complexity of Our Traditions: New Developments in Property Theory*, 46 J. LEGAL EDUC. 596, 604 (1996).

6. WALSH, *supra* note 1, at 76.

law legal systems.[7] Responding to some of these challenges, a "progressive" school of thought crystallised in property theory that highlights the relational nature of property rights and the fact that such rights are imbued with obligations and limitations.[8] Much of the scholarship within that school of thought has taken the fact of constitutional protection for property rights for granted and has largely focused on reinterpreting constitutional property doctrine in line with the values of progressive property.[9] This Article builds on *Property Rights and Social Justice*'s focus on the detail of constitutional property doctrine and the social values that can be excavated from that doctrine to critically assess the broad acceptance of constitutional property rights within progressive property theory. It argues that *political* dynamics in respect of property that are at times antithetical to the progressive property agenda are in fact related to, and partially explained by, distinctive, embedded features of constitutional property *doctrine*. Constitutional property rights exert significant background ex-ante influence on the realisation of progressive legal reform, even if constitutional property doctrine is not consistently strong or absolutist in its protection for such rights. Crucially, where they are interpreted by judges as having an anti-redistributive dimension, constitutional property rights can deter legislative changes that restrict property rights or lead to regulatory under-enforcement.

Inspired by the comparative discussion at the symposium, the distinctive doctrinal features of constitutional property that contribute to these dynamics are illustrated primarily through a comparison between United States and Irish constitutional property law on the permissible scope for uncompensated regulation of the exercise of

7. On property's public and private values, *see* Hanoch Dagan, *The Public Dimension of Private Property*, 24 KING'S L. J. 260, 261-62 (2013); Gregory S. Alexander, *Ownership and Obligation: The Human Flourishing Theory of Property*, 43 HONG KONG L.J. 451, 452 (2013).

8. *See generally* Gregory S. Alexander et al., *A Statement of Progressive Property,* 94 CORNELL L. REV. 743, 743 (2009); Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CAL. L. REV. 107, 107 (2013); Timothy M. Mulvaney, *Progressive Property Moving Forward*, 5 CAL. L. REV. CIR. 349, 351 (2014); Zachary Bray, *The New Progressive Property and the Low Income Housing Conflict*, 2012 BYU L. REV. 1109, 1114 (2012); Christopher K. Odinet, *Of Progressive Property and Public Debt*, 51 WAKE FOREST L. REV. 1101, 1107-08 (2016); John A. Lovett, *Progressive Property in Action: The Land Reform (Scotland) Act 2003*, 89 NEB. L. REV. 739, 742 (2011).

9. *See, e.g.*, HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS 94-95, 123 (2011); GREGORY S. ALEXANDER, PROPERTY AND HUMAN FLOURISHING xiii, 169 (2018); LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 137, 140-41 (2003).

property rights—so called "regulatory takings." These examples provide illuminating reference points for the arguments that this Article advances. United States constitutional property law grounds much of the progressive property theory that is examined in this Article,[10] while Irish constitutional property law offers a unique example of a common law, English-speaking jurisdiction that protects property rights in terms that explicitly recognise such rights as appropriately delimited by social justice and the common good.[11] Offering a more trans-jurisdictional perspective, this Article also draws some insights from the interpretation and development of Article 1 of the First Protocol of the European Convention on Human Rights.[12]

10. The Takings Clause of the Fifth Amendment of the U.S. Constitution provides: "Nor shall private property be taken for public use, without just compensation."

11. In the Irish Constitution (adopted by referendum in 1937), property rights are protected twice. Article 40.3.2° secures such rights alongside other personal rights against 'unjust attack'. It provides: "[t]he State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen." Article 43 states:

> 1 1° The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.
> 2° The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.
> 2 1° The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.
> 2° The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.

Relatedly, but outside the focus of this article, Article 40.5 protects the inviolability of the dwelling. CONSTITUTION OF IRELAND 1937 (BUNREACHT NA HÉIREANN), art. 40.3.2°, 43.

12.That provision provides:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure payment of taxes or other contributions or penalties.

What emerges from these doctrinal examples is a pattern of sporadic, often temporary, oscillation between "soft" protection and "hard" protection for property rights in legal outcomes.[13] The discretion conferred on judges by constitutional property guarantees enables widely varying approaches within constitutional property law. The Irish example shows how, as a matter of law, it can facilitate deference to the public interest, and the United States example illustrates how it can provide a constitutional grounding for an (inconsistently) absolutist approach to property rights protection. In their contribution, Fox-O'Mahony and Roark highlight relevant differences in scale between Ireland and the United States, including the American federal structure of government and the explicit constitutional empowerment of the Irish State to regulate property rights to secure the common good and social justice, as partial explanations for property law divergences between these jurisdictions.[14] While these are certainly plausible explanations, the focus here is not primarily on the causes of such differences in approach, but rather on the fact that the broad framework established by constitutional property rights protection facilitates such varying approaches.

The conclusion drawn from this analysis is that the unpredictable nature of the legal doctrine generated where constitutional property clauses are interpreted as having an anti-redistributive dimension enables both judicial activism in *protecting* property rights and regulatory inertia in the enactment or application of measures that *restrict* such rights. The resulting political effects of constitutional property doctrine often go unnoticed and unchallenged due to their subtlety and their ex-ante nature, but merit closer attention in progressive property scholarship. First, where a legislature lacks the political will to initiate changes to advance the common good, qualified legal advice may bolster an existing status quo bias. Second, where a legislature sincerely wishes to act on an issue but is concerned to avoid enacting laws that may encroach impermissibly on property rights, it may decide to err on the side of caution and not act, or it may act in an overly circumscribed way. Third, insofar as doctrinal

The First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, Mar. 20, 1952, 3 E.T.S. 9.

13. Frank I. Michelman, *Constitutional Protection for Property Rights and the Reasons Why: Distrust Revisited*, 1 BRIGHAM-KANNER PROP. RTS. J. 217, 235 (2012).

14. Fox O'Mahony & Roark, *supra* note 4, at III, V.

ambiguity relates to compensation requirements, the risk of a chilling effect is further heightened by potential budgetary hurdles for a proposed reform. More broadly, these political effects of constitutional property doctrine can bolster myths of constitutional property rights as strong rights or, at the very least, make it difficult to decisively rebut characterisations of property rights as strong rights.

Against that backdrop, and given progressive property theory's key goal of improving the circumstances of those on the margins of society (including non-owners), this Article argues that those with a progressive property agenda should pay closer attention to the political effects of constitutional property doctrine. Part II outlines the relationship between constitutional property law and progressive property theory. Part III analyses key features of constitutional property doctrine that lead to unpredictability, particularly to shifts between "hard" and "soft" protection for property rights. Part IV highlights the political effects of these features of constitutional property law and considers their significance for the compatibility of progressive property and constitutional property rights guarantees.

II. RELATING CONSTITUTIONAL PROPERTY AND PROGRESSIVE PROPERTY

The political effects of constitutional property law have often been to the fore at founding "constitutional moments."[15] For example, the potential constraining effects of a property rights guarantee on legislative freedom motivated objections (particularly from the U.K. government) to the inclusion of such a guarantee in the European Convention on Human Rights.[16] Those concerns were sufficiently powerful to ensure that the Convention was approved without a property rights guarantee, with protection for property rights eventually introduced in Article 1 of the First Protocol on May 18, 1954.[17] Tom Allen notes, "it does not appear that there was any conviction that the draft represented an ideal right to property, but merely that it was the best compromise that could be achieved."[18]

15. On "constitutional moments," *see* BRUCE ACKERMAN, WE THE PEOPLE 1: FOUNDATIONS 40-41 (1991).

16. Tom Allen traces the British fear that property rights protection would impede economic planning to the Lochner era of the U.S. Supreme Court. TOM ALLEN, PROPERTY AND THE HUMAN RIGHTS ACT 1998 21 (2005).

17. On this development, *see* ALI RIZA COBAN, PROTECTION OF PROPERTY RIGHTS WITHIN THE EUROPEAN CONVENTION ON HUMAN RIGHTS 127-137 (2004).

18. ALLEN, *supra* note 16, at 28.

Constitutionalising property was similarly debated, and ultimately rejected, in the making of the Canadian Charter of Rights and Freedoms, in part due to senior civil servants' concerns about the risk of "extreme substantive interventionism by the Canadian judiciary."[19] The spectre of the *Lochner* jurisprudence of the United States Supreme Court, as well as provincial concerns about the risk of encroachment on their jurisdiction, were key factors.[20] Influenced by the Canadian experience, the issue was also contentious in the drafting of the 1996 South African Constitution, which subjected protection for property rights to express limitations to secure competing rights, such as in respect of housing.[21] In both jurisdictions, debate about the desirability of constitutional protection for property rights continued after the relevant "constitutional moment," extending to proposals for abolishing or amending the South African constitutional property clause.[22]

However, once a body or state decides to adopt some form of constitutional protection for property rights, most scholarly attention tends to turn to the legal doctrine generated by property rights guarantees without attending to the political effects of that doctrine.[23] While scholars analyse the relative significance and strength of property rights as compared to other constitutional rights,[24] the ex-ante

19. Philip W. Augustine, *Protection of the Right to Property Under the Canadian Charter of Rights and Freedoms*, 18 OTTAWA L. REV. 55, 67 (1986). On this aspect of Canadian constitutional property law, *see also* David Schneiderman, *Property Rights and Regulatory Innovation: Comparing Constitutional Cultures*, 4 INT'L J. CONST. L. 371, 382 (2006).

20. Donna R. Christie, *A Tale of Three Takings: Taking Analysis in Land Use Regulation in the United States, Australia, and Canada*, 32 BROOKLYN J. INT'L L. 343, 370-71 (2007); *see also* Jean McBean, *The Implications of Entrenching Property Rights in Section 7 of the Charter of Rights*, 26 ALBERTA L. REV. 548, 550-51 (1988).

21. A.J. VAN DER WALT, CONSTITUTIONAL PROPERTY LAW 3, 7, 9 (3d ed. 2011).

22. Fox O'Mahony & Roark, *supra* note 4, at 54-55; *see also* JENNIFER NEDELSKY, LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW 253 (2011).

23. Notable exceptions are Frank Michelman, who has given this question close attention. *See, e.g.*, Frank I. Michelman, *The Property Clause Question*,19 CONSTELLATIONS 153 (2012); *see also* Michelman, *supra* note 13, at 217. *See also* J. Peter Byrne, *What We Talk About When We Talk About Property Rights – A Response to Carol M. Rose's 'Property as a Keystone Right?'*, 71 NOTRE DAME L. REV. 1049, 1049 (1996); J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89, 91 (1995) (hereinafter Byrne, *Ten Arguments*); A.J. Van Der Walt, *The Modest Systemic Status of Property Rights*, 1 J.L. PROP. & SOC'Y 15 (2014).

24. *See* Carol M. Rose, *The Guardian of Every Other Right: A Constitutional History of Property Rights*, 10 CONST. COMMENT. 238, 238 (1993); Carol M. Rose,

effects of constitutional property rights on lawmaking remain relatively underexplored. This raises the core question of whether constitutional property *doctrine* may itself have underappreciated effects on lawmaking that need to be accounted for and addressed in property scholarship, particularly in approaches to property law that seek to improve the position of those on the margins.

The *Statement of Progressive Property* published in 2009 created a manifesto or charter for the "progressive property" school of thought.[25] Amongst other principles, it argued that greater attention should be paid to the social relations shaped by property and to the values it serves. Furthermore, those values should be recognised as "plural and incommensurable" and as capable of generating individual obligations relevant to judgments about the interests that should be recognised in law as property entitlements.[26] The Statement contended that rational choices amongst values based on reasoned, contextual deliberation are required, drawing upon "critical judgment, tradition, experience, and discernment."[27] It argued that property law should facilitate all individuals in acquiring the resources needed for full social and political participation and more broadly should "establish the framework for a kind of social life appropriate to a free and democratic society."[28] Thus, from its first formal statement, progressive property had the normative aim of improving social conditions and enhancing equal access to material resources. That commitment has been consistent, with Alexander arguing, "[u]sing property to help the lives of marginalized people is, after all, what makes progressive property *progressive*," again prioritising the goal of assisting marginalised individuals and communities.[29]

Constitutional property law forms an important—although by no means exclusive—focus of progressive property scholarship.[30] This

Property as the Keystone Right?, 71 NOTRE DAME L. REV. 329, 329 (1996); Van Der Walt, *supra* note 23; Laura S. Underkuffler-Freund, *Property: A Special Right*, 71 NOTRE DAME L. REV. 1033, 1033 (1996).

25. Alexander et al., *supra* note 8.

26. *Id.*

27. *Id.* at 744.

28. *Id.*

29. ALEXANDER, *supra* note 9, at 320.

30. In fact, progressive property theory has been vague on its relative importance in public and private law contexts, and on whether its primary goal is to smooth the way for public law regulation of property rights, or to re-engineer private law rules in a more progressive direction. *See generally* Rachael Walsh, *Property, Human Flourishing and St. Thomas Aquinas: Assessing a Contemporary Revival*, 31 CANADIAN J. OF L. & JURIS. 197 (2018).

likely reflects the fact that much progressive property scholarship is grounded in United States law, where takings law is a live and evolving legal issue that provokes significant political and legal debate.[31] Progressive property scholarship has engaged with a wide range of constitutional property issues, including the compulsory acquisition of land for public purposes (or "eminent domain"),[32] the restriction of the exercise of property rights without compensation,[33] and the creation or recognition of public claims to use private land[34] On these issues, progressive property scholars have deployed their theoretical perspectives to analyse and interpret constitutional property doctrine in its best light or to chart new doctrinal directions.[35]

However, perhaps again reflecting the dominance of American scholarship in this field, there has been limited consideration of whether the very presence of a constitutional property rights guarantee, in particular given prevailing judicial interpretations of that guarantee, creates barriers to the type of progressive legal change that could improve the effects of property law on those on the margins of society. Rather, the predominant approach has been to accept constitutional property rights protection as culturally entrenched.[36]

31. See the public debate and controversy surrounding the decision of the Supreme Court in *Kelo v City of New London* 545 U.S. 469 (2005), documented for example in ILYA SOMIN, THE GRASPING HAND: *KELO V. CITY OF NEW LONDON* AND THE LIMITS OF EMINENT DOMAIN (2015).

32. *See, e.g.*, Gregory S. Alexander, *The Public Use Requirement and the Character of Consequentialist Reasoning*, *in* RETHINKING EXPROPRIATION LAW II: CONTEXT, CRITERIA, AND CONSEQUENCES OF EXPROPRIATION 113, 116-17 (Björn Hoops et al. eds., 2015).

33. *See, e.g.*, Joseph William Singer, *Justifying Regulatory Takings*, 41 OHIO N.U.L. REV. 601, 606-07 (2015).

34. *See, e.g.*, Timothy M. Mulvaney, *Walling Out: Rules and Standards in the Beach Access Context*, 94 S. CAL. L. REV. 1, 9 (2020).

35. For critical assessment of this approach, *see generally* Rosser, *supra* note 8.

36. Underkuffler canvases the possibility of not protecting property rights at a constitutional level in the U.S. but concludes "to remove the protection of property from the list of foundational constitutional rights is unthinkable to us-its idea, its security, is far too deeply rooted." Underkuffler, *supra* note 24, at 1044. She suggests that the focus should instead be on what the constitutional right should mean—on its interpretation. *Id.* For a contrary view in the U.S. context (not from within the 'progressive property' school of thought), *see* J. Peter Byrne, *What We Talk About When We Talk About Property Rights – A Response to Carol M. Rose's 'Property as a Keystone Right?'*, 71 NOTRE DAME L. REV. 1049, 1049 (1996). On U.S. cultural myths in respect of property, *see also* Laura S. Underkuffler, *Property as Constitutional Myth: Utilities and Dangers*, 92 CORNELL L. REV. 1239, 1244 (2007); Jennifer Nedelsky, *American Constitutionalism and the Paradox of Private Property*, *in* CONSTITUTIONALISM AND DEMOCRACY 241, 241 (John Elster & Rune Slagstad eds., 1988).

This may, in part, reflect the nature of the property *nomos* prevailing in the United States—as Fox-O'Mahony and Roark point out, that *nomos* reflects "traditions of respect for individual private property rights, embedded in the American Constitution, as well as lived experiences of colonial dispossession and (racial) exclusion."[37] However, if constitutional protection for property rights impedes progressive lawmaking or dilutes the progressive tenor of legal changes that are in fact introduced, such protection may be undesirable, at least in its current form, given the normative aims of progressive property. At the very least, judicial and political interpretations of constitutional property rights protections, and scholarly analysis of those interpretations, would need to attend carefully to such chilling effects.

The next Part analyses constitutional property doctrine's ambiguity, which in turn facilitates unpredictability, in particular judicial approaches at divergent ends of a wide spectrum—from "property fundamentalism" to judicial deference.[38] Part IV then connects that ambiguity with property problem-solving in the legislative and administrative spheres. In these ways, the Article shows how constitutional property doctrine offers plausible explanations for both judicial activism in respect of property rights protection and regulatory reluctance to intervene in property rights matters.

III. CONSTITUTIONAL PROPERTY'S DOCTRINAL AMBIGUITY

This Part highlights three general features of constitutional property doctrine that create ambiguity that has the potential to impede the core progressive property agenda. First, such doctrine often displays unpredictable oscillation between standard-based and rule-based reasoning by judges.[39] Second, and relatedly, it includes judicial decisions that Carol Rose vividly describes as "anti-regulatory ammunition" that purport to control the distribution of the burdens of collective life.[40] Third, areas of doubt remain about the circumstances in which compensation is and is not payable in respect of public law

37. Fox-O'Mahony & Roark, *supra* note 4, at 61.

38. Byrne, *supra* note 2, at 7-9.

39. Amnon Lehavi, *The Dynamic Law of Property: Theorizing the Role of Legal Standards*, 42 RUTGERS L. J. 81, 100-01 (2010); s*ee generally* Marc Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93 (2002).

40. Carol M. Rose, *Rations and Takings*, 2020 WIS. L. REV. 343, 350-351 (2020).

interferences with the exercise of property rights.[41] Across these three doctrinal issues, the distributive nature of the questions that judges are called upon to address in constitutional property rights adjudication prompts obfuscation concerning the reasons for judicial decisions, further contributing to doctrinal ambiguity.[42]

A. Rules vs. Standards

The rules-versus-standards debate is long-running and divides property theorists.[43] Constitutional property law generally involves at least some standard-based balancing by judges. For example, United States regulatory takings law involves judges asking whether a taking "goes too far."[44] The same analysis in the Irish context requires judges to consider whether an "attack" on property rights is "unjust," with judges often using the proportionality principle to structure that assessment.[45] In the context of Article 1 of the First Protocol of the ECHR, judges ask whether a "fair balance" has been struck in any restriction of an individual's right to peaceful enjoyment of possessions.[46]

Standards, as is well documented, are capable of producing predictability over time, particularly as to outcomes.[47] This has often been the case in constitutional property law, with the emergence of patterns of judicial deference to assessments of the public interest arrived at by the elected branches of government.[48] However, there can be unexpected, sometimes temporary, shifts in approach by courts

41. Jacques Sluysmans et al., *Compensation for Expropriation: How Expropriation Reflects a Vision on Property*, 3 EUR. PROP. L.J. 1, 3 (2014).

42. As Frank Michelman points out, questions of distribution are 'endemic' in constitutional property law. Frank I. Michelman, *Liberties, Fair Values, and Constitutional Method*, 59 UNIV. CHI. L. REV. 91, 99 (1992).

43. *See* Jane B. Baron, *The Contested Commitments of Property*, 61 HASTINGS L.J. 917, 948 (2010).

44. *See generally* Thomas J. Miceli & Kathleen Segerson, *Regulatory Takings*, *in* THE OXFORD HANDBOOK OF LAND ECONOMICS 668, 668-97 (Joshua M. Duke & JunJie Wu eds., 2014

45. WALSH, *supra* note 1, at ch. 5, 6.

46. ALLEN, *supra* note 16, at 150.

47. *See* Joseph W. Singer, *The Rule of Reason in Property Law*, 46 UC DAVIS L. REV. 1369, 1389 (2013); *see also* Poirier, *supra* note 40, at 175.

48. As André Van Der Walt put it, "…courts in most jurisdictions accept, as a matter of fact, that the police power cannot and is not usurped or excluded or even unduly restricted by the property guarantee, except for the provision of due process protection against arbitrary and improper exercise of that power." André Van Der Walt, *The Constitutional Property Clause: Striking a Balance Between Guarantee and Limitation*, *in* PROPERTY AND THE CONSTITUTION 141 (Janet McLean ed., 1999).

away from standard-based, largely deferential reasoning in constitutional property law towards a more rule-based, strictly rights-protective approach. For example, as Byrne analyses in his contribution, a hardening in protection for property rights is identifiable at present in United States takings law, with the Supreme Court's decision in *Cedar Point Nursery v. Hassid* consolidating a shift away from balancing analysis in favour of more rigid rule-based protection of property rights.[49] Such a rule-based approach had previously waned in popularity in the Supreme Court's takings jurisprudence, which tended to defer, through standard-based reasoning, to democratically arrived-at delineations of public and private interests in property. This generated what Nestor Davidson and Timothy Mulvaney termed "a deeply democratic vision of constitutional property," which Byrne signals has now been strongly disavowed by the Court.[50] Developing on the opposite (but equally inconsistent) trajectory, Irish constitutional property law saw three decisions signalling robust rule-based protection for property rights delivered in the 1980s and 1990s.[51] However, those decisions have not been applied in subsequent cases. Rather, Irish judges adopt a balancing approach in constitutional property rights adjudication that usually is applied in favour of the public interest.[52]

As such, divergences in the strength of judicial protection for constitutional property rights are observable both *between* jurisdictions and *within* jurisdictions over time. Shifts in approach may be due to changes in judicial personnel, as appears to have occurred in the United States, or due to intuitive, under-reasoned judicial resistance to distributive policies, as has been seen, for example, in respect of rent control in Ireland and in the European Court of Human

49. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021).

50. Nestor M. Davidson & Timothy M. Mulvaney, *Takings Localism*, 121 COLUM. L. REV. 215, 230 (2021). As they put it, "the Supreme Court has made clear… that the political arena is the appropriate one for resolving the tradeoffs inherent in balancing individual ownership and community imperatives." *Id*. On the prior trend of judicial deference and non-intervention in the takings context, *see also* Timothy M. Mulvaney, *Non-Enforcement Takings*, 59 BOS. COLL. L. REV. 145, 150, 154 (2018), noting: "… takings law should not be—and generally has not been—interpreted to restrict the democratic process of definition and adjustment of property allocations" and characterising takings "rules" as "anything but categorical."

51. Blake v. Att'y Gen. [1982] IR 117 (Ir.); In re Article 26 and the Housing (Private Rented Dwellings) Bill [1983] IR 181 (Ir.); In re Article 26 and the Employment Equality Bill [1997] 2 IR 321 (Ir.).

52. Gerard Hogan, *The Constitution, Property Rights and Proportionality*, 32 IRISH JURIST 373, 387 (1997); Rachael Walsh, *The Constitution, Property Rights and Proportionality: A Reappraisal*, 31 DUBLIN UNIV. L. J. 1, 1-2 (2009).

Rights.[53] Such changes are often relatively abrupt and poorly explained in the judicial decisions in which they emerge. For example, in Ireland, judges defer to the judgment of the elected branches of government on property rights issues, but it is hard to pin down the precise reasons for pro-public interest outcomes.[54] In the United States context, the body of takings doctrine is characteristically described as a "muddle."[55] The European Court of Human Rights' jurisprudence

53. In Ireland, see supra note 52. In the ECHR context, contrast the acceptance of rent control in Mellacher v. Austria, App. No. 10522/83, 11011/84, & 11070/84 (Dec. 19, 1989), https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-57616&filename=001-57616.pdf [https://perma.cc/CF9X-W725] and Nobel v. Netherlands, App. No. 27126/11, (Jul. 2, 2013), https://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-122988&filename=NOBEL%20AND%20OTHERS%20v.%20THE%20NETHERLANDS.docx&logEvent=False [https://perma.cc/7Q5C-85DR] with more recent decisions invalidating rent control measures, such as Hutten-Czapska v. Poland, App. No. 35014/97 (June 19, 2006), https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=002-3297&filename=002-3297.pdf [https://perma.cc/YD8S-VR2J]; Radovici & Stanescu v. Romania, App. No. 68479/01, 71351/01, & 71352/01 (Nov. 2, 2006), https://hudoc.echr.coe.int/fre#%7B%22display%22:[2],%22tabview%22:[%22related%22],%22languageisocode%22:[%22FRE%22],%22itemid%22:[%22002-3079%22]%7D [https://perma.cc/G5E8-PHKS]; Ghigo v. Malta, App. No. 31122/05 (Sept. 26, 2006), https://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-87517&filename=CASE%20OF%20GHIGO%20v.%20MALTA.docx&logEvent=False#:~:text=The%20case%20originated%20in%20an,Ghigo%2C%20on%2023%20August%202005 [https://perma.cc/NT5C-X7CV]; Fleri Soler & Camilleri v. Malta, App. No. 35349/05 (Sept. 26, 2006), https://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-77003&filename=CASE%20OF%20FLERI%20SOLER%20AND%20CAMILLERI%20v.%20MALTA.docx&logEvent=False [https://perma.cc/SLL6-5CTW]; Edwards v Malta, App. No. 17647/04 (Oct. 24, 2006), https://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-87520&filename=CASE%20OF%20EDWARDS%20v.%20MALTA.docx&logEvent=False#:~:text=The%20case%20originated%20in%20an,Maltese%2C%20on%204%20May%202004 [https://perma.cc/V5LY-NL4Y]; Amato Gauci v. Malta, App. No. 47045/06 (Sept. 15, 2009), https://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-93959&filename=CASE%20OF%20AMATO%20GAUCI%20v.%20MALTA.docx&logEvent=False [https://perma.cc/3JZ7-62BP]; Lindheim v. Norway, App. No. 13221/08 & 2139/10 (June 12, 2012), https://hudoc.echr.coe.int/eng?i=001-111420 [https://perma.cc/2RLV-JBFM]. On the wholesale adoption of a liberal market approach to property by the ECHR, see generally Tom Allen, Liberalism, Social Democracy, and the Value of Property under the European Convention on Human Rights 59 Int'l & Compar. L.Q. 1055 (2010).

54. WALSH, *supra* note 1.

55. Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle* 57 S. Cal. L. Rev. 561, 561 (1984).

on Article 1 of the First Protocol is also characterised by a lack of clarity concerning the conception of fairness that determines property disputes.[56] As Allen puts it, "reasons for judgments are cast in an almost impressionistic way, where the courts seem to do little more than say that a particular interference imposed an excessive impact on the victim or not."[57] Changes in approach may be temporary and issue-specific or they may represent a more lasting alteration in the balance between rights protection and the facilitation of legislative freedom. Given the general absence of clear reasons, it is hard to definitively predict on which side of this line a judicial approach may land.

The combination of sporadic changes in approach and under-reasoned decisions means that while constitutional property guarantees are often "soft" in doctrinal terms, being applied by judges through balancing analysis with a predominantly pro-public interest leaning, they cannot definitively be categorised as "soft" in all circumstances.[58] Accordingly, the kind of doctrinal stability that supports lawmakers in planning regulatory strategies and designing laws likely to withstand constitutional challenges can be elusive in the constitutional property context. Where judicial interpretation of a constitutional guarantee generates unpredictable outcomes, and where judges consistently struggle to explain those outcomes, the prior question of the appropriateness of the guarantee itself, or of the core interpretive approach that is generating unpredictability, resurfaces. As Mulvaney puts it, the application of a standard by judges could be so opaque that it could fail to generate a desirable "justificatory conversation" concerning the key values at stake.[59] Furthermore, as Alexander Alvaro points out, empowering judges to strike down legislation based on constitutional property rights raises the controversial possibility of divergence between judges and legislative majorities on the extent to which property rights are appropriately

56. *See* ALLEN, *supra* note 16, at 288, 297; COBAN, *supra* note 17, at 214.

57. ALLEN, *supra* note 16, at 165.

58. Michelman, *supra* note 13, at 233-37.

59. Mulvaney describes the ideal "justificatory conversation" as follows: "…judges, by forthrightly reciting and analyzing the interests on all sides of exclusion/access disputes and explaining the justifications for their allocative choices amidst competing claims, can drive public engagement and discussion." Mulvaney, *supra* note 35, at 31. Mulvaney has elsewhere developed an understanding of takings law as fundamentally conferring a 'right to justification' and a 'right to press a legitimate complaint' in respect of the fairness of adjustments in property laws. *See, e.g.*, Mulvaney, *supra* note 51, at 158-59, 176; Davidson & Mulvaney *supra* note 51, at 230.

subordinated to democratic will.[60] The potential controversy created by this empowerment is heightened if judges cannot develop legal doctrine that clearly explains the reasons for such invalidations and allows patterns of predictability to emerge.

B. Anti-Regulatory Ammunition

As noted above, constitutional property law is often "soft"; however, rule-based, strongly rights-protective decisions can emerge. Such decisions, even if they are few, tend to intensify the political effects of constitutional property rights. Nedelsky states the obvious but fundamental point: "[i]f property rights *are* constitutionalized, then laws aimed at promoting equality can be challenged as violating property rights."[61] Successful challenges in this vein generate what Rose aptly terms "anti-regulatory ammunition" that can be deployed in a wide range of contexts to impugn measures with redistributive effects. As well as threatening existing measures, such decisions raise the possibility of constitutional invalidity in respect of *new* measures that might be contemplated by legislators. Many doctrinal examples could be cited here, but two will suffice to illustrate the point: the Armstrong principle in the United States context and the Employment Equality Bill principle in Irish constitutional property law.

In *Armstrong*, Justice Black famously defined the core purpose of the Takings Clause as follows: **"**[t]he Fifth Amendment**'**s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.**"**[62] While this principle has often been cited in takings decisions, judges tend not to employ the principle as the basis for their decisions, and the distributive question that it poses has not been squarely addressed.[63] The Irish equivalent to

60. Alexander Alvaro, *Why Property Rights Were Excluded from the Canadian Charter of Rights and Freedoms*, 24 CANADIAN J. OF POL. SCI. 311 (1991).

61. NEDELSKY, *supra* note 22, at 255.

62. Armstrong v. United States, 364 U.S. 40, 49 (1960).

63. As Davidson and Mulvaney put it, "[t]he Armstrong principle, however, for all of its visceral appeal, hardly provides determinant jurisprudential answers in all cases, and the Supreme Court seems to have little interest in offering a clearer resolution." Davidson & Mulvaney, *supra* note 51, at 226. *See, e.g.*, Penn Cent. Transp. Co. v. New York City*,* 438 U.S. 104, 123-24 (1978*);* Palazzolo v. Rhode Island*,* 533 U.S. 606, 633 (2001); Pennell v. City of San Jose, 485 U.S. 1 (1988); Yee v. City of Escondido, 503 U.S. 519 (1992); Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021) (cases that appeared to be candidates for application of the Armstrong principle, but where that principle was not applied)..

Armstrong in terms of "anti-regulatory ammunition" is the decision of the Supreme Court in *Re Article 26 and the Employment Equality Bill 1996*.[64] The Supreme Court held that despite the public interest advanced by the bill under review in that case (which aimed to secure equal access to workplaces), it was unjust to require employers to pay for necessary adaptations to workplaces for disabled persons. The Court held, "the difficulty with the section now under discussion is that it attempts to transfer the cost of solving one of society's problems on to a particular group."[65] It attempted to limit the scope of its holding by listing in its decision examples of *permissible* targeted legislation, such as health and safety legislation, pollution remediation, and the facilitation of disabled access to public and private buildings intended to be open to the public.[66]

These doctrinal principles, which do not rule out redistributive measures but create a role for judges in overseeing the fairness of such measures, are not often directly deployed by judges to impugn regulatory measures. For example, judges have not used the Employment Equality Bill case in any subsequent decision to invalidate legislation that imposes targeted burdens to secure the common good, despite several constitutional challenges arising where the principle could have been applied.[67] Similarly, as already noted, *Armstrong* is often cited but is rarely the direct basis for takings decisions. Instead, in both jurisdictions, judges tend to employ proxy

64. In re Article 26 and the Employment Equality Bill [1997] 2 IR 321 (Ir.). Two precursors to this decision in the 1980's invalidated rent control measures, in part on anti-redistribution grounds: Blake v. Att'y Gen. [1982] IR 117 (Ir.); In re Article 26 and the Housing (Private Rented Dwellings) Bill [1983] IR 181 (Ir.).

65. *Id*. at 367–68.

66. The Court said, "[i]t is important to distinguish between the proposed legislation and legislation to protect the health and safety of workers. It is entirely proper that the State should insist that those who profit from an industrial process should manage it as safely, and with as little danger to health, as possible. The cost of doing the job safely and in a healthy manner is properly regarded as part of the industrialist's costs of production. Likewise, it is proper that he should pay if he pollutes the air the land or the rivers. It would be unjust if he were allowed to take the profits and let society carry the cost. Likewise, it is just that the State, through its planning agencies, should insist that the public buildings and private buildings to which the general public are intended to have access for work or play should be designed in such a way as to be accessible by the disabled as well as by the able-bodied." *Id.* at 367.

67. *See, e.g.*, In re Article 26 and in re Part V of the Planning and Development Bill [2000] 2 IR 321 (Ir.), where this argument was made (and rejected by the Supreme Court) in respect of social and affordable housing contributions required as a condition of grants of planning permission for large-scale residential or mixed development.

factors or "rules" that test for fairness without directly engaging with distributive issues.[68] This trend of non-use is unsurprising. Institutional constraints—in particular, the resistance of many courts to assuming a role in respect of distributive justice—can explain a reluctance on the part of judges to move beyond rhetoric and explicitly engage with the fairness of the distribution of collective burdens that arises through democratic processes.[69] However, despite the relatively rare direct application of such anti-redistribution precedents to invalidate regulatory measures that restrict property rights, for so long as they are not overruled, they create legitimate doubt about the scope for legal interventions that restrict property rights to secure progressive ends.

In this way, such "anti-regulatory ammunition" risks chilling the enactment of new reforms and incentivising the under-enforcement of regulatory measures that restrict property rights. Some property scholars, including progressive property scholars, have lauded the vagueness of regulatory takings doctrine.[70] However, if vagueness contributes to regulatory inertia or under-enforcement by blurring the boundaries of permissible legislative and administrative action that restricts property rights, the result may be a subtle ex-ante judicial thwarting of the democratic will in respect of the balance between individual property rights and the public interest.

C. A Continuum Approach to Compensation

Public law principles concerning compensation form an important subset of broader constitutional property law, with at least two doctrinal approaches distinguishable. First, a clear-cut line can be drawn between measures that "take" property rights and measures that "restrict" property rights, with compensation required as a rule for the first category of measures and not for the second category of measures.

68. For analysis of these factors in the Irish context, *see* WALSH, *supra* note 1, at ch. 6. For analysis of "categorical rules" in U.S. Takings law, and their relationship to the assessment of fairness in the distribution of collective burdens, *see, e.g.*, Frank I. Michelman, *Takings, 1987,* 88 COLUM. L. REV. 1600 (1988); John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003 (2003).

69. On this institutional culture, *see* Rachael Walsh, *Distributing Collective Burdens and Benefits: O'Reilly, TD, and the Housing Crisis*, 6 (3) IRISH JUD. STUD. J. 63 (2022), https://www.ijsj.ie/assets/uploads/documents/2022%20edition%203/8.%20Rachael%20Walsh.pdf [https://perma.cc/5N3K-HPM6].

70. *See e.g.* Poirier, *supra* note 40, at 190; Eduardo M. Peñalver, *Is Land Special? The Unjustified Preference for Landownership in Regulatory Takings Law*, 31 ECOLOGY L.Q. 227, 287 (2004).

Second, deprivation and restriction can be treated on a continuum, with compensation provision a factor that feeds into an overall assessment of the fairness or proportionality of an interference with property rights.[71]

In fact, when it comes to compensation for regulatory interferences with property rights falling short of outright deprivation, the second approach is most commonly adopted.[72] A core of clarity exists—compensation is usually not required for interferences with property rights falling short of outright taking or deprivation in jurisdictions with constitutional property clauses. However, both national and international courts have in various cases required compensation for some non-expropriatory interferences with property rights.[73] The

71. Allen distinguishes between these approaches in terms of a liberal view of compensation on the one hand, focused on compensation as a corrective justice mechanism, and a social democrat view of compensation on the other hand, focused on compensation as a distributive justice mechanism: (n 54). On these political visions of compensation, *see also* Sluysmans et al., *supra* note 42.

72. *See* André Van Der Walt & Rachael Walsh, *Comparative Constitutional Property Law*, *in* COMPARATIVE PROPERTY LAW: GLOBAL PERSPECTIVES 193, 209-12 (Michele Graziadei & Lionel Smith eds., 2017).

73. *See, e.g.*, the body of regulatory takings doctrine in the U.S. context, exemplified in Penn. Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978). On the so-called regulatory takings doctrine, *see* Singer, *supra* note 34. Similarly, Swiss constitutional property law identifies a category of 'material expropriation' for interferences falling short of expropriation that are so far-reaching as to require compensation. *See* BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 26 (Switz.); VAN DER WALT, *supra* note 21 at 350. For examples of cases where the ECHR has found that regulatory interferences disproportionately impacted on property rights, *see, e.g.*, Sporrong & Lonnroth v. Sweden, App. No. 7151/75 & 7152/75 (Dec. 18, 1984), https://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-57579&filename=CASE%20OF%20SPORRONG%20AND%20L%C3%96NNROTH%20v.%20SWEDEN%20(ARTICLE%2050).docx&logEvent=False [https://perma.cc/J8L5-7AP4]; Hutten-Czapska v. Poland, App. No. 35014/97 (June 19, 2006), https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=002-3297&filename=002-3297.pdf [https://perma.cc/YD8S-VR2J]; Radovici & Stanescu v. Romania, App. No. 68479/01, 71351/01, & 71352/01 (Nov. 2, 2006), https://hudoc.echr.coe.int/fre#%7B%22display%22:[2],%22tabview%22:[%22related%22],%22languageisocode%22:[%22FRE%22],%22itemid%22:[%22002-3079%22]%7D [https://perma.cc/G5E8-PHKS]; Ghigo v. Malta, App. No. 31122/05 (Sept. 26, 2006), https://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-87517&filename=CASE%20OF%20GHIGO%20v.%20MALTA.docx&logEvent=False#:~:text=The%20case%20originated%20in%20an,Ghigo%2C%20on%2023%20August%202005 [https://perma.cc/NT5C-X7CV]; Fleri Soler & Camilleri v. Malta, App. No. 35349/05 (Sept. 26, 2006), https://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-77003&filename=CASE%20OF%20FLERI%20SOLER%20AND%20CAMILLERI%20v.%20MALTA.docx&logEvent=False [https://perma.cc/SLL6-5CTW];

resulting blurred doctrinal line between compensable acquisitions and noncompensable restrictions introduces another layer of contingency and unpredictability into constitutional property law and may create a further incentive for legislators to remain inactive rather than introduce legal changes that could trigger expensive compensation claims.[74]

IV. ASSESSING CONSTITUTIONAL PROPERTY LAW'S CHILLING EFFECT

Scholars have already paid much attention to the fact that the combination of contextual decision-making by judges and a lack of clarity surrounding the reasons for judicial decisions creates uncertainty that risks destabilising property law.[75] The focus of such scholarship is on the systemic impact *within property law* of a lack of clarity for owners concerning the scope of their freedoms. However, scholars have paid less attention to the political effects of such doctrinal uncertainty, particularly its effects on the initiation of new laws or policy changes that adversely impact property rights. To what extent do the features of constitutional property doctrine analysed in the previous Part shape *lawmaking*?

As well as facilitating the kind of judicial activism in respect of property rights that Byrne observes in his contribution, those features plausibly support narrow interpretations of the scope for legislative and administrative restrictions on property rights. This can, in turn, impact on the initiation and enforcement of such restrictions. While the public interest often prevails over individual property rights in constitutional property law disputes, decisions that create "anti-regulatory ammunition," particularly when coupled with the lack of

Edwards v Malta, App. No. 17647/04 (Oct. 24, 2006), https://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-87520&filename=CASE%20OF%20EDWARDS%20v.%20MALTA.docx&logEvent=False#:~:text=The%20case%20originated%20in%20an,Maltese%2C%20on%204%20May%202004 [https://perma.cc/V5LY-NL4Y]; Amato Gauci v. Malta, App. No. 47045/06 (Sept. 15, 2009), https://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-93959&filename=CASE%20OF%20AMATO%20GAUCI%20v.%20MALTA.docx&logEvent=False [https://perma.cc/3JZ7-62BP].

74. On regulatory inertia and the status quo bias generally, *see* Holly Doremus, *Takings and Transitions*, 19 J. LAND USE & ENV'T L. 1, 21-24 (2003).

75. *See, e.g.*, Henry E. Smith, *Mind the Gap: The Indirect Relationship Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959 (2009); Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453. (2002).

clear articulation of reasons in precedents, create a risk that measures that adversely impact property rights could be invalidated. Furthermore, there is ambiguity concerning the circumstances in which compensation is required to legitimise an interference with property rights. Against this backdrop of uncertainty, the answer to whether a proposed regulatory interference with property rights is constitutionally permissible will often be, "it depends," because a wide range of factors and variables might influence a court in determining whether an interference with property rights is "proportionate" or "unjust." Ex-ante assessments of the constitutionality of proposed legislative or administrative interferences with property rights will usually be qualified. As such, the kinds of clear-cut answers about legality that are often sought by legislators and administrators, and that are easier for politicians to communicate to voters and affected stakeholders, may not be forthcoming. As Jeremy Waldron puts it, "our urge is to get into a position where we can always answer the question, '[w]ell, *is* this prohibited or is it not?'"[76] In response, Waldron suggests, "sometimes the point of a legal provision may be to start a discussion rather than settle it, and this may be particularly true of the constitutional provisions that aim at restricting and governing legislation."[77] However, a lack of clarity surrounding the constitutional parameters within which the democratic power to restrict property rights must be exercised may create challenges for a progressive property agenda, in particular making it difficult to undermine embedded "property mythology." As Jennifer Nedelsky argues, property myths can be persistent even absent constitutional protection for property rights, but "constitutionalizing property perpetuates the myth in a particularly powerful and destructive form."[78] Laura Underkuffler suggests that a mythology of strong property may have the important function of restraining government action.[79] But if that dynamic goes too far, it can impede the introduction or implementation of progressive reforms that adversely impact property rights.[80] Furthermore, where property mythology is not wholly mythological but rather is traceable to

76. Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CAL. L. REV. 509, 539 (1994).

77. *Id.*

78. NEDELSKY, *supra* note 22, at 423.

79. Underkuffler, *supra* note 37, at 1248.

80. Schneiderman, *supra* note 19, at 371. *See also* McBean, *supra* note 20, at 575–80, on important laws that might be at risk of invalidation where property rights are constitutionalised.

judicial interpretations of constitutional property rights guarantees, it may provide legal cover for political protection for property rights and the distributive status quo motivated by non-constitutional values and priorities.[81]

Ambiguous constitutional property doctrine may also deter legislative action—even where a strong political will exists to restrict property rights where necessary to advance the common good—by creating doubts about the legal scope for redistributive measures. As Nedelsky puts it, "[o]ne of the central costs of constitutionalizing property, is not just that courts can overrule democratic legislatures; it is that property becomes a matter only lawyers are thought competent to address."[82] The nature of pre-legislative legal advice to governments inclines towards legalistic, highly qualified advice on matters of constitutionality. As David Kenny and Conor Casey put it, "[s]ince the advice is lawyerly and court-mimicking, it is likely to err on the side of caution in hard or borderline cases."[83] This tendency is likely to be heightened where pre-legislative legal advice must anticipate and speculate about the application by judges of the kinds of vague constitutional standards that are common in constitutional property law. It is likely to be further heightened where patterns of inconsistent and/or under-reasoned judicial application of constitutional standards are established. Where a finding of unconstitutionality or incompatibility is perceived as a political defeat to be avoided, cautious, court-mimicking legal advice that could prevent such an outcome will likely be carefully followed at the pre-legislative stage.

Finally, and relatedly, ambiguity in respect of compensation requirements heightens the political stakes of progressive legislative change and incentivises regulatory inertia by creating uncertainty on when and how measures that interfere with property rights can be enacted without having to pay compensation. In this respect, Holly Doremus argues for adapting constitutional property doctrine in light of the budgetary constraints created by compensation entitlements, the

81. Kenny and Casey refer to the Constitution as a potential source of "legalistic credibility", noting the possible cynical rhetorical use of pre-legislative opinions on constitutionality by politicians. David Kenny & Conor Casey, *Shadow Constitutional Review: The Dark Side of Pre-Enactment Political Review in Ireland and Japan*, 18 INT'L J. CONST. L. 51, 75–76 (2020).

82. NEDELSKY, *supra* note 22, at 427.

83. Kenny & Casey, *supra* note 82, at 71.

political consequences of adverse judicial determinations, and the general political resistance to legal change.[84]

Taken together, these overlapping legal and political dynamics could result in legislative inaction or in the ambition of legislative action being circumscribed by an over-inflated interpretation of the strength of constitutional property rights.[85] A concern to avoid impermissibly encroaching on constitutional property rights could also operate to dilute the transformative ambition of legislative reforms that are in fact enacted, including through regulatory under-enforcement.[86] Significant political capital is expended in initiating and enacting a legal change, generating a strong status quo bias—as Doremus puts it, "[e]xperience suggests that it is extraordinarily difficult to change the law."[87] Disincentives for change increase further when the constitutional parameters for change are unclear and when that lack of clarity has potential budgetary implications. As such, regulatory inertia, or a dilution in the ambition of legal changes that adversely impact property rights, may be explained in part by constitutional property doctrine.

A recent Irish political controversy concerning housing illustrates these interrelated concerns about constitutional property doctrine's political effects. Following public outcry about an investment fund's outright acquisition of a new commuter-belt housing development, the Irish Government committed to stopping investment funds from bulk-buying new developments.[88] The government made this decision against the backdrop of a long-running housing crisis in Ireland, including a lack of affordable housing, in particular for first-time buyers. The government's position was that any restriction on bulk-buying could only be imposed as a condition of future grants of

84. Doremus, *supra* note 75, at 6.

85. Kenny and Casey note the contrasting experience in New Zealand, where pre-legislative reports advising of risks in respect of constitutionality are regularly ignored by politicians. *See* Kenny & Casey, *supra* note 82, at 56-58.

86. On regulatory under-enforcement triggered by the shadow of constitutional property rights protection, *see generally* Glenn P. Sugameli, *Takings Bills Threaten Private Property, People, and the Environment*, 8 FORDHAM ENV'T L. REV. 521, 579-580 (2011); *see* Nicole Graham, *Property and Adaptation: The Question of Coastal Erosion*, *in* PROP. & SUSTAINABILITY 39, 43 (Penny Carruthers et al. eds., 2011).

87. Doremus, *supra* note 75, at 21.

88. For analysis of this initial commitment, *see* Rachael Walsh, *No Legal Reason Government Can't Limit Sale of Homes*, IRISH TIMES (May 7, 2021), https://www.irishtimes.com/life-and-style/people/no-constitional-impediment-to-limits-on-sale-of-new-home-developments-1.4557567 [https://perma.cc/PG89-AQAV].

planning permission for residential developments, not of existing grants of permission, even if development on foot of such grants had not yet commenced. This position was reflected in the policy response adopted,[89] notwithstanding the fact that Irish constitutional property doctrine does not hold that planning permission is guaranteed to remain unchanged once granted. On the contrary, Irish courts have consistently emphasised that there is no *prima facie* right to develop in a manner contrary to the public interest. As Humphreys J put it in a recent High Court decision:

> While the right to private property is essential of course, it does not include a right to develop; or in particular to develop in a way that is not in accordance with proper planning and sustainable development. The preclusion of the latter kind of development by zoning or an adverse decision does not infringe any right of a property owner still less a constitutional right. The Constitution is a social contract—not a one-way offer.[90]

Nonetheless, given the pattern of under-reasoned decisions outlined above and the presence of outlier "anti-regulatory ammunition" on the Irish constitutional property precedent book, the relevant doctrine was sufficiently vague on the core questions of *when*, *why*, and *how much* the right to develop could be constrained without triggering compensation entitlements that a very cautious reading of it could plausibly support confining the application of any restrictions to future grants of permission. A risk-averse (in constitutional terms) government would need strong political incentives to disregard such advice or to "read-down" its qualifications or cautions. The result was a significant dilution in the transformative ambition of a key plank of the State's response to the Irish housing crisis.[91]

89. For the relevant planning guidelines, *see Regulation of Commercial Institutional Investment in Housing – Guidelines for Planning Authorities*, DEP'T OF HOUS., LOC. GOV'T & HERITAGE (May 2021), https://www.gov.ie/en/publication/f422a-regulation-of-commercial-institutional-investment-in-housing-guidelines-for-planning-authorities/ [https://perma.cc/6U83-BX84]. These guidelines require developers to enter into agreements as a condition of a grant of planning permission limiting the sale of new units to individual buyers rather than institutional investors (excluding apartment developments).

90. Clonres CLG v. An Bord Pleanála [2021] IEHC 303, para. 83 (H. Ct.) (Ir). *See also* Tracey v. Ireland [2019] IESC 70, paras. 26-27 (Ir).

91. For key facts on the current Irish housing crisis, *see* Shauna Bowers,

This pattern of iterative interaction between unclear constitutional property case law and political risk adversity may explain the many other instances in which Irish government ministers and public representatives have cited the Constitution's protection for property rights as a barrier to proposed housing reforms.[92] Sometimes the advice of the Attorney General is referred to, although not published.[93] In other instances, no specific advice is cited, but direct reference is made to the Constitution's property rights guarantees as supporting the Government's position.[94] This trend has been criticised as reflecting strategic political manoeuvring to support a non-interventionist approach to the Irish housing market, bolstered by politically expedient legal advice.[95] The prevailing *political* discourse on the effect of the constitutional property clauses has been identified as a key cause of a consistently cautious interpretation of the range of acceptable policy changes on housing in Ireland.[96] While this is likely to be part of the story, the analysis in this Article supports the view that the *judicial* interpretation of the constitutional property clauses has also played a role in the weak Irish response to the housing crisis. The real doctrinal ambiguity created by outlier "anti-regulatory ammunition", and the need to account for those precedents in legal

Ireland's Housing Crisis Facts and Figures: All You Need to Know, IRISH TIMES (Mar. 23, 2023, 6:49 PM), https://www.irishtimes.com/ireland/housing-planning/2023/03/23/irelands-housing-crisis-facts-and-figures-all-you-need-to-know/ [https://perma.cc/9Q3P-FNLC].

92. On this trend, *see generally* Finn Keyes, *Property Rights and Housing Legislation*, OIREACHTAS LIBR. & RSCH. SERV. (2019); *see also* Hilary Hogan & Finn Keyes, *The Housing Crisis and the Constitution*, 65 IR. JUR. 87 (2021).

93. S*ee* Residential Tenancies (Prevention of Family Homelessness) Bill 2018: Second Stage [Private Members]: DÁIL EIREANN DEBATE Before the Houses of the Oireachtas, vol. 981, col. 2 (Mar. 28, 2019) (statement of Eoghan Murphy, Minister for Housing, Planning and Local Government). He characterized the Bill as unconstitutional "because it is an unjust attack on a sub-group of people for a societal problem that is far more complex than simply someone selling property." The Bill would have prevented the sale of a property for rent with tenants in situ, which the Minister stated on the advice of the Attorney General, was unconstitutional.

94. Dáil debates contain many similar examples where Government ministers have cited the constitutional protection of property rights as preventing the enactment of proposed bills, for example, in response to the Housing Emergency Measures in the Public Interest Bill 2018, the Urban Regeneration and Housing (Amendment) Bill 2018, the Residential Tenancies (Greater Security of Tenure and Rent Certainty) Bill 2018, the Mortgage Arrears Resolution (Family Home) Bill 2017, Media Ownership Bill 2017, Pensions (Amendment) (No. 2) Bill 2017, Anti-Evictions Bill 2016, Central Bank (Variable Rate Mortgages) 2016.

95. Hogan & Keys, *supra* note 94, at 116-17.

96. *Id.* at 117.

advice, form important elements of any full exploration of that response.

V. CONCLUSION

As *Property Rights and Social Justice* demonstrated, where constitutions or human rights conventions protect property rights, a complex relationship exists between the interpretation of those guarantees in legal doctrine, political attitudes towards the strength of those rights, and the scope for progressive legal change.[97] Based on the Irish experience, the book concluded with a positive outlook on the prospects of achieving a broadly stable "qualified progressive" approach to property. However, it signalled concerns about marginal areas of instability and unpredictability in constitutional property doctrine, in particular their influence on political attitudes towards the appropriate mediation of property rights and social justice.[98]

This Article has delved deeper into those concerns, exploring how judicial decisions in respect of constitutional property rights interact with and influence progressive lawmaking. If judges are unclear in how they determine ideas of fairness or proportionality in property rights decisions, or if they fail to clearly articulate the reasons for their decisions, they create doctrinal uncertainty. Such doctrinal uncertainty means that answers on whether a restriction on property rights is lawful will often be qualified. But that kind of analysis is difficult to effectively explain beyond legal circles, particularly where the (conscious or unconscious) inclination of at least some target audiences is in favour of status quo preservation in respect of property. It can cause or support regulatory inertia and under-enforcement, as well as bolstering political and wider cultural myths about the strength of property rights.

From a progressive property perspective, this means that there is substantive value to doctrinal clarity and predictability that has heretofore been underappreciated. Such clarity may pave the way for lawmakers to implement progressive change freed from concerns about encroaching on property rights, or it may assist observers and commentators in highlighting where political rhetoric concerning the strength of property rights protection diverges from doctrinal reality, thereby exposing cynical deployment of the Constitution as political

97. On the Overton window of the 'politically possible' range of policy responses, *see* LORNA FOX O'MAHONY & MARC L. ROARK, SQUATTING AND THE STATE 386-87 (2022).

98. WALSH, *supra* note 1, at 267.

cover. In these ways, doctrinal clarity has potential practical value in facilitating progressive lawmaking through legislative and administrative processes.

These insights suggest that the traditional divide within property theory between progressive theorists advocating for flexible standards and information theorists arguing for strict rules considerably oversimplifies the distinctions between those approaches to legal regulation of property rights and, in particular, neglects their ex-ante influence on lawmaking.[99] Progressive property's distrust of the reliability of representative politics as a means of securing equitable outcomes in respect of property is a plausible explanation for its focus on *internalising* social obligations within property, thereby equipping judges to participate in the mediation of private ownership and social justice.[100] However, a downside of this strategy may be the creation of doctrinal ambiguity that stymies progressive lawmaking if judges do not clearly articulate reasons to support their applications of vague legal standards. The recent United States experience highlighted by Byrne in this volume indicates that constitutional property rights adjudication can shift its trajectory away from standard-based reasoning toward more rigid, rule-based protection. Such shifts can, of course, further stymie progressive reforms where the tenor of the relevant rules is more absolutist. But perhaps most significantly, the doctrinal examples considered in this Article show that both vague standard-based reasoning and rule-based decision-making in constitutional property law can contribute to the ex-ante chilling of progressive reforms. The very fact that constitutional property frameworks facilitate abrupt, under-reasoned shifts between such approaches itself creates an embedded likelihood of doctrinal unpredictability that may deter legal change.

Irish and American regulatory takings law both reflect what Peter Gerhart terms property's "normative core" in the public law context, namely "that owners are promised an appropriate assignment of the burdens and benefits of decisions about resources when the state, representing the community, adjusts the burdens and benefits of ownership."[101] However that question is phrased, judges will likely

99. On the complexity of progressive property and information theorists' approaches to complexity, *see* Baron, *supra* note 44, at 945-52.

100. On this strategic question for progressive property theory, *see* Walsh *supra* note 31, at 217-19.

101. PETER M. GERHART, PROPERTY LAW AND SOCIAL MORALITY 60 (2016); s*ee also* ALLEN, *supra* note 16, at 286.

struggle to generate determinate or definitive "tests" to address it and will likely lack the inclination to tackle it explicitly, given its strongly distributive focus.[102] This analysis indicates that the broader effects of constitutional property rights should receive closer attention from a progressive property perspective, given that a core aim of progressive property scholarship is to improve the position of those on the margins. To date, progressive property has largely sought to improve property law "from the inside" rather than present a radical challenge to it.[103] However, the ambiguity of constitutional property doctrine analysed in this Article and the challenges that it creates for progressive legal change suggest that progressive property scholars may need to go further and question the *principle* of constitutional property rights protection, at least where such rights are interpreted judicially as having anti-redistributive effects.

What might the alternatives be? Rather than interpreting constitutional property clauses as giving judges a supervisory function in respect of the distribution of collective burdens, a wholly procedural understanding of the effect of those clauses could be adopted, focused on ensuring a clear legal basis and fair process for interferences with property rights.[104] A related option would be to excise regulatory takings from constitutional property law entirely by confining any constitutional entitlement to compensation to instances of outright expropriation.[105] However, these kinds of foundational reinterpretations of the effect of constitutional property clauses would raise the question of whether the provisions would retain any distinctive meaning or effect within a constitutional framework.[106] Most radically, constitutional property rights protection could be jettisoned entirely. Absent these overhauls of constitutional property law, a significant degree of both doctrinal ambiguity and "discomfiting politicization" seems unavoidable as judges are called

102. For analysis of this dynamic in Irish constitutional property law, *see* WALSH, *supra* note 1, at 258-261.

103. Rosser highlights this somewhat conservative nature of progressive property scholarship, suggesting that it is "… an example of leading scholars' attempting to make the best out of property law's available material." Rosser, *supra* note 8, at 114.

104. For analysis of thinner of constitutional property clauses, *see* Michelman, *The Property Clause Question*, *supra* note 23, at 158-60.

105. *See* Byrne, *Ten Arguments*, *supra* note 23.

106. *See, e.g.*, Michelman, *The Property Clause Question*, *supra* note 23, at 152, arguing "…it is not a "property clause" at all, in my sense of the term, unless it conveys a trumping right of every person to be protected—perhaps not absolutely and unconditionally, but not negligibly, either—against state-engineered losses in lawfully acquired asset-holdings or asset-values."

upon to delineate permissible and impermissible burdening in the public interest.[107]

The general absence of such foundational "re-thinks" in constitutional property scholarship, including within the progressive property school of thought, raises questions about whether at least some progressive property theorists regard constitutional property rights as necessary and fundamental.[108] A robust commitment to constitutionalising property rights would likely mark a division within the progressive property school of thought, since at least some progressive property scholars do not support such elevation of property rights. As André van der Walt put it, "a generalization that would abstractly classify property rights as systemically central to the constitutional order is too broad to be meaningful. Progressive property theory would thus do well to make the distance between itself and similar-looking positions clear on this point."[109]

Perhaps most significantly, the analysis in this Article suggests that a generalised commitment to a thick understanding of constitutional property rights would be on a collision course with progressive property's expressed aim of improving practical legal outcomes for marginalized individuals and communities. Given that aim, critical analysis within progressive property scholarship should carefully consider whether the task given to judges by constitutional property guarantees is in fact achievable with the degree of predictability required to prevent such guarantees from stymying progressive reforms. At the very least, progressive property scholarship should approach constitutional property doctrine that is imbued with anti-redistributive rhetoric with considerable caution. This is the case even where such doctrine is of marginal significance within the overall body of constitutional property law in any given jurisdiction, given the influence that it can exert on the non-judicial politics of property.

107. *See* Frank I. Michelman, noting that in the constitutional property context, acceptance is required of ". . .some greater degree of politicization of our ideal understanding of adjudication, and particularly constitutional adjudication, than we have yet learned to find comfortable." Frank I. Michelman, *Possession v. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1320-21 (1987).

108. Rosser, *supra* note 8, at 109 ("The choice of what to emphasize and where to devote scholarly attention is value laden.").

109. A.J. Van Der Walt, *The Modern Systemic Status of Property Rights*, 1 J.L., Prop., & Soc'y, 15, 35-36 (2014).