From Progressive Property to Progressive Cities: Can Socially Sustainable Interpretations of Property Contribute toward Just and Inclusive City-Planning? Global Lessons

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Abstract: This paper explores if and how the idea of progressive property can help to shape more inclusive, sustainable, and just cities around the globe. While quite nuanced, at its heart the progressive perspective on property considers property as a means of addressing important human needs. It is consistent with reciprocal and communitarian approaches to property rights. Nowhere are these insights more relevant or needed than in cities—dense urban areas where legacies of exclusion have deprived disadvantaged groups of housing and public services. In cities and neighboring suburbs, the right to exclude collides head-on with the need to share limited space with those of little means. By re-examining the work of progressive property scholars, we suggest concrete ways of reconceptualizing access to the city. This paper ties legal theory to housing and city-planning by proposing an international perspective to progressive property scholarship, with a focus on local government policies pertaining to housing. We do so by comparatively examining case studies from the United States (US), Spain, Brazil, and Israel—four countries that are actively experimenting with progressive definitions of property in a manner which affects urban planning and housing in cities.

Keywords: housing; progressive property; progressive city; regulation

1. Introduction

“What is it about society that disappoints you so much?.... Oh, I don’t know ... Is it that we voted for this? Not with our rigged elections, but with our things, our property, our money ...” [Mr. Robot TV Series. USA Network] [1].

Much like in Mr. Robot [1], progressive property scholars, as well as conservative property theorists, have attempted to X-ray one of society’s core legal concepts—property rights. Just as in Mr. Robot, these researchers believe that property is a tool for defining the self and shaping the society we live in. Progressive property scholars tend to challenge the mainstream interpretation of property by classical liberals, also known as libertarians. This critical view maintains that, in addition to individual rights, certain ideals and social goals should be taken into account when considering the definition of property. Progressive property scholarship criticizes the extreme-liberal view of property rights, which focuses on the ontology of the individual as a basic point of reference. The progressive school of property rights advocates for a different understanding of possession: as a community-empowering tool which corresponds with inclusion, resilient communities, sustainable outcomes, distributional justice, and responsibility towards other individuals.

For many decades now, the controversy has raged between classical liberals and progressive property scholars. It has sharpened our understanding of how property works, and should work,
to achieve different societal goals. However, progressive property scholarship appears to be marooned on an intellectual island, where little has evolved that could chart a clear and applicable path forward—at least as it concerns real world problems.

While marooned, the progressive property school faces constant critique by classical liberals who consider many property law systems as an efficient mechanism that puts the world on notice as to the relationship between individuals and things [2] (p. 924). From among classic liberal theorists we find ‘conservative’ scholarship that demands respect for owners’ despotic dominion over their property. A less conservative outlook, also known as ‘progressive’, regards property as a means to an end, be it social justice, sustainable outcomes, or the creation of inclusive conditions that help people flourish, or at least live together well in a community [3].

For progressive scholars, property law is used to effectively convey values and norms, not only information to would-be property infringers [3]. As a result, progressive property scholars are highly interested in the role of property in promoting mutual responsibility, human capabilities, and social relations [4] (p. 107–111).

There are two concerns at the outset: first, the juxtaposition that we are making here between the progressive and the classical liberal (or libertarian) view of property rights is not meant as a crusade toward the latter. Rather, it is designed to open the hatch for pluralistic views on the concept of property rights in the context of the urban environment. A closer look at the outstanding texts of Hayek [5], Friedman [6], and Demsetz [7], to name a few, forewarns against drawing a caricature of classical liberals, which depicts them as anti-social. Both classical liberal and progressive views can be seen as complementary to the defense of freedom and liberty, albeit with different emphases.

Demsetz [7], who is often considered as a staunch pro-market liberal, regards property rights as a product of negotiations and dynamic economic powers. At the same time, however, he points out that there could be certain social restrictions on property, such as those banning child labor. He also acknowledges that “it takes time, effort and experience to develop a legal system that gives meaning to ownership” [7] (p. 95). Like Demsetz, Friedman notes that property is a complex term and that “the existence of a well specified and generally accepted definition of property is far more important than just what the definition is” [6] (p. 27). Namely, property can be many things and property rights may be defined differently, by different settings.

Furthermore, by endorsing a progressive view of property rights it is not our intention to imply that the state—through progressive manoeuvres—is more effective, efficient, or responsible than the market. However, we take into account that in some cases, market rules can be reconsidered by governments that craft the rules according to which the market operates. Economists like Ha-Joon Chang [8] have noted that even within a close-knit group of pro-market economists, there exists a growing unease of the market. An entirely free market, according to this perspective, is a myth, because markets operate according to rules set by institutions. Thus, it is difficult to separate the state from the market, and central planning from market forces [9]. Accordingly, our purpose here is not to refute pro-market logic nor to sanctify state-intervention. Instead, we would like to promote an awareness that the state/regulator can adjust market rules in favor of a more progressive view.

Due to the ongoing disagreement over the purpose of property law, there remains a great deal of uncertainty about the future direction and life of the progressive property school, not to mention a multitude of unanswered questions. For example, what does progressive property in action really look like in different jurisdictions around the world? Is it motivated by similar—if not identical—ideas? Do policies based on progressive property ideals actually work? Other questions concern socio-economic and spatial realities that challenge the way we look at property rights. For example, does rapid urbanization create new conditions that assist the progressive property school in promoting its agenda? Do spatial relations in an urbanizing world mount new challenges to the conservative view of property rights? And—in the face of growing urban problems—how are we to achieve outcomes like human flourishing? Specifically, does the progressive property school’s
conceptualization of property have a role to play in the daily lives of individuals who live in cities and suburbs—places like São Paulo, Tel Aviv, Granada, or San Jose?

To date, insufficient attention has been paid to non-American case studies pertaining to the progressive property ideology. In addition, there is a gap in understanding if (and how) urban problems—and housing in particular—could directly benefit from theories associated with the progressive property school [10–13]. The aim of this paper is to fill these gaps by looking comparatively at urban environments around the globe and by examining attempts made by state or local governments to create new policies, based on progressive ideas, and to address housing issues in intensive urban environments.

Indeed, one of the purported weaknesses of progressive property theory is its failure to articulate bold positions that can be used for actual change [4]. Missing from a discussion that largely revolves around domestic (American) cases is a global, even comparative, outlook on how property rights can accommodate more ‘progressive’ interpretations. One possible stage for this examination is urban environments where issues such as housing, a persisting shortage of local-government resources, urban economic crises, and aging infrastructure have all come together to challenge the way in which most of the world’s population lives today [14].

We contend that an international outlook into cities, and the way in which urban problems are resolved in cities, could further enrich and inform the debate between conservative and progressive property scholars, not to mention provide opportunities for real world applications.

Specifically, we argue that cities are key to understanding if, and how, property rights can be reconceptualized in line with progressive property scholars. Today, cities are home to most of the world’s population, condensing human, economic, social, and cultural activities [15]. As a result, cities are a ready-made laboratory for intense interaction between individuals, groups, and public officials. More specifically, urban dwellers “interact with the city and each other mainly via property relations” [16] (p. 31) and regulations that apply to cities “operate through property” [16] (p. 31). Because, on one hand, property has many functions and many manifestations, and, on the other hand, the city is a complex web and network of activities, cities can therefore become a platform for negotiations and discussions over the limitations and meaning of property. These ongoing discussions also address the issue of housing and its relationship with the social function of property. In turn, these deliberations can inform progressive property scholarship.

2. Property and the Conservative-Progressive Debate

2.1. Limitations and Opportunities of Progressive Property Scholarship

In a nutshell, progressive property scholarship looks at property rights in a way that emphasizes their role in society [11]. Progressives are looking for ways in which property can be better harnessed to allow people to live together [17]. This notion is often confronted by conservative, libertarian, or individualist perspectives about property rights and the political order, all of which maintain that the good state is a minimal one that allows people to flourish by intervening in neither their lives nor their property [18]. According to this view, property cannot be tampered with by governments and entails an inherent right to exclude others [19].

Progressive property scholarship has many philosophical roots [20]. For example, it is partly rooted in welfare economics and the idea that governments should enable people to develop their capabilities [21]; it also emerges from a long tradition of political philosophy which considers governments as morally bound to promote and protect both liberty and property, while ensuring equal opportunities and just outcomes [22]. These perceptions suggest that people should be empowered and allowed to live meaningful lives [23], although the way to achieve this goal is often disputed among those involved in public policy.

These ideas can be traced back to an ideology of republicanism [24] as advocated by scholars such as Thomas Paine, arguing that rights (including suffrage) cannot be solely dependent on property
ownership. Progressive scholarship can also be associated with earlier revolutionary manuscripts such as Rousseau’s *Social Contract*, which argue that sovereignty lies with the people, not with the government, the rich, or the empowered [25].

All of these ideas are linked to an ideology of liberalism which consists, in itself, of many versions [25]. Specifically, progressive scholars can be considered as modern liberalists, who acknowledge that governments should recognize the developmental needs of their subjects, as means of achieving social justice [26]. Different versions of this idea have been promoted by liberals such as John Rawls [27], Luis Mora [28], and Gustavo Gutierrez [29].

Importantly, the progressive school does not militate against the conception of property rights, but rather works around (and with) it. Progressive scholars find ‘property’ and ‘property rights’ to be useful concepts, although in need of adjustment [30]. In this context progressive scholarship can be regarded, to a certain extent, as liberalist at its core [31]. However, it believes that, like tofu, the concept of property can absorb the flavor of the sauce in which it marinates. In other words, it may also imbue many other contextual [32] (non-libertarian) interpretations of property that stem from a “social property” approach. These interpretations advocate a range of ideas such as an intergenerational view of property, sustainable development, stewardship, and distributive justice [33] (pp. 204–206).

Notably, the progressive school is not uniform and there are many different approaches to what ‘progressive’ interpretations mean [2]. Recent scholarship even criticizes the foundational elements of the progressive school as being less critical and less sensitive to issues of race and discrimination [18]. In addition, within the progressive school there is a different emphasis on the reasons behind a social approach to property; while some scholars argue for reciprocity [32], others stress an inherent social obligation of an owner towards others [2, 3]. This idea, also known as the Social Obligation Norm, is reflected in most progressive discussions over property.

We cannot venture here into a full summary of progressive scholarship, but for our purposes suffice it to say that progressive ideas can be better understood by pitting them against more conservative ideologies pertaining to property. While classical liberals [34, 35] argue for property as an extensive right that grants owners undisputed claims over their assets, progressives view property as contextual [36]; while classical liberals perceive property as a vehicle for promoting values such as freedom, liberty, and sovereignty [37] (p. 15), progressives emphasize other values as well, such as distributive justice [38], or fairness. Moreover, while liberals look at property as a source of duties (of others, not to impinge on property rights), progressives view it as a source of responsibility towards others, and while conservatives tend to make property their champion, progressives put people—not property—at the epicenter of property law [39].

Put differently, while progressive theorists believe that property law can prescribe love (towards the other) conservative scholarship asserts that property law can prohibit certain actions, but cannot compel people to love each other. Thus, according to a more conservative-liberal view of property, government actions cannot compel owners to pursue distributonal goals or compel them to ‘give’ to others simply because they are not as wealthy, fortunate, or able human beings [40].

The chestnut of this debate revolves around the relational aspect of property, namely, what does property mean for social relations [4]? The progressives believe the entire concept of property has been too commodified, and skewed towards private, rather than public, interest. Indeed, some of us today speak not about property but rather of ‘real estate’, ‘real estate development’, or even ‘patents’. This critique meshes well with studies lamenting the decline of public interest in public policy. It poses concerns about if and how public policies can be re-shaped to accommodate a more inclusive ideal of property rights. Assuming distributonal (or more social) interpretations of property are important, one way to further legitimize them is by studying policy reorientations and by examining regulations from around the world that rethink property. However, it appears as though these accounts have not been fully tapped by progressive property scholarship.

In fact, recognition of the geographical insularity of existing work is missing from current debates on the role of property, particularly among those in the progressive property school. Apart from a few
accounts of how progressive property ideals materialize in other countries, most studies remain in the relative (American) silo.

2.2. Progressive Property: Marooned in the US? The American-Centric Nature of Progressive Property Scholarship

Apart from a few studies by prominent scholars, existing progressive property theory remains rather uninformed about new policies and regulations that incorporate a more inclusive understanding of property rights. The American-centered discussion of progressive property has failed to examine other countries where vigorous debate over the meaning of property rights has been ongoing. In addition, the debate has remained largely confined to law reviews and legal periodicals.

In the few instances where American scholars have expanded their view, they have looked to South Africa and Germany in order to find support for their argument about the diverse role of property rights in sustaining communities [42]. Gregory Alexander [42] has sought to expand the American perspective by studying progressive approaches outside the US. Likewise, Lubens compared the US with Germany, and observed that the social obligation norm is more accepted in German law [43]. Lovett [44] noted that progressive American theorists dwell on trespass claims and public access disputes, without looking outside of the US. He therefore proposes looking at Scotland’s land reforms in order to “discover new property rulemaking” [45] (p. 741) so as to “alleviate the palpable shortage of new subjects in property law analysis” [46] (p. 741).

Following their footsteps, Foster and Bonilla [45] have argued for a more expansive study of the Social Obligation Norm, as articulated by Alexander [42]. In particular, they call for a nuanced discussion which focuses on other jurisdictions (beyond the US) where different legal, political, and social traditions exist [45] (p.109). In line with Foster and Bonilla’s suggestion, an argument can also be made that the debate between conservatives and progressives can become better informed by looking at property law in other countries, and in particular at the implementation of progressive versions of property rights elsewhere. The debate between these two ‘property rights camps’ can become less entrenched by looking at jurisdictions where the virtues of property law are constantly being challenged; where property is regarded as a diverse institution which goes beyond autonomy and negative freedom; where legal systems have been traditionally receptive to more socially inclusive policies. Indeed, scholars from around the globe have gradually turned to examine non-American legal systems in order to exemplify the works of progressive property. Examples include analysis of progressive property in Scotland [44], New Zealand [46], Canada [47], Brazil [48–50], South Africa [46], Colombia [51], and Chile [31].

It is clear that jurisdictions differ in terms of the constitutional status they grant property. Where examinations of non-American jurisdictions do take place, they raise questions about the transferability of lessons from one country to another. Political and social factors are additional variables which affect the interpretation of property rights, as well as the ability to take or impinge on property in different ways. However, this variance may add perspective to existing property law scholarship, rather than clutter academic discussions.

2.3. Filling-in the Gaps Caused by Geographical Insularity: Moving on to Investigate Cities around the Globe

We contend that by focusing on urban environments, researchers of property law can make significant leaps in the study of progressive property regimes. Our proposal stems from the realization that the future of humanity is an urban future [52], and therefore academics need to look at how property operates in a challenging urban environment, where people are constantly negotiating their rights in the light of socio-economic challenges such as the need to provide infrastructure or to balance a variety of needs and interests.

Cities are also key to progressive property scholarships due to the history of urban governance and its relationship to property. Whereas cities began as organizations whose goal was to protect property rights [16], in the 21st century some city governments are striving to use property in various ways
to ensure their continued growth, to improve the human condition and to ease the social problems that tend to be concentrated in cities. Specifically, we believe that a closer look at housing policies, municipal governance, urban regeneration, and land-use legislation reveals profound insights on which progressive scholarships can build.

3. Methodology

To study how progressive ideas about property materialize in different cities and jurisdictions around the globe, we applied the comparative legal method [53,54]. Specifically, we compared laws, policies, guidelines, court rulings and related practices. The comparative analysis focused on four jurisdictions: the US, Spain, Israel, and Brazil. In each jurisdiction we explored if and how progressive ideas about property rights take effect in the field of housing and planning. In each jurisdiction we conducted an analysis of documents and regulations from the past decade that shed light on potentially novel interpretations of the right to property. The examination was structured as a targeted policy analysis [55] (p. 22). We chose to focus on four jurisdictions where existing academic studies imply that progressive dispositions concerning property have been deliberated at the local-municipal level. We selected case-studies of cities and regions (shown in Figure 1) that represent attempts by legislators to address comparable housing challenges, namely lack of adequate housing and the need to enlarge or renew the housing stock.

![Figure 1. Location of case-studies selected for comparison.](image-url)

The four jurisdictions we selected are different in socio-economic makeup, constitutional foundations, geography, and the standing of property vis-à-vis other rights. However, these jurisdictions are comparable because of ongoing attempts to inject property rights with social meaning. Moreover, we chose the four jurisdictions on the basis of different circumstances that make comparison especially revealing. Several semi-autonomous regions in Spain experimented with a variety of legal provisions in the field of housing following the economic meltdown of 2008. As well, certain Brazilian regions and cities have applied progressive interpretations of property to tackle several housing challenges. Likewise, the Israeli legislature has begun to look at property in an instrumental manner in order to promote social goals, such as urban renewal and expedited development of neighborhoods in decline. Finally, the centerpiece of the comparison was the US, where progressive property scholarship flourished in recent decades. Moreover, the US was chosen because it showcases several case-studies that apply an inclusive viewpoint of property rights which balances property rights with competing
goals of local and state governments. The US, too, has introduced legal innovations, in particular in the field of inclusionary zoning.

In each jurisdiction we identified key policies that enabled a structured comparison of legal experiments that apply to progressive thinking about property. We then compared these policies, while highlighting similarities and differences. The core findings are presented thematically in Table 1. The thematic summary is organized according to key criteria, including: the status of property as a basic right; identifiable policies that correspond with the progressive property school; the field which is impacted by progressive property ideology; the type of ‘social obligation’ towards others; critiques and support with respect to the identified policies; implementation; and the conflicting interests associated with progressive interpretations of property rights.

4. Analysis and Findings: From Progressive Property to Progressive Cities and Neighborhoods

The following sections discuss the implementation of the progressive idea of property in four jurisdictions around the globe: in the US, Israel, Spain, and Brazil. In each section we discuss if and how progressive interpretations of property rights have helped in shaping urban policies and practices in the field of planning, housing, and municipal governance. In particular, how the progressive idea has influenced recent changes in jurisprudence and regulation relating to urban environments. These changes have the potential to transform cities into more sustainable, inclusive, and just places, and to improve the capacity of social urbanism to create change in the people’s lives.

4.1. How do Progressive Ideas about Property Help Shape More Inclusive Cities in the US?

As a liberal democracy based on an ideology of freedom, the US shaped its constitutional provisions and its socio-political order based on the sanctity of property rights. Does this mean that the only interpretation available in the US is a Blackstonian interpretation of property rights? In the ensuing analysis, we argue that although US property law is predominantly tilted in favor of the right to “play darts with one’s Rembrandt”, it can nevertheless be receptive to socially inclusive interpretations of property and has, to some extent, allowed public interests to interfere with private property. There are many reasons behind these developments in American property law; the obvious ones, often analyzed by existing scholarship, concern questions about due process and the acquisition of property.

However, it is possible to look at American jurisprudence from a different vantage point based on recent reinterpretations of capitalism. Indeed, capitalism is a dominant economic and political system in the US, but as of late it has come under attack, even by liberal economists arguing that capitalism has been radicalized by a for-profit mindset which hijacks the free markets at the expense of business, the public interest, and people’s well-being [56,57]. Accordingly, those critics now stress capitalism for people, not for profit. They argue for reform in capitalism rather than an embrace of socialism. One proposal is to have a fresh look at property rights not as a given, but as an evolving social institution which mandates inclusive policies at the local and national level. Recent developments in American jurisprudence provide interesting perspectives on these views.

In the US, not only were local government zoning laws challenged to facilitate the development of affordable housing in an area that prohibited it, but the very idea of property as a right to exclude certain communities was refuted as unconstitutional [44]. These and other recent developments in American jurisprudence have shown a certain willingness, if not a direct shift, towards a more progressive vision of the right to property—one linked to the idea of inclusionary zoning. This shift began in New Jersey in 1975 and was addressed in California in 2015.

4.1.1. New Jersey and the Mount Laurel Doctrine

The Mount Laurel doctrine has been frequently discussed in the literature [58], and it is not our intention to repeat what is already known. The doctrine, however, is an appropriate starting point for
the ongoing debate on progressive property in the US and around the globe. Thus, we briefly outline its main components and examine how it has influenced contemporary case law in the US.

The New Jersey Supreme Court articulated the essence of progressive property scholarship in *Mount Laurel* more than 40 years ago [59]. The core of the dispute was whether or not inclusionary zoning laws, like the kind introduced in Mount Laurel, New Jersey, were legal. Such laws typically “link approvals for market rate housing to the creation of affordable homes for low- and moderate-income households.” [60] (pp. 1–2) Importantly, and relevant to our discussion, these local land use regulations “seek to expand the supply of affordable housing and promote social and economic integration” [60] (p. 1). The Court, in two opinions over the course of several years, eloquently outlined why property is important, and how inclusionary zoning served a greater social good and was an appropriate use of the local government’s police powers.

Displaced by urbanization in the 1950s and the high cost of housing, Black and other low-income residents of the municipality of Mount Laurel, New Jersey were forced to move out to more affordable neighborhoods. It became apparent that Mount Laurel’s zoning ordinance did not allow for multifamily housing, and the township had no interest in providing any kind of variance [58]. The Camden Regional Legal Services and the Southern Burlington County NAACP filed a lawsuit alleging that Mount Laurel Township had zoned out individuals based on their color and economic class [58,59]. The legal issue was straightforward:

> Whether a developing municipality like Mount Laurel may validly, by a system of land use regulation, make it physically and economically impossible to provide low and moderate income housing in the municipality for the various categories of persons who need and want it and thereby, as Mount Laurel has, exclude such people from living within its confines because of the limited extent of their income and resources. Necessarily implicated are the broader questions of the right of such municipalities to limit the kinds of available housing and of any obligation to make possible a variety and choice of types of living conditions. [59] (p. 173)

The Court ultimately concluded that Mount Laurel’s zoning ordinance was unconstitutional, and outlined what kinds of obligations municipalities in New Jersey have with respecting to affordable housing. In the words of the Court:

> Every such municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality’s fair share of the present and prospective regional need therefor. These obligations must be met unless the particular municipality can sustain the heavy burden of demonstrating peculiar circumstances which dictate it should not be required so to do. [59] (p. 174)

More significantly, 40 years prior to the emergence of the progressive property school, the Court proceeded to articulate the philosophy that underpinned its decision—by tying land use regulation to the police powers afforded to government under the New Jersey Constitution, the opinion states:

> There cannot be the slightest doubt that shelter, along with food, are the most basic human needs . . . ‘The question of whether a citizenry has adequate and sufficient housing is certainly one of the prime considerations in assessing the general health and welfare of that body...’. [59] (p. 179)

The Court further explained:

> It is plain beyond dispute that the proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare required in all local land use regulation. [59] (p. 180)
In short, the Court viewed Mount Laurel’s actions as economic discrimination and a violation of the state constitution, which seeks to give all citizens the opportunity to thrive. Specifically, the Court called on municipal officials to identify those living in low-standard housing and to draw up the necessary zoning plan to meet those needs. Property owners had to allocate certain portions of their land to develop more affordable housing units.

When the plaintiffs sought the Court’s help in enforcing compliance a second opinion was issued that clarified the first and emphasized underpinnings of the Mount Laurel Doctrine [56]. Specifically, the Court explained that at the core of their original ruling was an issue of fairness, and that governments cannot, by legislation, allocate “dilapidated housing in urban ghettos for the poor and decent housing elsewhere for everyone else” [61] (p. 209).

There have been many criticisms of the Mount Laurel doctrine. At the end of the 1970s and the beginning of the 1980s—the days of Ronald Reagan and Margaret Thatcher, when neoliberalism was on the rise [62]—there was a sense that such court rulings promoted a communist, anti-private property rights position. Indeed, none other than New Jersey Governor Thomas Kean argued that “the idea of a predetermined mix of social and economic classes in town after town is a ‘communist’ concept.” [63] (p. A1)

Supporters of the Mount Laurel Doctrine, on the other hand, saw it fundamentally as an opportunity for the poor to secure decent housing in a good community—supported by good quality public services [64]. The central underpinning of this perspective stems from the neighborhood effects literature. According to Massey et al., “dwellings are inevitably tied to neighborhoods, which in turn define a social, economic, cultural, and political environment that shapes life trajectories to affect individual and family well-being along a variety of dimensions.” [58] (p. 27) In essence, property ownership must be considered in the context of neighborhoods—“location, location, location” or “location cubed”—to truly facilitate human flourishing [58] (p. 27). The state, which has a direct interest in public health and welfare, must therefore balance its role as protector of property as an investment, and as the enabler of affordable housing, as a necessary prerequisite for improving residents’ “health, cognitive skills, education, [and] labor-force participation”, among others [59]. This progressive perspective is key to understanding the far-reaching impact of the Mount Laurel Doctrine.

4.1.2. Mount Laurel’s Reach in American Jurisprudence

Post Mount Laurel, other American courts demonstrated a similar willingness to engage with the issue of affordable housing and inclusionary zoning [65,66]. These decisions re-invigorate the progressive idea of property by clarifying that municipalities can use their police powers to legislate in order to ensure equal housing rights and therefore, essentially, human flourishing. Importantly, as of 2014, there were approximately 507 inclusionary housing programs in 482 jurisdictions similar to those in Mount Laurel [60], and, “of the 507 programs, 36 percent was located in New Jersey and 29 percent was located in California” [60] (p. 18).

At times, these inclusionary zoning programs have been challenged in courts across the US [67]. While in some cases courts were critical of inclusionary zoning, ruling that it violated State statutes [68], in others these measures were upheld.

Notably, in 2015, the Supreme Court of California made another significant stride towards inclusionary zoning. This shift mirrors a willingness by the court to look critically at arguments regarding the violation of property rights, thereby instilling property with a social meaning. Specifically, the court ruled unanimously that a municipality may require developers to set aside a percentage of units to be sold as affordable housing, and that this type of regulation was not an unconstitutional taking of the developer’s private property [66]. One of the plaintiff’s main arguments was that “by requiring the developer to sell, at below market (affordable) prices, a portion of the units that it could otherwise sell at market value, the ordinance divests the owner of the difference, in money, between the market value of the property and the affordable price of the property” [66] (p. 466). To this claim, the Court swiftly responded that it was commonplace to expect that land use regulations
may diminish the market value of an owner’s property [66]. As such, San Jose’s affordable housing affordable housing requirement was “no different from limitations on density, unit size, number of bedrooms, required set-backs, or building heights” [66] (p. 466).

In San Jose, the court also noted that the 15% affordable housing requirement does not, as was claimed by the plaintiffs, require the developer to provide the government with a legal interest in their property, which would indeed be a form of taking [66]. Instead, it was considered as a mere use-restriction.

It remains unclear whether recent American jurisprudence and regulations suggest a paradigm shift with respect to ownership and property. As a constitutional right, property still imposes significant limitations on those who seek to redefine or impinge on it [69]. The cases of Mount Laurel and San Jose are prominent examples of the extension of the social obligation norm to the area of inclusionary zoning and affordable housing. In this vein, since the early 2000s there has been a gradual increase in inclusionary zoning by local governments across the US. At least 886 jurisdictions have introduced inclusionary zoning ordinances in 25 states [70]. These steps, however, do not signal an overarching change towards inclusive and socially sustainable cities by means of the right to property [69,71]. Inclusionary zoning regulations are frequently challenged in courts; the Supreme Court of the US may still impose limitations on inclusionary zoning statutes [72]; a few states in the US have introduced significant and effective state-wide inclusionary provisions (primarily New Jersey, California, and Massachusetts), while others have campaigned against such measures [70]. Thus, despite good intentions [73], the interface between land-use regulation, property rights, and cities (at least in the US), has not produced long-lasting impacts that ensure just and socially sustainable urban environments [69].

4.2. How do Progressive Interpretations of Property Rights Help Shape Better Urban Environments in Israel?

The urban condition in Israel with its condo-like, multi-unit buildings, is fertile ground for legal experimentation, particularly for re-imagining property rights. Recent deliberations on property rights in Israel focus on issues such as affordable housing, as well as urban renewal and neighborhood regeneration. These matters are not disconnected; as in other countries around the globe (including the US), in Israel, the right to property is often deliberated in conjunction with the urban condition and the need to create better, healthier, and more just spatial arrangements.

Similar to the US, in Israel, property is recognized as a ‘basic’ constitutional right [74], which—according to classical liberalism—grants owners the right to do what they wish with their assets. But can this right be remodeled to fit the progressive ideal? Recent developments in Israeli jurisprudence and legislation shed light on this issue. In the main, these sources point to a certain mind shift towards a more inclusive and socially responsible view of property rights.

Although the right to property is framed as a fundamental right which cannot be diminished (“The property of any person shall not be violated” [74]), the Basic Law on Human Dignity and Liberty [74] also states that “there shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required” [74]. As a consequence, property is treated not an absolute right, but as a right which—under certain preconditions—can be bent to accommodate competing goals.

The ensuing analysis exemplifies how the Israeli Courts and legislature have found it possible to rethink property rights in the city. With respect to progressive property and the social obligation norm, the following section highlights how urban renewal scenarios indicate that a mind-shift is well underway.

4.2.1. How Recent Urban Regeneration Policies Support the Progressive Property Approach?

In a nation whose housing stock was predominantly built in the 1940s–1960s, the question of urban regeneration of dilapidated neighborhoods has been raised with gusto in the last two decades [75]. Most of these areas were built to house a large population of refugees who came to Israel from Europe,
As early as the late 1970s, the government initiated a number of programs to rehabilitate dilapidated neighborhoods [78] (pp. 11–13). There was an effort to build communities and nurture local awareness and leadership. However, the physical aspect of home improvements remained unsatisfactory, with many older tenements still in shambles today. In the late 1990s, a cascade of initiatives emerged in order to instigate urban renewal [79]. However, these initiatives were, by then, market driven, and relied not on government financing, but on the actions of developers and apartment-owners. Thus, a new model was shaped, one which relies on the selling of ‘air rights’ (building rights) with the intention of financing certain works with funds gleaned from the sale.

This entrepreneurial strategy involves the rezoning of some plots, or whole neighborhoods in order to grant extra building rights to existing owners of multi-unit developments [80] (p. 67). According to this model, landowners sell those rights to a developer, who then invests money to regenerate that area. Sometimes the developer will also demolish and rebuild an entire housing complex. Because a developer receives financial incentives to regenerate a given area, he or she will agree to carry out extra infrastructure works (e.g., build roads), and even construct public facilities such as kindergartens.

This model requires the government to prepare new outline plans for the neighborhood, most of which include extra (unused) building rights; it requires the developer to come into an agreement with the owners of existing apartments; it requires property owners to agree amongst themselves to allow the sale of their property and any extra building rights it may carry. Thus, if landowners cannot reach an agreement, the whole project might be stalled.

Generally speaking, in dilapidated neighborhoods ownership will be shared by dozens, sometimes hundreds, of apartment owners in multi-unit title buildings. This means that, while each owner would have exclusive ownership over their apartment, the grounds on which the building stands will normally be shared equally by all owners. Other common areas, such as an elevator, a lobby, hallways and, sometimes, even the rooftop will also be jointly owned by apartment owners in multi-title buildings—with each apartment owner getting a share of the common areas [80]. Sometimes, unused building rights (‘air rights’) will also be owned by the whole group of apartment-owners. Thus, any transaction in those “common assets” will require the consent of all owners. In such a scenario, agreement on a number of issues would be required to undertake urban renewal projects, including whether or not to initiate development at all, the sale price, and the additional benefits that would be granted to each apartment owner [81].

In this regard, the Israeli Real Property Law of 1969 [82] prescribes that in order to demolish a building and build it anew, each and every owner would have to agree to the sale and the demolition. If 100% of apartment owners reach an agreement, the building can be demolished and built with modern amenities. Sometimes a group of several buildings will be demolished in a single stroke, thereby allowing the developer a wider margin of profit. In return, existing apartment owners receive a new (often enlarged) apartment [83] and are entitled to return to the building after its completion. Owners may also receive cash money to enable their temporary relocation and to finance short-term rent. In certain cases, the sale also includes cash money in addition to a new apartment. But what if ‘only’ 90% of owners agree to sell their extra building rights, and to temporarily relocate until the project in completed? Until recently, in those cases, the project would not be able to proceed because a few apartment owners were able to veto the wishes of the many.

This situation brings to the fore several questions discussed by progressive property scholarship, namely: does an owner have a certain responsibility toward their community? Does ownership imply unfettered powers to do whatever an owner wishes with her property? Projecting these questions onto the situation we have just described, the question is whether a minority of apartment owners as well as from Arab and North-African countries [76]. Because of their speedy creation, these old tenements were built rapidly without essential amenities such as elevators, adequate insulation, or climatic adjustments. The end result was a large stock of buildings, with small, unhealthy units, in cheaply built structures that did not cater to the needs of their inhabitants [77].
in a multi-title building can prevent urban renewal by exercising their property rights in the face of necessary improvement works? Simply put, can the few undermine the needs of the many?

4.2.2. Implementing Progressive Property Theory in Urban Regeneration Practice

In the Israeli context, refusals to evict residents and to conduct a sale are often motivated by several factors. First, there are situations in which an apartment owner does not want to move and would rather stay in their apartment, even if it is run-down and in need of repairs. These cases often involve tenants who find it harder to move—even for a limited time—until the project is completed, such as the elderly or the disabled [84]. Second, refusals often stem from owners of apartments exercising their holdout powers [81]. Those tenants refuse a deal offered to them because they believe that the developer could have offered them a bigger apartment in the newly built development, or even top the offer with cash. Other tenants would choose to refuse the offer in order to be the last hold-out, thereby raising their negotiating power and seeking a better contract compared to the one offered to those who already signed. In those situations, the end-result could be no deal. Urban regeneration therefore becomes harder to achieve in an environment where ownership is shared but owners do not cooperate [85]. In this classic “prisoner’s dilemma” scenario, the neighborhood remains in shambles, and most apartment owners are unable to begin the process of redevelopment [86]. Some of these owners are poor, some are better off, but their inability to cooperate, and their mistrust of each other can result in market failure that affects the urban fabric and the quality of many lives. The absolutist notion of property rights is also at play here, with owners “building a fence” around their property and, consequently, prohibiting redevelopment.

Given these challenges, the government intervened by changing real-property legislation [87] to enable the majority of apartment owners in a given building to impose their will on few apartment owners who object to redevelopment. The 2006 Evict and Build Law [88] (and its 2011 amendment) sets preconditions for eviction, demolition, and re-building of a residential structure that is located in a regeneration area.

The new law covers “urban renewal areas” [88]. Once the government declares that a neighborhood is suitable for urban regeneration, 80% of apartment owners in a given compound may agree to proceed with an ‘Evict and Build’ transaction, in which existing apartment owners can sell ‘air rights’ to a developer in return for a complete redevelopment of the regeneration area.

In other words, the parliament modified the requirement that all apartment owners agree to the sale of the commonly-owned building rights. Now, full (100%) owners’ agreement is not necessary, and 80% of apartment owners may, under certain conditions, impose their will. A fundamental prerequisite is that 80% of apartment owners also own at least 75% of the common areas in the multi-unit building. More importantly, the law imposes civil liability on an apartment owner who “unreasonably” refuses to sell their share of additional building rights and to temporarily relocate until the redevelopment has been completed [88].

The new law prescribes that a “reasonable” refusal is contextual, but it also specifies certain scenarios that indicate a reasonable refusal. These include situations where: (a) a real-estate appraiser opined that the sale is not economically profitable—such as where the developer’s gains are much greater, even disproportionately greater, than those of the sellers; (b) the developers did not offer alternative accommodations to the existing apartment owners for the period until the building is rebuilt; (c) the developer did not offer sufficient guarantees; (d) there are “unique personal circumstances” that justify a refusal; or (e) the refusing owner is handicapped and was not offered alternative accommodations that fit their disability [88].

As a whole, the prescriptions of the Evict and Build legislation reflect a belief that property is synonymous with responsibility [86]. Consequently, public interest in re-development trumps private property rights in cases where few apartment holders “unreasonably” reject a deal offered to them by free-market initiatives. Indeed, it is possible to criticize this legal arrangement as encouraging a
‘bulldoze’ policy [89]. However, the new law enables owners not to initiate development in the first place, and not to sell the extra air rights they own.

In cases where the majority of co-owners agree to the sale, private property rights of the many could trump the property rights of the few. In line with this rule, the law enables the majority of co-owners to file a civil lawsuit against few apartment owners in cases of unreasonable refusals [88]. In the future, courts will be able to order forced evictions following a civil action lawsuit brought by a majority of apartment owners who wish to sign a redevelopment agreement [90]. Following these changes in legislation, property rights have been re-interpreted by the courts and the legislature to fit the progressive maxim. Progressive property scholars, however, often focus on the obligation of the affluent toward the needs of the poor [10] and the new legislation further extends this idea to impose a duty, regardless of the economic condition of those having property. Thus, joint ownership itself imposes an obligation to behave in a manner that serves the common good, and the common good is measured using the voting yardstick in a democratic-like scenario.

The Israeli case has important implications for progressive property scholarship because it exemplifies a situation in which an owner can be compelled to actively promote redevelopment, which is itself intended to encourage human flourishing. In fact, Israeli property law has provided an exception to the owner’s freedom from contact and cooperation with other (nearby) owners. These measures, however, evoke hard-pressing questions about whether majority opinions are necessarily just. Significantly, there is ample cause to question if such formal and punitive steps are too severe and lead to gross infringements of the individual’s right to property. It appears, however, that the new Israeli law follows Alexander’s proposal: “if I value my own flourishing, then to avoid self-contradiction, I must value the flourishing of others as well [11] (p. 769).” Therefore, the new legislation includes clear decision-rules, pertaining to the relationships between co-owners. These rules democratize fundamental management decisions.

Some critics argue that the new measures invigorate pernicious misinterpretations of the right to property [91]. In essence, the ability of a majority of co-owners to force a rehabilitation project amounts to a gross violation of the property right of the few in a manner disproportionate to the alleged public (or communal) benefits [92]. Other critics suggest that the new measures employ scare-tactics of the powerful against the powerless [92]. Supporters, however, argue that the law is a welcome step towards enabling urban regeneration andremediying past market failures. Accordingly, the new measures allow aggregation of individual preferences, and afford a simple majority rule which guards against opportunistic—or at least individualistic—behavior. Supporters also contend that the new legislative measures are too modest and do not go far enough, because the primary measure they employ is a right to file a civil action against those refusing to go ahead with the sale [95]. Overall, supporters note that the new legislation can help the poor by expediting urban regeneration, empowering existing tenants, and granting them extra rights to develop as leverage for renewal [94].

Despite the criticism leveled against the new ‘Evict and Build’ law, since its enactment it has benefited co-owners in several renewal projects. As an example, in 2013, after the majority of co-owners decided to go ahead by selling their extra air rights, the majority also filed civil lawsuits against the minority of co-owners who had declined to sell their share of building rights [95].

As a consequence, courts were favorably inclined towards the claims of the majority, and ordered those who refused to sell to pay substantial amounts as damages.

Significantly, the Supreme Court, in a seminal ruling (Shwartzberger case), articulated that the new measures in the Evict and Build law are important for instilling property with a social meaning [86]. While a group of apartment owners in a condominium in the city of Haifa pressed for an Evict and Build transaction, a single apartment owner (Shwartzberger) refused to sell her share of building rights and attempted to block the redevelopment of the ageing housing block. The Supreme Court ruled that Shwartzberger had to pay punitive compensation for her ongoing refusal:

The constitutional right to property does not imply that it trumps other rights and interests. It is not an absolute right and at times it will be possible to rule against it. On one hand,
the individual has the right to property, but on the other hand, there stands the public interest to enable the provision of goods and services that the free market finds it hard to supply, as well as other important societal goals such as protecting disadvantaged groups and individuals. Land-use planning facilitates the achievement of said goals by balancing the right to property with social needs. [86]

The court was non-apologetic about this view, and swiftly disarmed the libertarian notion of property rights as negative freedom and as an absolutist and exclusive right. In another illuminating paragraph, the court argued that the “private dominion” approach to property is but one approach, and that there are several other competing views with respect to property rights.

The decision in *Shwartzberger* reflects a growing awareness in the Israeli judicial system that city planning, justice, and property are intertwined. There have also been other cases where the courts referred to the urban condition as a marker of social justice and welfare. For example, in another prominent case, the District Court of Tel Aviv ruled that urban regeneration is part of a larger set of tools designed to enhance the lives of city-dwellers, and that exclusionary zoning policies undermine this objective [96].

Although these cases are sporadic, they are part of a recognizable shift in the perception of property rights. Remarkably, this shift now permeates Israeli planning in novel ways. Indeed, there have been many other instances where the courts stressed that property is contextual and that in particular joint ownership generates a weaker version of property rights [89], because even if the property rights of the refusing apartment owner will be harmed, the right of other apartment owners to better their living conditions prevails [89].

4.3. How Does Progressive Property in Spain Help Provide Housing in the Face of Economic Meltdown?

In this section we analyze a few items in Spanish law with a direct affinity to progressive property ideas. We highlight new legislation enacted by several provinces in Spain based on the idea that property is a context-specific measure that can be molded to fit unique socio-economic conditions. Spanish discussions on property rights are indicative of an ongoing deliberation on the role of property in society. It bears noting, however, that scholars in the United States use the term “progressive property”, whereas those on the European continent, as well as legal scholars in Latin America, use a slightly different terminology to refer to the same concept—“the social function of property” [97–99]. This term shares the basic ideals of the progressive property school, which places at the center of property theory the requirement that property be used to better the lives of many, especially when resources are scarce.

Notably, the Spanish legal system does not resemble that of the US or Israel. It is a civil law system based on legal codification rooted in the Roman-Continental law [100]. Nevertheless, as in Israel, the Spanish system is based on constitutional provisions and their interpretation by the courts [101]. The right to property is a key provision in this setting which potentially delineates private and public interests.

Specifically, two constitutional rights are acknowledged in the Spanish constitution: the right to adequate housing on one hand, and the right to property on the other [102]. Section 33 of the constitution enshrines the right to property, but goes further to acknowledge that “the social function” of this right “shall determine the limits of their content in accordance with the law” [102] (Article 33(2)). Accordingly, property rights are reframed, contextualized, and put under scrutiny based on the circumstances in question. Importantly, the constitution stipulates that no one may be deprived of their property rights “except on justified grounds of public utility or social interest and with proper compensation” [102] (Article 33(3)). The aforementioned constitutional clauses regarding property rights became highly important and contested following the 2007 economic crisis in Spain. In fact, a prominent reason we chose Spain for a comparative analysis is the economic meltdown, which created many challenges to owners and debtors and thus propelled a vibrant discussion about the function of property rights.
Several factors led to the crisis, one of which was a housing bubble that fueled government revenues [103]. Increased government expenditures and relaxed supervision of the financial sector led to an institutional addiction to housing-led economic growth. In fact, Spain’s developed credit market, low interest rates, and income growth were key instigators of this process [104]. Consequently, when the global financial meltdown hit, Spain was already a highly volatile market incapable of sustaining itself. The ensuing recession spawned high rates of unemployment, loss of jobs, and social tensions, with young professionals finding themselves unemployed and unable to afford a basic apartment [105]. Popular uprising soon followed massive foreclosures, mortgage enforcements, and forced evictions. This social unrest launched a national anti-eviction movement which wrestled with forced evictions and repossessions of property [106].

Evictions led to a large share of vacant housing units. Some sources estimate that approximately 3.5 million units (out of a national stock of 26 million housing units) were left unoccupied [106]. The meltdown also resulted in a large stock of 700,000 new homes that could not be sold [107]. Some of these vacant homes were kept in the hands of banks, developers, and other corporations [108]. To make things worse, similar to the United States, a more responsible or austere (depending on the perspective) loan policy adopted by financial institutions led banks to refuse credit to those in need of housing [108,109].

Given that the Spanish constitution acknowledges housing as a basic human right [102] (Article 47), decision-makers and non-governmental organizations sought to achieve a more inclusive and affordable housing market to enable citizens to buy or rent [110]. Several steps were made in this direction. For example, measures providing for shared ownership or temporary ownership models were proffered [111]. Perhaps the most daring initiative in this respect was an attempt by the Regional (Provincial) Government of Andalucía to enact a new law, the Andalusian Decent Homes Legislation (ADHL). The law would allow the government to fine banks and corporations that own empty homes [112]. The ADHL entails the creation of a special register of empty homes, which would compel landowners to provide the necessary information upon request. The ADHL also proposed allowing the government to expropriate (for a period of up to three years) the use of residential units, when banks threaten to evict tenants because of mortgage arrears [106]. This measure underscores the important use value of a home and the right of families not to be evicted due to debts. Consequently, the government would be able to enlarge the stock of housing available to new tenants, and in addition allow existing tenants (as debtors) to stay in their home upon the condition that they have limited financial means to repay their debt and that the property was their only residence. Importantly, the ADHL grants landlords financial help for making their properties available for renters. In so doing, the law strives to consolidate and harmonize two basic human rights in Spain: the right to adequate housing and the right to own property.

The wording of the new measure emphasizes the obligation of property owners to maintain and rent-out their property. In particular, section 1(2) of the ADHL stipulates “[t]he right to own property includes a duty to effectively allocate the property to residential use and to maintain, preserve, and rehabilitate housing” [112]. This initiative exemplifies a broad understanding of property rights by the government of Andalucía. It is motivated by the social obligation pegged to property and the social function of property and housing as envisioned by the provincial government. In addition, the provincial government saw it as its inherent duty to make decisions about redistribution of wealth and resources. Specifically, it cited Article 40(1) of the Spanish Constitution [102], which states that the government has to promote socio-economic progress through re-distributional means. This step can be perceived as radical, because it imposes a broad duty on creditors, as owners, to take into account the dire economic situation in Spain, therefore mandating a socially responsible action by landlords of empty homes.

The overarching principle that guided the provincial government was that every person has the right for a decent home. Despite its place as a free-market commodity, the government held the view that housing is much more than that and has an essential social function. Thus, citing several
declarations and covenants, the proposed law assumes that the constitutional right to property in Spain cannot be interpreted in a way that promotes anti-social actions (or inaction) that result in homes remaining empty while citizens are struggling to rent or purchase a place to live in. In other words, the social obligation of those with surplus resources (in the form of housing) is to aid the less fortunate.

The ADHL, as proposed, was limited to corporations owning homes, and did not include individuals [112] (Article 53(1)). Thus, the rights of corporations (including financial institutions and real estate companies) were to be interpreted as subject to the larger societal or public right to land and shelter. The Spanish government, however, did not see eye-to-eye with the provincial government of Andalucía and subsequently challenged the ADHL in the Spanish Constitutional Court (constitutional challenge no. 7357-2013, filed on 14 January 2014). The core argument made by the government was that the new measures exceedingly violate the right to property and are therefore unconstitutional. Indeed, the Constitutional Court eventually ruled that the interests of the banking sector cannot be interfered with by the Spanish provinces in a manner which grossly violates their right to property [106]. The by-product of this ruling is that only the state can regulate matters of expropriations in cases of mortgage arrears.

Critics on the left argue that the proposed legislative measures were too modest and not the appropriate way to ensure decent housing for all. One criticism is that the new legislation did not enable the expropriation of all unused or abandoned homes. Critics on the right, however, argue that the proposed measures are intrusive and impinge on property rights. One main argument is that the ADHL is discriminatory because it primarily targets corporations, including financial institutions, who own unoccupied homes and offers no compensation for their taking [106]. Although the court struck down the new measure, supporters of the ADHL see the law as a welcome step towards a mind shift which highlights the right of people to a decent home and, more broadly, the right to live in just and inclusive cities. Indeed, other Spanish provinces, like Catalonia, promoted similar measures to help relieve the dire housing situation. This includes another contentious law to fine owners who do not rent out their property [113]. According to the initiators of this provision, keeping a house empty for more than two years runs contrary to the social function of property [114] (p. 37).

The ADHL, as well as similar provisions in other Spanish provinces, have created a vision for the future but failed to spur an actual change in the housing market. This is owed to constitutional challenges, which in fact suspended the new measures from coming into effect. Given these shortcomings, these initiatives appear as mere symbolic and populist maneuvers by regional governments.

Despite these limitations, the social function doctrine appears to be working overtime in Spain owing to extreme economic difficulties and increasing household debt. In particular, it has had some effect on the housing market: for example, courts have ruled that squatters may continue residing where the owner (in the case of a corporation) neither occupies the building nor invests money in its maintenance. Lack of periodic upkeep by the owner runs against the social function of property, therefore justifying the continued use of property even by those who do not possess a ‘formal’ legal right [108]. This suggests that the social function of property does have a significant place in Spanish jurisprudence, despite the abovementioned failures to remodel housing and property legislation.

4.4. Progressive Property in Brazil: Learning from the Global South

As in the other jurisdictions explored above, regulatory and administrative measures in Brazil tie together housing and progressive interpretations of property. Recent developments in Brazil mirror local-federal intervention in property rights in an attempt to provide fairer and more inclusive distribution of land. The source of these arrangements can be traced back to Brazil’s 1988 constitution [115]. Section No. 5 in the Constitution states that property is a basic human right, acknowledged together with equality, liberty, and security.

At the outset, the right to property in Brazil mandates further elaboration. Owing to matters of scope, our intention here is not to conduct a thorough analysis of the right to property, but instead
to provide the basic attributes of that right in order to frame the ensuing discussion about the social function of property in Brazilian cities.

In general, property is acknowledged by the constitution. It cannot be taken without compensation [115] (Article 5(V) and 5(X)). Concurrently, the Constitution defines property in non-abolitionist terms [111], prescribing that “property shall observe its social function” [115, 116] (Article 5(XXIII)). As a consequence, Brazilian federal law also notes that property can be taken in order to protect ‘social interest’ or to ensure public use [115] (Article 5(XXIV)). These prescriptions are founded on the appreciation of the values of social justice and human dignity. These notions are quite prevalent in Latin America, where radical and revolutionary ideas about property have been actively promoted since the 19th century [28].

The Brazilian Constitution states that alongside the protection of property, the socio-economic order of Brazil is founded on overarching principles, including the social function of property and a reduction of social inequalities [115] (Article 170).

Thus, in Brazil, the progressive facets of property rights are channeled through the doctrine of social function [50]. In particular, the social function of property in urban and rural environments has been set by the 1988 Constitution. Section 5(XXIII) of the Brazilian Constitution [115] states quite simply that “property shall observe its social function”. Sections 182 and 183 of the same constitution deal specifically with urban policy and tie together the social function of property to the development of cities. The social function therefore becomes a central, structuring principle of Brazilian urban development policy, alongside the social functions of the city.

In fact, the relationship between property and the city in Brazilian law is quite symmetric: the city, as a spatial entity and as an administrative organization, must observe the social function of property, because the city in itself has several social functions according to the Brazilian Constitution [117] (p. 154). Article 182 of the constitution ties the “social functions of the city” to the social function of property. Four essential social functions of the city have been acknowledged in Brazilian law: housing (i.e., dwelling), mobility (i.e., transportation), labor, and leisure (i.e., recreation).

Although the Constitution refers generally only to the “development of the social functions of the city” [115] (Section 182), both planners and scholars in Brazil agree that there are primarily four essential social functions (housing, mobility, labor, and leisure), following the 1933 Charter of Athens [118]. This is a very consensual doctrine in Brazil [119] which has influenced the drafting of the 2001 Brazilian Statute of the City [120]. The statute defines the “right to sustainable cities” as the sum of the rights to housing, transportation, labor, and leisure [120] (Article 2) amongst other rights, such as the right to infrastructure, to urban land, and to public services. Thus, Brazilian law carries the concept of the city’s social functions to the human rights domain.

According to the Brazilian Constitution, municipalities—which in Brazil are federal entities—play a central role in urban planning [115] (Article 182). All cities with more than 20 thousand inhabitants must edit their own master plans in the form of municipal laws, in order to direct the city’s urban development policy. In other words, the constitution sets the essential guidelines for urban and land use planning. These guidelines are considered crucial for spatial, economic and social development.

In turn, article 182, paragraph 2 of the Brazilian Constitution states that urban property fulfills its social function whenever it complies with the “fundamental requirements” set by a master plan. Ergo, compliance with urban planning regulations determines the fulfillment of the social function of both private and public property in the city.

One of the most important consequences of this powerful enunciation is that, in Brazil, urban private property and the right to develop and use land are byproducts of planning laws. As Silva [121] (p. 76) points out, urban property in Brazil is framed by planning law, which classifies urban property and defines its legal boundaries.

A highly pertinent expression of the principle of property’s social function is set by Article 182, paragraph 4 of Brazil’s constitution. This provision enables municipalities to compel landowners to allow “adequate use” of their empty, non-used, or sub-utilized urban properties. When owners
fail to do so they are subjected to a series of penalties and procedures, set by the Constitution [115] (Article 182(4)). These measures include the following successive sanctions: compulsory parceling or construction, progressive taxation, and, finally, expropriation. This framework of punitive measures is called PEUC, an acronym of Compulsory Land Parceling, Edification, and Use, or in Portuguese, “Parcelamento, Edificação e Utilização Compulsórios - PEUC” [117].

The constitutional obligation—to give the land a ‘proper designation’—prohibits owners from retaining empty, unused land for speculative purposes. To fulfill their property’s social function, landowners must parcel, build, or use their land according to the city’s master plan and zoning laws. As Lenhart [116] notes, “property accomplishes its social function in an urban environment when it does not generate social disorder, lack of housing, unemployment...”. Consequently, municipalities in Brazil have both the duty and the powers to actively intervene whenever the social function of property is violated or not observed by private owners [122].

Considering the striking social inequalities extant in Brazilian cities, where land is accessible and affordable to only a few [123], the PEUC’s main objectives are to suppress land speculation and hopefully render large parcels of well-located and serviced urban land available to those most in need. There are two conditions explicitly set by the Brazilian Constitution to ensure valid sanctions on the speculative retention of land in accordance with PEUC. First of all, municipalities must define, in their respective master plans, the areas of the city where these sanctions can be applied according to the city’s territorial planning strategies. Second, municipalities must prepare a specific municipal law to comply with due process requirements. If both conditions are not fully observed, the municipalities cannot validly implement the PEUC framework in their jurisdiction [124] (p. 94).

Idealism aside, PEUC procedures are nonetheless quite complex to implement. According to the master plan and specific municipal regulations, the municipality must first identify which empty, disused, or under-utilized properties can be considered as “retained in speculation”, usually through in situ inspections and documental instructions. The owners of these properties must be served with a notice which requests that they give their properties an adequate use within the following deadlines [117]: one year to initiate licensing procedures to subdivide, use or develop the land, and two years from the granting of a license to start the subdivision or the development of land. Alternatively, the notified owners can challenge the notification through an administrative process, in order to either annul the procedures or demonstrate the existence of insurmountable impediments to fulfilling the obligation.

If owners remain indifferent or if their challenges are for any reason dismissed, the municipality must proceed and impose the second possible sanction set by the Constitution: progressive taxation [115] (Article 182(4)(II)). In this case, the property tax imposed on the notified owners increases year by year, up to double the previous annual rate, for a total period of five years. Overall, increased taxation can reach up to 15% (fifteen percent) of the property’s value.

At the end of the fifth year, if the notified owners remain inert, the municipality must initiate the necessary procedures to expropriate the land [116]. As an exception to the constitutional clause which guarantees fair compensation, in cash, to all expropriated owners [115] (Article 182(3)), the indemnities under the PEUC expropriation procedures are limited to the cadastral land value and are only payable through municipal debt titles, redeemable within a period of up to ten years, in equal and successive annual installments. Put differently, in the route of PEUC, the constitution allows government to pay less when expropriation takes place. It is an exception to the general rule of full indemnity. Due to its punitive format, this type of expropriation is commonly known as “sanction-expropriation”, or “desapropriação-sançao” in Portuguese.

Once the land is expropriated, the municipality must give it an adequate use within five years, either by directly developing the land, by selling it, or granting private developers permission to develop it. Whoever acquires the land from the municipality must develop it observing the same deadlines set by PEUC.
In order to avoid the sanctions imposed by PEUC’s framework, the notified owners can associate themselves with the municipality in a “real estate consortium”—in Portuguese, “consórcio imobiliário”—in order to develop the unused land. They must follow the procedures set by the Statute of the City [120], which are fairly similar to land readjustment. Under this kind of partnership, the notified owner must transfer the property’s ownership to the municipality, which will then be in charge of the development. Once the work is finished, the notified owner is paid back with a number of lots or units with an equivalent worth compared with the original property.

Insofar, very few Brazilian municipalities have succeeded in implementing the PEUC procedures as a means to compel speculators to observe the social function of urban property [125]. According to an extensive study carried out by the Federal University of ABC in 2015, under the order of the Brazilian Ministry of Justice [126], the new generation of master plans edited according to the 2001 Statute of the City has failed to fully implement the PEUC measures. In their analysis, the researchers opted to narrow their focus to medium and large cities (with a population of over 100 thousand inhabitants) as they considered that the PEUC, because of its complexity, would not be as suitable for smaller cities. This methodological approach reduced the research scope from 5570 existing municipalities in Brazil to a total of 288 municipal authorities. Amongst these jurisdictions, existing studies verified that no more than 25 had fully regulated the PEUC.

The researchers [126] credited such low numbers to the master plans’ failure to set genuinely enforceable regulations concerning the PEUC framework. However, whenever the implementation process was actually initiated, compliance with the notifications was quite significant: at Maringá, from 105 notifications issued in 2009, only 47 properties underwent progressive taxation in 2014; similarly, at São Bernardo do Campo, out of 150 notifications issued between 2013 and 2014, no more than 27 properties underwent progressive taxation in 2015 (the owners which had not undergone progressive taxation were able to either (1) cancel the notifications or (2) effectively use their properties in due time).

Another interesting example of the implementation of PEUC is the case of the São Paulo Municipality. The largest and richest city in Brazil compiled a new master plan in 2014, completely changing its PEUC regulations. A new municipal department, exclusively dedicated to the pursuit of the social function of property, was created in order to implement the PEUC, prioritizing empty lots and buildings located at the city center. All information concerning the PEUC framework, including lists and maps with the locations of notified properties, is available to the public on the internet. It is also possible for any citizen to alert the municipality to any potentially empty, disused, and under-utilized properties in the city through an interactive map, also accessible online.

Due to these innovations, according to official data [127], as of December 2018 a total of 1981 properties had been inspected, of which 1388 were notified due to sub-utilization or non-utilization. The notified properties are largely concentrated in the city center, where the 2014 master plan aims to increase population density and encourage diversified uses. As of late 2018, 105 notified owners were able to fulfill the obligation to use their properties and 288 had requested sub-division or development licenses. Subsequently, in 2016, the city entered the next stage in the implementation of the PEUC, namely progressive taxation; so far, 392 properties have been subjected to progressive taxation.

Despite São Paulo’s many efforts to fully implement the PEUC, concrete results are still elusive, mostly due to the country-wide economic and political crisis that has drastically slowed investments in the city’s real estate market. In this context, it is highly unlikely that the market, or the municipality of São Paulo, will have the appetite or the financial means to absorb the numerous properties already notified in the PEUC framework. On top of the enormous implementation difficulties, the Brazilian legal framework, which allows for expropriations, came under attack by those arguing that the emphasis on the social function of property comes at a price: legal ambiguity, arbitrary implementation, and a general disrespect of private property rights [116].
5. Summary and Conclusions: The Practical Applications of Progressive Property Scholarship in Urban Environments across the Globe

Given that progressive property scholarship is still in its relative infancy and in an academic silo [69], cross-national studies can assist in understanding the complexity of progressive interpretations, and the challenges of their implementation in real-life situations.

Obviously, any comparative study needs to take into account the content of the right to property in each jurisdiction. The scope of protection to property may also be influenced by additional factors, such as the state’s attitude towards land-use planning, and the perceived relationship between public and private interests. All of these may contribute to a progressive-like understanding of property rights, or delimit social interpretations altogether. Despite those inherent difficulties in comparative analysis [128–130], it appears that comparison is instructive in that it grants the outside viewer a sense of scale [131] (pp. 5–6).

Bearing those difficulties in mind, the comparative analysis of the US, Israel, Spain, and Brazil (for a summary, see Table 1) illustrates that property rights have been repositioned in a variety of jurisdictions to enable the achievement of more responsible and socially sustainable cities where ownership does not imply indifference towards the other. Sustaining, in the 21st century, cities and the people that live in them entails making concessions and demanding them from citizens, property owners, developers, and businesses. According to this idea, living together in shared urban spaces prescribes different understandings of land and property [132].

We found instances where property rights are being reinterpreted around the globe in light of diverse goals, such as urban regeneration, re-distribution of resources, inclusionary planning, and the supply of affordable housing. Real property laws and land-use regulations are also being reconsidered so as to prevent speculation on land and to battle social exclusion.
Table 1. Comparative overview of the application of progressive regulation in the field of housing and planning.

| Jurisdiction | Property's Standing as a Constitutional Right | Notable Steps with Respect to Progressive Property | Which Field Is Impacted by Progressive Property Ideology? | Whose Obligation? | Type of Property Owner Obligation | Critique | Support | Implementation | Type of Conflicting Interests |
|--------------|---------------------------------------------|--------------------------------------------------|---------------------------------------------------------|------------------|----------------------------------|---------|---------|----------------|-----------------------------|
| USA          | Protected through the Fifth Amendment as a foundational right. | Approval of statutes pertaining to inclusionary zoning. | Affordable Housing. | Developers/owners. | Inclusionary zoning amounts to takings of property. Owners should not be asked to solve a problem created by government (e.g., too few housing permits, under-supply, or entrenched discrimination). | Inclusionary zoning statutes ‘tip the balance’ towards achieving just and equitable outcomes. | Approval of inclusionary zoning statutes intensified in the past 20 years. About 900 local jurisdictions approved inclusionary ordinances that designate a certain percentage of housing units as affordable, or impose a fee to secure said goal. | Interests of developers versus interests of those in need of affordable housing. |
| Israel       | Basic human right, which amounts to a Constitutional right according to the Israeli Human Dignity and Freedom Act of 1992. | New legislative measures pertaining to multi-owned apartments buildings in Urban Renewal Areas. Based on a democratic perception of living in condominiums. | Urban Renewal. | Few apartment owners, when the majority of owners in the co-owned apartment building agree to sign an agreement with a developer to renew their building. | Enable urban rejuvenation projects. | The new measures were considered by some as a crude violation of the right to property held by those objecting to the project. | Civil liability lawsuits have been filed, resulting in heavy fines imposed by the courts on co-owners who blatantly violated the norms set out in the new legislation. In several cases, the fines imposed urged those objecting to urban renewal to settle. | Majority of apartment owners in multi-owned buildings versus fewer apartments owners; tool to deal with conflicts of interests: Democratization. |
| Jurisdiction | Property's Standing as a Constitutional Right | Notable Steps with Respect to Progressive Property | Which Field Is Impacted by Progressive Property Ideology? | Whose Obligation? | Type of Property Owner Obligation | Critique | Support | Implementation | Type of Conflicting Interests |
|--------------|---------------------------------------------|---------------------------------------------------|--------------------------------------------------------|------------------|---------------------------------|----------|---------|---------------|-----------------------------|
| Spain        | Property rights are enshrined in the Spanish Constitution. However, it also prescribes that the social function shall determine the boundary of property rights. | New measures designed to provide social help for vulnerable households; redefining a broad right for housing, enabling temporary expropriations of residential properties owned by corporations, and fining of those who own empty dwelling units. | Housing. | Mostly banks, and other financial and real estate corporations. | Help property-less owners, and those with mortgage arrears. | Measures ‘go too far’, therefore impinge unreasonably on the right to property. | The proposed measures help in preventing forced evictions in the face of adverse economic circumstances. | Central government challenged in Court the measures introduced by regional governments. | Banks and financial institutions versus owners with mortgage arrears. |
| Brazil       | Property rights are enshrined in the Brazilian Constitution (§5, XXII). However, it also prescribes that all property must fulfill its social function (§5, XXIII). According to §182, paragraph 2, urban property fulfills its social function when it meets the fundamental requirements of city ordinance expressed in the master plan. | New legislative and administrative measures taken at the local level in order to compel speculators to observe the social function of urban property through the PEUC framework. | Urban development (redistribution of urban land). | Landowners in the city. | Obligation to avoid empty properties and to avoid keeping property under-used. | PEUC framework is confronted by lack of political will and technical expertise to ensure its implementation. PEUC also leads to a general disrespect of private property, as it utilizes arbitrary and ambiguous measures. | The proposed measures prevent speculation. They also help cities maintain existing housing stock, and encourage public-private cooperation in building projects in undeveloped parcels. | Few municipalities have initiated the implementation of the PEUC framework, none of them having yet reached the final, expropriation phase. | Interests of owners of under-used property versus interests of the city and the community at large. |
Specifically, the analysis of policies and regulation pertaining to urban environments suggests that from the United States to Israel, Brazil, and Spain, governments and courts are looking for ways to promote progressive housing solutions. To do so, they focus on context and the needs of stakeholders in property disputes—rather than on pure economic analysis. It appears that recent amendments in laws and policies, as well as some court decisions, challenge the classical liberal view of property ownership as the right to exclude. In a growing climate of austerity and social unrest, it is possible that these shifts in domestic laws may accelerate. It is therefore up to future research to continue documenting these phenomena, keeping in mind that legal traditions, constitutional norms, and the society in which these shifts occur may differ.

Nowhere are these shifts more evident than at the intersection between spatial planning and property rights. Planners and legislators who compile policies pertaining to housing, urban regeneration, inclusionary zoning, and management of multi-unit developments are actively reshaping the scope of property rights. The interface between property rights, land, and spatial planning provides opportunities to look at property from a different angle. Our exploration of policies in the US, Israel, Spain, and Brazil suggests that contextual thinking is well underway. An actual and effective change, however, is less evident, as housing shortages, evictions, speculation, and improved living conditions still impose quite a few challenges.

The comparative analysis also indicates that progressive interpretations of property rights do not come easy. There are a series of critiques that could undermine progressive attitudes. The challenges involve insufficient political stamina (such as in municipal authorities in Brazil) or implementation challenges in the form of lawsuits lodged against progressive policies (as in Spain, Israel, and the US).

The comparative angle helps to highlight the fact that certain differences between the analyzed jurisdictions appear to be superficial, even nuanced. While in Israel and the US the dominant doctrine valorizes property rights, and thus gives way to exclusion, in Spain and Brazil the point of departure is somewhat different: at least on the face of it, these jurisdictions openly promote the ideology of social obligation. However, when looking deeper under the hood of property law, one can find that, in Spain and Brazil, constitutional challenges and implementation hurdles still elevate—de facto—the right to exclude others through property. In other words, in all four jurisdictions the obligation of owners to share their property with the property-less is still curtailed, challenged, or hampered by the right to exclude.

The comparative analysis also reveals other difficulties with respect to progressive property. These difficulties stem from a need to reconfigure institutions, policies, and procedures in order to accommodate progressive thinking about the right to property. Indeed, as demonstrated by the São Paulo case, to answer the ‘progressive’ call, municipalities may need to establish new departments to ensure the social function of property is observed.

Another pertinent issue is whether property can be channeled through democratic principles, such as those applied in the Israeli case, or is property strictly a non-democratic construct which cannot be violated based on a simple raise of hand?

A significant challenge relates to implementation. Even in countries such as Spain and Brazil, where the social function of property is an entrenched doctrine, there are many implementation challenges. In Spain, the doctrine encounters many constitutional challenges. In Brazil, the new PEUC measures have not been extensively utilized by city administrations owing to a lack of resources, shaky political grounds, and disagreements with owners.

Interestingly, the Israeli example provides an optimistic viewpoint, at least from a progressive property point of view. The idea that common property should be managed in a responsible manner is not new to property law, but the way in which property law in Israel was remodeled to achieve the social obligation norm is quite fresh, given the interesting Israeli context of urban regeneration efforts and the prevalence of condominiums.

All of this shows that abstract suggestions to consider the social aspect of property in political decision-making might be hard to achieve in real life. The ‘burden of proof’ concerning the applicability
of progressive norms is on progressive scholars, yet they have not been able to lift that burden in a convincing manner. The comparative analysis points at more gaps and challenges rather than simple, cookbook, solutions. Thus, future research should deepen this exploration, and include ‘best practice’ examples from other countries.

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