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## The New Progressive Property and the Low-Income Housing Conflict

Zachary Bray

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# The New Progressive Property and the Low-Income Housing Conflict

Zachary Bray\*

ABSTRACT.....	1110
I. INTRODUCTION .....	1111
II. A REVIEW OF RECENT PROGRESSIVE-PROPERTY ACCOUNTS.....	1116
A. <i>The Communitarian Nature of the New Progressive Property</i> .....	1119
B. <i>Individual Property Rights and the New Progressive Property</i> .....	1120
C. <i>The Contrast Between the New Progressive-Property and the Law-and-Economics Approaches</i> .....	1122
D. <i>The Role of Virtue Ethics Within the New Progressive Property</i> .....	1125
III. SECTION 8 AND RENT CONTROL AS EXAMPLES OF THE NEW PROGRESSIVE PROPERTY .....	1127
A. <i>Section 8 as an Example of the New Progressive Property</i> ....	1128
B. <i>Rent Control as an Example of the New Progressive Property</i> .....	1136
IV. LESSONS FOR THE NEW PROGRESSIVE-PROPERTY APPROACH FROM THE INTERSECTION OF RENT CONTROL AND SECTION 8	1145
A. <i>Recent Litigation at the Intersection of Rent Control and</i>	

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Section 8.....	1145
B. <i>Lessons from the Anti-Progressive Conflict at the Intersection of Rent Control and Section 8</i> .....	1153
V. CONCLUSION .....	1161

## ABSTRACT

*The foundation of property law has been much debated in recent years, as several scholars have sought to provide a theoretical alternative to what they call the dominant, “law-and-economics” approach to property. In place of the law-and-economics approach, these scholars advance a new theoretical approach, which I call “the new progressive property.” At its core, this new approach favors rules thought to promote the collective well-being of the larger community while ensuring that relatively disadvantaged members of society have access to certain basic resources. This Article explores the boundaries and practical implications of the new progressive property. To do so, I focus on two potential examples of this theoretical approach related to low-income housing: the federal Section 8 housing voucher program and local rent-control ordinances. I argue that Section 8 is a better example than rent control of the new progressive-property approach, even though rent control has previously been identified as a practical example of the new progressive property and Section 8 has not.*

*I then turn to examine a deep conflict at the intersection of Section 8 and rent control, which presents an important opportunity to further test and refine the new progressive property. In particular, I argue that this underexamined low-income housing conflict provides good reasons to abandon rent control, even from a progressive-property perspective. In addition, the low-income housing conflict between Section 8 and rent control sheds light on the ambiguous relationship between law-and-economics analysis and the progressive-property framework. More specifically, I argue that the conflict between rent control and Section 8 demonstrates that even the most basic law-and-economics tools must be incorporated into a progressive-property framework to achieve the ends of the new progressive property.*

## I. INTRODUCTION

For much of the past decade, groups of landlords in rent-controlled jurisdictions have sought to exploit the intersection between the federal Section 8 housing voucher program<sup>1</sup> and local rent-control ordinances,<sup>2</sup> arguing that the baseline eviction standards set forth in the federal program preempt the more tenant-protective eviction controls present in rent-control ordinances. More specifically, these landlords have issued form notices purporting to evict Section 8-assisted tenants in rent-controlled units for reasons acceptable under federal regulations but precluded by local rent-control ordinances. Predictably, these efforts prompted a spate of state and federal litigation by tenants-rights advocates.<sup>3</sup> Although the preemption issues central to this litigation are important in their own right, beyond them lurks a larger, more interesting, and more significant problem: namely, the underlying conflict at the intersection of Section 8 and local rent-control ordinances, despite their superficially similar progressive aims.

This low-income housing conflict is important in its own right, but its true significance lies in what it can teach us about the broader picture and theoretical foundations of property law. In recent years, several scholars have advanced a new foundation for the law of property, based in part on the claim that property law and property theory implicate plural and incommensurable values. These accounts also suggest that the dominant conception of property today, which focuses on protecting individual property rights and maximizing the efficient distribution of resources, is inadequate both for conflict resolution and for institutional

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1. In 1974, Congress created the federal Section 8 housing voucher program “[f]or the purpose of aiding low-income families in obtaining a decent place to live and of promoting economically mixed housing.” 42 U.S.C. § 1437f(a) (2006). For a more detailed discussion of Section 8, see discussion *infra* Part III.A.

2. Given the long and varied history of rent control in this country, local rent-control ordinances come in a variety of forms and may be designed to achieve varying ends. Nevertheless, one can find broad similarities and common themes. For example, many local rent-control ordinances are designed, in whole or in part, to mitigate the displacement of “senior citizens, persons on fixed incomes and low and moderate income households” from “decent, safe and sanitary housing.” See L.A., CAL., MUN. CODE ch. 15, § 151.01 (2012), available at <http://bit.ly/ReEuEn>. For a more detailed discussion of the history and variety of local rent-control ordinances generally, and LARSO in particular, see discussion *infra* Part III.B.

3. See, e.g., *Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197 (9th Cir. 2009). This litigation has largely ended in defeat for the landlord groups’ position. *Id.* at 1215 (holding eviction restrictions in local rent-control ordinances are not preempted by the Department of Housing and Urban Development’s Section 8 regulations “to the extent the HUD regulation[s] permit[ ] eviction to obtain a higher rent[ ]”).

design.<sup>4</sup> By their own lights, these recent accounts of property law and property theory are “progressive” and bear a “family resemblance” to each other.<sup>5</sup> Accordingly, I coin and use the term “the new progressive property” to refer to the common values and ends these accounts endorse.<sup>6</sup>

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4. Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 743 (2009) [hereinafter Alexander et al., *A Statement of Progressive Property*]; see also ERIC T. FREYFOGLE, ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND xiv (2007) (claiming that “[a]t the center of today’s debate . . . lies a collective failure . . . to think clearly and intently about the institution [of private property],” which, “[i]n operation[,] . . . is less an individual right than a tool society uses to promote overall social good”); JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 3, 6–7 (2000) (noting the pervasiveness of the Blackstonian “ownership model” of property, which is both “misleading and morally deficient,” because it fails to consider the multiple “tensions within the concept of property itself,” the resolution of which requires “controversial value judgments . . . between conflicting interests”); LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 100 (2003) (emphasis omitted) (noting that the “interdependent nature of property interests—the fact that protection of one person’s property interest so often affects the property interests of others—explains why property rights so often lack, and should lack, presumptive power”); Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1938–58 (2005) (suggesting that the appropriate vision of property “starts with an understanding of ownership, not primarily as a means of separating individuals . . . but of tying them together into social groups”); Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237, 1243 (2005) (noting that in contrast to libertarian theories of property, “the freedom-promoting [property] standpoint” for which he argues “does not conceive of property as a fixed and immutable category” but rather a “dynamic institution” and a series of evolving rules).

5. In calling these recent accounts “progressive,” I use a label that many of the authors of these recent accounts have themselves adopted, and one that some commentators about these recent accounts have adopted as well. See, e.g., Alexander et al., *A Statement of Progressive Property*, *supra* note 4, at 743 (entitled “*A Statement of Progressive Property*”); see also Jane B. Baron, *The Contested Commitments of Property*, 61 HASTINGS L.J. 917, 924, 924 & n.12 (2010) (grouping together many of the accounts discussed in this Article under the label “progressive theories,” in contrast to “informational theories” of property). My claim that these accounts have a close family relationship to one another is echoed by some recent progressive accounts themselves and the works of some commentators. See, e.g., Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 748 & n.7 (2009) [hereinafter Alexander, *The Social-Obligation Norm*] (gathering “examples of other scholarly works that bear a family resemblance” to the works in that Symposium); James J. Kelly, Jr., *Land Trusts that Conserve Communities*, 59 DEPAUL L. REV. 69, 69–70 (2009) (grouping together many of the accounts discussed in this Article, and suggesting that community land trusts provide a way to realize these accounts’ common values and ends).

6. I am mindful that this broad grouping brings together a wide variety of potentially divergent theories and that some scholars whose work is included under this umbrella term might have reservations about the wholesale inclusion of their work under this label. See, e.g., Jedediah Purdy, *A Few Questions About the Social-Obligation Norm*, 94 CORNELL L. REV. 949 (2009) (raising questions about the implications of Alexander’s Article, despite Alexander’s inclusion of his previous work within the larger “family” of progressive accounts). But see Gregory S. Alexander, *Pluralism and Property*, 80 FORDHAM L. REV. 1017, 1030–32 (2011) [hereinafter Alexander, *Pluralism and Property*] (including Purdy’s work as an example of the pluralistic social-obligation

The new progressive property is both prescriptive and at least partially descriptive: On the one hand, the new progressive property is prescriptive insofar as it seeks to prescribe new or revive forsaken normative approaches to property law and theory.<sup>7</sup> On the other hand, the new progressive property is at least partially descriptive insofar as it contends that American property law, at times, already recognizes the goals it endorses.<sup>8</sup> For example, rent control has already been identified by some recent progressive accounts as a practical example of the theoretical ideal for which they argue.<sup>9</sup> To take another example, I argue in this Article that the federal Section 8 housing voucher program, which has previously been overlooked in recent progressive-property accounts, fits the descriptive characteristics of the new progressive property at least as well as many local rent-control ordinances.<sup>10</sup> Accordingly, Section 8 and rent control are independently useful programs to examine the new progressive property in some detail; and the low-income housing conflict at their intersection provides an even more fruitful testing ground for the new progressive property in theory and practice.

Already, these recent progressive-property accounts have sparked

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theory he advances). Nevertheless, the term “the new progressive property” is useful because it captures essential common themes, values, and characteristics found across these accounts, which are discussed in substantial detail below. See *infra* Part II, and especially notes 22–28 and accompanying text.

I am also mindful that some critics of the new progressive property have questioned whether these recent accounts possess a degree of consensus substantial enough for practical implementation. See, e.g., Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 960 (2009) (noting that “[i]t is hard to be against human flourishing, and a concept that is in one form or another central to Aristotle, Aquinas, Catholic social thought, modern virtue ethics, some forms of natural law, and the capabilities approach . . . but one can question the degree of consensus required for implementation in a legal regime”). Indeed, this Article explores and addresses this criticism through its close comparison of the federal Section 8 housing voucher program and local rent-control ordinances to the values and ends of the new progressive-property approach. See *infra* Parts III.A and II.B.

7. See Alexander, *The Social-Obligation Norm*, *supra* note 5, at 819 (arguing that “although American property law implicitly includes a robust social-obligation norm,” courts and scholars must work to fully identify, develop, and apply this norm); Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 863–64 (2009) (stating that “the purpose of this Article is . . . to reintroduce the Aristotelian ethical tradition into discussions of property and land-use as an approach with much to offer, one that has been neglected by contemporary property scholars”).

8. See Alexander, *The Social-Obligation Norm*, *supra* note 5, at 748 (arguing that “American property law at times and in some places recognizes something like the social-obligation norm I propose here,” if “only sporadically and implicitly”); Peñalver, *supra* note 7, at 883 (stating that “the New Jersey Supreme Court’s decision in [State v. Shack, 277 A.2d 369 (N.J. 1971),] exemplifies, in many ways, the rich pluralism of the approach I am advocating”).

9. See *infra* Part III.B.

10. See *infra* Parts III.A, III.B, IV.B.

detailed criticism,<sup>11</sup> thoughtful commentary,<sup>12</sup> and enthusiastic acclaim.<sup>13</sup> What remains to be done is a close examination of the new progressive property on some of its own terms by carefully considering the plural and incommensurable underlying values, purposes, and social relationships<sup>14</sup> that recent progressive-property accounts seek to serve. Such an approach should also take into account a potentially “vexing problem” that progressive-property theorists have already recognized: namely, what reasoning processes are needed to balance the plural values of the new progressive property in practice?<sup>15</sup> In addition, such an approach should examine the new progressive property on the terms advanced by some of its critics, especially the claims for and criticisms of the new progressive property as they relate to institutional relationships and institutional design.<sup>16</sup> Because recent progressive-property accounts emphasize the importance of contextual analysis,<sup>17</sup> these tasks will be served best by testing the new progressive property against specific property regimes and doctrines that embody some or all of the characteristics of recent progressive accounts.

This Article addresses all of these needs by examining the new progressive property through a series of focusing lenses: namely, the federal Section 8 housing voucher program, local rent-control ordinances, and the potential for conflict that arises out of their intersection. Some have suggested that the recent progressive-property accounts cohere as little more than a grab-bag of largely unrelated values

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11. *E.g.*, Eric R. Claeys, *Virtue and Rights in American Property Law*, 94 CORNELL L. REV. 889 (2009); Smith, *supra* note 6; Katrina M. Wyman, *Should Property Scholars Embrace Virtue Ethics? A Skeptical Comment*, 94 CORNELL L. REV. 991 (2009).

12. *E.g.*, Baron, *supra* note 5.

13. *E.g.*, Kelly, *supra* note 5.

14. *See, e.g.*, Alexander et al., *A Statement of Progressive Property*, *supra* note 4, at 743 (claiming that “[p]roperty implicates plural and incommensurable values . . . such as environmental stewardship, civic responsibility, and . . . human . . . dignity,” and that the purpose of property law ought to be the promotion of these values, which “implicates moral and political conceptions of just social relationships” and just distribution of resources).

15. *See* Alexander, *Pluralism and Property*, *supra* note 6, at 1051 (claiming that “property theorists who are pluralist need to attend to the vexing problem of . . . exactly, analytically, what [reasoning process] does this balancing process [between incommensurable values] involve?”).

16. *See, e.g.*, Smith, *supra* note 6, at 970 (claiming that “if there is anything legal scholars do better than economists, social scientists, and philosophers, it is institutional design,” and arguing that legal scholars should embrace this role).

17. *See, e.g.*, Alexander et al., *A Statement of Progressive Property*, *supra* note 4, at 744 (claiming that deliberation about property entitlements should be the product of contextual reflection).

lacking practical consistency.<sup>18</sup> If, contrary to these critical suggestions, the recent progressive-property accounts do provide a level of substantial consensus capable of both implementation in legal regimes and cohesion in future academic debates,<sup>19</sup> then they should be able to provide relatively consistent and predictable answers in most situations to the following related questions. First, to what extent can specific property regimes be justified in both absolute and relative terms on the basis of the values identified by the recent progressive-property accounts? Second, if conflicts arise between regimes that are based on the sorts of norms and values defended in recent progressive-property accounts, how should these conflicts be resolved?

This Article tests the new progressive-property approach on exactly these grounds. Part II reviews the recent progressive-property accounts, focusing both on their common themes and on the various criticisms they have engendered. Part III then explains how both Section 8 and rent control fit the descriptive components of the new progressive-property accounts, and why considering whether they are good examples of the new progressive property is useful.

Part IV of the Article begins by examining the conflict between Section 8 and local rent-control ordinances highlighted by recent litigation. Part IV then examines what light this conflict sheds on both the descriptive story and the prescriptive recommendations of the new progressive property. In particular, I suggest that the most basic tools from what many recent progressive accounts refer to generally as “law-and-economics theory,” “law-and-economics analysis,” or the “law-and-economics approach” to property<sup>20</sup> have important, even necessary,

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18. *E.g.*, Smith, *supra* note 6, at 960.

19. *Cf. id.* (noting that “[i]t is hard to be against human flourishing, and a concept that is in one form or another central to Aristotle, Aquinas, Catholic social thought, modern virtue ethics, some forms of natural law, and the capabilities approach . . . but one can question the degree of consensus required for implementation in a legal regime”).

20. For examples of this collective treatment, see, for example, Alexander, *The Social-Obligation Norm*, *supra* note 5, at 750 (noting that “[i]n recent years, law-and-economics analysis has dominated property scholarship,” and declaring a goal of “offer[ing] an alternative to that mode of analyzing property disputes,” which, though it “certainly provides important insights into a remarkably wide range of property issues,” suffers from limited vision and an impoverished analysis of moral values and moral issues) and Peñalver, *supra* note 7, at 823 (claiming that his aim is not to discredit law-and-economics analysis of property theory across the board, “but merely to explore several problems raised for the operation of law and economics within the discrete area of land-use scholarship”). For a more thorough discussion of the treatment of “law-and-economics analysis” in recent progressive-property accounts, see *infra* Part II, and especially notes 53–62 and accompanying text. Using the term “law and economics” as such an umbrella term, as it is used in recent progressive-property accounts, is deliberately imprecise, blurring long-standing and critical

roles to play in the new progressive property. More specifically, I claim that the most basic tools from these law-and-economics approaches to property are important, even within a progressive-property framework, to predict and respond to conflicts between property regimes based on progressive-property norms. In so doing, I help resolve the previously ambiguous role of these tools within a progressive-property framework. As a related point, I argue that the use of these tools may also be necessary to ensure that progressive-property regimes encourage rather than distort the kinds of behavior that many recent progressive-property accounts aim to inculcate. In addition, I suggest that the conflict between Section 8 and rent control can be attributed, in part, to inconsistencies in the ways that these programs balance and promote some of the plural values identified by recent progressive-property accounts. Balancing such plural values is a key characteristic of the new progressive property, and I argue that Section 8 provides a better example of this balancing approach than rent control. Finally, at each step this Article attempts to address one of the “vexing problems” already identified by some progressive theorists<sup>21</sup>: namely, what reasoning processes should be used to balance the incommensurable values that undergird the new progressive property?

## II. A REVIEW OF RECENT PROGRESSIVE-PROPERTY ACCOUNTS

To begin, it is necessary to provide a brief introduction to the general picture of progressive property that emerges from recent accounts. The degree of consensus among recent progressive-property accounts is, as noted above, an open issue, but several common traits can be identified.<sup>22</sup> After summarizing these traits, I will examine each in more

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differences between radically different descriptive and prescriptive accounts in an attempt to focus on a few common themes and techniques. Of course, the authors of recent progressive-property accounts are well aware of this and use the umbrella term advisedly. *See, e.g.,* Alexander, *The Social-Obligation Norm*, *supra* note 5, at 748–49 n.8 (noting that he uses “the terms ‘law and economics’ and ‘the law-and-economics tradition’ to embrace all normative positions that evaluate alternative possible legal regimes by reference to some scalar metric, be it ‘welfare,’ ‘wealth,’ ‘utility,’ ‘preference,’ or some cognate metric”). In this Article, I simply follow this same terminological usage of these progressive-property accounts. When I discuss the “basic law-and-economics tools” that, I argue, should be incorporated to progressive-property accounts in specific ways, I refer in this Article to basic considerations of overall efficiency and assumptions about the economic incentives facing various actors, *see infra* note 63, while recognizing that other elaborate tools from the law-and-economics approach may also have a place in a progressive-property framework, *see infra* note 64.

21. Alexander, *Pluralism and Property*, *supra* note 6.

22. The summary of the new progressive property in this Section is based largely on the

detail. First, the new progressive property is characterized by its deeply communitarian nature<sup>23</sup>—by its claims that property law should seek to improve the character of the social relationships and the health of the communities from which it emerges.<sup>24</sup> Second, the recent progressive-property accounts tend to be hostile towards absolutist or libertarian conceptions of private property, favoring instead an approach that takes into account a wider range of values that private property arguably serves.<sup>25</sup> Third, most recent progressive-property accounts also tend to express skepticism about descriptions and prescriptions of property law that are rooted largely in analysis of economic incentives and

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following three types of sources: First, this summary is based on the recent “Statement of Progressive Property” in the Cornell Law Review. Alexander et al., *A Statement of Progressive Property*, *supra* note 4. Second, this summary is based on related pieces by the signatories to that Statement. *See, e.g.*, UNDERKUFFLER, *supra* note 4; Alexander, *The Social-Obligation Norm*, *supra* note 5; Peñalver, *supra* note 7; Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009 (2009). Third, this summary is based on those other works whose close resemblance to these accounts has elsewhere been expressly noted. *See, e.g.*, Alexander, *The Social-Obligation Norm*, *supra* note 5, at 748 n.7 (collecting examples of other accounts “that bear a family resemblance to the social-obligation theory developed in this Article,” most of which are referred to in this Article below).

23. For an example of the generally communitarian nature of recent progressive-property accounts, see, for example, Alexander et al., *A Statement of Progressive Property*, *supra* note 4, at 744 (“Property enables and shapes community life. Property law . . . can render relationships within communities either exploitative and humiliating or liberating and ennobling . . . [and] should establish the framework for a kind of social life appropriate to a free and democratic society.”). Of course, the label “communitarian” is a loaded one, which is often applied more frequently as an epithet by critics than a badge of identification. *E.g.*, Daniel Bell, in *Communitarianism*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2010), available at <http://plato.stanford.edu/entries/communitarianism/>. This general communitarian trait is not equally prominent in all recent progressive-property accounts; however, the general characteristic is common to most, and the specific term has been at least tentatively adopted by some of these accounts. *See, e.g.*, Alexander, *The Social-Obligation Norm*, *supra* note 5, at 786 (suggesting opportunities for courts “to act in creative and socially transformative ways, reaching decisions on the basis of the thick *communitarian* social-obligation norm” defended elsewhere in his article) (emphasis added). In claiming that the recent progressive-property accounts are generally “communitarian,” I mean only that they tend to place greater relative importance on social context, social relationships, and the health of the community than the alternative theoretical approaches that they criticize, and that they tend to make normative claims based on the value of community itself and an individual’s relation to the community more often than these same alternative theoretical approaches. *See* Singer, *supra* note 22, at 1035 (noting that “[w]hile efficiency analysis focuses on satisfying individual interests, Alexander’s more communitarian and dignity-based approach assumes that we have obligations to others in our community and to those with whom we form relationships”); *cf.*, *e.g.*, Bell, *supra* (identifying different strands of communitarian thought, including “methodological claims about the importance of tradition and social context for moral and political reasoning” and “normative claims about the value of community”).

24. *See infra* notes 31–37 and accompanying text.

25. *See infra* notes 39–51 and accompanying text.

motivations.<sup>26</sup> At the same time, most of the recent progressive accounts agree that this law-and-economics approach is ascendant in contemporary property scholarship.<sup>27</sup> Fourth, in place of a focus on maximizing economic efficiency or preserving the negative freedom of landowners, almost all recent progressive-property accounts assert that property law should incorporate alternative systems of values. More specifically, recent progressive-property accounts often invoke human flourishing as the proper end at which property rules should aim,<sup>28</sup> and some progressive-property accounts suggest that systems of virtue ethics might provide a useful means for property law to reach this end.<sup>29</sup> As a result, scholars writing from the perspective of the new progressive property often display a relatively greater tolerance for property regimes that produce inefficiencies or infringe upon individual property rights, so long as those regimes also serve certain other positive values identified

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26. See *infra* notes 53–62 and accompanying text.

27. See *infra* note 54 and accompanying text.

28. See *infra* notes 65–71 and accompanying text. By invoking “flourishing” or similar concepts, even those recent progressive-property accounts that do not expressly refer to systems of virtue ethics seek to appropriate a normative alternative to the norms that support the law-and-economics and libertarian approaches to property theory. See, e.g., Peñalver, *supra* note 7, at 864 (noting that “[u]nlike both utilitarian consequentialism and deontological libertarianism, virtue-based ethical theories in the Aristotelian tradition adopt an agent-centered approach to determining right action” that “[d]raw on a substantive conception of the human good or flourishing”). By “flourishing,” these accounts refer expressly or implicitly to a concept that can be traced back to Aristotle’s *Nicomachean Ethics*, where the concept is defined as the ultimate end of human action, pursued for its own sake, complete and self-sufficient, the presence of which makes life desirable and lacking in nothing. ARISTOTLE, THE NICOMACHEAN ETHICS OF ARISTOTLE I.1.1094a1-3, I.2.1094a19-20, I.7.1097a24-33, 1097b6-21. (Sir David Ross trans.). For a useful short summary of the various alternative translations of the original term *eudaimonia*, see, for example, Christopher Shields, *Aristotle*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2011), available at <http://plato.stanford.edu/archives/fall2011/entries/aristotle/> (gathering sources and noting the dispute as to whether the term *eudaimonia* is best translated as “flourishing,” or “happiness,” or “living well,” or simply transliterated and left untranslated).

29. By invoking “virtue ethics,” some recent progressive accounts invoke specific ethical systems that are aimed at this ultimate goal of human flourishing. See, e.g., Peñalver, *supra* note 7, at 864 (gathering sources and noting that “[v]irtues are acquired, stable dispositions to engage in certain characteristic modes of behavior that are conducive to human flourishing”). Even systems of virtue ethics that are deliberately removed from Aristotelian roots tend to revolve around this central concept of flourishing. See, e.g., Rosalind Hursthouse, *Virtue Ethics*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2010), available at <http://plato.stanford.edu/archives/win2010/entries/ethics-virtue/> (noting that “[t]he concept of *eudaimonia* . . . is central to any modern neo-Aristotelian virtue ethics and usually employed even by virtue ethicists who deliberately divorce themselves from Aristotle”). For a more fulsome discussion of related ethical systems in the context of recent progressive-property accounts, see, for example, Alexander, *The Social-Obligation Norm*, *supra* note 5, at 760–72; Peñalver, *supra* note 7, at 864–69.

by recent progressive-property accounts.<sup>30</sup>

*A. The Communitarian Nature of the New Progressive Property*

The most common characteristic of recent progressive-property accounts, and arguably the most significant, is their communitarian focus on the ways in which property law can and should shape social life and relationships between individuals.<sup>31</sup> At the most basic level, the communitarian focus of the new progressive-property approach can be seen in its claim that property rules affect both individual property owners and the larger community, and the related suggestion that property law should account for this larger community interest in addition to the interests of individual owners.<sup>32</sup> Perhaps more importantly, recent progressive-property accounts suggest that property law must focus on the nature of the community because its subject matter is uniquely and inseparably tied to the health of both the community and its individual members.<sup>33</sup>

In other words, according to recent progressive-property accounts, property law is uniquely intertwined with the broader community from which it springs—so much so that it is impossible to truly understand property without reference to the broader community that gives it meaning.<sup>34</sup> This communitarian focus has a practical bite: if property

30. See *infra* notes 69–71 and accompanying text. As a practical example of this common trait, one recent progressive-property account cites the nondiscrimination mandate placed on private owners of places of public accommodation in Title II of the Civil Rights Act of 1964. See *id.*

31. See, e.g., Alexander et al., *A Statement of Progressive Property*, *supra* note 4, at 744 (“Property enables and shapes community life. Property law can render relationships within communities either exploitative and humiliating or liberating and ennobling. Property law should establish the framework for a kind of social life appropriate to a free and democratic society.”); see also Alexander, *The Social-Obligation Norm*, *supra* note 5, at 751 (noting that a conception of the social-obligation norm that “links ownership’s social obligation with the idea of community . . . is the conception that I wish to examine most closely here”).

32. See, e.g., ERIC T. FREYFOGLE, *THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD* 15–16 (2003) (claiming that “[m]any times, how property is employed also affects the surrounding community—socially, economically, and ecologically—so the community and its interests must be taken into account”).

33. See, e.g., Alexander, *The Social-Obligation Norm*, *supra* note 5, at 766 (noting that “[c]ommunities, including but not limited to the state, are the mediating vehicles through which we come to acquire the resources we need to flourish and to become fully socialized into the exercise of our capabilities”).

34. See Alexander, *The Social-Obligation Norm*, *supra* note 5, at 749 (arguing that what “is socially cognizable as property is only that form of access to resources that is consistent with human flourishing and community itself”); Purdy, *supra* note 4, at 1243, 1298 (arguing that property is “a social institution” because “property regimes set the terms on which people are able to recruit each

law is uniquely related to the health and well-being of the community, it should reflect a substantial concern for community interests; and individual private property rights should perhaps receive less protection than the individual rights protected by other areas of the law.<sup>35</sup> More specifically, some recent progressive-property accounts argue that individual property claims deserve less protection than, for example, individual claims to artistic or political self-expression because of the uniquely communitarian nature of property law.<sup>36</sup> However, progressive accounts also tend to argue that much of contemporary property law fails to incorporate these practical communitarian insights, reflecting instead an undue concern for individual interests at the expense of the community.<sup>37</sup>

### *B. Individual Property Rights and the New Progressive Property*

Given their conclusion that property law and theory should be reoriented toward neglected plural and communitarian values,<sup>38</sup> most recent progressive-property theorists reject what they call absolutist<sup>39</sup> or

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other for social cooperation”); Singer, *supra* note 22, at 1049 (claiming that “[w]e cannot understand property law without understanding the social relationships it embodies and promotes”).

35. See, e.g., UNDERKUFFLER, *supra* note 4, at 127 (arguing that private property rights are and should be “protected less” than individual rights in other areas of the law because they “involve[], far less often, the uniquely powerful normative claims that justify the ‘trumping’ or presumptive power of” other types of individual rights); David Lametti, *The Objects of Virtue, in PROPERTY AND COMMUNITY* 35-36 (Gregory S. Alexander & Eduardo M. Peñalver, eds., 2010) (noting that “[t]he objects of property relations, contextually understood and valued, therefore, become a specific point of entry for the community’s imposition of values in property discourse”).

36. See, e.g., UNDERKUFFLER, *supra* note 4, at 127 (noting that “because property claims so often involve . . . *interdependent* claims or *allocational* claims[,] the normative power of the values that these claimed rights assert is much more frequently matched by the normative power of the competing public interests than is true in other contexts. . . . [T]his is a *routine occurrence* in property cases”); Lametti, *supra* note 35, at 36 (suggesting that in the future, “land use will be increasingly subject to this communal concern, and the number of restrictions that reflect this dimension of ‘public in use’ will increase or become more explicit”).

37. See, e.g., FREYFOGLE, *supra* note 32, at 252 (claiming that “[a]s commonly understood today in the United States, private property stands starkly opposed to holistic, ecological goals such as land health,” in part because “the main strands of contemporary ownership came together at a time when the liberated entrepreneur, not the healthy community, was the symbol of progress”).

38. See, e.g., Alexander, *Pluralism and Property*, *supra* note 6, at 1017, 1035-51 (arguing in support of a social obligation approach to property that is based on incommensurable plural values).

39. See, e.g., Kevin Gray, *Land Law and Human Rights*, in *LAND LAW: ISSUES, DEBATES, POLICY* 211, 222-23 (Louise Tee ed., 2002) (claiming that “[i]n most areas of property law there exists a tension between . . . the perspectives of the *property absolutist* and the *property relativist*,”

libertarian<sup>40</sup> approaches to property law—approaches that, according to these recent progressive accounts, tend to unduly privilege individual property interests at the expense of the community.<sup>41</sup> This theoretical rejection has practical significance,<sup>42</sup> because it leads to a relatively broad tolerance for infringing upon individual property claims to serve communitarian or other values.<sup>43</sup> For example, although many believe that an individual landowner’s right to exclude is the theoretical core of property,<sup>44</sup> many new progressive accounts claim that this right is and should be compromised in the service of broader social obligations.<sup>45</sup> Compared to other property theories, therefore, recent progressive accounts suggest that such negative, individual property rights can relatively frequently be trumped, particularly when they conflict with the new progressive property’s commitment to values such as human dignity and development,<sup>46</sup> distributive justice and equitable distribution of

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and suggesting that property absolutists “tend . . . [to] maintain that all regulatory interference with land use necessarily constitutes a compensable ‘taking’ of property”).

40. See, e.g., UNDERKUFFLER, *supra* note 4, at 159 (claiming that the American “tradition of ‘negative’ constitutional rights, and our firm inclusion of property among those rights,” reflects an aspiration “toward a system characterized by ‘free-market, minimalist-state libertarianism,’” which reinforces the incorrect and impractical “notion that property is . . . defined by private law and insulated (by constitutional guarantee) from otherwise legitimate public demands”).

41. See, e.g., Peñalver, *supra* note 7, at 861 (noting that the absolutist “libertarian position that respect for individual property rights is all that matters, consequences be damned, is neither appealing nor workable” nor, ultimately, “acceptable even to its own practitioners”).

42. Some recent progressive accounts acknowledge that this figure of the absolutist private-property enthusiast, against whom the new progressive-property approach is partially drawn, is something of a bogeyman. See, e.g., Gray, *supra* note 39, at 222–23 (noting that “[t]here remain today few true property absolutists”). Nevertheless, the opposition of recent progressive-property accounts to the absolutist or deeply libertarian approach is significant, because it reflects a relatively broad tolerance in the new progressive property for compromising individual property claims. See *id.* at 240 (noting that the debate between absolutist and relativist theories of property impacts crucially important views “of the political balance to be maintained between individual and community interests”).

43. See, e.g., Alexander et al., *A Statement of Progressive Property*, *supra* note 4, at 744 (claiming that the pursuit of the values identified by the new progressive property requires “attentiveness to the effects of claiming and exercising property rights on others, including future generations, and on the natural environment and the non-human world”).

44. See, e.g., Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998) (arguing “that the right to exclude others is more than just ‘one of the most essential’ constituents of property—it is the *sine qua non*”).

45. See, e.g., Alexander, *The Social-Obligation Norm*, *supra* note 5, at 747–48 (claiming that “[t]he core image of property rights . . . [in which] the owner has a right to exclude others and owes no further obligation” is misleading, and stating that the purpose of his progressive account is to draw attention to the social obligations of owners at the expense of individual rights such as the right to exclude).

46. See *id.* at 748, 768 (claiming that his “version of the social-obligation norm” is superior

resources,<sup>47</sup> and other traditionally underexamined rights and goods.<sup>48</sup> As a result, the new progressive-property approach tends to favor specific property regimes and policies such as restrictions on the terms and the marketing of home mortgages for low-income borrowers;<sup>49</sup> expansive interpretations of the public trust doctrine;<sup>50</sup> and local rent-control ordinances,<sup>51</sup> which this Article examines in some detail.<sup>52</sup>

*C. The Contrast Between the New Progressive-Property and the Law-and-Economics Approaches*

In addition to their opposition toward libertarian approaches, most recent progressive-property accounts are skeptical about an approach to property law that they refer to as the “law-and-economics approach,” which they characterize as based largely on the analysis and projection of overall efficiency as expressed by contemporary market values.<sup>53</sup> Most of the recent progressive accounts agree that the law-and-economics approach dominates the contemporary academic analysis of property

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because it “enables individuals to live lives worthy of human dignity,” and further claiming that “[a]s a matter of human dignity, every person is equally entitled to flourish”).

47. See Alexander et al., *A Statement of Progressive Property*, *supra* note 4, at 744 (“Because of the equal value of each human being, property laws should promote the ability of each person to obtain the material resources necessary for full social and political participation.”); see also Alexander, *The Social-Obligation Norm*, *supra* note 5, at 771–72 (arguing that “[w]e must protect important values like fairness . . . even as we recognize that community membership involves the possibility of unreciprocated sacrifices”); Peñalver, *supra* note 7, at 880 (noting that “[i]n contrast” to utilitarian property theories, “the plural values recognized by the virtue theory of land pushes its commitment to redistribution in more complex and expansive directions”).

48. See, e.g., Gray, *supra* note 39, at 211–12 (arguing that although “[l]and law and human rights have never seemed particularly natural bedfellows,” property law should more openly confront the wide range of value judgments it currently “silently betrays” regarding “the ‘proper’ entitlements of human and other actors”).

49. See, e.g., Singer, *supra* note 22, at 1060–61 (suggesting that the regulations governing home mortgage loans should be reformed to prevent various sales tactics and to discourage financial institutions from making loans to certain borrowers).

50. See, e.g., Alexander, *The Social-Obligation Norm*, *supra* note 5, at 805 (outlining the ways in which “[a] human flourishing-focused social-obligation theorist might attempt to justify the expansion of public access to privately-owned beaches”).

51. See, e.g., Peñalver, *supra* note 7, at 882–83 (suggesting that rent control and eviction-protection statutes may be an example of attempts by the law to protect crucially important dignitary interests representative of the flourishing-centered approach to property law he endorses).

52. See *infra* Part III.B.

53. See, e.g., Alexander, *The Social-Obligation Norm*, *supra* note 5, at 748 n.8 (noting that he uses the terms “law and economics” and “the law-and-economics tradition” as umbrella terms “to embrace all normative positions that evaluate alternative possible legal regimes” by referring to “wealth” or other cognate scalar metrics).

law.<sup>54</sup> At the same time, however, they also tend to argue that the law-and-economics approach should be replaced by, or at least supplemented with, a new theoretical system that takes into account the true communitarian nature of property and the other important values that property law should reflect.<sup>55</sup>

Still, it would be inaccurate to claim that recent progressive-property accounts have rejected the law-and-economics approach wholesale.<sup>56</sup> Rather, what many recent progressive accounts criticize in the law-and-economics approach is the single-minded focus on market values as well as the tendency to give arguably unsupported, normative weight to economic analysis and economic models.<sup>57</sup> In place of a single-minded focus on efficiency and market values, the recent progressive-property accounts tend to seek a new approach that retains a place in property theory for such law-and-economics analysis—albeit a place that is properly cabined and that serves the plural norms they have identified as the proper foundation for a theoretical analysis of property law.<sup>58</sup>

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54. *See, e.g., id.* at 745 (stating, as an overarching goal of his article, the desire “to provide in property legal theory an alternative to law-and-economics theory, the dominant mode of theorizing about property in contemporary scholarship”); Peñalver, *supra* note 7, at 822 (noting that “[l]aw and economics dominates contemporary legal academic discussions of the ownership and use of land.”)

55. *See, e.g.,* Alexander, *The Social-Obligation Norm*, *supra* note 5, at 819 (arguing that “[t]he time has come . . . [to] end the virtual hegemony of law-and-economics analysis in property theory,” which fails to “provide a satisfactory account of many of the obligations that courts have imposed on property owners” and which is based upon a “moral dimension [that] is too anemic to do justice to the values that inhere in [property] obligations, values that notably include human flourishing”); *see also* FREYFOGLE, *supra* note 32, at 201 (arguing that “the market is no simple tool to use to achieve healthy lands and communities,” which “can come only from public policies that have as their aim not the promotion of markets but something far different”); Singer, *supra* note 22, at 1053 (arguing that “[a]lthough economic analysis of property rights appears to be the dominant approach in law schools these days, the utilitarian moral theory on which it is based is . . . fatally flawed—at least unless it is supplemented or cabined by normative analyses of other kinds, such as considerations of justice, fairness, obligations, and ethics”).

56. *See, e.g.,* Peñalver, *supra* note 7, at 823 (“I aim not to discredit . . . [law-and-economics] analysis across the board, but merely to explore several problems raised for the operation of law and economics within the discrete area of land-use scholarship.”).

57. *See id.* at 823–24 (noting that the particular focus of his progressive-property account is “first, on some legal economists’ over-reliance on land’s market value and owners’ incentives to maximize market returns in crafting their positive models of landowner behavior, and, second, on highlighting what I see as the limited normative significance of economists’ positive findings”).

58. *See, e.g.,* FREYFOGLE, *supra* note 32, at 187 (claiming that “[t]he market train, in truth, is less new and less powerful than its advocates claim,” and that it “needs a human engineer . . . able to think clearly and talk sensibly about where the train ought to head,” but that under these terms, market analysis “can be a potent tool . . . if it is well embedded in a communal order and in a sound ethical and ecological view of the human place in nature”); *see also* Peñalver, *supra* note 7, at 823

Indeed, some recent progressive accounts conclude that sophisticated forms of economic analysis, especially those incorporating behavioral and psychological insights, may play a significant role within a progressive framework.<sup>59</sup> The real targets of these recent progressive accounts are those law-and-economics analyses of property that employ straightforward, rational-actor models of landowner behavior as determined, in large part, by basic economic incentives and an assumed desire to maximize market returns.<sup>60</sup> The prospect of preserving a place for efficiency-based analysis while serving norms and values unique to property law provides much of the appeal and promise of the recent progressive-property accounts: these accounts suggest the possibility of a useful synthesis between the law-and-economics approach and many norms and values that have often been defined as incompatible with it.<sup>61</sup> To date, however, this promise has not been entirely fulfilled because the proper role and scope of efficiency analysis within the new progressive-property approach remains somewhat ambiguous.<sup>62</sup> To begin resolving

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(“My goal . . . is twofold. First, I aim to explore some of the limitations of law-and-economics analysis of land-use questions. Second, I begin to lay the groundwork for an approach rooted in the Aristotelian tradition of virtue ethics, one that is able to incorporate the insights of economic analysis without succumbing to the tendency to treat efficiency as the only relevant normative consideration.”).

59. See, e.g., Peñalver, *supra* note 7, at 824, 873 (noting that the “exploration of the descriptive and prescriptive problems with the economic property theories I am discussing” does not “reach these more sophisticated behavioral approaches,” and claiming that “sophisticated and empirically grounded positive economic analysis (as well as empirical analysis from within other social science disciplines) will have a great deal of value” within a progressive-property framework).

60. See, e.g., *id.* at 824 (“I intend to focus my descriptive critique on the subset of ‘law and economics’ accounts of land ownership that continue to employ a rational-actor model of landowner behavior.”).

61. See, e.g., *id.* at 863 (claiming that “[t]he challenge for property and land-use theorists is to find a way to put the valuable tools of economic analysis to use while restricting the normative ambition of those tools to their proper domain”).

62. See *infra* Parts III.A, III.B, and IV.B. The ambiguity of the proper place for efficiency analysis within the larger framework of progressive-property theory is due in part simply to the novelty of the recent progressive-property accounts, and the resolution of this ambiguity is one of the ends of this Article. At the same time, a measure of ambiguity regarding the role of law-and-economics analysis is simply an irreducible feature of the new progressive property, marked as it is by a plurality of values and a rejection of narrow scalar analysis. See, e.g., Alexander, *The Social-Obligation Norm*, *supra* note 5, at 751 (noting that the progressive approach he advocates “candidly admits that the best we can do is to . . . frankly eschew[] any pretense of precise ex ante predictions”); see also Peñalver, *supra* note 7, at 887 (noting that his virtue ethics-based account’s “plural conception of value raises the obvious question of what to do when two or more values appear to conflict,” and that while “[l]egal economists . . . resolve these apparent conflicts” by reduction “to a single metric of preference satisfaction” followed by “cost-benefit analysis” on that metric, the approach he advocates “does not aim at generating an ‘algorithm for life independent of

this ambiguity, I suggest that even the most basic tools from a law-and-economics analysis of property—those which assume that landowners will attempt to maximize the present market value of their land and which examine the economic incentives that such landowners then face<sup>63</sup>—have important roles to play within a progressive-property framework.<sup>64</sup>

#### D. The Role of Virtue Ethics Within the New Progressive Property

Recent progressive accounts advance a plurality of diverse and underexamined values, such as human dignity and development, an equitable distribution of resources, and other traditionally underexamined values, as a new guide for property law and theory.<sup>65</sup> At the same time, they also offer a remarkably consistent, overall normative framework to organize and interpret these diverse values.<sup>66</sup> In place of an exclusive focus on maximizing economic efficiency or preserving the negative freedom of landowners, most of the recent progressive-property

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judgment’”) (quoting ROASALIND HURSTHOUSE, ON VIRTUE ETHICS 54 (1999) (internal quotation marks omitted)). While the inherent ambiguity of the role of law-and-economics tools within a progressive-property framework may never be entirely resolved, I argue that it can and should be minimized if the basic tools of law-and-economics analysis are incorporated within a larger progressive-property framework, along the lines argued for below. See *infra* Part IV.B.

63. For a paradigmatic example, see, for example, Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 354–58 (1967). For a criticism of the so-called “Demsetzian” position from a recent progressive-property account, see, for example, Peñalver, *supra* note 7, at 825–26 (labeling “discussions of the incentives that land’s market value generates for wealth-maximizing landowners” the “Demsetzian” or “investment model of landowner behavior”) (quoting Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments and Just Obligations*, 30 HARV. ENVTL. L. REV. 309 (2006)). Recent progressive-property accounts criticize both the “descriptive” aspect of the Demsetzian model, which asserts that private owners predictably act in ways that maximize market returns from their land, and its “normative” dimension, which concludes that the decision making of private owners is superior to the product of public deliberation. See, e.g., Peñalver, *supra* note 7, at 824–26 (“I intend to focus my descriptive critique on the subset of ‘law and economics’ accounts . . . that continue to employ a rational-actor model of landowner behavior.”). Below I argue that the basic tools and assumptions of the descriptive component of this Demsetzian approach have a role to play even within a progressive-property framework. See *infra* Part IV.B. I make no claims regarding its normative dimension.

64. I do not deny that more sophisticated tools from behavioral law-and-economics analysis have significant, perhaps even more important, roles to play within a progressive-property framework than the “basic” descriptive approach considered here. I argue only that basic law-and-economics tools also have an important role to play within a progressive-property framework. See *supra* note 64 and *infra* Part IV.B.

65. See *supra* notes 46–48.

66. See, e.g., Alexander, *The Social-Obligation Norm*, *supra* note 5, at 818 (claiming that “property law is not solely about either individual freedom or cost-minimization” but “also about human flourishing and supporting the communities that enable us to live well-lived lives”).

accounts consistently suggest that property law should be reoriented toward normative systems based on human flourishing<sup>67</sup> to fully account for the diverse values that property ought to embody.

In place of welfare-maximizing approaches to property, many progressive accounts suggest a new theoretical approach, aimed at promoting human flourishing, and based on Aristotelian systems of virtue ethics, with three specific goals.<sup>68</sup> First, property law properly subordinated to a system of virtue ethics can provide a set of rules and obligations that protect relatively disadvantaged members of society, whose ability to flourish might be harmed by property owners' immoral decisions.<sup>69</sup> Second, property law can provide a set of rules and obligations that constrain and correct the behavior of nonvirtuous property owners so that, over time, they learn to act virtuously of their own accord.<sup>70</sup> Third, property law can provide a set of rules that clarify social obligations and coordinate collective virtuous actions, both for individual self-realization and for the broader health of the community.<sup>71</sup> In Part III of this Article, I examine all four common traits of the new progressive-property approach in more detail, including this incorporation of systems of virtue ethics, to determine whether the federal Section 8 housing voucher program and rent control meet the new progressive-property approach's descriptive characteristics.

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67. See, e.g., *id.* at 761 (noting that “[a]t the core of the Aristotelian tradition is the belief that a distinctively human life exists toward which all of one’s capabilities should be directed,” and arguing that property law should encourage actions and dispositions that contribute to living this distinctively human life); see also FREYFOGLE, *supra* note 32, at 207–08 (citing previous work by Joseph William Singer, and arguing that “[p]rivate property promotes individual good to the degree that it enables individuals to thrive . . . [and] live a ‘fully human life’”); Alexander et al., *A Statement of Progressive Property*, *supra* note 4, at 743 (claiming that “[v]alues promoted by property include life and human flourishing, the protection of physical security, the ability to acquire knowledge and make choices, and the freedom to live one’s life on one’s own terms”).

68. E.g., Peñalver, *supra* note 7, at 871–72; see also Alexander, *The Social-Obligation Norm*, *supra* note 5, at 761–62 & nn. 64–67 (invoking Aristotelian systems of virtue ethics as a normatively distinctive component of the approach to property for which he argues); Lametti, *supra* note 35, at 13, 36–37 (concluding that “[v]irtue should dictate how we act with respect to valuable resources,” and considering potential sources for the necessary system of virtue ethics necessary for a full understanding of property). Under a progressive-property approach, whether all or any of these goals should be pursued is a prudential and context-dependent issue, as are the relative weights that should be assigned to each.

69. Peñalver, *supra* note 7, at 871.

70. *Id.*

71. *Id.* at 872. Peñalver suggests that Title II of the Civil Rights Act of 1964 is one example of such a virtue-based property regime. Despite initial criticism, Title II has largely succeeded in reshaping individual and community attitudes while protecting disadvantaged members of society from discrimination by non-virtuous individual property owners. *Id.* at 871–72.

### III. SECTION 8 AND RENT CONTROL AS EXAMPLES OF THE NEW PROGRESSIVE PROPERTY

Viewed together, the various accounts characterized here and elsewhere as the new progressive property comprise a broad and diverse doctrine. Indeed, some have argued that the wide range of values endorsed by recent progressive-property accounts undermines their practical significance.<sup>72</sup> At the same time, however, this diversity is a fundamental characteristic of these new progressive-property accounts, based on the claim that property implicates plural and incommensurable values.<sup>73</sup> The plural values endorsed by recent progressive-property accounts make their boundaries somewhat unclear, and commentators have already begun to try to determine whether a particular property regime should be considered “progressive property.”<sup>74</sup>

In this Part, despite the inherent ambiguities involved in defining the borders of accounts consciously built around plural values, I argue that both the federal Section 8 housing voucher program and many local rent-control ordinances merit consideration as potential examples of the new progressive property. Rent control has previously been identified as a practical example of the values and ends endorsed by the new progressive property,<sup>75</sup> and I examine this identification in more detail below. I also argue that Section 8 is a good example of a progressive-property approach in practice. More specifically, as I conclude below, Section 8 fits the values and ends of the new progressive-property approach better than rent control, even though Section 8, unlike rent control, has not previously been identified as a practical example of the new progressive-property approach.<sup>76</sup>

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72. See, e.g., Smith, *supra* note 6, at 960 (“It is hard to be against human flourishing, and a concept that is in one form or another central to Aristotle, Aquinas, Catholic social thought, modern virtue ethics, some forms of natural law, and the capabilities approach . . . but one can question the degree of consensus required for implementation in a legal regime.”).

73. Alexander et al., *A Statement of Progressive Property*, *supra* note 4, at 743.

74. See, e.g., Kelly, *supra* note 5, at 69–71 (suggesting that some community land trusts provide a way to practically realize the values and ends advanced by these accounts).

75. See, e.g., Peñalver, *supra* note 7, at 882–83 (suggesting that local rent and eviction control ordinances may be an example of property law’s attempts to protect crucially important dignitary interests and long-standing bonds that land users form with land, which are representative of the flourishing-centered approach to property law he endorses).

76. See *infra* Parts III.A, III.B, and IV.B.

*A. Section 8 as an Example of the New Progressive Property*

Since the Great Depression, the federal government has advanced an enormous number of federal programs designed to improve housing for low-income Americans, each of which has typically undergone several changes in substance and title.<sup>77</sup> What this Article refers to for the sake of simplicity as the federal Section 8 housing voucher program is no exception. In using the term “federal Section 8 housing voucher program,” this Article refers to the broad program of federal tenant-based assistance for low-income households to obtain rental housing in the private housing market; this program began in earnest in 1974, when Congress amended the Housing Act of 1937 by passing the Housing and Community Development Act of 1974.<sup>78</sup>

Even a relatively brief description of the Section 8 housing voucher program must include a bit of context about some of the other types of federal housing assistance from which Section 8 sprung, beginning with the creation of the first substantial federal housing programs in the Housing Act of 1937.<sup>79</sup> Under the public housing program created by the Housing Act of 1937, government funds were used to create public, government-owned housing for low-income households.<sup>80</sup> Federal funds were used for the initial-development costs of the public-housing facilities, while local funds and local public-housing authorities, or “PHAs,” paid for and supervised the facilities’ subsequent

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77. *E.g.*, Edgar O. Olsen, *Housing Programs for Low-Income Households*, in MEANS-TESTED TRANSFER PROGRAMS IN THE UNITED STATES 365 (Robert A. Moffitt, ed., 2003).

78. *See* Public L. No. 93-383, 88 Stat. 662 (codified as 42 U.S.C. § 1437f(a) (2006)) (adding Section 8 to the Housing Act of 1937 for the purpose of “aiding low-income families in obtaining a decent place to live and of promoting economically mixed housing”). For a brief discussion of the relationship between Section 8 and predecessor programs, such as the Experimental Housing Allowance Program, see DEP’T OF HOUS. & URBAN DEV., HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK, at 1-2 to 1-3 (2001), available at [http://portal.hud.gov:80/hudportal/documents/huddoc?id=DOC\\_35611.pdf](http://portal.hud.gov:80/hudportal/documents/huddoc?id=DOC_35611.pdf); EDWARD L. GLAESER & JOSEPH GYOURKO, RETHINKING FEDERAL HOUSING POLICY: HOW TO MAKE HOUSING PLENTIFUL AND AFFORDABLE 115 (2008). Today, what this Article refers to as “the federal Section 8 housing voucher program,” or simply “Section 8,” is known as the Housing Choice Voucher Program. For a discussion of the evolution from the Section 8 Existing Housing Program, also known as the rental-certificate program, to the Housing Choice Voucher Program, see DEP’T OF HOUS. & URBAN DEV., *supra*, at 1-2 to 1-5. As noted in the text, this Article refers generically to both the rental-certificate program and the rental-voucher program as “the federal Section 8 housing voucher program” or “Section 8.”

79. *E.g.*, DEP’T OF HOUS. & URBAN DEV., *supra* note 78, at 1-1.

80. *E.g.*, Olsen, *supra* note 77, at 370.

administration.<sup>81</sup> In keeping with the Depression-era roots of the Housing Act of 1937, the public housing program focused on job creation through the production of new housing projects as well as on slum clearance and improving housing conditions for low-income families;<sup>82</sup> indeed, some scholars have suggested that this goal of job creation was so central to these first public housing efforts as to be necessary for their passage.<sup>83</sup> Beginning in the late 1960s, the federal government began to increase its role in the administration of public-housing projects, by providing additional subsidies to local housing authorities in exchange for restrictions on the rents that could be charged to low-income tenants and modernization of the housing units.<sup>84</sup> Despite this expansion, public-housing projects, like all subsequent forms of federal, low-income housing programs discussed in this section, do not provide an entitlement to decent housing, with many qualified households on waiting lists for public housing.<sup>85</sup>

In addition to the publicly owned, low-income housing projects that began with the Housing Act of 1937, the federal government began contracting with private parties to provide low-income housing in

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81. *Id.*; see DEP'T OF HOUS. & URBAN DEV., *supra* note 78, at 1-1 (noting that “[t]he U.S. Housing Act of 1937 authorized local PHAs established by individual states. The 1937 Act also initiated the public housing program”).

82. DEP'T OF HOUS. & URBAN DEV., *supra* note 78, at 1-1; see also J. Peter Byrne & Michael Diamond, *Affordable Housing, Land Tenure, and Urban Policy: The Matrix Revealed*, 34 *FORDHAM URB. L.J.* 527, 532-33 (2007) (noting that the Public Housing Act of 1937 “was bitterly opposed by the private real estate industry and prevailed in no small part because it provided construction work during the Depression”).

83. See, e.g., ALEX F. SCHWARTZ, *HOUSING POLICY IN THE UNITED STATES* 125 (2d ed. 2010) (suggesting that passage of the Public Housing Act in 1937 “owed nearly as much to public housing’s potential for employment generation and slum clearance as to its ability to meet the nation’s need for low-cost housing”).

84. E.g., Olsen, *supra* note 77, at 370.

85. This, of course, makes low-income housing programs something of an outlier among means-tested transfer programs. See, e.g., Olsen, *supra* note 77, at 365 (“Unlike other major means-tested transfers, no low-income housing program is an entitlement for any type of household.”). For criticism of this aspect of low-income housing programs, see, for example, SCHWARTZ, *supra* note 83, at 318 (arguing that “[u]nfortunately, unless housing assistance for low-income families becomes an entitlement—just as tax benefits are for homeowners—the nation’s housing problems will persist”). With respect to Section 8, for which demand for assistance generally outstrips the supply determined by present funding levels, this means that in most places there are lengthy waitlists of otherwise-qualified tenants who are not served by the program. Byrne & Diamond, *supra* note 82, at 605. For example, the Housing Authority of the City of Los Angeles (“HACLA”), which administers Section 8 vouchers to over 45,000 households, has a waitlist of several thousand households. HOUS. AUTH. OF THE CITY OF L.A., *FACT SHEET 1-2* (2009), available at [http://www.hacla.org/attachments/wysiwyg/10/FactSheet\\_2009\\_091809.pdf](http://www.hacla.org/attachments/wysiwyg/10/FactSheet_2009_091809.pdf).

1954.<sup>86</sup> These privately owned and federally subsidized projects for low-income housing can be understood as a separate category of federal programs to address problems related to low-income housing.<sup>87</sup> In general, under the terms of most of these programs, and in exchange for federal subsidies, private developers agree to build or rehabilitate housing to conform to federal standards. The private developers then agree to provide this new or rehabilitated housing primarily or exclusively to households that meet certain income characteristics for a specified term of years.<sup>88</sup> Today, privately owned, subsidized-housing projects have become a larger source of new housing aid than publicly owned projects.<sup>89</sup>

Until the creation of the federal Section 8 housing voucher program's forerunners in the mid-1960s, almost all federal programs for low-income housing were "project based," whether those projects were publicly or privately owned.<sup>90</sup> Section 8 and its forerunners, therefore, represent a third and different type of low-income housing program—one tied to specific qualifying households or tenants rather than specific housing projects.<sup>91</sup> In other words, and in contrast to the project-based

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86. Olsen, *supra* note 77, at 371–72. The federal government's efforts to directly contract with private parties to provide housing for low-income households began with HUD's Section 221(d)(3) Market Interest Rate Program. *Id.*

87. JOHN C. WEICHER, *PRIVATIZING SUBSIDIZED HOUSING 3* (1997) (describing "the three major categories of subsidized housing programs: public housing, privately owned projects, and vouchers and certificates for use in privately owned housing").

88. Olsen, *supra* note 77, at 371. Today, the largest program of federally subsidized and privately owned housing projects for low-income households is the Section 8 New Construction/Substantial Rehabilitation Program, which was created in 1974 along with the Section 8 housing voucher program that is analyzed in this Article. *Id.* at 372–73. In addition to the subsidies for the construction or rehabilitation of privately owned low-income housing projects it provides, under the Section 8 New Construction/Substantial Rehabilitation Program, as under the Section 8 housing voucher program, federal funds are used to provide rental assistance payments that reduce the rents paid by tenants in the subsidized building to a portion of the tenants' adjusted incomes. *Id.* Despite this similarity, all references to "Section 8" in the remainder of the Article, unless otherwise specified, are to the tenant-based Section 8 housing voucher program, and not to the project-based subsidies of the Section 8 New Construction/Substantial Rehabilitation Program.

89. See, e.g., Robert C. Ellickson, *The False Promise of the Mixed-Income Housing Project*, 57 *UCLA L. REV.* 983, 990 (2010) (noting that the various private-owner, and project-based federal subsidy programs, rather than public housing projects, are now the major source of new project-based federal aid).

90. Olsen, *supra* note 77, at 374–75. However, tenant-based programs similar in nature to the Section 8 housing voucher program had been proposed in legislative debates reaching back to the Public Housing Act of 1937. See, e.g., SCHWARTZ, *supra* note 83, at 177 (noting general backdrop of early attempts to establish housing voucher programs prior to the 1970s).

91. SCHWARTZ, *supra* note 83, at 177; see also WEICHER, *supra* note 87, at 5 (noting that "[h]ousing certificates and vouchers are the third type of subsidy program, with a basic subsidy

programs, Section 8 is a “tenant-based” program: it provides federal subsidies made available through local PHAs for tenants’ use on the private-housing market, wherever those tenants may choose to live.

More specifically, under the Section 8 program, local PHAs set payment standards at fixed levels, targeted around local Fair Market Rent levels, or “FMRs.”<sup>92</sup> Total tenant payment levels for qualifying low-income households are set according to a formula that accounts for various local standards and tenant income, with tenants generally responsible for a portion of the rent out of their own adjusted net income.<sup>93</sup> Tenants are also responsible for finding an apartment that meets the rent and physical standards of the program and is owned by a landlord willing to participate.<sup>94</sup> Landlords may apply for rent increases on units inhabited by tenants in the program, with desired rent increases approved or denied by local PHAs on the basis of a reasonableness test.<sup>95</sup> Unlike project-based programs, the Section 8 housing voucher program is not designed to increase the supply of affordable housing—instead, the program relies on low-income households finding acceptable units from existing housing stock.<sup>96</sup>

In further contrast to project-based federal housing programs, low-income tenants participating in the Section 8 housing voucher program are not tied to a particular place, which means assisted tenants can theoretically be dispersed throughout the community—or at least dispersed at rates greater than under project-based programs.<sup>97</sup> Moreover, in theory, if not always in practice, the vouchers under this

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mechanism very different from the project-based subsidies described above”).

92. DEP’T OF HOUS. & URBAN DEV., *supra* note 78, at 1-6.

93. *Id.* (noting that total tenant payments under the program are “the greater of: 30% of adjusted income, 10% of gross income, the welfare rent (in as-paid states only), or the PHA minimum rent. If the family chooses a unit with a gross rent that exceeds the payment standard, the family pays the TTP plus the amount by which the gross rent exceeds the payment standard.”). Total tenant payments are capped at a portion of the total rent generally not in excess of 40% of the total. *Id.*

94. *See, e.g.*, SCHWARTZ, *supra* note 83, at 177-78 (noting that “[t]o qualify for the voucher program, a unit must meet certain standards for physical quality and space,” must be available for the Fair Market Rent covered by the vouchers available and the low-income tenant’s qualifying income, and must be owned by a landlord who agrees “to physical inspections, to complete the necessary paperwork, and to accept rental subsidy payments from the government”).

95. DEP’T OF HOUS. & URBAN DEV., *supra* note 78, at 1-6.

96. Byrne & Diamond, *supra* note 82, at 605.

97. DEP’T OF HOUS. & URBAN DEV., *supra* note 78, at 1-3 (noting that the Section 8 housing voucher program’s popularity is based in part on its role in “dispers[ing] families throughout the community and [avoiding] projects or site selection problems”).

program are portable; this means that once in the program, assisted tenants can move to new residences, provided they can find a new and willing landlord and a rental unit that meets the program's specifications. Despite the decades-long head start enjoyed by the earliest public housing projects after the Housing Act of 1937,<sup>98</sup> today, the housing choice voucher program is the largest assisted-housing program administered by the U.S. Department of Housing and Urban Development ("HUD").<sup>99</sup> Many commentators ascribe the voucher program's creation and rapid rise to disappointment with the other types of federal housing programs created earlier in the last century.<sup>100</sup>

Should the federal Section 8 housing voucher program be considered an example of the new progressive property? In general, and especially when compared to other types of federal housing programs, the answer seems to be at least a qualified yes. The broad statutory purposes of Section 8 are to "aid[] low-income families in obtaining a decent place to live and . . . promot[e] economically mixed housing."<sup>101</sup> These broad statutory purposes match up well with the ends described and endorsed by recent progressive-property accounts. Most obviously, the stated goal of helping low-income families obtain a decent place to live resonates strongly with a progressive-property focus on human flourishing; after all, physical security and the means to live on one's own terms are the most basic and essential goods protected by property that promote human flourishing.<sup>102</sup> Moreover, in attempting to secure this most basic property good for low-income households, Section 8 embodies the new progressive property's characteristic concerns for distributive justice, the

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98. See, e.g., SCHWARTZ, *supra* note 83, at 180 (noting that "[w]hereas the number of households in public housing and other project-based subsidy programs has decreased since the early 1990s, the voucher program has continued to grow, if only in fits and starts").

99. DEP'T OF HOUS. & URBAN DEV., *supra* note 78, at 2-1; see also GLAESER & GYOURKO, *supra* note 78, at 103-04 (summarizing HUD data on the number of low-income households assisted under various federal programs).

100. E.g., GLAESER & GYOURKO, *supra* note 78, at 115.

101. 42 U.S.C. § 1437f(a) (2006).

102. See FREYFOGLE, *supra* note 32, at 207-08 (arguing that "[p]rivate property promotes individual good to the degree that it enables individuals to thrive . . . [and] live a 'fully human life'"); Alexander et al., *A Statement of Progressive Property*, *supra* note 4, at 743 (claiming that the proper "[v]alues promoted by property include life and human flourishing, the protection of physical security . . . and the freedom to live one's life on one's own terms"); Peñalver, *supra* note 7, at 880 (pointing out that "a person cannot flourish without the ability to occupy some physical space within which she can carry out activities essential to her existence, such as eating and sleeping"); see also ARISTOTLE, POLITICS 1.3.1253b23-26 ("Property is a part of the household, and the art of acquiring property is a part of the art of managing the household; for no man can live well, or indeed live at all, unless he be provided with necessaries.").

equitable distribution of resources, and the protection of relatively disadvantaged members of society.<sup>103</sup> In terms of its general purposes, therefore, Section 8 is an excellent example of the kind of property program or regime that the new progressive-property approach endorses, even though it has not previously been so identified by recent progressive-property accounts.

The close fit between Section 8 and recent progressive-property accounts becomes even more evident when Section 8 is scrutinized in more detail and compared to other low-income housing programs at a similar level of scrutiny. For example, Section 8 focuses on providing rental housing to low-income families from existing stock.<sup>104</sup> Thus, unlike project-based, low-income housing efforts,<sup>105</sup> Section 8 is not designed to stimulate job growth by building new housing units, a goal which is at best ancillary<sup>106</sup> to the progressive end of providing low-income families with decent housing.<sup>107</sup>

Moreover, in requiring assisted low-income families to find their own housing on the rental market after empowering them with vouchers, Section 8 is designed to enhance the dignity and autonomy of its recipients,<sup>108</sup> while reducing any social stigma that may attach to visible

103. See *supra* notes 47, 69, 71 and accompanying text; see also Peñalver, *supra* note 7, at 880 (claiming that securing basic shelter for the relatively disadvantaged is a key example of the new progressive property's commitment "to redistribution in more complex and equitable directions" to promote human flourishing).

104. See, e.g., Byrne & Diamond, *supra* note 82, at 605 (noting that the Section 8 housing voucher program "is not designed to increase the supply of affordable housing, relying on the voucher recipient finding an acceptable unit from among the existing stock").

105. For the roots of federal project-based housing programs in Depression-era theories about building subsidies and job creation, see *supra* notes 82–83 and accompanying text.

106. See, e.g., GLAESER & GYOURKO, *supra* note 78, at 113 (concluding from various studies that subsidized housing production through project-based aid actually crowds out private development at an average net rate of 50%).

107. It might be possible, of course, to argue that the building subsidies inherent in project-based housing programs also foster progressive-property ends, but the relationship is attenuated at best, far more so than the connection between Section 8 and the new progressive property. Moreover, the potential relationship between subsidies for project-based construction and the new progressive property is further compromised by the environmental and resource demands of such construction, which fit poorly with the focus of many recent progressive accounts on environmental and resource conservation. See, e.g., FREYFOGLE, *supra* note 32, at 223 (claiming that property law needs to change to meet three critical goals, the first of which must be to promote conservation).

108. See, e.g., Written Testimony of Shaun Donovan, Secretary of U.S. Department of Housing and Development, before Senate Committee on Banking, Housing and Urban Affairs, May 5, 2011, at 10 (noting HUD's priorities and "core belief: when you choose a home—you also choose transportation to work, schools for your children, and public safety. You choose a community—and the amenities available in that community"). Testimonials abound regarding the Section 8 housing

project-based assistance.<sup>109</sup> These goals, of course, are central to many recent progressive-property accounts.<sup>110</sup> In contrast to Section 8, project-based programs, by their very definition, do not empower low-income households to participate in the rental housing market, and they do not therefore advance the dignity or autonomy of their recipients as fully as does Section 8.

Furthermore, the assistance given to low-income households through the Section 8 program is narrowly targeted: rather than a pure cash transfer to low-income households, which might be used to purchase a variety of goods, Section 8 assistance can be used only to participate in the housing market. By insisting upon the importance of one specific end among the many material needs facing low-income households—namely, the need for some minimum degree of adequate housing—Section 8 seeks to advance the new progressive property’s commitment to one of the essential and incommensurable components of human flourishing.<sup>111</sup> Finally, Section 8 seeks to promote economically mixed housing,<sup>112</sup> and

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voucher program’s efficacy in promoting the dignity and autonomy of voucher recipients. *See, e.g.*, Statement of Terri Ceaser, Testimony before House Subcomm. on Hous. and Cmty. Opportunity, Comm. on Fin. Servs., June 10, 2003, at 28 (“When . . . I was issued a housing voucher, I was able to move my children to a decent and affordable home in a safe neighborhood. . . . Not only are my children busy with their studies, but I . . . will complete graduate school in December 2004. . . . The voucher has assured my family of the stability needed for my children to succeed in school . . . . Section 8 has afforded me the opportunity to provide my family with a stable and safe environment, so I consider this a hand up, not a hand out.”); Statement of Telissa Dowling, Testimony before House Subcomm. on Hous. and Cmty. Opportunity, Comm. on Fin. Servs., June 10, 2003, at 29–30 (“Without a voucher I would not have been able to get my degree. I might not have a job, and my daughter and I would still be homeless.”); Statement of Leona Thompson, Testimony before House Subcomm. on Hous. and Cmty Opportunity, Comm. on Fin. Servs., July 1, 2003, at 135 (“I owe a great deal of thanks and appreciation to the Housing Authority of the City of Los Angeles Section 8 program . . . for providing the resources and information . . . and self-empowerment to rise above the elements that keep so many people in economic bondage. . . . I received a certificate in medical assisting, a certificate in nurse assisting. . . . [and] I’ve secured enrollment for my sons to attend college preparatory schools.”).

109. *See, e.g.*, DEP’T OF HOUS. & URBAN DEV., *supra* note 78, at 1-3 (noting that the early rise of the Section 8 voucher program, and its relative popularity with both low-income families, local governments, and federal legislators was due in part to its ability to provide assistance quickly, to provide low-income families with a measure of choice, and to provide low-income families with a measure of anonymity).

110. *See supra* note 46 and accompanying text; *see also* Peñalver, *supra* note 7, at 882–83 (discussing the need to protect certain crucially important dignitary interests in property law).

111. I am grateful to Eduardo Peñalver for this point. *See* E-mail from Eduardo Peñalver to Zachary Bray (Dec. 7, 2011) (on file with author).

112. *E.g.*, 42 U.S.C. § 1437f(a) (2006); *see also* DEP’T OF HOUS. & URBAN DEV., *supra* note 78, at 1-3 (noting that the early rise of the Section 8 voucher program, and its relative popularity with low-income families, local governments, and federal legislators was due in part to its ability to

it achieves greater integration,<sup>113</sup> a goal clearly in line with the communitarian focus of recent progressive-property accounts.<sup>114</sup>

In sum, Section 8 is a good example of the new progressive property, even though it has not previously been so identified. Section 8 fits well with many of the values described and prescribed in recent progressive-property accounts; indeed, it serves these ends at least as *effectively* as every other federal low-income housing program.<sup>115</sup> It also serves these

allow low-income families to disperse throughout the larger community).

However, the integration of Section 8–assisted households into more affluent neighborhoods is not always harmonious, especially when it occurs relatively rapidly, as some recent stories have indicated. *See, e.g.,* Jennifer Medina, *Seeking a Better Life, Section 8 Renters Encounter Resistance*, N.Y. TIMES, August 11, 2011, at A13 (detailing resistance of existing residents of Lancaster, California, a town in Los Angeles County, to the recently increased presence of Section 8–assisted tenants). Some might argue that the potential for rapid neighborhood change that can be seen from such stories potentially undermines the communitarian goals central to recent progressive-property accounts; others might see these sorts of stories as little more than typical NIMBY behavior by existing residents, which does not override the benefits to the larger community gained from increased residential economic integration.

Regardless, it is important to realize that stories about floods of voucher-assisted households are outliers: whether they live in the suburbs or in central cities, the overwhelming majority of voucher holders live in neighborhoods with very few other voucher recipients. SCHWARTZ, *supra* note 83, at 204–05 (noting that although vouchers promote economic residential integration, voucher residents tend to disperse from one another; neighborhoods with more than 10% of households receiving vouchers comprise only 4.3% of central city neighborhoods, and only 1% of suburban neighborhoods). In other words, Section 8 promotes economically mixed housing better than alternative federal housing programs and with relatively few side effects.

Moreover, there is reason to believe that Section 8 tends to promote greater integration of minorities than alternative federal housing programs. *See, e.g.,* SCHWARTZ, *supra* note 83, at 190–95, 205–06 (collecting data and concluding that while minority Section 8 voucher holders do tend to reside in minority neighborhoods, when compared to the beneficiaries of alternative federal housing programs, minority Section 8 voucher recipients are less likely to live in highly segregated neighborhoods). Although this is not an express statutory goal of the Section 8 program, it is clearly a side effect in accord with the communitarian focus of recent progressive-property accounts.

113. *See, e.g.,* Byrne & Diamond, *supra* note 82, at 555–56 (noting that despite its limited funding and reluctance by some landlords to participate in the program, “there seems little doubt that Section 8 has given many recipients a greater opportunity for integration into a more diverse society than public housing would have afforded them”); *see also* SCHWARTZ, *supra* note 83, at 188 (gathering sources and noting that “voucher recipients tend to live in communities that are far more typical of all renters than do public housing residents”); Ellickson, *supra* note 89, at 1010–16 (expressing skepticism about the magnitude of the benefits of neighborhood economic integration, but concluding that the Section 8 voucher program “is the more potent instrument [compared to project-based programs] for the affirmative promotion of economic integration”).

114. *See supra* notes 31–37 and accompanying text.

115. Of course, after comparing Section 8 and alternative federal low-income housing programs to the central common characteristics of recent progressive-property accounts, one might well conclude that Section 8 is a *better* example of the new progressive-property approach than these alternatives. My conclusion here is slightly weaker: I claim only that Section 8 is *at least as good* an example of the new progressive property as alternative federal low-income housing

progressive-property ends much more *efficiently* than other federal low-income housing programs.<sup>116</sup> Accordingly, comparing Section 8 to other low-income housing programs suggests a more general point about the previously ambiguous nature of overall economic efficiency within a progressive-property framework: when comparing a program or property regime to alternative programs, if the initial program serves the central ends of the new progressive property at least as well as its alternatives but with greater efficiency, then from a progressive-property perspective, such a program should be more worthy of protection or advancement than the related or alternative programs—especially if the two programs conflict.<sup>117</sup> This general rule incorporates considerations of economic efficiency into a progressive-property framework while keeping them subordinate to the central values and ends of recent progressive-property accounts. Using this general rule, along with the plural norms central to recent progressive-property accounts, contemporary rent control can be evaluated in its own right and compared with Section 8 from a progressive-property perspective.

#### *B. Rent Control as an Example of the New Progressive Property*

Although Section 8 has never previously been identified as an example of the new progressive property, some recent progressive-property accounts have already picked out local rent-control and eviction-protection ordinances as examples of the norms and values for which

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programs, and is more efficient (or, at least, less inefficient) to boot.

116. See GLAESER & GYOURKO, *supra* note 78, at 115 (“We are sympathetic to the view that cash is preferable to in-kind transfers, but if we are going to subsidize the housing of the poor, then vouchers are preferable to all the existing alternatives.”); SCHWARTZ, *supra* note 83, at 206–07 (noting that rental vouchers are far less expensive per unit [than project-based alternatives], “potentially allowing the government to assist more households with the same amount of funding”); Ellickson, *supra* note 89, at 995 (noting that “most housing economists who have addressed the issue assert that, as a general matter, portable tenant-based subsidies are markedly more efficient and fairer than project-based subsidies”).

117. The straightforward logic behind this conclusion is especially clear with respect to otherwise progressive *housing* programs. As discussed above, programs that serve the generally progressive goal of providing decent low-income housing are not entitlements in the United States. See *supra* note 85 and accompanying text. Accordingly, using overall efficiency as a tie-breaker between otherwise comparably progressive housing programs allows policy makers to provide more low-income housing.

As will be discussed in greater detail below, two or more otherwise progressive-property programs may conflict with one another, creating unintended consequences that are antithetical to the to the central values and ends of the new progressive-property approach. See *infra* Part IV. Therefore, the general rule of thumb discussed here may have significant impacts on arguments about specific property programs with substantial practical impact.

they advocate. More specifically, some recent progressive-property accounts have pointed out that local rent-control and eviction-protection ordinances attempt to protect crucially important dignitary interests through property law—namely, the longstanding bonds that some land users form with land they do not own.<sup>118</sup> In addition, some accounts have identified the standard defense of rent control, discussed in more detail below, as an important precursor to many of the arguments central to the new progressive property.<sup>119</sup>

Although some recent progressive-property accounts have already noted the link between the new progressive property and the standard defense for rent control, some brief background about the long and somewhat complicated evolution of rent-control is necessary before analyzing whether contemporary, local rent-control and eviction-protection ordinances are a good fit with the ends and values advanced by the new progressive property. Though rent control programs are in relative decline today,<sup>120</sup> rent control has, in the past, been among the most significant governmental programs designed to provide affordable housing in the United States.<sup>121</sup>

The history of rent control programs is arguably older than the common law,<sup>122</sup> but the history of rent control in this country did not begin until the World War I era, when several cities and states adopted temporary rent-control or eviction-control measures.<sup>123</sup> Although rent

118. See, e.g., Peñalver, *supra* note 7, at 882–83 (suggesting that some property regimes and doctrines do recognize the “crucially important dignitary interests” key to a virtue-based normative theory of property, and citing rent control and eviction-protection statutes as an example of same).

119. See Alexander, *Pluralism and Property*, *supra* note 6, at 1017–19, 1032–35 (discussing Margaret Radin’s personhood theory of property generally and her arguments regarding the normative justifiability of rent control specifically, and concluding that both share important characteristics with his social obligation theory of property).

120. GLAESER & GYOURKO, *supra* note 78, at 59 (noting that “[t]here are now only four states in the United States with rent-controlled cities: California, Maryland, New York, and New Jersey”).

121. See, e.g., *id.* at 58 (“Rent control historically has been among the most important interventions in housing markets.”).

122. See, e.g., John W. Willis, *A Short History of Rent Control Laws*, 36 CORNELL L.Q. 54, 59–68 (1950) (detailing history of rent control efforts from Roman law through the 20<sup>th</sup> Century).

123. See, e.g., Kenneth K. Baar, *Rent Control in the 1970’s: The Case of the New Jersey Tenants’ Movement*, 28 HASTINGS L.J. 631, 634 (1976) (“Between the years 1920 and 1923, several cities and states adopted rent control or eviction control statutes in response to the housing crisis created by World War I. They were seen as temporary emergency measures which would have been unconstitutional under normal peacetime conditions.”).

The temporary nature of these original American rent and eviction control restrictions was underscored by the Supreme Court, which held that such “regulation[s] [may be] justified only as a temporary measure. A limit in time, to tide over a passing trouble, well may justify a law that could

and eviction controls are creatures of state and local law today,<sup>124</sup> the history of rent control in this country has been marked by two significant federal interventions. The first occurred with the reintroduction of rent controls by the federal government during World War II, as part of the federal government's general price-control program.<sup>125</sup> Federal rent control was short-lived, essentially ending after wartime price controls expired, and the end of wartime federal controls left to state and local governments the issue of whether to keep, modify, or abolish rent control.<sup>126</sup> However, federal rent controls emerged again in the early 1970s, when President Nixon ordered an initial ninety-day national freeze and subsequent limited caps on rents, wages, and prices,<sup>127</sup> using the power granted to the executive under the Economic Stabilization Act of 1970.<sup>128</sup> Although this second round of federal rent controls was short-lived,<sup>129</sup> a second wave of state and local rent controls emerged in

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not be upheld as a permanent change." *Block v. Hirsh*, 256 U.S. 135, 157 (1921). By 1929, even New York City, the American jurisdiction with perhaps the longest and most extensive experience with rent control, had abolished its initial World War I-era rent controls. Baar, *supra*, at 634.

124. See GLAESER & GYOURKO, *supra* note 78, at 59 (noting that rent control has been effectively turned over to state and local governments); Kathryn Lori Partrick, Comment, *Rent Control: A Practical Guide for Tenant Organizations*, 15 SAN DIEGO L. REV. 1185, 1187 (1978) (noting the various ways that state and local governments can enact rent control legislation).

125. GLAESER & GYOURKO, *supra* note 78, at 58-59.

126. See, e.g., *id.* (noting that once the Emergency Price Control Act of 1942 expired after World War II, federal rent control on new buildings was eliminated by the Federal Housing and Rent Act of 1947, which effectively ended federal involvement in rent control, making rent control or its absence a state and local issue).

127. See Exec. Order No. 11,615, 3 C.F.R. 602 (1971-75) (known as "Phase I," beginning on August 15, 1971, and involving an initial ninety-day freeze on all wages, prices, and rents); Exec. Order No. 11,627, 3 C.F.R. 621 (1971-75) (known as "Phase II," beginning on December 28, 1971 and ending January 12, 1973, and involving a subsequent economic stabilization program, which permitted landlords to increase rents by a limited amount each year").

The limited amount of rent increases landlords were allowed to seek under Phase II was complicated and varied across states, municipalities, and even individual units, depending in part on the basis of state and local property tax increases, potential increases based on capital improvements, lease renewals, and hardship operations, as well as exemptions for small-scale landlords. Partrick, *supra* note 124, at 1186. Accordingly, many units were not subject to Phase II's regulation, and the overall enforcement of the regulations under Phase II, even for units nominally subject to the regulations, was relatively lax. Baar, *supra* note 123, at 639-40.

128. Economic Stabilization Act of 1970, Pub. L. No. 91-379, tit. II, 84 Stat. 799 (1970) (codified at 12 U.S.C. § 1904 (2006)).

129. Phase II was followed by Phase III, initiated by Exec. Order No. 11,695, 3 C.F.R. 741 (1971-75), which called for voluntary restraint regarding rent increases, but state and local rent control measures began to be passed at the end of Phase II. See, e.g., Partrick, *supra* note 124, at 1186 (noting that "[t]he termination of Phase II controls prompted passage of significant state and local rent control measures").

the mid- to late-1970s.<sup>130</sup>

Over the course of their history in the United States, rent and eviction controls have taken two forms.<sup>131</sup> The first type, sometimes called “first generation rent controls,”<sup>132</sup> involves straightforward caps on rents at a level below market rates.<sup>133</sup> The second type, sometimes called “second generation rent controls,”<sup>134</sup> allows rent levels to be set more or less freely when tenants first occupy an apartment, but then limit subsequent increases as long as the tenant remains.<sup>135</sup> Second generation rent controls may also contain eviction controls, which limit the permissible grounds for eviction and set procedures for local enforcement to prevent landlords from circumventing the substantive rent-increase restrictions by threatening to evict tenants who refuse to pay rent increases.<sup>136</sup> For example, the Los Angeles Rent Stabilization Ordinance (“LARSO”),<sup>137</sup> which is discussed at greater length below, is such a second-generation local rent-control ordinance.<sup>138</sup> Today, both

130. See, e.g., Baar, *supra* note 123, at 640–41 (noting that “[t]he termination of Phase II controls on January 12, 1973, resulted in the passage of more state and local rent controls,” and collecting examples from Maryland, New Jersey, Maine, Washington D.C., and Alaska).

131. See, e.g., GLAESER & GYOURKO, *supra* note 78, at 59 (“There have been two basic types of rent control in the United States. One . . . has capped rents at a level far below current market rates for those tenants who have lived in their apartments for a long time. Those rent levels would not persist if these tenants moved. The other type, often referred to as rent stabilization . . . allows landlords and tenants to fix rents more or less freely when the tenants first occupy the apartment, but limits increases thereafter.”).

132. See, e.g., David Shulman, *Real Estate Valuation Under Rent control: The Case of Santa Monica*, 9 J. AM. REAL EST. & URB. ECON. ASS’N 38, 39–40 (1981) (discussing background of first and second generation rent controls); see also Richard E. Blumberg, Brian Quinn Robbins & Kenneth K. Baar, *The Emergence of Second Generation Rent Controls*, 8 CLEARINGHOUSE REV. 240 (1974).

133. GLAESER & GYOURKO, *supra* note 78, at 59.

134. See, e.g., Shulman, *supra* note 132, at 39–40 (1981) (discussing background of first and second generation rent controls); see also Blumberg, Robbins, & Baar, *The Emergence of Second Generation Rent controls*, 8 CLEARINGHOUSE REV. 240 (1974).

135. GLAESER & GYOURKO, *supra* note 78, at 59.

136. Partrick, *supra* note 124, at 1202–03 (claiming that because landlords hold dominant bargaining positions when housing is in short supply, and because rent-control restrictions alone may be “circumvented by landlords who threaten to evict tenants who refuse to pay rent increases,” some rent-control measures “often limit the permissible grounds for eviction and set procedures for local enforcement”).

137. L.A., CAL., MUN. CODE ch. 15 (1979), available at <http://bit.ly/ReEuEn>.

138. LARSO contains both restrictions on rent, see, for example, chapter 15, section 151.04(A) of the Los Angeles Municipal Code (prohibiting any landlord from “demand[ing], accept[ing], or retain[ing] more than the maximum adjusted rent permitted pursuant to this chapter”), and limitations on the permissible grounds for eviction, see, for example, chapter 15, section 151.09 of the Los Angeles Municipal Code of 1979 (setting forth permissible grounds for

forms of rent control are dying out: only a few states contain municipalities with either type, and many states ban rent control outright.<sup>139</sup>

Critics of rent control argue that its popularity is dramatically dwindling both because it has failed in its main goal of making housing more affordable in high-cost markets, and because its many side effects have become more widely acknowledged since the last wave of rent-control ordinances were enacted in the 1970s.<sup>140</sup> The standard arguments against rent control are numerous and well developed: critics argue that rent control is highly inefficient and distorts housing markets;<sup>141</sup> is a poorly focused and potentially unfair redistribution device;<sup>142</sup> exacerbates the very housing shortages it is designed to

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eviction limited, for most rental units, to non-payment of rent, violation of the tenancy agreement, nuisance or criminal activity, refusal to grant access, renew a lease, unapproved subtenancies, renovations, demolition, removal from the rental market, or use of the property by the landlord or a family member or a resident manager, or government order).

LARSO is best understood as a second-generation rent-control ordinance: when the rental unit is voluntarily vacated by a tenant, or vacated as a result of a certain permissible evictions, then “[t]he landlord may increase the maximum rent. . . to any amount upon re-rental” of the unit. L.A., CAL., MUN. CODE ch. 15, § 151.06(C) (1979).

139. See, e.g., GLAESER & GYOURKO, *supra* note 78, at 59 (noting that “[t]oday, thirty-two states ban their municipalities from enacting local rent control rules,” and “only four states in the United States [contain] rent-controlled cities: California, Maryland, New York, and New Jersey”).

140. See, e.g., Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741, 770 (1988) (claiming that “the economics profession is united over rent control, as it is not over any other issue”); Edgar O. Olsen, *Is Rent Control Good Social Policy?*, 67 CHI.-KENT L. REV. 931, 940-41 (1991) (claiming that “[t]he shortcomings of rent-control ordinances are not limited to their unjustifiable patterns of benefits and costs,” but also because they are “highly inefficient redistributive devices” that “lead to higher costs of producing housing services in both the controlled and uncontrolled sectors,” as well as to “haphazard changes in consumption patterns by occupants of controlled units”); see also Bruno S. Frey et al., *Consensus and Dissension Among Economists: An Empirical Inquiry*, 74 AM. ECON. REV. 986, 988, 991 (1984) (noting that only 1.9 percent of the economists surveyed disagreed with the proposition that a “ceiling on rents reduces the quantity and quality of housing available”).

141. See, e.g., Epstein, *supra* note 140, at 770 (claiming that “[t]he strength of the [efficiency] case [against rent control] is shown by the efforts to circumvent it” because “[t]here is simply no effort to show that misallocations associated with rent control do not exist”); Olsen, *supra* note 140, at 944-45 (arguing that “[t]he benefits of a mature rent-control ordinance to tenants is far less than its cost to landlords because it leads to distortions in the consumption patterns of tenants and the production decisions of landlords” as well as “haphazard changes in consumption patterns”).

142. See, e.g., Olsen, *supra* note 140, at 944 (“No compelling justification has been offered for financing benefits to tenants by an implicit tax on landlords. There is no satisfactory explanation of why the magnitude of this tax on equally wealthy people should depend on the proportion of their assets held in . . . rental housing. The pattern of benefits is equally indefensible. . . . In short, rent control is a poorly focused redistributive device.”).

reduce;<sup>143</sup> reduces tenant mobility and increases commuting costs;<sup>144</sup> leads to unnecessarily formalized relationships between landlords and tenants, crowding out the possibility for increased social capital;<sup>145</sup> distorts landlords' incentives to maintain building quality, leading to dilapidation;<sup>146</sup> and tends to reduce the possibility of cooperation and increase the possibility of nasty behavior between landlords and tenants.<sup>147</sup> Much, though not all, of this criticism obviously comes from economists or scholars writing in what progressive-property accounts refer to as the law-and-economics approach.

The leading contemporary argument in defense of rent control has many similarities to the new progressive property;<sup>148</sup> indeed, some recent progressive-property accounts have acknowledged the close links between the new progressive property and the ideas behind rent control's standard defense.<sup>149</sup> The standard defense of rent control admits the potential efficiency losses picked out by many critics of rent control, but suggests that these potential losses may be offset by other gains of rent control, at least in certain situations.<sup>150</sup> More specifically,

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143. Epstein, *supra* note 140, at 767 (arguing that “[a]ll rent control statutes . . . depress the future total return of any investment,” leading to reduced future investments in housing stock, “so that rent control statutes only exacerbate the housing shortages they are said to alleviate”).

144. Robert C. Ellickson, *Rent Control: A Comment on Olsen*, 67 CHI.-KENT L. REV. 947, 948, 952–53 (1991) (noting that “[a]ll scholars agree that rent control lessens tenant mobility,” which “may lock in stale households,” “lock out the fresh entrants the community most needs to retain its vitality,” and “increase commuting costs” for both tenants in rent controlled units and others).

145. Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 226, 326 (2006) (noting that rent control “spawn[s] some of the most legalized of midgame relationships between landlords and tenants” who are then “uncommonly likely to turn to lawyers and courts to resolve spats”).

146. See, e.g., GLAESER & GYOURKO, *supra* note 78, at 60 (noting that rent control “limits landlords’ incentive to invest in building quality,” then gathering citations and noting the “abundant evidence” on the link between “rent control and quality deterioration”).

147. See, e.g., Ellickson, *Rent control*, *supra* note 144, at 949 (noting that “[r]ent control . . . tends to lock landlords and tenants into continuing uncooperative relationships” and “breeds nastiness in landlord-tenant interactions”).

148. Margaret Jane Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFF. 350 (1986). The pre-eminence of Radin’s defense of rent control can be seen in the prominence of her arguments in many of the leading critiques of rent control. See, e.g., Epstein, *supra* note 140, at 770–73 (focusing solely on Radin’s “communitarian” defense of rent control); see also Olsen, *supra* note 140, at 934–35 (noting that Radin’s detailed analysis stands in “stark contrast with the many superficial attempts to justify rent control”).

149. See *supra* notes 118–119 and accompanying text.

150. Radin, *supra* note 148, at 352 (suggesting that “the level of efficiency losses” picked out by critics of rent control might “be outweighed by other gains” and offering instead a normative account of the potential value of rent control “that takes into account the uncertainties and complexities of actual practice”).

the standard defense of rent control begins by suggesting, as a baseline, that most tenants generally ought to have a stronger interest in retaining their longstanding homes than most landlords ought to have with respect to their freedom of contract or the maintenance of their profit margins.<sup>151</sup> However, according to the standard defense of rent control, this baseline rule does not apply to would-be tenants, because their potential property interest in a future tenancy has not yet become bound up, in meaningful, noncommercial ways, with their personhood.<sup>152</sup> Thus, the standard defense suggests that rent and eviction controls may be justified, even in the face of some of the negative side effects identified by various critics, as long as those controls can be justified in terms of more significant benefits related to protecting property interests in personhood or existing communities.<sup>153</sup>

This reasoning has obvious similarities to recent progressive-property accounts.<sup>154</sup> However, at least one recent progressive-property account has argued that progressive-property theory can and should be able to provide a more complete evaluation of rent-and-eviction controls because the standard personhood defense of rent control, despite its express consideration of certain communitarian goals, fails to give aggregate well-being its due.<sup>155</sup> More specifically, according to recent progressive-property accounts, although the standard defense identifies important values potentially served by rent and eviction controls, it fails to provide the sort of systematic framework for evaluating how much loss, and what sorts of negative side effects, should be tolerated to serve these values.<sup>156</sup> By its own terms, then, the new progressive property

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151. See *id.* at 359–60 (stating “[t]he intuitive general rule . . . that preservation of one’s home . . . [or] noncommercial personal use of an apartment as a home is morally entitled to more weight than purely commercial landlording”).

152. *Id.* at 361–62.

153. *Id.* at 371. Radin does not attempt to provide a blanket defense of rent control; arguing that in situations where “it does not make sense to speak of property for personhood or of community with respect to the tenants involved, then on balance rent control may not be justified, especially if most landlords appear noncommercial or efficiency losses are high.” *Id.*

154. See, e.g., JEDEDIAH PURDY, *THE MEANING OF PROPERTY: FREEDOM, COMMUNITY, AND THE LEGAL IMAGINATION* 20 (2010) (drawing a relationship between Radin’s theory of property as personhood and the communitarian, virtue-ethics based theory advanced by Peñalver).

155. Peñalver, *supra* note 7, at 862.

156. *Id.* More specifically, according to Peñalver, although Radin makes “a convincing case” for granting tenants some form of rent and eviction control based on the potential value of some tenants’ attachments to their long-time homes – a potential value much in keeping with the recent progressive-property accounts – her account is ultimately flawed because it “provides no framework for assessing *how much* of an economic sacrifice society ought to tolerate . . . to protect the personhood interests of individual tenants.” *Id.*

must be capable of providing a more thorough, systematic, and context-specific evaluation of both the benefits and the costs of rent and eviction controls if it is to provide a new and lasting contribution to this debate.

What, then, should an evaluation of rent and eviction controls based on recent progressive-property accounts look like? The substantive similarities between the standard defense of rent control and the new progressive property have already been noted.<sup>157</sup> To improve upon the standard defense of rent control, therefore, an evaluation of rent control from the perspective of the new progressive property must begin where the standard defense of rent control leaves off: by providing greater specificity about when, on balance, rent control may not be justified, given its acknowledged negative side effects.<sup>158</sup> Because of the importance of context to recent progressive-property accounts,<sup>159</sup> such an evaluation is not possible in the abstract: some general comparison to another property program or, if possible, some specific situation involving rent control must be analyzed. At the end of this Part, I provide such a comparison, analyzing rent control and the federal Section 8 housing voucher program from a progressive property standpoint. In Part IV.B below, rent control's relative merit or lack thereof from a progressive-property perspective will be examined in the context of the rent and eviction control ordinances in Los Angeles, their interaction with Section 8, and the conflict at the center of this interaction. But before turning to the close examination of rent control and Section 8 in such a specific situation, it is useful to compare rent control and Section 8 more generally.

As discussed above, many of rent control's acknowledged negative side effects arise from its inefficient distortion of economic incentives for participants in housing markets.<sup>160</sup> However, some of rent control's negative side effects also impact ends that are more central to recent progressive-property accounts.<sup>161</sup> In light of these substantial negative and anti-progressive side effects of rent control,<sup>162</sup> Section 8, which

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157. *See supra* notes 148–155 and accompanying text.

158. *See supra* note 153.

159. *See* Alexander et al., *A Statement of Progressive Property*, *supra* note 4, at 744 (claiming that deliberation about property entitlements “should include non-deductive, non-algorithmic reflection” that is “both principled and contextual”).

160. *See supra* notes 140–144 and accompanying text.

161. *See supra* notes 142, 144–147 and accompanying text (noting that rent control may seem unfair, may breed “nastiness” in landlord and tenant behavior, and may lock the parties into prolonged and uncooperative social relationships).

162. To be clear, in calling these side effects “negative” or “undesirable,” I mean only that

largely lacks such negative and anti-progressive side effects, seems on balance to be at least as progressive as rent control.<sup>163</sup> At the same time, of course, Section 8 does not impose the sorts of inefficient distortions that rent control inflicts on housing markets.<sup>164</sup> In other words, although rent control has previously been identified as an example of the new progressive property,<sup>165</sup> and although Section 8 has not previously been so identified, Section 8 is at least as progressive as rent control. It is also more efficient.

This conclusion has a number of important consequences for both low-income housing policy and the larger academic debate. To begin, as argued above,<sup>166</sup> if a program such as Section 8 serves the central ends of the new progressive property at least as well as its alternatives but with greater efficiency, then from a progressive-property perspective, one should generally seek to protect or advance such a program at the expense of the less efficient alternative, especially if the programs conflict. Accordingly, if, as I argue in Part IV below, the intersection of rent control and Section 8 generates conflict that is deeply antithetical to the ends advanced by recent progressive-property accounts, then it will be necessary to consider policy solutions that seek to preserve Section 8 while eliminating or phasing out rent control, even from the standpoint of the new progressive property.<sup>167</sup>

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they are antithetical to the central values and ends described in recent progressive-property accounts, aside from whatever negative effects they may have according to other approaches to property law and theory. Insofar as they are antithetical to the central values and ends described in recent progressive-property accounts, they are also “anti-progressive,” and I use the term in this sense.

163. Of course, after comparing Section 8’s beneficial impact on the dignity and autonomy of many low-income tenants with the related anti-progressive social and behavioral side effects of rent control, one might well conclude that Section 8 is a *better* practical example of the values and ends endorsed by the new progressive property than rent control. My conclusion here is slightly weaker: at this point, I claim only that Section 8 is *at least as good* an example of the values and ends endorsed by the new progressive-property approach as most local rent-control ordinances, and more efficient (or, at least, less inefficient) to boot. For an argument on progressive-property grounds that that rent control should be eliminated or phased out in most contexts in favor of Section 8, see Part IV.B and Part V, *infra* at notes 216–231 and accompanying text.

164. *Compare, e.g.*, note 116 and accompanying text (gathering sources and concluding that Section 8 is a more efficient means of low-income housing assistance, or at least less inefficient, than existing alternatives), *with, for example*, notes 140–144 and accompanying text (describing rent control’s inefficient distortion of housing markets).

165. *See supra* notes 118–119 and accompanying text.

166. *See supra* note 117 and accompanying text.

167. *See infra* Part IV.B. This means that, contrary to conventional wisdom, there is a significant practical convergence in this context between the ultimate policy solutions that should be prescribed by both the new progressive-property approach and by the law-and-economics approach.

#### IV. LESSONS FOR THE NEW PROGRESSIVE-PROPERTY APPROACH FROM THE INTERSECTION OF RENT CONTROL AND SECTION 8

Part IV moves beyond the general comparison of rent control and the federal Section 8 housing voucher program to look more closely at their intersection through the lens of recent litigation. Part IV.A reviews this litigation in detail. Part IV.B discusses the significance of this litigation and the broader conflict between Section 8 and rent control that this litigation illuminates for the new progressive-property approach. Part IV.B concludes by suggesting that even from a progressive-property perspective, it may be appropriate to phase out or eliminate rent control to protect the progressive property ends that Section 8 realizes.

##### *A. Recent Litigation at the Intersection of Rent Control and Section 8*

Recent litigation arising from the intersection of the federal Section 8 housing voucher program and local rent and eviction controls offers a unique opportunity to test and clarify the new progressive property. In particular, this conflict makes it possible to further clarify the ambiguous role of some basic law-and-economics tools within the larger progressive-property framework, by demonstrating additional significant and practical roles for these tools that advance, rather than compromise, the fundamental norms and goals of progressive property theory. Moreover, examining the conflict between Section 8 and local rent and eviction controls sheds new and useful light on the new progressive property's communitarian nature. To explore these insights, it will first be necessary to look at the litigation that reveals the low-income housing conflict at the intersection of Section 8 and rent control in more detail.

This conflict has been most visible in Southern California—more specifically in greater Los Angeles—which possesses a rental-housing market that is unusually significant and complicated.<sup>168</sup> Due to Los

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In short, both positions should lead to the conclusion that rent control should be eliminated or phased out, for the reasons discussed above from a law-and-economics perspective, see notes 140–144 and accompanying text, and for the reasons given below from a progressive-property perspective, see *infra* Part IV.B.

168. The share of Los Angeles residents who rent their homes is double the national rate, though roughly equivalent to the rental rate of other major U.S. metropolitan areas, such as New York and Chicago. DANIEL FLAMING ET AL., ECONOMIC ROUNDTABLE, ECONOMIC STUDY OF THE RENT STABILIZATION ORDINANCE AND THE LOS ANGELES HOUSING MARKET 26, 29 (2009). However, Los Angeles renters typically pay a larger share of their income than renters in either New York or Chicago, and substantially more than average renters elsewhere in the United States. *Id.* at

Angeles's size and socioeconomic diversity, the Section 8 housing voucher program, administered through Los Angeles-area PHAs, is one of the largest in the nation.<sup>169</sup> Yet Section 8 is not the only housing-assistance regime in Los Angeles. Rent control also plays an important role, as Los Angeles is also home to one of the most significant, remaining, local rent-control ordinances in the United States. The Los Angeles Rent Stabilization Ordinance ("LARSO"), enacted in 1979,<sup>170</sup> is an example of a second-generation rent-control ordinance: it contains provisions for limited annual rent increases<sup>171</sup> as well as a series of eviction restrictions that limit the legal grounds on which landlords may evict tenants.<sup>172</sup> Within the City of Los Angeles, LARSO covers all rental units in buildings with two or more rental units constructed before October 1, 1978, with a few additional exceptions and exemptions.<sup>173</sup> As a result, the number of rental units subject to LARSO has tended to decline since 1978, as new units have been constructed and old units have passed through LARSO's various exceptions and exemptions;<sup>174</sup> however, LARSO still covers over 620,000 rental units,<sup>175</sup> a total equivalent to almost two-thirds of all rental units and about forty percent of all housing in Los Angeles.<sup>176</sup> Permissible grounds for eviction under

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28. From 1970 until 2006, Los Angeles's population grew 34 % while its housing inventory grew only 26%. *Id.* at 25–26. Much of this scarcity can be attributed to the 1980s, when Los Angeles's population grew 17% but the housing inventory grew only 9%. *Id.* Los Angeles's rent-control ordinance, discussed in more detail immediately below, was enacted in 1979.

169. The Housing Authority of the City of Los Angeles ("HACLA"), a Los Angeles-area PHA that administers the Section 8 housing voucher program in the area, administers the second-largest housing voucher program in the United States, with a total of over 45,000 housing vouchers at present. *See Section 8 Housing*, HACLA, <http://www.hacla.org/section8/> (last updated Oct. 2012).

170. L.A., CAL. MUN. CODE ch. 15 (2012), available at <http://bit.ly/ReEuEn>.

171. *See id.* §§ 151.04(A), 151.06(C) (detailing restrictions on annual rent increases for existing tenancies and the permissible grounds for maximum rent increases including annual adjustments and unrestricted increases during permissible vacancies or evictions).

172. *See id.* § 151.09 (detailing permissible grounds for eviction in registered rent-controlled units in Los Angeles).

173. *Id.* § 151.02 (Rental Units) (defining those rental units covered by LARSO). Additional exceptions include units taken out of the rental housing market as well as those that have undergone "substantial renovation" since 1980, as determined by reference to the cost of the renovation. *Id.*

174. For more detailed information about the distribution of lost rent-controlled units in Los Angeles, and the relation of this loss to the construction of new affordable-housing rental units, see BETH STECKLER & ADAM GARCIA, AFFORDABILITY MATTERS: A LOOK AT HOUSING CONSTRUCTION & AFFORDABILITY IN LOS ANGELES 25–29 (2008), available at <http://www.livableplaces.org/files/Affordability+Matters+Final+2.pdf>.

175. L.A. HOUS. DEP'T, POLICY & PLANNING UNIT, A GUIDE TO AFFORDABLE RENTAL HOUSING IN THE CITY OF LOS ANGELES 4 (2011).

176. DANIEL FLAMING ET AL., *supra* note 168, at 2.

LARSO for registered units are limited to nonpayment of rent and a few other narrow grounds, including removal from the rental market, significant tenant misconduct, or criminal activity.<sup>177</sup> LARSO's rent controls and eviction restrictions apply to tenants who are assisted by the Section 8 housing voucher program, provided that they live in a rental unit that qualifies for LARSO's protections.<sup>178</sup> At the same time, of course, tenants can be covered by LARSO's restrictions on rent increases and permissible grounds for eviction even if they do not qualify for the Section 8 housing voucher program, again, provided that they live in a rental unit that qualifies for LARSO's protections.<sup>179</sup> As a result, tens of thousands of low-income tenants in Los Angeles who participate in the Section 8 housing voucher program have used their vouchers in rent-controlled units, often living alongside unassisted tenants, many of whom enjoy the same restrictions on rent increases and permissible grounds for eviction imposed by LARSO as their Section 8-assisted neighbors.

During the last decade, California landlords in rent-controlled jurisdictions—particularly in greater Los Angeles—began using various new types of form eviction notices, marketed by law firms, in a series of attempts to evict substantial numbers of tenants who were both receiving Section 8 housing-voucher assistance and living in rent-controlled units.<sup>180</sup> The forms changed over time in response to legal challenges by

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177. See § 151.09 (setting forth permissible grounds for eviction— limited, for most rental units, to non-payment of rent, violation of the tenancy agreement, nuisance or criminal activity, refusal to grant access, renew a lease, unapproved subtenancies, renovations, demolition, removal from the rental market, use of the property by the landlord or a family member or a resident manager, or government order).

178. See *id.* § 151.02 (Rental Units) (5) (expressly noting that LARSO's protections and restrictions also apply to “rental units for which rental assistance is paid pursuant to the [Section 8] Housing Choice Voucher Program codified at 24 C.F.R. part 982,”); see also *Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197, 1205-06 (9th Cir. 2009) (commenting on same).

179. Indeed, the many exceptions to LARSO's coverage suggest that objections about the lack of fairness and distributional equity often levied against rent control in general may be particularly significant in this context. The fact that some relatively affluent tenants qualify for LARSO's protection while some relatively poorer tenants do not is one of the main objections raised by critics of this rent-control program. See, e.g., Paul Habibi & Eric Sussman, Op-Ed., *L.A. Should Abandon Rent Control*, L.A. TIMES, May 21, 2010 (claiming that it “makes little sense” that under LARSO, a “lawyer earning \$200,000 a year renting in a pre-1978 building would be afforded the benefits of rent control, whereas a struggling retiree living off Social Security, but renting in a post-1978 building, would not”). In general, a perceived lack of distributional equity is both an anti-progressive feature and a common criticism of rent control. See *supra* notes 47 and 142 and accompanying text.

180. For one example of these efforts and the litigation that ensued, see *Barrientos*, 583 F.3d at 1197. *Barrientos* and the immediately related litigation in California state and federal courts provide the most prominent example of litigation arising out of this fundamental conflict, but not

some tenants, but the essential substance remained the same, as all of the form notices were ostensibly based on federal regulations enacted to implement the Section 8 housing voucher program. The federal regulations cited in the form notices provide a general baseline of standards that apply to landlords and tenants who wish to participate in the federal program.<sup>181</sup> Among them is the “good cause” eviction standard, which provides additional substance to the statutory mandate that “during the term of the [assisted tenant’s] lease, the owner shall not terminate the tenancy except for serious or repeated violation of the terms and conditions of the lease, for violation of applicable Federal, State, or local law, or for other good cause.”<sup>182</sup>

More specifically, the federal good-cause eviction standard, as fully defined in the relevant regulations, provides that “‘other good cause’ . . . may include, but is not limited to . . . [a] business or economic reason for termination of the tenancy (such as sale of the property, renovation of the unit, or desire to lease the unit at a higher rental).”<sup>183</sup> Without citing any unit-specific facts that might be related to a business opportunity as defined by the statute and regulation, and without any other support related to specific tenant misconduct or another appropriate good-cause eviction ground under federal law or LARSO, the form notices simply cited the federal good-cause statute and regulations and stated that the landlord intended to terminate the assisted tenancy for a general

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the only example, as similar litigation has arisen in other cities with both substantial rent control and large populations of Section 8–assisted tenants.

More specifically, similar issues arose in litigation in New York, in, for example, *Rosario v. Diagonal Realty, L.L.C.*, 872 N.E.2d 860 (N.Y. 2007), in which the right of tenants assisted by the Section 8 housing voucher program to request renewal of their leases under local rent stabilization ordinances was also challenged and affirmed. For a more fulsome discussion of *Rosario*, and its close relationship to *Barrientos* and other similar state cases in California, see, for example, Erin Liotta, *United States Agrees that HUD Voucher Regulations Do Not Preempt Local Eviction Controls*, 39 HOUSING L. BULL. 201, 202 n.15 (2009) (noting the similarities between *Barrientos* and *Rosario*), and Jason Lee, *New York’s Highest Court Rules NYC Voucher Owners Must Offer Assisted Renewal Leases*, 37 HOUSING L. BULL. 158 (2007) (summarizing *Rosario*).

181. See generally 24 C.F.R. § 982 (2010).

182. 42 U.S.C. § 1437f(o)(7)(C) (2011) (emphasis added).

183. 24 C.F.R. § 982.310(d)(1)(iv) (2010). Although a business or economic reason may constitute good cause for the eventual termination of an assisted tenancy in jurisdictions without more searching local eviction controls, the regulations are clear that it does *not* constitute other good cause for termination during the initial lease term, which must last at least a year. See 24 C.F.R. §§ 982.309(a)(1), 982.310(d)(2) (2010) (stating that the initial lease term for a Section 8–assisted tenancy must be for at least one year, and that “[d]uring the initial lease term, the owner may not terminate the tenancy for ‘other good cause’ . . . based on . . . a business or economic reason”).

“business or economic reason,” namely, the general desire “to lease the unit at a higher rental rate.”<sup>184</sup> This conduct was, at best, in tension with LARSO, and it led to the litigation ultimately resolved by the Ninth Circuit in *Barrientos v. 1801-1825 Morton LLC*.<sup>185</sup>

On their collective face, the form notices at issue in *Barrientos* and the related litigation in California state courts obviously sought to evade the eviction restrictions imposed by LARSO, as none of the stated reasons for the attempted evictions in the form notices met the grounds for permissible evictions under LARSO.<sup>186</sup> Accordingly, hundreds of tenants across Southern California sought to challenge the legality of the attempted eviction notices, either by resisting subsequent eviction actions brought by the landlords or by filing declaratory judgment actions before an eviction action could be brought.<sup>187</sup> The landlords typically defended the legality of the notices, both in *Barrientos* and in the related litigation,

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184. See, e.g., *Barrientos*, 583 F.3d at 1206 (reproducing the relevant section of one instantiation of the form notices). More specifically, the notices stated that:

[t]he grounds for termination of your tenancy are based upon . . . 24 C.F.R. 982.310(d)(1)(iv), which allows the landlord to terminate the rental agreement for a business or economic reason, including but not limited to, the desire to opt-out of the Tenant Based Section 8 Program and or the desire to lease the unit at a higher rental rate. Prior to the service of this notice, the landlord made a business decision to no longer participate in the Section 8 voucher program for your unit.

*Id.* (reproducing the relevant excerpts of one form notice). Although the specific phrasing of this form notice varies slightly from earlier and subsequent versions of the form notice that were also litigated in California courts at around the time of *Barrientos*, the essential substance is the same, and the variations will not be discussed in greater detail in this Article. The essential substance of this notice is also, of course, quite similar to the substance of the legal issues litigated in *Rosario*, in which a New York landlord attempted to evict a Section 8–assisted tenant from a rent-controlled unit after informing the local housing authority that it “no longer wished to participate in the Section 8 program with respect to [the tenant], and refused the [relevant housing authority’s Section 8] subsidy payments for her apartment.” 872 N.E.2d at 862.

The notices at issue in *Rosario* did not frame the issue of whether unspecified business or economic reasons constituted other good cause under the federal Section 8 statutes and regulations as clearly as the notices in *Barrientos*. Accordingly, *Barrientos* presents a much more useful example with which to examine and test the potential roles within a progressive-property framework of efficiency analysis and basic economic incentives, and for this reason, it is discussed at much greater length here. Nevertheless, the preemption questions at issue on the surface of the litigation and, more importantly, the fundamental, low-income housing conflict that the litigation illuminates are substantially the same.

185. 583 F.3d 1197 (9th Cir. 2009).

186. See L.A., CAL., MUN. CODE ch. 15, § 151.09 (2012) (setting forth permissible grounds for eviction under LARSO).

187. Many of these tenants were represented as part of a coordinated effort that included lawyers from the Los Angeles Legal Aid Foundation; Munger, Tolles & Olson LLP; and the National Housing Law Project. In the interest of disclosure, I was employed by Munger, Tolles & Olson LLP while representing many of these tenant-litigants.

by arguing that the Section 8 good-cause eviction standards set forth in the relevant federal statute and regulations preempted the more stringent eviction controls found in LARSO.<sup>188</sup>

The potential consequences of the landlords' attempts to uphold these form notices in *Barrientos* are best illustrated by a brief thought experiment. Imagine two long-time neighbors, Sam and Ursula, who rent neighboring rent-controlled units subject to LARSO from a common landlord, Larry. Sam and Ursula both signed initial one-year leases on their rental units several years ago. Since that time, protected by the eviction restrictions of LARSO, they have remained in their rental units and continued to remit regular rent payments to Larry without signing another lease.<sup>189</sup> Larry, for his part, has consistently sought and received annual upward adjustments to the total rent for both units equal to the maximum annual adjustment permitted under LARSO. All in all, Sam and Ursula's tenancies, total rent payments, and rental units are largely identical except in one detail: tenant Sam receives Section 8 housing voucher assistance, while Ursula's tenancy is unassisted by any federal program.<sup>190</sup>

Had the landlords' argument about the form notices prevailed, then landlord Larry would now be able to evict Section 8-assisted Sam with a form eviction notice, based solely on Larry's general business or economic desire to raise the rent on Sam's unit. However, Larry would still not be able to evict unassisted tenant Ursula except on one of the grounds specifically permitted under LARSO. Such a business or economic reason for evicting Section 8-assisted Sam would almost always be present because LARSO, like many other second-generation rent-control ordinances, places caps on year-to-year rent increases within an ongoing tenancy while allowing rent increases without restriction during periods of permissible vacancy.<sup>191</sup> Indeed, under the landlords'

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188. More specifically, in *Barrientos*, the landlords argued that 24 C.F.R. § 982.310(d)(1)(iv), which specifies that "good cause" under the federal "good cause" standard for Section 8 evictions "may include [the] desire to lease the unit at a higher rental," preempted the relevant provisions of LARSO restricting the grounds for permissible evictions from rent-controlled units.

189. The factual pattern of each of these hypothetical tenancies is thus similar to the patterns at issue in *Barrientos* and many of the other cases that were litigated. In general, in such rent-controlled units in Los Angeles, tenants and landlords do not execute additional leases beyond the initial one-year period although tenants remain in possession and landlords may seek annual adjustments pursuant to LARSO.

190. Again, aside from this single difference between Sam and Ursula's tenancies, assume roughly similar lengths of tenancy, roughly equal total rents (once Sam's voucher payments are included), and more or less identical rental units.

191. *Compare* L.A. MUN. CODE ch. 15, § 151.04(A) (2012) (detailing restrictions on annual

interpretation, this business or economic reason is both enabled and effectively *generated* by the intersection of LARSO with Section 8.

More specifically, Larry's business or economic reason for evicting Section 8-assisted Sam is simply Larry's pre-existing desire to raise the rent on Sam's unit, during a period of a permissible vacancy, beyond the limits of the annual increases permitted for ongoing tenancies under LARSO.<sup>192</sup> And under the landlords' interpretation of the regulations, this desire becomes possible; therefore, it becomes an intelligible business or economic reason, simply because the landlords' interpretation makes an eviction on these grounds permissible, if only for Section 8-assisted tenants like Sam. In one swoop, therefore, the preemptive relationship between Section 8 and LARSO advanced by the landlords would entirely strip away LARSO's substantive protections from Section 8-assisted tenancies and only Section 8-assisted tenancies, while also dramatically enhancing the incentives for landlords to evict Section 8-assisted tenants.<sup>193</sup>

The landlords' arguments in *Barrientos* and most of the related cases were, however, unsuccessful. Courts have generally found that the federal good-cause eviction standards for Section 8 tenancies were intended as a floor, setting an absolute minimum baseline to protect tenants

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rent increases for existing tenancies), *with* L.A., CAL., MUN. CODE ch. 15, § 151.06(C) (2012) (detailing permissible grounds for maximum rent increases, including annual adjustments and unrestricted increases during permissible vacancies or evictions).

192. Given the assumptions we have made about Sam and Ursula's near-identical units, we can further assume that Larry has at least a somewhat similar desire to evict Ursula on permissible grounds, thereby giving him the ability to raise the rent on her unit beyond the limits of the annual increases permitted for ongoing tenancies under LARSO as well. For reasons discussed in Part III.B, *infra*, Larry's desire to raise unassisted Ursula's rent may be less than his desire to raise Section 8-assisted Sam's rent, but this introductory hypothetical remains instructive so long as Larry's desire to raise Ursula's rent is at least comparable to his desire to raise Sam's rent, an assumption that need not be compromised by this detail.

193. Indeed, the incentives to discriminate against existing Section 8 tenants that would face landlords like Larry under such an interpretation of the federal regulations would be far stronger than this simple hypothetical might indicate. Under the landlords' interpretation of the regulations advanced in *Barrientos* and elsewhere, after evicting Sam with the form notice and raising the rent of Sam's former unit by an unrestricted amount, Larry's revenue would be maximized if he could then re-rent the unit for the one-year term to a subsequent Section 8-assisted tenant Stella, followed by a similar form notice eviction of Stella that would enable Larry to make yet another unrestricted rent increase. Given the long waiting lists of qualified Section 8-assisted tenants seeking apartments in Los Angeles and elsewhere, such a course of behavior might well be more than a purely academic possibility. In light of the distortions rent control inflicts on the rental housing market, this behavior might ultimately lead to the most efficient use and assignment of this specific rental unit. But it would frustrate or undermine many of the progressive-property ends served by Section 8. *Cf. supra* Part III.A (setting forth the progressive-property ends served by Section 8).

participating in the program across the country, rather than as a ceiling that would preempt more searching, local tenant protections where they exist, such as the eviction controls found in LARSO.<sup>194</sup> Beyond the doctrinal preemption issues upon which the litigation facially turned, this is the right result from a progressive-property perspective for several reasons.<sup>195</sup> First, recent progressive-property accounts seek to identify and defend systems of property law that will provide a set of rules and obligations to protect more vulnerable members of society, whose ability to flourish might be harmed by the actions of property owners.<sup>196</sup> The holding of *Barrientos* and similar results in related litigation around the country achieve this end by protecting the most vulnerable and materially disadvantaged parties involved—namely, tenants receiving Section 8 housing vouchers in rent-controlled apartments—from exploitation by their landlords and discriminatory treatment compared to unassisted tenants in similar rent-controlled apartments.

The results of *Barrientos* and its related litigation also protect additional progressive-property values and ends from being drastically eroded. For example, the new progressive property seeks to constrain and guide the behavior of property owners by emphasizing plural and communitarian norms, the social obligations that property owners ought to bear toward disadvantaged members of society, and the flourishing model for owners and nonowners alike.<sup>197</sup> Had *Barrientos* and its related cases turned out the other way, the sorts of long-running Section 8-assisted tenancies that encourage greater individual and community

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194. See, e.g., *Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197, 1215 (9th Cir. 2009) (concluding, on the basis of an “analysis of the statutory language and legislative history” of Section 8, as well as several other factors, “that the HUD regulation and LARSO do not actually conflict” because “LARSO does not impede the federal objective of providing affordable housing to low-income families” and “therefore, is not preempted . . . to the extent the HUD regulation permits eviction to obtain a higher rental, in the absence of contrary state or local law”).

195. To be clear, while it is important to understand the incentives facing the relevant landlords who chose to issue these form notices, I believe that *Barrientos* was correctly decided and that the results of *Barrientos* and its related litigation are defensible on both progressive and non-progressive-property grounds. At a theoretical level, however, this litigation is most interesting because it serves as a testing ground to explore the new progressive property in some theoretical and practical detail. Accordingly, a more fulsome discussion of the other issues involved in this litigation, as well as the overall outcome, has been left to other work. For a more detailed examination of the legal issues involved in *Barrientos*, see, for example, Christian Abasto et al., *HUD Voucher Regulations Do Not Preempt Local Eviction Controls*, 43 HOUSING L. BULL. 570 (2010).

196. See *supra* note 69 and accompanying text.

197. See *supra* notes 69–71 and accompanying text.

development<sup>198</sup> would have been even more difficult to achieve than they are at present, given the increased economic incentives and enhanced ability of landlords to create rapid turnover of their Section 8–assisted tenants in rent-controlled units.

*B. Lessons from the Anti-Progressive Conflict at the Intersection of Rent Control and Section 8*

In sum, the form notices that gave rise to *Barrientos* and its related litigation were profoundly antithetical to the values endorsed by recent progressive-property accounts, while the results of this litigation were roughly in accord with the new progressive property. However, the true significance of *Barrientos* and its related cases lies beyond the preemption issues they raise and their ultimate result. Rather, from a progressive-property perspective, the real significance of this litigation lies in the light it sheds on the true extent of the anti-progressive conflict at the intersection of the federal Section 8 housing voucher program and local rent-control ordinances.

Put another way, the landlord conduct at issue in *Barrientos* and the related litigation is but one symptom—albeit a clear and unmistakable symptom—of a much larger problem for the new progressive-property approach. This larger problem can be summarized as follows: the intersection of Section 8 and rent control drives landlords to inflict many different types of disproportionate and significantly anti-progressive burdens upon Section 8–assisted tenants in rent-controlled units, ranging far beyond the form notices at issue in *Barrientos*. To appreciate the nature and extent of this deeper problem, one must first rely, in part, upon some basic tools of the law-and-economics approach to property.<sup>199</sup> More specifically, one must apply these basic law-and-economics tools to some of the well-known anti-progressive side effects of rent control,<sup>200</sup> to appreciate how these known anti-progressive side effects of rent control alone might be exacerbated by the intersection of rent control and Section 8.

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198. See *supra* note 108 and accompanying text.

199. For more detail on what I mean by these “basic tools,” see *supra* notes 20, 60, and 63 and accompanying text.

200. See *supra* notes 142, 144–147 and accompanying text. In discussing these anti-progressive side effects of rent control and the combination of rent control and Section 8, I mean that they are negative from the standpoint of the new progressive property. Other sorts of commonly identified negative side effects of rent control, such as its distorting impact on housing market, are not included in this discussion.

So, for example, many commentators have claimed that in rent-controlled jurisdictions, landlords often seek under-the-table bribes from prospective or existing tenants to obtain or keep a tenancy, or to obtain services nominally guaranteed by lease or law.<sup>201</sup> It is easy to explain why this occurs if one uses some of the most basic, descriptive tools of law-and-economics analysis.<sup>202</sup> More specifically, if one assumes that at least some landlords are primarily motivated to maximize the full market value of their rental units, and if one knows that their efforts to do so are frustrated by a local rent-control ordinance, then one should expect such landlords to extract part of the rent-controlled difference by soliciting bribes from their tenants, backed up with threats of harassment or withheld services.<sup>203</sup>

This is an obviously anti-progressive side effect of rent control alone: far from providing rules that promote virtuous activity and correct nonvirtuous property owners,<sup>204</sup> rent control encourages illegal bribery and threats. Given the nature of Section 8 assistance, existing Section 8-assisted tenants in rent-controlled units, by their means-tested definition, are unable to match the ability of most unassisted existing or unassisted prospective tenants to provide these sorts of bribes. Therefore, one ought to expect that Section 8-assisted tenants in rent-controlled units will bear a disproportionate share of the anti-progressive burdens of harassment, threats, and withheld services that support these landlord demands. From a progressive-property perspective, this compounds the anti-progressive problems created by rent control alone: under the assumptions stated above, at the intersection of Section 8 and rent control, one should expect these negative side effects to be inflicted

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201. *See, e.g.*, GLAESER & GYOURKO, *supra* note 78, at 61 (noting the prevalence of “key money—a cash bribe for the landlord” paid by some tenants in rent-controlled units); Epstein, *supra* note 140, at 763 (noting “the common practice of paying key money to vacating tenants, or of greasing the palm of the superintendent” in rent-controlled jurisdictions). In Los Angeles, roughly one-third of the roughly 7,000 annual tenant complaints about possible violations of LARSO received by the City of Los Angeles Housing Department relate to allegedly illegal rent increases. FLAMING ET AL., *supra* note 168, at 12.

202. *See supra* notes 20, 60, and 63 and accompanying text.

203. Of course, disagreement exists as to how frequently, and under what circumstances, landlords engage in the kind of behavior described in notes 201, 206, 208, and the accompanying text. *See, e.g.*, Michael J. Mandel, *Does Rent Control Hurt Tenants? A Reply to Epstein*, 54 BROOK. L. REV. 1267, 1271, 1273 (1989) (agreeing with Epstein that rent control systems may lead to increased conflict between landlords and tenants, but arguing that rent control systems do not impact levels of maintenance or building quality).

204. *See supra* notes 69–71 and accompanying text.

disproportionately upon the most disadvantaged tenants.<sup>205</sup> More specifically, application of the basic law-and-economics tools discussed above suggests that rent-controlled tenants, especially Section 8–assisted rent-controlled tenants, who fail to make under-the-table payments to some landlords will face at least two problems: first, landlords will withhold services and maintenance nominally guaranteed by lease or law; second, landlords will undertake repeated and widespread efforts to evict such tenants on flimsy, pretextual, or illegal grounds.

With respect to the problem of withheld services and maintenance, it is relatively well established that rent-controlled units for all types of tenants tend to receive substantially lower levels of landlord service and maintenance than non-controlled units and, therefore, they tend to be substantially more dilapidated.<sup>206</sup> By applying the basic tools of law-and-economics analysis, one can see that the problem will likely be exaggerated for Section 8–assisted tenants in rent-controlled units. Compared to unassisted existing or unassisted potential tenants in rent-controlled units, Section 8–assisted tenants are relatively unable to make the under-the-table payments discussed above. Accordingly, one ought to expect that many landlords would allow rent-controlled units inhabited by Section 8–assisted tenants to become even more disproportionately dilapidated than rent-controlled units inhabited by unassisted tenants. From a progressive-property perspective, this compounds the anti-progressive problem that emerges under rent control alone, for at the intersection of Section 8 and rent control, the central progressive goal of Section 8—namely, providing a decent place to live for low-income households—is being directly subverted, as this negative side effect is likely being inflicted disproportionately upon the most disadvantaged tenants.<sup>207</sup>

With respect to the problem of repeated and widespread efforts to

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205. See *supra* note 69 and accompanying text.

206. See, e.g., GLAESER & GYOURKO, *supra* note 78, at 60 (noting the “abundant evidence on rent control and quality deterioration,” and collecting sources that tend to show that “rent-controlled units” in various jurisdictions are “disproportionately dilapidated”); Epstein, *supra* note 140, at 766 (noting that rent control “may well yield a reduction in the level of . . . maintenance and security”). In Los Angeles, tenants in rent-controlled units rate their apartments as being in worse condition than tenants in non-rent-controlled units, and they are almost twice as likely to rate their units as “Very Poor” or “Fairly Poor.” ECON. ROUNDTABLE, ECONOMIC STUDY OF THE RENT STABILIZATION ORDINANCE AND LA HOUSING MARKET, Powerpoint Briefing to the Housing, Community & Economic Development Committee, at 12 (Oct. 7, 2009), available at <http://bit.ly/REeKu>.

207. See *supra* note 69 and accompanying text.

evict tenants on flimsy, pretextual, or illegal grounds, it is also relatively well established that rent control generally tends to radically increase a landlord's returns from for-cause evictions or permissible vacancies. Simply put, for-cause evictions and permissible vacancies usually provide an escape hatch from the constraints of second-generation rent-control ordinances.<sup>208</sup> By applying the basic law-and-economics descriptive tools discussed above, one can see that the problem should become even worse, at least from a progressive-property perspective, at the intersection of Section 8 and rent control. More specifically, given that existing Section 8-assisted tenants in rent-controlled units are relatively unable to make the under-the-table payments discussed above, when compared to unassisted existing or potential rent-controlled tenants, one would expect landlords to invest disproportionate amounts in stretching or manufacturing for-cause grounds to terminate their rent-controlled Section 8-assisted tenants' tenancies.<sup>209</sup>

In sum, the use of very basic assumptions and analytic tools from the law-and-economics approach strongly suggests that the combination of a substantial rent-control program in a city with a significant number of Section 8-assisted tenancies will create and then compound these serious anti-progressive problems. Rather than providing rules that promote virtuous activity and correct the behavior of nonvirtuous property owners, the intersection of rent control and Section 8 provides incentives for potentially dishonest and even illegal landlord conduct.<sup>210</sup> Moreover, at the intersection of Section 8 and rent control, one should expect these negative, anti-progressive side effects to be inflicted disproportionately upon the most disadvantaged tenants.<sup>211</sup>

Although these basic law-and-economics tools have played a

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208. Epstein, *supra* note 140, at 764-65 (noting that "rent control laws radically increase the landlord's returns from for cause dismissal" and therefore give landlords "strong incentives to exploit minor breaches [of the terms of the tenancy] to escape rent control laws"). In Los Angeles, tenant complaints about potential violations of LARSO to the Los Angeles Housing Department about false or deceptive eviction notices are almost as common as complaints about illegal rent increases. FLAMING ET AL., *supra* note 176, at 13, 128, 138.

209. One might expect this to occur in a variety of overlapping ways: landlords systematically exploiting minor breaches of the tenancy by their Section 8 tenants; or worse, from a progressive-property perspective, landlords investing heavily and disproportionately in efforts to expand the frontiers of legally permissible evictions for Section 8 tenants; or worse still, from a progressive-property perspective, landlords harassing Section 8 tenants into vacating with the threat of such eviction actions; or worst of all, from a progressive-property perspective, landlords attempting to evict Section 8 tenants for flimsy, pretextual, or even fraudulent reasons.

210. See *supra* note 70 and accompanying text.

211. See *supra* note 69 and accompanying text.

significant predictive and explanatory role within the broader progressive property analysis provided immediately above, more evidence is needed to show that the predicted problem for the values and ends of the new progressive-property approach actually exists. Such evidence tends to be difficult to obtain for at least two reasons: first, because it is inherently difficult to identify and measure the predicted pretextual, quasi-legal, or illegal landlord behavior beyond assembling anecdotes; and second, because there is generally a great dearth of reliable information about owner behavior in the Section 8 housing voucher program.<sup>212</sup> Here, the true significance of *Barrientos* and its related litigation reveals itself; after all, the form notices that gave rise to *Barrientos* and its related litigation are an unmistakable, indeed almost pathognomonic, symptom of the problem predicted and described above.

Basic tools of law-and-economics analysis suggest, for example, that some landlords will invest systematically and disproportionately to stretch the barriers of permissible eviction of Section 8 tenants to their legal limit and beyond to maximize the market returns on these rental units by raising the rent without restriction during subsequent vacancies.<sup>213</sup> And, in fact, this is exactly what happened with the form notices at issue in *Barrientos* and its related litigation. Given the unique doctrinal nature of the landlords' purported preemption justification,<sup>214</sup> the notices themselves are devoid of any pretext or alternative explanation.<sup>215</sup> The existence of these eviction notices as well as their number, expense, and facial language unmistakably suggest that the deeply anti-progressive problem described and predicted above exists.<sup>216</sup> The purpose behind the eviction notices employed by the landlord groups, revealed by their facial language, was simply and solely to maximize the short-term economic value of their rental property. Motivated by this purpose—exactly the sort of purpose predicted by the

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212. See, e.g., Brian Maney & Sheila Crowley, *Scarcity and Success: Perspectives on Assisted Housing*, 9 J. AFFORDABLE HOUS. & CMTY. DEV. L. 319, 329–30 (2000) (noting the generally fragmentary and incomplete state of knowledge about Section 8, and noting that in particular, “aside from assuming that they want to earn a profit, very little about owners is known”).

213. See *supra* notes 20, 60, 65, 199, 200, 202, and accompanying text.

214. See *supra* notes 182–184 and accompanying text (discussing the “business or other economic reason” component of the federal good-cause eviction standard).

215. See *supra* note 184 (reproducing relevant language from a form notice).

216. Namely, that the intersection of Section 8 and rent control drives substantial numbers of landlords to invest heavily and disproportionately in attempts, which are directed exclusively at Section 8–assisted tenants in rent-controlled units, to stretch the boundaries of for-cause eviction to their legal limit and beyond, solely to maximize the market returns from these units.

basic law-and-economics analysis outlined above—substantial numbers of landlords were then willing to invest truly substantial sums of money in eviction notices that were both legally questionable and sure to be litigated, solely to evict their most low-income tenants for immediate or short-term financial benefit.<sup>217</sup> *Barrientos* and its related litigation therefore confirm the existence of the potential anti-progressive problem outlined above: the most basic economic motivations, which may be generated by the intersection of two progressive property regimes, are capable of pushing property owners to extraordinary anti-progressive actions of questionable legality, which tend to be directed disproportionately at the most materially disadvantaged members of society, further compounding this anti-progressive problem.<sup>218</sup> For these reasons, *Barrientos* and its related litigation are most significant for the light they shed on the extent and nature of the anti-progressive conflict at the intersection of rent control and Section 8, with consequences that likely extend far beyond the specific example of landlord conduct at issue in these cases.<sup>219</sup>

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217. To fully appreciate the significance of the investment that landlords were willing to make in these form notices, one must move beyond the initial costs of the notices themselves and the litigation fees landlords were prepared to pay their own attorneys. Because of relatively common fee-switching provisions in the initial leases signed by many of the relevant landlords and tenants, which were applicable to legal disputes arising even after the initial lease had elapsed, many of the landlords in *Barrientos* and the related litigation faced the prospect of substantial fee awards to their tenants' attorneys if they initiated such litigation with a form notice and lost in court. Meanwhile, their Section 8-assisted tenant opponents, being relatively judgment-proof, did not. Such fee awards could often be fairly significant. As an example, the Ninth Circuit upheld an award of \$180,029.50 against the losing landlord in *Barrientos* for the tenants' attorney's fees through the district court judgment alone. *Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197, 1216–17 (9th Cir. 2009).

218. *Barrientos* and its related litigation demonstrate that landlords will invest heavily in eviction strategies of questionable but at least unproven legality, based solely on basic economic motivations, with substantial and disproportionately anti-progressive effects. Additionally, these cases and the notices at their heart also strongly suggest, though they cannot prove, that the intersection of Section 8 and rent control may drive substantial numbers of landlords to disproportionately withhold basic services from Section 8-assisted tenants in rent-controlled units, as described and predicted above, or to evict Section 8-assisted tenants in rent-controlled units on truly pretextual grounds. Given the stated importance of practical and contextual judgment to recent progressive-property accounts, the existence of this aspect of the broader problem described above should be taken almost as seriously from a progressive-property perspective as the disproportionate eviction aspect. See, e.g., Alexander et al., *A Statement of Progressive Property*, *supra* note 4, at 744 (claiming that deliberation about property and the plural values it embodies “should include non-deductive . . . [and] contextual” reflection).

219. Similar anti-progressive conflicts may be found at the intersection of other progressive-property regimes and policies. For example, several cases applying the Fair Housing Act, 42 U.S.C. §§ 3601 et seq. (2012), show the tension between tenantry procedures designed to maintain racially integrated communities and the anti-discrimination mandate of that statute. See,

Accordingly, from a progressive-property standpoint, one ought to support weakening or eliminating a rent-control ordinance such as LARSO to protect the progressive values and ends that are served at least as well, and more efficiently, by Section 8. More specifically, Section 8 alone is not subject to the anti-progressive effects that arise at the intersection of rent control and Section 8. Moreover, although rent control alone is subject to many of these same anti-progressive side effects, these side effects are significantly worse at the intersection of rent control and Section 8. From a progressive-property standpoint, therefore, the conflict at the intersection of Section 8 and rent control requires a clear choice between promoting either rent control alone or Section 8 alone. As argued in Part III above,<sup>220</sup> if an anti-progressive conflict exists at the intersection of rent control and Section 8, then from a progressive-property perspective, one should generally seek to protect or advance Section 8 at rent control's expense. In this context, therefore, and contrary to conventional wisdom, the practical implications of the new progressive-property approach ought to be the same as the practical implications of the law-and-economics approach: under both approaches, rent-control ordinances such as LARSO should be eliminated or phased out.<sup>221</sup>

What lessons can be drawn for future policy and institutional design based on the low-income housing conflict generated by the intersection of LARSO and the Section 8 housing voucher program? First, as has

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*e.g.*, *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1098, 1100–01 (2d. Cir. 1988) (noting that “[w]hile quotas promote [the Fair Housing Act’s] integration policy, they contravene its antidiscrimination policy, bringing the dual goals of the Act into conflict”). (I am grateful to Greg Alexander for this particular suggestion.)

As this Article suggests, identifying and resolving these conflicts will be one of the great challenges facing the new progressive property. For a discussion about what guidelines may be appropriate to identify and resolve anti-progressive conflicts similar to the conflict illuminated by *Barrientos* and its related litigation, see *infra* notes 221–231 and accompanying text.

220. See *supra* notes 159–61.

221. Of course, many cures for the anti-progressive conflict at the intersection of Section 8 and rent control might be worse, from the perspective of the new progressive property, than the underlying disease. On this point as well, both the new progressive-property approach and the law-and-economics approach are agreed. See, *e.g.*, Epstein, *supra* note 140, at 773 (noting, in the context of his arguments against rent control generally, that policy choices about eliminating rent control will be complicated because “it is far more difficult to return to unregulated markets than it is to maintain them in the first place”). Therefore, a temporary and second-best justification for continued rent control from a progressive-property perspective might still be possible in some situations, depending on the specific anti-progressive consequences of the available remedies for winding up a local rent control regime, and particularly in light of the long waiting lists in many localities for Section 8 assistance. See *supra* note 85 and accompanying text.

already been demonstrated, this conflict shows that the use of even the most basic law-and-economics tools, as described above, can be useful within a progressive-property approach to help predict and describe potential problems arising at the intersection of more or less progressive regimes. But the problematic intersection of LARSO and Section 8 suggests even more basic lessons for the new progressive-property approach, particularly with respect to the balancing that is necessary to implement its plural values and ends in practice. LARSO was designed to address a specific harm facing the community: namely, a shortage of decent housing and critically low vacancy levels—identified in the late 1970s—that had reached “crisis level[s].”<sup>222</sup> The intended beneficiaries of LARSO are low-income households but also moderate-income households, senior citizens, and other persons on fixed incomes.<sup>223</sup> In contrast, Section 8 is designed to aid low-income families alone in obtaining a decent place to live, while also promoting economically mixed housing.<sup>224</sup>

Section 8 and LARSO both have general communitarian values built into their foundations, therefore both are also designed to serve different, albeit overlapping, communities of interest. More specifically, Section 8 is designed to serve low-income families, a goal which fits most closely with the new progressive property’s focus on protecting the most vulnerable and least advantaged; however, LARSO, like many other local rent-control ordinances, is also designed to serve moderate-income households,<sup>225</sup> a goal that is less central to the new progressive property. Beyond the problematic economic incentives facing landlords at the intersection of Section 8 and rent control is, therefore, a deeper problem—there is no true community of interests at this intersection but

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222. L.A., CAL., MUN. CODE ch. 15., § 151.01 (2012) (noting, as LARSO’s “Declaration of Purpose,” that “[t]here is a shortage of decent, safe and sanitary housing in the City of Los Angeles resulting in a critically low vacancy factor,” that “[t]his problem reached crisis level in the summer of 1978 following the passage of Proposition 13,” and the rent and eviction restrictions of LARSO are necessary to address this “crisis” and to prevent its recurrence).

223. *Id.* (noting, in LARSO’s “Declaration of Purpose,” that its measures are intended to benefit “senior citizens, persons on fixed incomes, and low and moderate income households”).

224. 42 U.S.C. § 1437f(a) (2011) (“For the purpose of aiding low-income families in obtaining a decent place to live and of promoting economically mixed housing, assistance payments may be made with respect to existing housing in accordance with the provisions of this section.”).

225. LARSO’s split focus on both low- and moderate-income households is typical of other local rent-control ordinances. *See, e.g.,* Shulman, *supra* note 132, at 40 (noting that “[i]t is true that low-income households benefit from rent control, but it is just as true that the middle class benefits as well,” and claiming that “it is in fact the middle class who brings [local rent-control ordinances] about”).

rather three inconsistently treated groups: landlords, whose interests are treated neutrally at worst by Section 8 but are harmed by rent control; moderate-income tenants, whose interests are treated neutrally at best by Section 8 but are expressly favored by rent control;<sup>226</sup> and low-income tenants, whose interests are expressly favored by both rent control and Section 8.

It should not be surprising that anti-progressive conflict can arise at the intersection of two such progressive programs, despite their similar aims: both Section 8 and rent control seek to protect certain overlapping (but not identical) groups of tenants. Section 8 spreads the expense of doing so, however, over the community at large, thereby serving progressive ends in a manner superior to rent control. Rent control imposes the expense more-or-less directly on yet another group within the larger community—landlords. As a result, the intersection of Section 8 and rent control contains only fractured interest groups, one of which has strong economic incentives to act according to the self-interest that is singularly used to define it at the expense of progressive-property goals. Ultimately, the low-income housing conflict at the intersection of rent control and Section 8 suggests that to improve upon past theoretical approaches, the new progressive property must recognize and prevent similar conflicts in the future by distributing the costs and other burdens of progressive property programs as widely as possible.

## V. CONCLUSION

Designing or defending property regimes that successfully protect the most vulnerable members of society or promote communitarian values is, at best, a difficult task,<sup>227</sup> which some would say is inherently misguided or impossible.<sup>228</sup> This Article's close examination of the

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226. Of course, the interests of low- and moderate-income tenants are expressly favored by rent control only if they live in rent-controlled units, for despite the general solicitude of most rent-control ordinances for these groups, low- and moderate-income tenants who rent uncontrolled apartments in rent-controlled jurisdictions will be disadvantaged by rent control.

227. For another discussion of the difficulty inherent in defending costly property programs on communitarian grounds, see Zachary Bray, *Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements*, 34 HARV. ENVTL. L. REV. 119, 176-77 (2010) (suggesting that any defense of present policy regarding conservation easements held by private land trusts must proceed in part on communitarian grounds and noting the difficulty of doing so in light of the potential negative side effects and substantial costs of such easements).

228. See, e.g., Epstein, *supra* note 140, at 771-72 (claiming that "cant about communitarian ideals offers a convenient cloak to allow the 'haves' to exclude those unlucky enough not to have gotten there first," and arguing that "[i]f we do not stick with either Pareto or Kaldor-Hicks, then

relationship between the Section 8 housing voucher program and second-generation rent-control programs such as LARSO suggests that this difficult task will be more likely to fail if the property regime in question singles out a particular group within the community to bear a disproportionate burden of its costs.<sup>229</sup> Put another way, the task that the new progressive property has set for itself may only be practically possible through property regimes like Section 8, which impose the costs of greater socioeconomic housing integration and targeted support for low-income households on the public at large rather than property regimes like second-generation rent controls, which pick out a particular group to bear these costs. I have argued above that Section 8 tends to balance the plural values of the new progressive property in a way that is practically superior to rent control.<sup>230</sup> I now conclude that Section 8's approach to the costs imposed by its progressive-property goals also makes it more closely aligned with the theoretical underpinnings of recent progressive-property accounts than rent control.<sup>231</sup>

The new progressive property is a work in progress. Property regimes such as rent control and the Section 8 housing voucher program, which predate the recent progressive-property accounts by several decades, may more or less embody the values and ends that the new progressive property seeks to serve. But the real promise of recent progressive-property accounts lies in the future: the new progressive property, by its own lights, will be an improvement on what has gone before to the extent that it can provide a truly practical framework that advances communitarian values and concerns for human flourishing, and to the extent that it can provide a place for basic law-and-economics tools that ultimately serve, rather than simply oppose, these plural values and

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the old utilitarian maxim that 'every person should count for one and only one' is a far better way to do business").

229. Of course, some of the costs of rent control are born by other groups besides landlords. *See supra* note 226. The disadvantage faced by these groups, however, is a side effect of rent control, not part of its deliberate design. As a result, the position of landlords under rent control is different than the position of these groups, and all groups under Section 8, because rent control singles out landlords to bear the brunt of its costs.

230. *See supra* Section IV.B.

231. *See, e.g.,* ALASDAIR MACINTYRE, *DEPENDENT RATIONAL ANIMALS* 130 (1999) ("What I am trying to envisage then is a form of political society in which it is taken for granted that disability and dependence on others are something that all of us experience . . . to unpredictable degrees, and that consequently our interest in how the needs [of the disabled or dependent are] met is *not* a special interest, *the interest of one particular group rather than of others, but rather the interest of the whole political society*, an interest that is integral to their conception of their common good.") (emphasis added).

ends. This Article's close examination of the intersection of Section 8 and rent control helps to fill in the emerging picture of the new progressive property, in which basic tools and concepts familiar to the law-and-economics analysis of property can help predict and describe practical problems for progressive values and norms, and more or less progressive policy regimes such as rent control may need to be abandoned because of their practically anti-progressive side effects.