

Nadia Ahmad

**5.2 The Geography of Energy Transition: Property Issues in a Changing Climate
“Tribes and Pipelines”**

This Article scrutinizes the process of obtaining right-of-way grants in Indian Country and concludes that newly proposed federal regulations and existing common law burden indigenous property rights and harm tribal environmental sovereignty. Tribal lands often lie in the path of major energy siting projects, specifically oil and gas pipelines. American Indian communities suffer a disproportionate share of environmental degradation on account of the extractive industries in North America. This Article proposes that in the procedure of issuing environmental impact statements for major hydrocarbon projects, the Bureau of Indian Affairs and the Environmental Protection Agency should more readily advocate the “no action” alternative in consultation with tribes. I focus my analysis on how portions of the National Environmental Policy Act of 1969 (NEPA) discourage adequate consideration of tribal treaty provisions, land preservation, and environmental protection concerns in the context of energy easements. As such, the tribal consultation provision pursuant to NEPA is rendered inadequate because of the inherent weakness in the law for tribal environmental sovereignty.

The existing right-of-way regulations for Indian Country were promulgated in 1968, and last updated in 1980. In June 2014, the Department of Interior (DOI) proposed regulations comprehensively reforming leasing on Indian land and streamlining the leasing process. This revision specifically impacts oil and gas pipelines as well as electric transmission and distribution lines (including poles, towers, and appurtenant facilities), energy easements which are essential for transporting natural resources and electricity. What the DOI described as a “supportive” response to the leasing regulatory revisions” did not, in fact, account for treaty provisions, indigenous tribal law and customs, and tribal environmental justice considerations in the right-of- way context for energy easements. These proposed regulations will lead to a gradual encroachment of tribal lands. Moreover, all future development of energy easements, which includes pipelines and power lines, on tribal lands will be affected, including lands of the Northern Arawak Tribal Nation of Pennsylvania, White Earth Band of Ojibwe in northwestern Minnesota, Navajo Nation in Texas and New Mexico, and the Seminole Tribe of Florida’s Big Cypress Reservation.

Under these proposed regulations tribal environmental protection concerns are devalued and underappreciated, particularly in negotiating and/or contesting pipeline siting and permitting. Unless there is first a thorough reassessment of the essential laws that affect pipeline permitting on tribal lands, tribal environmental sovereignty will become less resilient, and tribal land more prone to environmental degradation and pollution in the form of increased toxins and hazards associated with oil and gas transport. Due to overlapping layers of administrative regulation, the legal scheme for securing rights-of-way in Indian Country benefits the economic interests of oil and gas industry and pipeline operators to the detriment of Native Nations. A secondary issue is the prodigious task that plaintiffs from Native Nations face when contesting energy permits and siting processes in overcoming systemic legal barriers for achieving environmental justice and actualizing land protection. Such plaintiffs lack effective legal regimes to contest pipelines in their territories and on sacred native lands due to problems with legal status and standing. The

term “Indian Country” is subject to an imprecise statutory definition, and the term, nonetheless, raises problems, as evidenced by ongoing court battles. Notwithstanding the unfavorable legal status of Native Nations in the pipeline permitting and siting processes and procedures as foreign entities, Native Nations have served as the most steadfast allies of the environmental movement to contest the rapidly increasing development and transport of hydrocarbon resources.

Part I of this Article provides a historico-legal overview and legal etymology of what constitutes “a federal right of way” in “Indian Country.” Part II turns toward federal law and statutory provisions encompassing right-of-way grants in Indian Country and how NEPA simultaneously accounts for and fails to account for tribal environmental considerations. Part III delves into tribal challenges to pipeline siting on account of NEPA claims in the cases of *Sisseton- Wahpeton Oyate v. U.S. Department of State and TransCanada Pipeline* and *White Earth Nation v. Kerry*. Part IV considers obstacles to the implementation of a more robust tribal consultation process in the federal process of granting rights-of-way in Indian Country. In Part V, I reevaluate the significance of the newly proposed federal right-of-way regulations in Indian Country and existing common law on the subject and suggest additional measures for enhancing tribal environmental sovereignty, included heightened transparency and enhanced legal mechanisms to provide for a more inclusive participatory processes. An environmental movement against fossils fuels and carbon-based energy systems that does not account for tribal environmental rights and the agency of Native Nations is incomplete and will provide only partial victory.

Mark Andrews

2.4 Rethorizing Property “Hohfeld’s Arc”

The eight “jural relations” defined by Wesley Hohfeld unite the many legal relationships that exist in American law. Together they are all part of a single structure, and this structure forms both a normal curve and a square of opposition. The two images express the process of legal analysis.

Mark Andrews

4.2 Governing Culture, Things, and Space “Property as a Cultural Tool”

Cultural values are sufficient to create property; a set of laws is not needed. Those values identify those decisions that the society will either protect; they determine where boundaries may be drawn and whether boundaries should be drawn at all. The fundamental variables are reliability, or the confidence that a given decision is likely to produce the desired outcome; and exclusivity, or the confidence that a second person does not share control of the outcome.

Kelly Askew (and Kennedy Gastorn)

1.3 The Global Indigenous Peoples Movement

Virtual Panel Paper: “Constitutional Indigenous Peoples' Land Rights in Tanzania”

This paper discusses the state of the indigenous land rights in Tanzania and how the struggles of indigenous peoples have influenced the ongoing constitutional reform processes in the country and project the milestone achieved as well as the challenges ahead. Tanzania hosts a number of

indigenous peoples within the wider understanding of the term as per the U.N. Declaration on the Rights of Indigenous Peoples of June 2006 as well as the 2003 African Commission on Human and Peoples' Rights Report on Indigenous Communities. Tanzania has long been at the forefront of conflict between the indigenous communities' claims to their ancestral lands and the demand for land created by the county's free market oriented economy coupled with emerging strong conservation interests. The country hosts indigenous communities that not only identify themselves as culturally dependent on their lands but have, to a larger extent than in any other African countries, chosen the judiciary as one of their main means of action to protect their ancestral lands.

Kristen Barnes

3.5 Property Law and Social Change

“Co-housing and the Sharing Economy”

Examples of co-housing in Europe (Spain and England) and in the U.S. allow us to explore the sharing economy in the property context. In co-housing arrangements, the same space is shared by many and may double as an office, a bedroom, and a social gathering space. What norms have co-housing communities developed to govern their individual decisions? How are they approaching sharing space? What is their understanding of “property ownership” within these shared spaces? Do they own the property for a certain time period or do they own it all the time in common with others? Will property law endorse these relationships, force them into predetermined forms, or seek to regulate them. How will co-housing change the lines between public and private ownership?

Jamie Baxter

5.3 Property and Community

"Collective Actions: New Logics from the Digital Age of Property Transitions"

Mancur Olson's *Logic of Collective Action* has long influenced how scholars and policymakers understand the pitfalls and prospects of legal and political change in a wide range of regulatory contexts. More recently, property scholars have drawn heavily on Olson's logic to explain an array of property transitions and failed resistances, from intellectual property in information, to taxi cab licensing, to the colonial enclosure of indigenous lands. This line of analysis has motivated a broader shift toward "supply side" stories of transition that showcase the comparative advantages for small groups of elites in mobilizing material resources and power. Such stories are consequentially pessimistic about the prospects of dispersed and direct political action to shape pathways of change.

Surprisingly, these transition stories have largely ignored some of the most salient forms of contemporary political organization around property, such as those formed by and around online digital networks. Drawing on compelling new attempts by media and communications theorists to explore the dynamics of online communities and to elaborate on new modes of digital coordination, this project aims to reinterpret the lessons of some classic property case studies in light of recent high-profile struggles over property rights. The project argues for an alternative approach to the relationship between collective action and property transitions, contributing not only in a less determinate account of legal change

but also a more optimistic posture toward the influences of large-scale and dispersed social movement action.

Abraham Bell

4.5 The Public Domain

“Fair Use as a Grant to the Public Domain”

The dominant theory of fair use in copyright law sees the doctrine as carve-out from the plenary property rights over expressions granted to the author, on the grounds that some licensed uses might be barred by high transaction costs. This talk (and the working paper on which it is based) suggests that fair use actually is based on a very different conception of allocating property rights: for any expression, copyright law grants the author certain exclusive rights to incentivize creation, while giving the public certain privileges designed to limit grants of private property rights to those most likely to incentivize and least likely to have broad public value. Grants of privileges to the public (and the deliberate creation of a large public domain) are thus vital to the economic structure of intellectual property. Unfortunately, the analysis cannot readily be carried over to ordinary tangible property.

Laura Binger

3.1 Housing and Homelessness

“Defiance at King Hill Hostel”

For one year in the mid 1960s, residents at a hostel for homeless families operated by Kent County Council refused to abide by the rules. This paper follows the residents of King Hill Hostel and their supporters as they evade, invoke, and mock the legal regime, and asks how their campaign remains relevant in England today.

Maureen E. Brady

8.1 Outsiders, Insiders, and Property Law

“The Lost ‘Effects’ of the Fourth Amendment: Giving Personal Property Due Protection”

Along with “persons, houses, and papers,” the Constitution protects individuals against unreasonable searches and seizures of “effects.” Historically, the word “effects” has received less attention than the rest of the categories in the Fourth Amendment. However, in the last three years, Supreme Court opinions on the Fourth Amendment have reintroduced the term “effects” in opinions without a firm definition of the word, an understanding of its history, or a clear approach to effects under the Fourth Amendment.

In the absence of a coherent approach to effects, many lower courts protect or decline to protect personal property—the objects an individual owns other than land and buildings—by examining the property’s physical location. This is because the Supreme Court generally evaluates whether a person may claim infringement of his or her Fourth Amendment rights by examining whether the government has violated a person’s “reasonable expectation of privacy”; many lower courts hold that individuals lack expectations of privacy in personal property that is unattended in public space. The privacy standard was intended to broaden the scope of the Amendment’s protection, but paradoxically, lower courts have used real property concepts of privacy to narrow protection for personal property.

This Article argues that personal property in public space should be given greater constitutional protection from search and seizure by providing a history and theory of “effects.” A historical account of personal property from the Founding onward demonstrates a constitutional commitment to protecting personal property because of its relationship to the privacy and security interests of the person. If Fourth Amendment jurisprudence were instead informed by this constitutional commitment to personal property, search and seizure doctrine would determine Fourth Amendment interests in an effect in public space by reference to its nature and context—factors personal property law already uses to ascertain the interests of a person in a thing. Using guidance from personal property law, this Article proposes a framework for identifying protected effects based on their qualities and environment and restoring them to the constitutional significance they deserve.

Zack Bray

8.2 Religion and Property

“RLUIPA and the Limits of Religious Institutionalism”

What sorts of special protections, if any, should religious organizations receive when it comes to local land use decisions, and how should we think about religious organizations if we do decide to extend them special protections? The Religious Land Use and Institutionalized Persons Act (“RLUIPA”) has been a magnet for controversy since its passage in 2000. But until recently, RLUIPA has played little role in recent debates about religious institutionalism, a set of ideas and arguments that suggest religious institutions play a distinctive role in developing the framework for religious liberty and that therefore such institutions may deserve some distinctive deference or protections. Instead, the ideas grouped together here and elsewhere under the broad umbrella of religious institutionalism have proved most significant in academic debates and high-profile litigation related to employment and health care.

Recently, however, RLUIPA’s magnetic affinity for controversy has begun to connect conflicts over religious land use with larger debates about religious institutionalism. This should come as no surprise—RLUIPA has wound up implicated in almost every significant debate about religious exercise in recent history. But as this Article will show, an institutionalist interpretation of RLUIPA would be inconsistent with the statute’s stated purpose while exaggerating some of the most significant structural problems inherent in the statute. Moreover, reading and applying RLUIPA in light of the ideas associated with religious institutionalism would exacerbate existing problems related to how federal courts apply RLUIPA. In short, an institutionalist interpretation of RLUIPA would make a bad statute much worse.

Lee P. Breckenridge

7.1 The Changing Landscape

“Institutional Cognition and Urban Resilience”

Elinor Ostrom, Firket Berkes, Carol Rose and many others have investigated the norms and practices of groups that are particularly successful in managing uses of common pool resources. Resilience is a prominent theme in this literature. Humans and other organisms are seen as interactive ecosystem participants. Some of these commentators have drawn contrasts between the brittle vulnerabilities of cities and the capacities for dynamic adjustment found in certain subsistence communities. Urban residents are insulated from ecological disruptions by global

markets and by paved, piped, and wired infrastructures. An institutionalized obliviousness to ecological signals aggravates the impacts of disasters and undermines organizational capacities for learning and adaptation.

Significant obstacles to resilience may be embedded in governance structures and decision-making arrangements that buffer urban inhabitants, reduce sensitivity to ecosystem dynamics, and limit public engagement. Water management utilities may narrowly support human security rather than ecologically responsive arrangements, while specialized agencies managing disasters can undermine urban resilience through decision-making criteria pursued in emergency contexts. At the same time, advances in sensing, monitoring, and communications technologies have opened up new possibilities for citizen participation and engaged self-governance. This discussion will seek to highlight some key characteristics of organizational arrangements – governmental, corporate, and nonprofit -- that affect the ability of urban communities to pay attention and respond wisely to ecosystem dynamics. I will consult with colleagues affiliated with the Resilient Cities Lab of Northeastern University, <http://www.northeastern.edu/resilientcitieslab/>, in developing the commentary.

Pete Brosius (and Laura Zanotti)

1.3 The Global Indigenous Peoples Movement

Virtual Panel Paper: “Political Ecologies of Indigenous Transnationalism”

The emergence of the transnational indigenous people’s movement has been accompanied by a parallel shift in Native American cultural production. Since the 1980s, Native art, literature, and film increasingly emphasize social issues and identities that transcend tribal and colonial national boundaries while also contributing to local endeavors to secure land and autonomy, the enduring centers of indigenous politics. The paper analyzes these connections between culture and politics by taking up a series of interrelated questions: how has transnationalism reshaped contemporary Native culture? How does culture engage issues of land and political autonomy, and what can it contribute to our understandings of them? Finally, how does culture critically reflect on the gaps and erasures of the transnational indigenous people’s movement? To analyze these issues, the paper examines visual and literary culture that thematizes the Alaska Native Claims Settlement Act, the establishment of Nunavut, and the James Bay Hydroelectric Project.

Susan Bright (and Lisa Whitehouse)

2.1 Housing and Social Justice

“Does the English Housing Possession Process Provide Effective Access to Justice?”

This paper evaluates the extent to which the system of handling housing possession cases in England offers effective access to justice to those at risk of eviction. The paper proceeds by two stages. The first offers a definition of ‘effective access to justice’ which is that access is achieved only when individuals are able to exercise effective choice in determining whether or not to enforce or defend their justiciable problems. Once individuals have decided to resolve their justiciable problems by recourse to an external adjudication system then the manner in which that system proceeds and its outcome must be perceived as ‘just’. Added to this are the other essential elements of procedural fairness including, ‘voice, neutrality, respectful treatment, and engendering trust in authorities.’

Using the meaning identified in the first stage of this paper, the second draws upon primary and secondary data to evaluate the extent to which the English housing possession process achieves effective access to justice. Particular reliance is placed upon the authors' recent empirical research which used both interview and survey data to offer an insight into the practical operation of the process. What this and other research reveals is that the eviction process, particularly when combined with the recent changes made to the provision of legal aid, falls short of achieving effective access to justice in a number of respects including a failure:

- to address the apparent non-engagement with the process by a large number of occupiers,
- to demystify the legal process; and
- to ensure consistent levels of advice and support for all defendants.

In particular, the empirical data suggests that it is difficult and daunting for occupiers threatened with the loss of home to access the information, advice and representation they need to assist them in navigating the complex legal terrain associated with housing possession. This paper argues that these failings in the eviction process must be addressed if effective access to justice is to be achieved.

Susan Bright

3.1 Housing and Homelessness

“Judging Possession Cases: Heuristics and the Rule of Law”

The rule of law requires that judges apply the law and do not ‘indulge their personal preferences’ and that the discretion must be constrained so as to avoid potential arbitrariness.

Judges in English housing possession cases have to make decisions quickly. Studies of ‘judgecraft’ explore how judges manage lists under time pressure but little is known about the cognitive processes used in making decisions in individual cases. Sometimes the decision whether or not to order possession is especially difficult because of the problems of incommensurability and the high stakes involved. Where decision makers are called upon to make hard choices under time pressure in non-judicial contexts psychologists have shown that they are likely to use short cuts or heuristics. This paper argues that:

1. The ‘fast’ nature of decision-making in possession cases, together what is known about judgecraft in this context, suggest that ‘cues’ (or heuristics) are probably used in possession cases.
2. This may be a useful time management tool but leads to the risk of inconsistency in decision making and judges failing to consider all potentially relevant information, raising issues of whether decision making is in accordance with the rule of law.

Helen Carr

1.1 Squatters Rights & Adverse Possession, Part I

“Out of time and out of place – unraveling the deaths of homeless people”

The starting point of this paper is the increased potency of the mechanisms of accountability triggered by the deaths of vulnerable adults in the UK (Kirton-Darling 2015). Its concern is with the limits of those mechanisms when the deaths at issue are those of people disenfranchised by homelessness, a concern exemplified by the failure of formal processes to unravel the legal,

social and political web of accountability surrounding the death of Daniel Gauntlett in February 2013 in the garden of a derelict bungalow in Aylesford Kent. The juxtaposition of an empty home, provided nearly 100 years ago to house victims of the trench warfare of the first world war, and the hypothermic homeless man apparently deterred from entering the property either by the actions of the owners or by the recent criminalization of squatting, is not only poignant, it is replete with political possibilities. However the coroner's verdict, death by natural causes exacerbated by self-neglect, not only depoliticizes the death, it also suggests, in an echo of Razack's claims in connection with the deaths of colonial subjects, that the body of the homeless person, too helpless to be helped, is inherently violable in the interests of ownership (Razack 2011 & 12).

The paper begins by suggesting that the contemporary social anxiety about death (see for instance the 2014 Reith lectures) ought to be intensified by the deaths of homeless people. These deaths are troubling because they are out of time (homeless people have very premature mortality Thomas 2012) and they are out of place (homeless people die where we should not die – on the street, in public toilets, in commercial refuse facilities, and they die alone). However, whilst homeless people's deaths hit the newspapers (see for instance) they do not seem to matter in terms of social action or political resistance, although the paper notes the recent introduction of annual memorial service for homeless people. The paper then turns to consider the formal and recently re-invigorated mechanisms for investigating the deaths of vulnerable people - Serious Case Reviews and inquests - to examine why they appear to have limited potential for making the deaths of matter. The final part of the paper concentrates on the inquest into the death of Daniel Gauntlett, focusing on the role of family, community and state, the significance of vulnerability and the function within liberal societies of the notion of self-neglect. In conclusion I reflect on relevance of Razack's observations in the context of the death of homeless people and the contemporary potency of ownership.

Shelley Cavalieri

7.1 The Changing Landscape “Theorizing Land Reform”

Essential theoretical insights about property form the foundation of redistributive land reform efforts, but these too often go unstated, leaving land reform efforts' theoretical underpinnings unexplored. Without properly theorizing land as the resource that is distributed in democratizing land reform efforts, it is impossible to formulate an effective land reform program. This article serves to fill this gap, grounding market-compatible land reform in property's animating principles. The article considers six different theoretical approaches to land. First, it assesses how the traditional treatment of land in equity reveals land's non-fungible character. Second, it analyzes how the shifting nature of land as a contextual, contingent resource shows how different communities, social classes, and nations might comprehend the meaning of land in divergent ways. Third, it sets forth the role of land in constituting individual identity and personhood and what this might mean for both land reform beneficiaries and those whose land the state purchases in order to redistribute it. Fourth, the article examines the historical role of land in constructing social status and creating wealth, and how broadening access to land might simultaneously empower land reform's beneficiaries while threatening the social position of elite landed gentry. Fifth, the article considers how land constitutes citizenship. Sixth, it contemplates the role of

land ownership in creating social stability. The article concludes by arguing that a properly theorized land reform will differ from untheorized land reform in important ways, and suggests that these theoretical insights about the deeper meanings of land can be leveraged to shape better land reform programs in the future.

Eric Claeys

1.4 Land Use and Environmental Law

“Accession, Riparianism, and the Colorado Doctrine”

In water law, lawyers and scholars recognize that riparian regimes and appropriative regimes differ sharply, and that they adapt general property principles to different climatic, hydrological, and economic conditions. Riparian regimes apply in humid communities and appropriative regimes in arid communities. Neither lawyers nor scholars, however, adequately appreciate the mid-level property concepts or policies that channel these non-legal considerations into property law. This Article attempts to fill that gap. The relevant concepts and policies relate to the right delineation of the “*res*,” “things,” or “entitlements” on which property operates. In recent scholarship, these concepts and policies have been associated with accession.

This Article shows how accession- or entitlement-delineation-related concepts and policies justify applying one property regime to the use of surface water in humid communities and another to use in arid communities. These policies take some of the sting out of suggestions that property policies are too wooden or rigid to apply to water. They also offer perspectives on new problems in water law—problems that arid countries (like South Africa) have encountered in employing civilian and common law riparian principles, or problems that eastern U.S. states are facing with riparianism now that water is becoming scarcer.

Steve Clowney

6.2 Property Law, Foreclosure, and the Home

“Home Improvement Decisions and the Law”

How do property-owners decide to make home improvements? Can the law help unsophisticated households avoid poor investment decisions? This area merits greater study for four reasons. For homeowners outside the top income decile, their home constitutes roughly half of their net worth and, thus, home improvement decisions are among their most significant asset management decisions. The contributions of home improvement spending to the housing sector are also sizable — spending amounts to roughly \$150 billion a year. Finally, improvement decisions by current owners also shape the housing stock for succeeding generations.

Tesh W. Dagne

1.2 New Directions in Intellectual Property

The Implications of 3D Printing for Canadian Intellectual Property Law

Intellectual property and charity law are generally considered distinct and unrelated bodies of law. But in some respects, they are similar and complementary. Specifically, patent, copyright, and charity law are all intended to increase social welfare by solving market and government failures in public goods caused by free riding and transaction costs. Patent solves market failures in innovation by providing an indirect subsidy to marginal innovators, copyright solves market

failures in works of authorship by providing an indirect subsidy to marginal authors, and charity law solves market failures in charitable goods by providing an indirect subsidy to marginal donors. In fact, innovation and works of authorship are categories of charitable goods. The “warm glow” of altruism includes the drive to innovate and create works of authorship. But patent, copyright, and charity law solve market and government failures in innovation and works of authorship in complementary ways. Patent and copyright efficiently reduce ex ante transaction costs, but increase ex post transaction costs. Charity law reduces both ex ante and ex post transaction costs. Accordingly, the efficient scope and duration of copyright should depend on ex ante transaction costs, because charity can more efficiently reduce ex post transaction costs, especially as the introduction of new social technologies like crowdfunding further reduces transaction costs associated with charitable contributions.

Jens Dahl (and Rebecca Hardin)

1.3 The Global Indigenous Peoples Movement

Virtual Panel Paper: “How the Subaltern took agency in the United Nations”

The achievements of indigenous peoples in the United Nations took their form when the indigenous movement became global. People from five continents unified behind common symbols, common interests and under the construction of a common indigenous identity. How did this take place? This presentation discusses the means adopted in a process that most observers consider as unique: Indigenous peoples unified across cultural and political boundaries, and the achievements on the international stage are impressive. Indigenous peoples shared the vision but did not all play the same role in the process, and some are better than others at putting the achievements into practice.

Ben Davy

4.3 Property and Human Rights

“Property as a Human Right”

The paper discusses three aspects:

(1) Considering the variety of meanings of property in domestic legal systems, a comprehensive standard would help compare property clauses. International human rights law can be such a standard. The diversity of property clauses must not be deprived from its idiosyncrasies. A discourse on comparative property still would benefit from human rights as epistemic background.

(2) The attempt of the drafters of UDHR, ICCPR and ICESCR to identify property as political, civil, economic, social or cultural right was futile. This attempt still can inspire. Property comprises political aspects (e.g., ownership of social media), but also touches on civil rights (e.g., property and family law). Property relates to economic rights, too (e.g., ownership of the means of production), yet property also touches upon social rights (e.g., right to housing) or cultural rights (e.g., property in an ancient burial ground). Human rights discourses help understand polyrational property.

(3) If property is considered a *human* right, how does such characterization affect the proprietary interests of corporations? The right of foreign companies to be compensated in case of nationalization or expropriation has been recognized by international customary law for times

immemorial. This protection never was considered an individual right of the expropriated company, however. UN-sponsored human rights treaties, in fact, deal with the rights of *natural* persons. Only in exceptional cases, such as Article 1, P1_ECHR, property rights of legal persons are protected explicitly. Property as a human right presumably emphasizes the personhood aspects of ownership.

Gregory Dolin

2.5 Empirical Methods in Intellectual Property

“The Early Data on Post-Issuance Review”

The 2011 America Invents Act sought to drastically improve the American patent system by creating new review processes for already issued patents.

These processes were meant to reduce patent litigation costs and clear the field of “dubious patents” all the while increasing certainty in the existence and scope of patent rights. Though this was not the first attempt to achieve these goals, Congress failed to heed the lessons of past reforms or fully take into account the costs associated with these new post-issuance review mechanisms. The result was a set of dubious reforms. This Article marshals empirical data and case-study based evidence to show that the newly created system is open to abuse, that such abuse in fact occurs, and that the costs that Congress ignored are indeed substantial.

Dalee Sambo Dorough (and Hari Osofsky)

1.3 The Global Indigenous Peoples Movement

Virtual Panel Paper: “The Indigenous Political Enterprise: What’s law got to do with it?”

Indigenous peoples are entitled to the full affirmation and recognition of the right to self-determination in the context of the UN Declaration on the Rights of Indigenous Peoples and in international law generally. UN member states must uphold their legally binding international obligations in regard to self-determination and its diverse elements. Furthermore, states must recognize and respect a range of other rights that are of a customary international law nature. These matters are highly significant in the context of Arctic Indigenous peoples, who presently face extraordinary pressures from political and economic forces far from their homelands and territories.

Simon Douglas (and Ben McFarlane)

2.4 Retheorizing Property

“The Limits of Property”

“That’s mine!” Children often invoke the concept of property when justifying their claims about how others should behave. The same appeal to property is often made in the courts, in a very broad range of contexts. But can the concept of property bear this weight? The child in the playground is most likely relying on what, we contend, is the core case of property: a right that others do not physically interfere with a specific tangible object.

Our key argument is that great care must be taken when trying to extrapolate from this core case to wider issues as to the use of resources, liberties to act, or liabilities to compensate for purely economic loss. Adopting a Hohfeldian analysis, we have already set out this argument in relation to English law (see “Defining Property Rights” in Penner & Smith eds “Philosophical

Foundations of Property Law” (OUP, 2013)) and in this paper we will develop that argument. We will consider the difference between logical and analogical uses of property, and will examine the use and abuse of property reasoning in contemporary practical contexts, such as the distribution of compensation for losses as a result of the Deepwater Horizon oil spill, and the status of digital forms of currency. We thereby hope to add our perspective to contemporary American debates as to the theory and operation of property law. This paper is the first part of a project supported by the award of a British Academy/ Leverhulme Trust research grant.

Mikhailien du Bois

1.2 New Directions in Intellectual Property

“Justificatory Theories for Intellectual Property viewed through the Constitutional Prism”

An important question that forms part of an analysis of constitutional property protection for intellectual property rights is when protection for these interests may be justified. This necessitates an analysis and discussion of the reasons why intellectual property rights and unconventional intangible property interests should be protected. Intellectual property rights are relations between individuals, as is the case with tangible property rights. However, intellectual property law pertains to rights in abstract objects. It is necessary to ask whether the legal recognition and protection of intellectual property may be explained and justified by utilizing general property theories or whether a distinctive theory of intellectual property needs to be developed. With the increasingly important function of intellectual property ownership, the legal rules are becoming strained, and the institutions of intellectual property need to be scrutinized carefully. The focus should fall on identifying which aspects of existing intellectual property law are supported by the existing theories as viewed through the Constitution, and which have shortcomings that need to be addressed. The purpose of property protection in private law is to get strong property-rule type protection for private rights against competing private parties. Constitutional property protection provides bill of rights-type protection for private interests against the state and competing constitutional rights of other private parties. The South African constitutional property clause provides for expropriation and deprivation by the state, subject to strict requirements that need to be met for such actions to be constitutionally justifiable. This is important where intellectual property rights conflict with other rights (for example the public domain, human dignity, education or freedom of expression), and they need to be weighed up during constitutional interpretation.

Chris Essert

4.3 Property and Human Rights

“Property and Homelessness”

My plan is to provide a justification of the institution of property by examining the relationship between property and homelessness. Roughly, my claims will be as follows:

- (1) I begin with the thought that justifying property rights’ exclusionary form requires demonstrating that property serves a need that only property can serve, in providing the distinctive value of exclusionary normative control.
- (2) To be homeless, while bad for many different reasons, is wrong distinctively in that it is a lack of a kind of normative control: the homeless person has no right except those in her body and so no place of her own into which she can normatively retreat.

(3) Thus, property is the institution whose purpose is to solve the moral problem of homelessness. To be an owner is to have the normative control necessary not to be homeless and to be homeless is to lack the normative control that property provides.

(4) The institution of property justified in this way must limit itself: we cannot justify an institution whose role is to allow for each of us to have a place of one's own if the terms of the institution result in some of us lacking in such a place. I argue that the nature of the value or interest that justifies property requires that a state realize an institution of property and discuss some particular implications of this claim.

David Fagundes

3.5 Property Law and Social Change

“The Rise and Fall of the Roller Derby Master Roster”

Roller derby skaters use informal norms rather than formal law to govern the pseudonyms under which they compete. The derby world has undergone major changes since I completed my study of those norms in 2011. This essay reflects on how the IP norms governing derby names have changed in the intervening four years, including the role played by formal law, the decline of preexisting regulatory systems and the emergence of new ones, and the related changes in skaters' expectations about their property interests in their pseudonyms. This updated reflection on roller derby's IP norms is a story of both decline and renewal, but one that delivers insight about the forces that lead ownership norms to change and why informal rules may be a more efficient means of regulating dynamic property systems than state-created law.

Lucy Finchett-Maddock

8.3 Squatters Rights & Adverse Possession, Part III

“Time's Up--Private Limitations on the Right to Protest and the Role of Property”

This piece seeks to address the temporal closing in of the right to protest through the role of property. The consistent upholding of the right to peaceful possession of the landowner over that of the rights to freedom of assembly and freedom of expression of the protestor leads to the question how can the right to protest ever be considered viable in light of the rights of paper title owners. The recent changes in the law regarding squatting suggest that there is little time left in which the space to adversely possess can be performed. How important is this to understanding the right to protest through political squatting and how far can we go with Article 8 of the European Convention on Human Rights in terms of not just foreseeing a right to housing, but allowing a space in which one can dissent? Recent case law from the European Court of Human Rights will be discussed, coupled with theoretical accounts of time by Walter Benjamin and Ernst Bloch in order to assimilate the role of time in law, property, the right to a home, space, and ultimately the right to resist. Reference to the 'Focus E15' protest by 29 young mothers occupying disused council buildings in Newham, London, will be made as a specific example of the coming together of housing and protest and what the response in law has been.

Alexandra Flynn

4.4 Comparative Perspectives on Land Use

“The Landscape of Local in Toronto’s Governance Model”

City decision-making is usually thought of in the context of a single body - comprised of a mayor and councillors - that determines policies, positions and contents of by-laws. In reality, given the tremendous scope of their jurisdiction, large cities must delegate to committees, commissions and other bodies responsibility to consider certain matters, sometimes as final decision-makers. In Toronto’s case, some matters have been delegated to its four community councils, whose boundaries roughly match former, pre-amalgamated municipalities within Toronto’s borders. Many other organizations in Toronto play a role in local decision-making as well, including voluntary associations, comprised of members who own homes or operate businesses within a geographic area with more limited boundaries than those of community councils.

The result is a messy, complex local governance model, with a number of overlapping institutions – some granted discretion by City Council and some not. The authority and role of these ‘local’ bodies have implications for the City of Toronto’s decisions, particularly those that affect ‘neighbourhoods’ and ‘communities’. They also raise questions of power, inequality and representation, and whether community councils as the locus of local decision making enhance or discourage the participation of already disadvantaged populations.

This paper sets out and defends the theoretical framework to study how ‘local’ is both legally and conceptually understood, and how formal and informal bodies identified as ‘local’, ‘neighbourhood’ and ‘community’ overlap to explain the city’s local governance model. Drawing from legal pluralism and the legal geographies project, I invite a new understanding of boundary-making which rejects compartmentalized approaches to law and governance. This paper suggests that a more comprehensive understanding of local law is available where hierarchical notions of federal, provincial and municipal governments are abandoned and, instead, a fluid conception of overlapping jurisdictions is embraced.

Judith Fox

6.2 Property Law, Foreclosure, and the Home

“Revisiting the Law of Abandonment in Light of the Recent Mortgage Crisis”

It is well established that you can abandon personal, but not real property. In many ways the recent mortgage crisis has provided support for and against this doctrine as cities and municipalities struggle under the weight of abandoned properties. While these attempts may have had little legal significance, cities and municipalities have been left with a significant financial burden as a result of these properties. Some states have reacted by increasing the rights of the municipality to gain control of the properties, while others have sought to make lenders more responsible. This paper will explore these responses through the lens of “abandonment,” asking whether the doctrine needs to be modernized in light of the foreclosure crisis, both as it relates to the real property and the securing mortgages.

Lorna Fox O'Mahony

1.1 Squatters Rights & Adverse Possession, Part I

“From Criminalisation of Squatting to Asset-based Welfare: The Meaning of Ownership, the Rhetoric of Home and the New ‘Rationality Mistake’ in English Property Politics”

The creation of a new criminal offence of unlawful occupation of a residential building in English law (section 144, Legal Aid, Sentencing and Punishment of Offenders Act 2012) marks an important turning point in English property politics. Building on, and fuelling, a growing culture of ‘strong property rights’, section 144 was propelled by a tide of official moral rhetoric, characterised by an absolute protection for ownership, excluding consideration of the proper stewardship of land or the contexts of unlawful occupation. In order to justify the deployment of criminal law to respond to social problems of unaffordable housing, homelessness and empty properties, the official rhetoric cast landowners who held empty residential properties as blameless victims, while drawing on the meanings of ownership and a misleading use of the rhetoric of ‘home’ to construct squatters as a threat to the ‘law abiding’ population, highlighting the ‘vulnerability’ of the propertied population to the ‘threat’ of the propertyless. The use of the criminal law to discipline unpropertied, ‘outsider’ populations who are perceived as challenging the aims of the neoliberal state has become a familiar strategy in the UK. At the same time, section 144 represents a step change in the strategic rhetorical deployment of ‘ownership’ and ‘home’ to shore up public support for these measures. This paper explores this shift in English property politics, and reflects on its interactions with the politics of asset-based welfare: between laws that promote ‘strong property rights’ norms, on the one hand, and public attitudes towards asset-based welfare, on the other. Drawing on new qualitative research, the paper explores the impact of property politics (particularly relating to ‘ownership’ and ‘home’) on strategies that seek to encourage neoliberal self-reliance through accumulation and decumulation of housing equity. The paper argues that the interactions between the strong property rights norms of contemporary English property politics, and the ‘solidarity thinking’ required for effective engagement in asset-based welfare, present a potential rationality mistake within English neoliberal property politics.

Jill M. Fraley

7.1 The Changing Landscape

“Surface Water Liability & the History of Drainage in North America”

Very few scholarly works address the subject of surface water liability, even fewer speak of the history of the jurisprudence, and none consider events prior to the establishment of the common enemy rule in the 1850s. In particular, scholars have not illuminated the connection to British colonization and the ideology of land drainage and improvement. This ideology created a lasting impact not only on the landscape of North America, but also in surface water jurisprudence, which continually evolved to favor new forms of land development and industrialization. Those preferences have continued, across the majority of jurisdictions, in seemingly politically neutral rules, thereby avoiding genuine thoughtful consideration of those policies. Notably, because surface water doctrines support land development so strongly, these doctrines contribute to climate change, and yet remain without thoughtful reexamination.

The primary purpose of this Article is to provide the unrecognized historical context and then to urge precisely such a reexamination. I propose a climate-friendly approach to surface water

liability: a single general rule that is landscape-specific. Such a rule would favor development within areas that were already highly developed, while disfavoring development in landscapes that remained closer to their natural state. This outcome would maximize economics where there were relatively few gains to be had from the landscape for climate health, but then maximize climate health where there were significant potential impacts to an entirely or largely undeveloped landscape.

Ben France-Hudson

1.4 Land Use and Environmental Law

“Social Obligation and Environmental Management”

This paper will explore the benefits of using the social obligation norm account of private property in the environmental law context. Using a selection of tradeable environmental allowance regimes from New Zealand and Australia, it will argue that the social obligation norm avoids the predominant concerns about using private property to manage natural resources. In particular, it addresses the potentially negative environmental consequences that can flow from the adoption of a classical liberal approach to private property in an environmental context. As the social obligation norm is predicated on the idea that private property is a social institution, which acknowledges broader community interests, it avoids the potential problems that can be created by privileging individual rights. This paper will also suggest that the social obligation norm provides a principled basis on which to explain the operation of tradeable environmental allowances regimes in practice. Overall, the paper suggests that private property can be a useful tool of environmental management and need not be seen as incompatible with environmental protection. Private property can be, and in fact is being, deployed in creative ways to achieve positive environmental results.

Kennedy Gastorn (and Kelly Askew)

1.3 The Global Indigenous Peoples Movement

Virtual Panel Paper: “Constitutional Indigenous Peoples' Land Rights in Tanzania”

This paper discusses the state of the indigenous land rights in Tanzania and how the struggles of indigenous peoples have influenced the ongoing constitutional reform processes in the country and project the milestone achieved as well as the challenges ahead. Tanzania hosts a number of indigenous peoples within the wider understanding of the term as per the U.N. Declaration on the Rights of Indigenous Peoples of June 2006 as well as the 2003 African Commission on Human and Peoples' Rights Report on Indigenous Communities. Tanzania has long been at the forefront of conflict between the indigenous communities' claims to their ancestral lands and the demand for land created by the county's free market oriented economy coupled with emerging strong conservation interests. The country hosts indigenous communities that not only identify themselves as culturally dependent on their lands but have, to a larger extent than in any other African countries

Peter Gerhart

3.5 Property Law and Social Change

Panel Summary

Property law depends on social customs and beliefs to, among other things, allocate private property to rival claimants, determine whether resources should be held as private or common property, and distinguish the public use of the takings power from private use. Although there can be order without law, law builds on and reflects social understanding and, to some extent, depends on social understanding to reduce enforcement costs. But the social order changes constantly, which means that property law is far more fluid than is sometimes imagined. Evolving social beliefs determine the obligations of owners of semi-public property (like universities and sports leagues) to police the conduct of users of their property, the obligations of buyers of art to determine the provenance of their purchases, turn wetlands from private to a form of common property, modulate the right to exclude, and determine whether taking property for economic development is a permissible use of the Takings Clause.

On the one hand, society operates by informal arrangements, understandings, and agreements that function outside of formal laws and legal institutions. At times, communities adhering to extra-legal rules wish to retain their position outside of law because the social arrangements lead to fair and efficient social cohesion. At times, there may be pressure for the law to intervene to regulate social behavior and practices when social cohesion is threatened. On the other hand, when the government does intervene, it may nonetheless look to the social customs and norms emerging from social communication to shape the law and make it acceptable to social groups with divergent social beliefs.

Yet we have no good theory of how and why social change occurs and how the new values that social change represents get transmitted to the law of property. In part this is because law influences social beliefs, so that the relevant causal relationship between law and social change is two-directional. In part, it is because the law portrays itself as an independent and self-contained body of thought that stands outside, rather than within, society. And in part, it is because social change is the field of social scientists and psychologists, not of lawyers, separating the academic study of law from the academic study of social change.

This panel will seek to break down the barriers that fragment our understanding of the relationship between law and social change by exploring several instances in which the social understanding of the idea of property seems to be changing. Our expectation is that through this analysis we can begin to construct a way of looking at the relationship between law and social change that will inform future research into the mechanisms by which the social understanding of property changes.

Marc-Tizoc Gonzalez

6.1 Property and Wealth Concentration “Criminalizing Charity: The Food Sharing Cases”

Before, during, and after the Great Recession of 2007-09, increasing numbers of United States cities have adopted ordinances that criminalize people, typically religious and social activists, who organize themselves to share food with hungry people in public places (e.g., parks, sidewalks, and streets). In disregard for constitutional protections under the First (freedoms of expression, exercise of religion, and assembly / association) or Fourteenth Amendments (equal protection), state laws protecting religious freedom, and international human rights norms regarding food sovereignty, the right to food, and the right to the city—the new anti-food sharing ordinances criminalize, and otherwise regulate, charity from and solidarity between one class of people (i.e., ostensibly non-poor religious and social activists), to another (i.e., those who hunger under poverty, homelessness, or another condition of precarity).

Legal challenges to these ordinances have produced mixed result in a set of cases that I call “the food sharing cases,” approximately twenty federal and state court opinions regarding the validity of the anti-food sharing ordinances, and my forthcoming symposium article, *Hunger, Poverty, and the Criminalization of Food Sharing in the New Gilded Age*, 23 AM. U. J. GENDER, SOC. POL’Y & L. – (2015) (lead article) introduces the previously unremarked split between the Ninth and Eleventh Circuits of the United States Courts of Appeal regarding the constitutionality of the anti-food sharing cases.

In my proposed ALPS presentation, I will share a comprehensive analysis of the food sharing cases—dismantling the facial neutrality of such laws in order to reveal the impermissible animus against impoverished, homeless, or otherwise hungry people that such ordinances express, exposing the regnant class relations at work when courts uphold such ordinances, and arguing for cities to replace criminalization strategies with policies that incentivize collective public action in the urban commons around food sharing and other practices intended to mitigate hunger and to improve public health.

Tiffany Graham

7.3 Neighborhoods: The In, The Out, The Inclusive, The Invisible “LGBTQ Families in Forgotten America: Integration of Physical Space, Reintegration of Psychic Space”

The meaning of “neighborhood” for sexual minorities is rich and multi-faceted, and the geography of LGBTQ life reflects these varied complexities. Historically, some of the key sites for developing the concept of neighborhood were the urban “gayborhoods” and lesbian enclaves which grew in earnest after WWII. Even though these spaces are highly diverse today, they were not formed with an eye toward integration – rather, these separate, comparatively safe spaces fostered visibility, connection, political mobilization, and the growth of a particular kind of LGBTQ identity. “Neighborhood” and “integration,” however, are terms that have a slightly different meaning for sexual minorities who live in small towns and rural communities. Given the general lack of dedicated neighborhood spaces for sexual minorities outside of urban centers,

most who live in small towns and rural settings have always been ensconced within the wider, more conservative, communities. Since this closeness in living offers less anonymity, individuals often have one of two choices for arranging their lives: (1) they can negotiate acceptance in exchange for de-emphasizing certain aspects of visibility; or (2) they can simply take steps to remain in the closet. How does meaningful integration occur in such a context, and what role do laws/legal actors play in mediating the process of inclusion? For those who remain closeted, integration is a chosen non-option. For those who maintain a public identity, two examples of laws and judicial interventions show how integration can occur in a more substantive fashion. First, a number of smaller cities and towns across the country have moved ahead of their state governments by prohibiting discrimination against sexual minorities; such laws can signal a norm of inclusion that may shift public perceptions of the baseline for equal treatment. Second, in the absence of any specific prohibition, it is not uncommon for allied judges to quietly, and systematically, approve modes of family formation that legally recognize sexual minorities as parents. Even though many of these individuals are already functioning as parents, legal recognition places them on the same plane as heterosexual couples who are also raising children. While these strategies carry with them some risk of backlash, they also have the potential to normalize sexual minorities' standing as fully equal participants within the community.

Shelby Green

5.3 Property and Community

“Building Resilient Communities in the Wake of Climate Change: Keeping Affording Housing Safe from Sea Changes in Nature and Policy”

Seas are rising. That is the observation by the scientists. The causes are many, but most believe it is largely attributable to climate change. Climate change portends many effects, most of them harmful and frightening—from severe storms to excessive heat to drought. Most of the world is responding to these threats, either through mitigation or adaptation. In mitigation, governmental institutions and industry are studying and implementing energy savings technologies and practices, from efficient lighting, to geo-thermal heating to renewable energy sources. The aim is to slow the demand for energy, particularly that derived from fossil fuels, which in turn will reduce the output of carbon, said to be the main culprit in climate change. At the same time, adaptation measures recognize that much of the climate change occurred over a course of a century or more and may be irreversible, at least in the short term. Thus, the need to adapt to ever present threats from a much more malevolent world. Adaptation may take many forms, from building up beaches to installing gates (e.g., in the Venice Lagoon). Significantly, it may mean removing populations from certain areas, in order to protect them and to reduce the costs of rescuing them. Other adaptation measures include stringent standards and codes for the construction and rehabilitation of buildings. The aim being to design and construct buildings that might withstand the ravages of a Hurricane Sandy (the Statue of Liberty did), that is, communities that are low energy consuming and that are resilient. Concurrent with the responses to climate change, the financial and regulatory world is responding to the housing crisis of 2008, with stringent bank capital and lending due diligence requirements.

But, what do these measures portend for the poor who live in vulnerable areas and in not so well-crafted structures? The most immediate effect, of course is dislocation and displacement. The second effect is that the stringent building standards will make new construction and

rehabilitation more costly and hence less likely. The third effect is that financing for homeownership will become more scarce—higher costs for casualty insurance, denial of mortgage loans for properties located in storm prone areas, and because new appraisal standards may require discounting the value of properties on account of threats from climate change, prices will decline, which in turn will impact the vigor of the secondary mortgage market.

In this paper, I will examine the current movement to construct new resilient communities in the larger historical context of other such community-creating programs—from urban renewal in the 1970's, to wholesale razing of homes in legacy cities in 2014, and then in the context of climate change. I will discuss the effects of the current movement on existing populations and their housing needs. In the end, I will lay out the protections that must be incorporated in any such plans if we are to avoid the enucleation of people of modest means from cities.

Priya Gupta

7.3 Neighborhoods: The In, The Out, The Inclusive, The Invisible “Judicial Constructions: Modernity, Economic Liberalization, and the Urban Poor in India”

Comparative legal research in property and urban planning law has taken an increasing interest in the policy patterns and legal arguments that municipal bodies and courts employ in the implementation of often radical urban reconfiguration. Aided by geographers, sociologists, and political economists, comparative property law scholars have begun to unearth the justificatory frameworks that underlie and shape these changes in metropolitan urban landscapes and that reveal an interplay between tangible and immediate modes of political constituencies' interest navigation on the one hand, and deep-seated cultural-historical motivations as well as commitments to transnational strategic and political loyalties, on the other. These modes of research have worked to show how urban 'local' decision-making is embedded in complex and entangled policy considerations, which are expressed through the use of economically minded categories such as progress, modernization, growth, and development.

This Article focuses on the case of urban modernization policies pursued and implemented in one of the world's largest metropolitan centers – India's capital, Delhi – which is also one of the world's global cities currently undergoing a radical and breathtaking transformation. Embarking on a micro-analysis of the justifications offered in the pursuit of a 'cleaner,' more 'modern' and 'competitive' metropolis, this Article examines a series of judgments regarding the rights of urban slum residents. Particularly, the Article applies two analytical and conceptual lenses in studying the regulatory policies and the courts' engagement with them, namely the political economy of development and the ideational and ideological concepts of 'modernity' and 'neoliberalism.' The role of the judiciary in the allocation of property and urban space functions hereby as the site of engagement, the place where the regulatory fiat is approved or rejected, reinterpreted and reshaped, endorsed and concretized. Through this analysis, the Article seeks to provide a richer context for the way in which a number of key Indian courts, including the Indian Supreme Court, have become actively involved in regulatory municipal policies. The Article highlights and analyzes the devastating effects of the recent judicial pronouncements for those constituencies who have long been at the margins and whose legal protection threatens to be further besieged and mitigated in a large-

scale shift towards economic liberalization in the name of urban modernization and the city's competitive enhancement.

Robert Hamilton

2.2 Indigenous Land Rights

“After *Tsilhqot'in*: The Past and Future of Aboriginal Title in Atlantic Canada”

In *Tsilhqot'in Nation v. British Columbia* (2014), the Supreme Court of Canada recognized Aboriginal title for the first time. In this paper I examine the current status of Aboriginal title in Atlantic Canada in light of the decision in *Tsilhqot'in*, which found that Aboriginal title can be established to broad swaths of territory where the claimant can establish exclusive occupation of the land at the time of the assertion of British Sovereignty. If title is established, the question then becomes whether it was extinguished, either by voluntary surrender or by legislation.

Aboriginal title is a live issue in the Atlantic Canada because, although the Mi'kmaq and Maliseet signed treaties with the British, those treaties did not purport to cede or surrender land. Given this, title must continue to exist wherever that title was not extinguished by legislation prior to 1982. For legislation to validly extinguish title, it must meet three criteria: it must be “clear and plain” in its intent to extinguish title, the body that passed the law must have had proper authority, and it must be in accordance with the *Royal Proclamation*, 1763.

In this paper I draw on my own research into all legislation in the Maritime Provinces that had the effect of dispossessing the Mi'kmaq and Maliseet of their lands. From this, I argue that First Nations in Atlantic Canada likely continue to hold Aboriginal title to significant parts of their traditional territory under the framework established in the Supreme Court's *Tsilhqot'in* decision.

Rebecca Hardin (and Jens Dahl)

1.3 The Global Indigenous Peoples Movement

Virtual Panel Paper: “How the Subaltern took agency in the United Nations”

The achievements of indigenous peoples in the United Nations took their form when the indigenous movement became global. People from five continents unified behind common symbols, common interests and under the construction of a common indigenous identity. How did this take place? This presentation discusses the means adopted in a process that most observers consider as unique: Indigenous peoples unified across cultural and political boundaries, and the achievements on the international stage are impressive. Indigenous peoples shared the vision but did not all play the same role in the process, and some are better than others at putting the achievements into practice.

Douglas Harris

6.1 Property and Wealth Concentration

“Dissolving Condominium, Private Takings, and the Nature of Property”

Condominium enables the subdivision of buildings into multiple private titles. It does so by combining individual titles to defined parcels of land, undivided shares of the common property, rights to participate in the governance of the property, and shared obligations to maintain the common property. The dissolution of condominium breaks apart this package of rights and responsibilities, and results in the termination of the individual titles. Some jurisdictions require the unanimous consent of title holders to dissolve condominium, others permit it with a supermajority vote. All jurisdictions allow for nonconsensual dissolution with a court order.

This paper argues that the non-consensual dissolution of condominium, initiated by some title holders over the objections of others, is a form of private takings. It then uses takings scholarship to reveal that the legislative choice between a unanimity rule and a supermajority rule is also a choice between different conceptions of property. Similarly, the judicial choice between ordering and declining to order the dissolution of condominium is also a determination about the nature of property. Finally, it suggests that as condominium becomes one of the principal legal forms for constructing ownership in land, the dissolution rule is important not only for determining the nature of property within condominium, but for establishing the nature of property in land more generally. This increasingly prolific form of ownership deserves attention not only for its prevalence, but also for its capacity to reorient our understandings of property.

Paul Heald (and Kristofer Erickson & Martin Kretschmer)

2.5 Empirical Methods in Intellectual Property

“The Valuation of Unprotected Works: A Case Study of Public Domain Photographers on Wikipedia”

What is the value of works in the public domain? We study the biographical Wikipedia pages of a large data set of authors, composers, and lyricists to determine whether the public domain status of available images leads to a higher rate of inclusion of illustrated supplementary material and whether such inclusion increases visitorship to individual pages. We attempt to objectively place a value on the body of public domain photographs and illustrations which are used in this global resource. We find that the most historically remote subjects are more likely to have images on their web pages because their biographical life-spans pre-date the existence of in-copyright imagery. We find that the large majority of photos and illustrations used on subject pages were obtained from the public domain, and we estimate their value in terms of costs saved to Wikipedia page builders and in terms of increased traffic corresponding to the inclusion of an image. Then, extrapolating from the characteristics of a random sample of a further 300 Wikipedia pages, we estimate a total value of public domain photographs on Wikipedia of between \$246 to \$270 million dollars per year.

Robin Hickey

5.4 Squatters Rights & Adverse Possession, Part II

“Criminalised Squatting and the Mechanics of Property Law Adjudicated”

Litigation since the criminalisation of squatting in England offers an important reminder of the complex effect of illegality on civil relationships. In *Best v Chief Land Registrar* (currently before the Court of Appeal), the High Court quashed the Land Registry’s refusal to allow an application for registration on the basis of adverse possession where, on the balance of probabilities, the acts of adverse possession involved the commission of the new criminal offence: the application to be registered should proceed in the usual way. In headline terms this amounts to holding that the criminality of squatting makes no difference to its acquisitive effects within the law of property. This proposition can be defended on several policy, theory or doctrine grounds; but the readiness with which English courts have accepted it risks concealing from view two important issues which are the subject of the this paper. First, Best’s sanguine reconciliation of the criminal and civil dimensions of adverse possession has a stabilising effect on the criminal measure which might be (a) undesirable in itself (we think of Peñalver and Katyal’s salutary warning about the dangers of over-deterring property infractions); and/or (b) incompatible with broader common law property principles. Second, inasmuch as resolution of an illegality problem commits courts to a nuanced, fact sensitive and open-textured decision-making exercise, it presents a fundamental challenge to the orthodox tropes of certainty and stability that dominate property discourse, and invites us to re-evaluate the mechanics of property law adjudication well beyond the context of illegality.

Felix Hoehn

2.2 Indigenous Land Rights

Property or sovereignty? The traditional territories of Indigenous peoples in Canada after *Tsilhqot’in*

The doctrine of Aboriginal title denies the sovereignty of Aboriginal peoples, denies them jurisdiction over their traditional territories, and leaves them only limited collective property rights. For the first time in Canada, the Supreme Court of Canada recognized Aboriginal title in *Tsilhqot’in Nation v British Columbia*, released in 2014. This has been hailed as history-making and a victory for Aboriginal peoples.

The analysis of *Tsilhqot’in* that has followed has overlooked its biggest weaknesses. By definition, Aboriginal title is a mere burden on the Crown’s underlying title. The Crown’s superior title still rests on the doctrines of *terra nullius* and discovery, despite the Court’s assertion that *terra nullius* was not operative in Canada. This is unconstitutional and inconsistent with the principle of the equality of peoples and the *United Nations Declaration on the Rights of Indigenous Peoples*. Moreover, the doctrine developed by the Supreme Court has flaws that will prevent Aboriginal title from offering practical solution to the historical grievances of Aboriginal peoples in Canada.

In two seminal decisions ten years before *Tsilhqot’in*, the Supreme Court recognized that Aboriginal sovereignty existed before “assumed” Crown sovereignty. These decisions pointed to a legal framework for reconciliation that recognized the sovereignty and jurisdiction of Aboriginal peoples and that is consistent with the principle of the equality of peoples and

international human rights norms. This paper will describe how this framework can overcome fatal flaws in the Aboriginal title doctrine, is better grounded in theory, and is a more promising path to true reconciliation.

Nick Hopkins

6.1 Property and Wealth Concentration

“Community Land Trusts: A ‘Progressive’ Model of Land Wealth Management?”

This paper considers the development, in England, of Community Land Trusts (CLTs) through the lens of progressive property theory. The paper considers whether CLTs can be seen as a ‘progressive’ model of land wealth management. The paper highlights a developing tension, at policy level, between the accrual of land wealth by individuals and communities, and examines the wider implications of this tension.

CLTs have been described by Handy as “a mechanism for the democratic ownership of land and housing by the local community”. They received statutory recognition in the Housing and Regeneration Act 2008, in which a CLT is defined as a “body [...] established for the express purpose of furthering the social, economic and environmental interests of a local community by acquiring and managing land and other assets”. They are considered to have a distinct role to play in the provision, in perpetuity, of affordable homes. It is estimated that there are around 150 schemes. Central to the success of CLTs in ensuring on-going affordability is the separation of land wealth from the individual home, so that the community benefits from increases in land value. Through the CLT (which is a not-for-profit body) land wealth is ploughed back into the community. CLTs thus reflect a communal rather than individual approach to the distribution of land wealth.

A central idea in progressive property theory is mutual interdependence between individuals and communities, with dependency and interdependency seen as inherent aspects of the human condition. Through the “social obligation norm” individuals are seen as having an obligation to others in the community to promote the capabilities necessary for human flourishing drawn (on one view) from virtue ethics. In this way, progressive property offers “a more sophisticated behavioural model [for land ownership] than the simplified wealth-maximising rational actor”. The model provided by progressive property, in particular, recognises the plurality of values in land, incorporating incommensurable as well as commensurable values. The community foundation of the CLT and its communal approach to land wealth lends the mechanism to an analysis by reference to progressive property.

Brice Huber

3.2 Property, Preemption, and Power in Energy Governance

“Paying for Energy”

America’s energy sector is in the midst of an expensive transformation. As aging coal and nuclear power plants are replaced by natural gas and renewable energy, it is worth asking how we will pay for the infrastructural overhaul that lies ahead. The way that energy costs are borne has important consequences: some technologies are underused because agreement about how to pay for them cannot be secured, while others are overused simply because their costs may easily

be imposed on ratepayers or taxpayers. This paper begins with a brief historical survey of American energy policy to demonstrate the importance of the various ways we pay for energy. It then moves to an analysis of some of today's vexing energy problems, and demonstrates that the adoption of acceptable cost-sharing mechanisms is crucial to the upgrade of energy infrastructure. To identify such mechanisms, we must look not only to the distribution and magnitude of costs—who will pay, and how much—but also to the operation of the relevant political, legal, and regulatory institutions. The key point is that superior technologies are not self-executing. Clean, safe and abundant energy depends not simply on technological improvement, but on securing a viable way to pay for it.

Blake Hudson

3.5 Property Law and Social Change

Changing Conceptions of Natural Resources: The Case of Forests

Social change is often spurred by shifts in scientific understandings—the sun does not rotate around the earth, the earth is not flat, science does not support discrimination based upon race, and so on. The same is true in the context of natural resources and their privatization within property regimes. Historically, perhaps no resource was seen as subject to privatization as forests. They are, after all, anchored to identifiable individual properties. But science has increasingly demonstrated that what one private property owner does with her trees has implications for societies on the other side of the globe, especially in the context of climate change. Even so, in many areas of the country the law treats forests very much as a private property resource subject to the sole control of the property owner—a legal perspective that is outmoded and renders the management of the resource unsustainable. This presentation will discuss how scientific understandings of forests as regulators of water quality and quantity, biodiversity, the global climate, among other ecosystem services call upon society to recognize that forests are as fluid as fish in the sea, and are a common-pool resource that should be managed as such.

Tim Iglesias

2.1 Housing and Social Justice

Inclusionary Zoning: Opportunities and Risks for Affordable Housing and Fair Housing

Local inclusionary zoning (IZ) ordinances are widely embraced by housing advocates nationwide. HUD's (expected) regulation on the duty to affirmatively further fair housing is likely to increase interest in IZ. While IZ ordinances can serve both affordable housing and fair housing goals simultaneously, they do not necessarily do so. This presentation will explore how the design of IZ ordinances affects the goals they serve and may determine their legality. It will also expose some often unacknowledged conflicts among housing advocates. Some preliminary solutions will be offered.

John Infranca

2.3 Local Government Law

“Planned Spontaneity: City Governments and the Creation of Innovation”

In 2010 Boston’s mayor declared a waterfront neighborhood of neglected industrial buildings and surface parking lots the “Innovation District.” Ongoing efforts to transform the area into an “urban environment that fosters innovation, collaboration, and entrepreneurship” are both constrained by the city government’s limited control over the area and dependent on the private sector—the source of the innovation and collaboration the city hopes to foster. More specifically, the city is constrained by severely limited home rule powers, the significant amount of neighborhood land under state control, and the federal government’s role as both a landowner and regulator. At the same time, the neighborhood’s rapid transition was facilitated by the clean-up of Boston Harbor, pursuant to federal litigation and substantial state spending, and improvements in local transportation infrastructure, due to the federal and state government’s Big Dig project. The city’s successful efforts to draw new and existing businesses to the neighborhood include a particular focus on fostering a sharing or peer-to-peer economy. A neighborhood-specific zoning change permits construction of “Innovation Units,” residences smaller than the city’s minimum unit size. These units explicitly rely upon access to shared workspaces and other shared resources (both private and public) within the neighborhood. They are designed to foster informal interactions that enable the collaborative efforts of the “shared idea economy” the city envisions for the neighborhood. In this early stage project, I plan to use Boston’s Innovation District as a case study for exploring how city governments can navigate amid federal and state-imposed limitations on their powers while creatively engaging the private sector in the transformation of neighborhoods.

John Infranca

8.2 Religion and Property

The Right to Property and/or Religious Freedom as the ‘Source and Synthesis’ of Rights”

The right to property has been described as “the guardian of every other right” or “the keystone right.” Classical liberal accounts of property rights highlight their role in promoting individual liberty and self-determination and in insulating land owners from intrusions by the state. Property can, by enabling economic independence, provide a bulwark between the individual and the state. Property rights thereby enhance individual dignity and serve as a necessary precondition for the exercise of other liberties, fostering a richly pluralistic society. In a similar vein, religious freedom has been framed as a necessary condition for the existence of other rights, as a unique barrier between individuals and the state, or as the historic foundation of other rights.

In this work-in-progress I plan to consider similarities and differences in arguments that the right of property or religious freedom is somehow foundational or constitutive of other civil rights (within the US) or human rights (in both international law and foundational human rights theory). I will then analyze the implications of these arguments for our understanding of other rights and consider the extent to which these claims are merely rhetorical. My goal is to develop a normative account of the relationship between these two rights and the relationship of each right individually and both rights collectively to other rights.

Anupam Jha

4.2 Governing Culture, Things, and Space

“Nuclear Reactors in India and People’s Concerns on Displacement, Safety, and Transparency”

Techno-scientific issues in India are traditionally driven by top-level governmental policy makers. This approach for nuclear energy development has been challenged notably in the wake of the 3/11 Fukushima Daiichi disaster in Japan. According to the focus of this book and its objectives, this chapter investigates the scope and extent of the “Fukushima effect” in critically reflecting upon the social, policy, legal and institutional effects of Fukushima in relation to nuclear power governance in India.

As such, I examine people’s rising concerns about the safety of nuclear power plants in relation to the surrounding natural habitat, land acquisition policy, and norms of environmental impact assessment, for example, willingness of the government and the nuclear power operators to pay adequate compensation in case of nuclear disaster, the role of public participation in decision making processes, and government willingness to share adequate information regarding the safety of people’s lives, for example, in regard to seismicity, and radioactive pollution, which was not forthcoming in the first instance from the Japanese government post-Fukushima (Hindmarsh 2013a).

My investigative context is informed by science, technology and society (STS) studies in focusing on issues of science, technology and the environment in relation to democratic governance and its relevance in India as in the case of a Fukushima effect. I thus investigate pre-Fukushima governance relating to large-scale nuclear energy technology, specifically on how decisions were made primarily on technical criteria, which ignored social acceptance, reactions and values for insights to make it applicable to India’s case. Given that context, my investigation adopts a policy- in- action approach (Hindmarsh 2013a:13), wherein I examine both policy formation and implementation with respect to (nuclear energy) in India, its vulnerability in regard to possible situations of catastrophes, such as occurred at Fukushima Daiichi, and consequent tangible and significant changes after disaster.

To inform my investigation of the Fukushima effect on India’s nuclear governance, I first provide a background on nuclear energy development in India, then I turn to the effects of the Fukushima Daiichi disaster on (i) policy and legal frameworks, (ii) livelihood issues of people displaced by land acquisition for nuclear power plants, (iii) environmental governance of nuclear technology, and (iv) on safety, disaster management, and issues regarding transparency of information and decision-making.

Shana Jones (and Scott Pippin)

1.4 Land Use and Environmental Law

“The GeoSpatial Data Revolution at the Local Level: Implications for Land Use and Environmental Law”

In the past twenty years, computing power to map and model the natural and built environment has dramatically increased, resulting in what some call the “Geospatial Revolution.” This data

and modeling is informing a great deal of policy research that will shape future land use practices and property management. Currently numerous major efforts are underway to build libraries of the basic data needed to run these analyses and to extend that computing power to local governments, state agencies, and other interest groups that previously lacked the resources to use these tools. As the availability and accuracy of the data and tools improve, they will increasingly be used to shape property management, environmental regulation and land use controls. This paper will provide case studies of several projects -- from identifying likely properties with clouded title to assessing community vulnerability to sea level rise -- currently being conducted by the Carl Vinson Institute of Government that demonstrate how advances in geospatial modeling have the strong potential to change the structure and practice of land use and environmental law.

Sarah Keenan

1.1 Squatters Rights & Adverse Possession, Part I

“Making Land Liquid: Race, Time, and Registration of Title”

In this paper I explore the temporalities of land title registration systems, and the racist effects of those systems. Legal and commercial systems that require land titles to be registered produce definitive archival memories that wipe out historically created entitlements to land that are unregistered and/or unregistrable. As a range of authors have noted, title registration systems are an important mechanism in turning land into a liquid asset, (Harris 2010: 263, de Soto 2000, Pasternak 2014). Historically, land title registration systems have been an important tool in the legal displacement and criminalisation of indigenous people in settler colonies. More recently, the registration of mortgage titles in the USA, through “MERS”, the corporate Mortgage Electronic Registration System which currently holds the legal title to 60% of American mortgages, has been instrumental in facilitating the trade of sub-prime mortgages, which have disproportionately resulted in the evictions of black families from their homes (Chakravartty and Ferreira da Silva 2012). I also argue in this paper that the Land Registration Act 2002 was a necessary prerequisite for the 2012 criminalisation of squatting in England and Wales, which disproportionately affects traveller communities and those with irregular migration statuses. Drawing on Ruthie Wilson Gilmore (2007), I argue that registration of title systems are racist because they produce patterns of displacement and criminalization that make particular groups vulnerable to premature death.

Deidre Keller

4.5 The Public Domain

“If IP is Property, the Public Trust Doctrine Ought to Inform Our Understanding of the Public Domain”

Nearly one hundred years ago in *INS v. AP*, 248 U.S. 215, 250 (1918) Justice Brandeis, dissenting, stated, “The general rule of law is, that the noblest of human productions -- knowledge, truths ascertained, conceptions, and ideas -- become, after voluntary communication to others, free as the air to common use.” Intellectual property law and, more specifically, copyright, terms the creations of the mind which are “free to common use” the public domain. In *Golan v. Holder*, 132 S. Ct. 873 (January 18, 2012), the Supreme Court soundly rejected the

notion that once works are in the public domain they cannot be retrieved; that is, such works, once in the public domain, cannot then be imbued with copyright protection. The Court went even further rejecting the notion that members of the public have a vested interest in the public domain. Just six months earlier in *Warner Bros. v. X One X Productions*, 644 F.3d 584 (8th Circ. 2011) the Eighth Circuit had held that use of works in the public domain could infringe other, related works that remained under copyright protection, essentially extending the protection of the copyrighted works to prohibit the use of the public domain works. These assaults upon the public domain and resulting enlargement of the copyright monopoly need to be checked.

One way that we might stymie the shrinking of the public domain is to import the public trust doctrine, an ancient property principle, into copyright theory. Plainly stated, the public trust doctrine provides that all land covered by tidal waters is held in trust for the people to use. Therefore, property owners on the shore are obliged to allow members of the public to cross their private property in order to reach the adjoining waterway. The public trust doctrine has long been recognized because public access to navigable waterways is seen as a public good. How much more so is access to the store of knowledge upon which our culture is built a public good?

I would argue that public access to what Brandeis called “the noblest of human productions” and what copyright scholars refer to as the public domain, ought to be unfettered by adjoining copyright owners. Under this formulation, the Supreme Court in *Golan* would have recognized the vested interest in the public in public domain works and the Eighth Circuit’s decision in *Warner Bros.* would have gone the other way.

James Kelly

7.2 Critical Perspectives on Property

“Progressive Property, Market Ideology, and Alienability”

In 2009, “A Statement of Progressive Property” announced a neo-Aristotelian response to an increasingly dominant economic libertarian legal theory. By developing conceptions of property that flow from the primacy of human beings flourishing as interdependent, social animals, Progressive Property scholars have thrown down a compelling challenge to conventional Law and Economics jurisprudence.

In his 2013 California Law Review article, Ezra Rosser challenges those who identify as progressive property theorists to first look to the property questions of acquisition and distribution. These, rather than the issues of exclusion and access that are the subjects of progressive property inquiries, he argues, will unlock the transformative potential of this new direction in legal thought. I argue that the neo-Aristotelian contribution to contemporary dialogue does begin with exclusion and access, but should move on to questions of alienability and thoughtful deployment of transaction costs. While fresh thinking in the law of property may play only a small part in the overall project of breaking free of market ideology, a true understanding of the ways in which flourishing persons relate to property and to another through property is critical to transformative progress.

Alexandra Klass

3.2 Property, Preemption, and Power in Energy Governance

“*Kelo*’s Antecedents and Applications in Natural Resources and Energy Law”

Kelo v. City of New London (2005) was one of the most controversial decisions in the modern history of the Supreme Court. It is now 10 years since the *Kelo* decision. This presentation looks at how eminent domain in natural resources and energy development cases in the early 20th century helped shape the *Kelo* decision as well as how *Kelo* is impacting cases today involving natural resources and energy development. In doing so, this presentation starts with a review of cases in the 19th and early 20th centuries where state courts and, ultimately, the U.S. Supreme Court, gave great deference to legislative delegations of eminent domain authority to private natural resource and energy development companies in Intermountain West states for economic development purposes. Justice Stevens relied on many of these decisions in upholding the City of New London’s use of eminent domain for economic development purposes in the *Kelo* case. This presentation then turns to contemporary eminent domain and public use disputes in the energy and natural resources arena, including use of eminent domain for oil pipelines, natural gas pipelines, and interstate transmission lines.

Donald Kochan

4.1 New Approaches to Takings

“Cross-Pollination Possibilities in the Jurisprudence of the Business Judgment Rule and the Public Use Clause”

This article will compare, contrast, and identify the opportunities for complementary cultivation between two significant doctrines of judicial deference in seemingly distinct areas of law: the business judgment rule in corporate law and the deference associated with public use clause analysis in the law of takings. There has heretofore been almost no comparative analysis of seemingly parallel developments in each area. On this tenth anniversary of *Kelo*, it is an especially appropriate time to find new ways to approach the public use issue.

The deference by courts to the business judgment of board members recognizes that such persons are in a better position to evaluate shareholder interests, more expert on the related facts and business matters in most contested decisions, and better situated to evaluate risks than the judges evaluating their decisions when challenged in a lawsuit by shareholders or others. It is a matter of comparative institutional competency/capacity/advantage. Similarly, “public use” has developed in a manner that involves judges reviewing the decisions of governmental entities in a highly deferential fashion.

This article examines whether there are any possibilities for cross-pollination between these doctrines. Can each learn from the other, evolve, and mutually mature including identifying appropriate exceptions to deference? Is there room for reciprocal refinement within each doctrine as a result of being informed and educated by the other? *I propose that we can discover ways to make both doctrines stronger (and that need not necessarily mean more robust) and improved by a comparative analysis and assessment.*

Shelly Kreiczer-Levy

3.3 Sharing Economy, Part I

“Consumption Property in the Sharing Economy”

Various doctrines from different areas of the law provide special legal protection for property that is produced and used for personal use, creating the legal category of “consumption property.” Zoning, criminal procedure, discrimination, foreclosure and bankruptcy, taxes and eminent domain all treat property for consumption differently than commercial property. Recently, a new social phenomenon known as the sharing economy allows owners to rent out personal assets such as a room in their home, their private car, a bicycle, and even pets. The sharing economy challenges the foundational distinction between privately used property and commercial property and leads to fragmentation of uses and symbolic meanings. This fragmentation raises new questions: what are the boundaries of intimacy in the realm of modern consumption? How should the law regulate business transactions in intimate locations? This article first presents the category of personal consumption property, arguing that the sharing economy profoundly challenges it, and then offers new ways to reinvent this category, introducing the framework of consumption property as a nexus of connections. The new framework also has numerous legal implications ranging from fair housing law and public accommodations law to taxes, business licenses and other regulatory regimes.

Shashi Kumar

4.3 Property and Human Rights

“Development and Displacement of Tribes in India: A Study in Human Rights Perspective”

Tribal population constitutes major part of demographic resource of Indian sub-continent, as they are mainly concentrated near the regions of mineral and natural resources. They are basically an indigenous people, who are ‘original inhabitants’, living in the hinter or forest lands for centuries together. Indian Government has recognized their identity and provided constitutional safeguards for protecting their socio-economic rights. Several laws have been enacted to protect their basic human rights and many policies are also initiated by the government for developing them. Paradoxically, the process of development and their interaction with modernity have brought adverse effect to them rather than positive development. Over the decades the continuous economic and political intrusion by the non-tribal communities like money lenders, traders, industrialists into the tribal’s domain and their forest regions for fulfilling their commercial interest have led to the problem of exploitation, discrimination, displacement and impoverishment of tribal people. The proposed paper examines the development process of tribal populace of India vis –a-vis its negative impact in terms of their displacement and disposition of land on which their livelihood is depended.

Malcolm Lavoie

8.4 Property, Cultural Displacements, Collective Identities, and the Common Good

“Why Restrain Alienation of Indigenous Lands?”

The paper deals with the rule against alienating Indigenous title lands to private parties, that is to say, parties other than the government. This rule exists, in common law and statutory forms, across common law settler societies, including the United States, Canada, Australia, and New

Zealand. The historical reasons behind this rule, including paternalism towards Indigenous peoples, can no longer be sustained. The author sketches out an alternative justificatory basis for the rule, rooted in the collective autonomy or cultural integrity of indigenous groups. The paper approaches this from two angles. In economic terms, one can posit that alienations of parts of a community's land base impose a cost on members of the group by reducing the group's capacity to preserve its culture and way of life, a good which can only be enjoyed in collective form. Alternatively, one can take collective autonomy and cultural preservation as goods not fully reducible to welfare. Erosions of the group's land base impinge on its ability to exercise collective autonomy, especially if governance jurisdiction is linked to land ownership. The paper considers some alternative institutional arrangements that might reconcile the interests at stake in ways other than through a rigid prohibition on alienation to private parties.

Tahirih Lee

5.1 The Chinese Real Estate Market

“Property Rights in the International Settlement and French Concession of Shanghai”

In this paper, I will explain the evolving legal basis for property rights in the sections of Shanghai, China, known in the late nineteenth and early twentieth centuries as the “International Settlement” and the “French Concession.” These areas formed most of the geographical center of Shanghai then, and do now as well. They were important for other reasons too. The financial center of Shanghai was based in the International Settlement, and the French Concession was home to the most desirable residential neighborhoods of the city. Property rights lay at the foundation of the growth of Shanghai’s urban infrastructure and population during that hundred-year period. Property rights are therefore of utmost importance to virtually any type of inquiry into the city at that time. Through analysis of court records and regulations from those areas I will show how foreign claims to property gradually supplanted those of Chinese. This process does not appear to have been entirely centralized or coordinated, but instead was somewhat ad hoc and chaotic. At the same time, there was a dramatic supplanting of Chinese claims to land that carried on unabated for a century.

Emma Lees

4.3 Property and Human Rights

“Human Rights and European Property Law: Integration or Imposition”

The interaction between human rights and property law rules is one riddled with tensions, complexity and, arguably, incoherence. Much of the existing literature charts the extent of the influence of human rights on property law in Europe, but the mechanisms by which such rules are superimposed onto existing property-rights structures is under-explored. This paper will consider these mechanisms in the light of recent decisions, including *Sims v Dacorum* in UK Supreme Court.

In particular, it will ask whether human rights rules are superimposed on top of existing property law, or whether they are integrated into property rules, and what difference such opposing mechanisms would make. It will be argued that the process currently adopted in European property law is to impose human rights constraints on top of existing property rules. This, it will

be shown, is problematic, and produces a situation of uncertainty at best, and incoherence at worst.

A failure to consider the process of the interaction between human rights and property rights undermines both the predictability of property rules, and the effectiveness of human rights controls. The lack of willingness of some property law scholarship to fully grapple with human rights issues adds to this problem, but the real cause lies in the approach of the courts. The current jurisprudence of both national and European courts fails to grapple with the complexity of the influence of human rights in property law, undermining both.

Jason Leslie

4.3 Property and Human Rights

“The Philosopher and the Developer: Understanding Developments in Condominium Law through Moral Theory”

The modern condominium form is an uneasy amalgam of property law and democratic governance. This paper takes a close look at condominium by analyzing the often unspoken theories of property and political morality that underlie recent legislative and judicial developments in the Canadian provinces of British Columbia and Ontario. Scholars might expect courts and legislatures to increasingly take a Law and Economics approach to property issues and collective action problems, inspired by moral and political theories in the utilitarian tradition. However, this paper shows that lawmakers have instead largely used either rights-based, deontological theories in the traditions of Locke or Kant, or pluralistic, value-ethics moral theories that are current in the neo-Aristotelean tradition.

The paper further explores how, in the condominium law context, a rule-oriented essentialist approach to property often conflicts with a more flexible and democratically-oriented pluralistic approach. In many cases each approach suggests a dramatically different solution to a condominium problem. Several specific examples of this divergence are outlined, occurring in the contexts of the enforcement of rights in common property, restrictions on leasing, condominium dissolution, forced alienation of units, and restrictions on conduct and occupancy within units.

Ronit Levine-Schnur (and Gideon Parchomovsky)

4.1 New Approaches to Takings

“Is the Government Fiscally Blind? An Empirical Examination of the Effect of the Compensation Requirement on Eminent Domain Exercises”

Eminent domain and compensation for its exercise are the core of property law. The topic fascinates economists, political scientists, city planners and legal scholars. Specifically hot debates concern the supposed links between compensation rules and officials’ behavior. These debates are reflected in the legal doctrine as well. Israeli land law provides a unique opportunity to empirically evaluate these debates, since it allows local governments to expropriate up to 40% of any parcel without paying compensation. This prerogative does not exist in any other country.

This article examines how this expansive and unparalleled power to take private property affects the behavior of the government. The most commonly cited theoretical approach predicts that the

government will take full advantage of its authority to expropriate if compensations are not required. Surprisingly, this belief has never been tested empirically. Our study fills this void by examining the actual practices of local governments that are authorized to confiscate without paying.

We collected and coded official data concerning all of eminent domain cases from the city of Tel Aviv between 1990 and 2014. Based on this data we are able to determine the precise percentage taken in every case. Hence, were able to empirically test the hypothesis that the Israeli local government disproportionately engages in takings of 40% in order to avoid paying compensation. Our findings refute this hypothesis, showing no support to the assertion that in a no-compensation regime eminent domain will be used with no restraints. We offer an alternative explanation for officials' reluctant to engage in over-expropriation: administrative fairness.

Jerrold Long

8.2 Religion and Property

“Mormons in the Tetons: Developing an Environmental Ethic in a Harsh Landscape”

When Mormon pioneers first arrived in the Salt Lake Valley in 1847, their leaders often espoused an environmental ethic that supported living in harmony with the natural environment. Now over 150 years later, the environmental ethic that exists in the Mormon Cultural Region seems much different, with a focus more on an Old Testament understanding of the earth existing primarily to benefit humans, who are to subdue and have dominion over it. This article explores the reasons for that transition, with a focus on the Teton Valley in southeastern Idaho. The Teton Valley was one of the last areas settled in the Intermountain West, and until recently was populated almost entirely by members of the Mormon faith. Although it is an area of phenomenal natural beauty, it remains a difficult place to survive and prosper if relying on an agricultural or natural resource economy. This article argues that it is this harshness of the landscape that was the primary contributor to the transition in the Mormon environmental ethic, in concert with a changing understanding of the Mormon's own place in the natural world, and a consistent mistrust of the Federal government. This changing ethic has affected both the natural landscape itself, as well as the legal regimes that regulate it.

John Lovett

4.2 Governing Culture, Things, and Space

“Professor Longhair's Legacy: Revindicating Movable--A Comparative Perspective”

This paper will address the problem of how an owner of a corporeal movable thing (*i.e.*, personal property) can recover possession of the movable from another person who detains the thing or possesses it without right. The paper will take a comparative view of this age old problem through the lens of *Songbyrd, Inc. v. Bearsville Records, Inc.*, 104 F.3d 773, (5th Cir. 1997) and *Songbyrd, Inc. v. Estate of Grossman*, 206 F.3d (2d Cir. 2000). These two decisions addressed the claims of the estate of the legendary New Orleans rhythm and blues pianist Henry Roeland Byrd, aka Professor Longhair, against the estate of the legendary rock and roll producer Albert Grossman. Byrd's heirs sought to recover possession of several master tapes of performances made by Byrd and other New Orleans musicians in the early 1970s that were loaned to Grossman. Without the consent of Byrd or his heirs, Grossman's estate eventually licensed these master tapes to two record companies. One of these companies eventually released an album that

earned Byrd a posthumous Grammy Award. This paper will examine the differences between Louisiana’s civil law response to the claims made by Byrd’s estate and New York’s common law framework for addressing the estate’s claims, address the long term impact of the respective decisions on the law of Louisiana and New York, and explore how the law in other jurisdictions might be revised to provide stronger protection for dispossessed owners of valuable movables and whether possessors of movables should be able to acquire ownership by acquisitive (positive) prescription.

Glynn Lunney

2.5 Empirical Methods in Intellectual Property

“Empirical Copyright: A Case Study of File Sharing, Sales Revenue, and Music Output”

A simple intuition justifies copyright: More revenue means more original works. In this article, I test that intuition by examining how the rise of file sharing, and the accompanying decline in record sales, affected music output. Using the appearance of new artists and new songs on the Billboard Hot 100 chart as a measure of music output, I show that the decline in sales was associated, *ceteris paribus*, with: (i) fewer new artists; but (ii) more hit songs by each new artist. Because the second effect outweighed the first, the rise of file sharing and the contemporaneous decline in record sales was associated with a net increase in the production of new hit songs.

Adam MacLeod

8.4 Property, Cultural Displacements, Collective Identities, and the Common Good

“Property from the Inside”

The author posits that property duties, out of which property rights arise and with which they correlate, are justifiable on the basis of the plans of action that human beings and groups of humans, as agents of practical reason, adopt for the use and management of things. Because plans of action can be adopted and carried out by group agents and not only individuals, ownership by group agents—families, religious communities, Indigenous groups, universities, etc.—are owed duties of self-exclusion, non-interference, and the rest just as individuals and governments are when they exercise dominion over property. This justification for property duties thus challenges a pervasive dichotomy between individual rights and state interests.

Robin Malloy

3.4 Book Panel: Robin Paul Malloy’s *Land Use Law and Disability*

Discussants: Robin Malloy, John Lovett, Jessica Owley, Jim Smith, Kenneth Stahl

In *Land Use Law and Disability*, Robin Paul Malloy argues that our communities need better planning to be safely and easily navigated by people with mobility impairment and to facilitate intergenerational aging in place. To achieve this, communities will need to think of mobility impairment and inclusive design as land use and planning issues, in addition to understanding them as matters of civil and constitutional rights.

Although much has been written about the rights of people with disabilities, little has been said about the interplay between disability and land use regulation. This book undertakes to explain mobility impairment, as one type of disability, in terms of planning and zoning. The goal is to

advance our understanding of disability in terms of planning and zoning to facilitate cooperative engagement between disability rights advocates and land use professionals. This in turn should lead to improved community planning for accessibility and aging in place.

Avital Margalit

5.3 Property and Community

“Social Change and the Incorporated Commons”

Many cases of commons may also be characterized as communities. As communities they may face phases of social change that may affect the commons' informal and formal governance mechanisms. The paper poses the question of how do commons change, and if formally incorporated what should be the relationship between its internal characteristics (as a property arrangement and as a community) and the formal demands of state law. While addressing questions of both substantive and procedural justice, the focus of the paper is on the processes of change and on the collective-action problems that may accompany decision-making by the commons/community.

As a demonstration of the above posed questions, the paper analyzes the processes of changes in the Israeli Kibbutz that while being both a commons and a community is also incorporated as a cooperative-society under state law. In the past, the kibbutz was a community that made no direct linkage between work and any form of monetary remuneration for it. Today, most of the kibbutzim had limited the scope of the general guarantee and constituted a direct connection between members' work and their monetary remuneration, thus introducing precepts of a market economy into the kibbutz. The case of the changing kibbutz introduces many questions, such as: if change is informal and/or gradual – when can or should the law intervene? Should the law accommodate new informal norms or customs that contradict its dictate? If change is made through formal decision making- should every member have a veto right or should a majority rule suffices? What are the collective action problems in this case and how can legal rules solve them? More generally the question is- should we treat the commons as a formal corporation or as a dynamic autonomous community that merits more deference from state law?

Thomas Mitchell

5.3 Property and Community

“Exit From Common Ownership: An International Comparative Perspective

A comparison of partition law, as applied to certain well-recognized concurrent ownership forms, across a number of countries demonstrates that partition law has developed very differently in some important ways in different countries. A number of countries (or states or provinces within these countries) in the Commonwealth of Nations still utilize the Partition Act of 1868 that first was developed in England though courts in the different jurisdictions that utilize the 1868 act have construed certain provisions of the act somewhat differently. Other countries have made much more substantial reforms to partition law. For example, England abolished the tenancy-in-common form of ownership altogether in its classic legal form in 1925 under the Law of Property Act and exit rules now determined under the Trusts of Land and Appointment of Trustees Act (TLATA) are quite different from the previous partition law exit rules. Ireland enacted the Land and Conveyancing Law Reform Act of 2009, replacing the Partition Acts of 1868 and 1876. Partition law in the United States in many states, at least with

respect to family-owned, tenancy-in-common properties, is in the midst of its most significant change since the mid-1800s. This presentation seeks to explore why partition law has remained quite stable over the course of nearly 150 years within many different countries or jurisdictions within the Commonwealth of Nations and why it has changed quite significantly within other countries or jurisdictions within some other Commonwealth countries and within the United States.

Timothy Mulvaney

6.3 Sharing Economy, Part II

“Takings and the ‘Sharing Economy’”

Uber, Lyft, AirBNB, and like services that have emerged in the increasingly bullish "sharing economy" might find justification and support under each of the leading theories of private property in Western legal thought, namely utilitarianism, libertarianism, and human flourishing. However, it is not clear that any of these theories—save, perhaps, a particularly ardent, non-Lockean form of libertarianism—would classify such services as “sharing,” for they are in practice far more commercial than communal. This insight could have at least two principal implications. First, on a functional level, repeated reference to such services as “sharing” could distort the debate playing out in New York City, San Francisco, and beyond about whether and how best to authorize and regulate these services. Second, on a more conceptual level, repeated reference to such services as “sharing” risks marginalizing more authentic forms of sharing in a host of other contexts.

Dwight Newman

8.4 Property, Cultural Displacements, Collective Identities, and the Common Good

“Indigenous Title Rights and Justifications for Property”

The author considers the underlying philosophical premises necessary for a legal system to recognize Indigenous title rights, arguing that these premises are often different than those that may be presumed. Discourses of Indigenous title are often framed in terms of postcolonialism and anti-imperialism, but also frequently in terms of some kind of egalitarian theory. The paper tentatively argues that consistent philosophical justifications for Indigenous title are most apt, however, to be found in natural law theories of property rather than in other accounts of property rights. The result is that legal protections for Indigenous title support justificatory frameworks for property that have other consequences different than those typically preferred by those who are traditionally politically most supportive of Indigenous rights. Moreover, there are within the account that emerges some reasons to think about reframing some of the parameters of Indigenous property rights in light of more complex accounts of collective identities and the common good.

Tyler Ochoa

4.5 The Public Domain

“Are Sports Statistics in the Public Domain?”

The original right of publicity case involved baseball cards, which contained an athlete’s picture on one side, and career statistics on the other. More recently, the Eighth Circuit has held that sports statistics are in the public domain, and that the First Amendment shields the use of statistics to play fantasy base–ball. Yet two Courts of Appeals have held that that First Amendment does not shield the depictions of athletes when similar statistics are used to generate fantasy football videogames. This talk will question whether it makes sense to distinguish between fantasy games on paper and fantasy games on screen when it comes to the First Amendment.

Hari Osofsky (and Dalee Sambo Dorough)

1.3 The Global Indigenous Peoples Movement

Virtual Panel Paper: “The Indigenous Political Enterprise: What’s law got to do with it?”

Indigenous peoples are entitled to the full affirmation and recognition of the right to self-determination in the context of the UN Declaration on the Rights of Indigenous Peoples and in international law generally. UN member states must uphold their legally binding international obligations in regard to self-determination and its diverse elements. Furthermore, states must recognize and respect a range of other rights that are of a customary international law nature. These matters are highly significant in the context of Arctic Indigenous peoples, who presently face extraordinary pressures from political and economic forces far from their homelands and territories.

Hari Osofsky

5.2 The Geography of Energy Transition: Property Issues in a Changing Climate

“Energy Partisanship”

Whether the topic is greenhouse gas emissions from power plants, the Keystone XL Pipeline, hydraulic fracturing, offshore drilling, or renewable energy, much of the U.S. policy dialogue about energy and climate change is deeply partisan. Republicans and Democrats debate individual issues in vitriolic sound bites that indicate minimal common ground. Set against these dysfunctional climate and energy politics, how can progress be made? For those that accept the science of climate change, this has become a critical question. However, an emerging body of psychological research indicates that strategies attempting to persuade those with opposing views with additional scientific evidence have limited effectiveness.

This Article provides a novel analysis of how to make progress on energy and climate change issues by translating this emerging psychological research into a framework for action. It proposes two interconnected strategies – substantive and structural – for moving past imbedded partisanship and political dysfunction. Substantively, the Article argues for refocusing regulatory efforts on areas where a greater degree of consensus may be possible, such as economic development and disaster resilience. Structurally, it proposes a shift to arenas that are less gridlocked by energy partisanship than the legislative branch of the federal government, such as other branches of the federal government, state and local levels, and corporate and private sector actors. The Article illustrates possibilities for progress using this framework by

drawing on original empirical research, including interviews with key stakeholders, and case study examples.

Ashira Ostrow

2.3 Local Government Law

“Weighted Voting in Local Elections”

This Article suggests weighted voting as an alternative apportionment method that provides each resident with an equally weighted vote while preserving representation for existing political subdivisions in regional governments. The United States Supreme Court favors single-member districts and permits only minor deviations from population equality to accommodate local political subdivisions. Single-member districts must be redrawn every ten years to maintain population equality, enabling those in power to gerrymander district boundaries to weaken the power of racial and political minorities and hindering the formation of meaningful political communities.

The constitutional requirement of one person, one vote guarantees that each person entitled to vote in an election will have an equally weighted vote. One person, one vote, does not, however, determine who is entitled to vote and it does not require that each vote be cast from an equal sized district. With the exception of general purpose municipal governments, which, like their state and federal counterparts, are bound by the democratic principle of universal adult resident suffrage, courts have given states extremely wide latitude to identify relevant political community for each local election. The odd result is that while states can use municipal boundaries to create local political communities, they cannot distribute the vote so as to preserve the integrity of those political communities.

Critics argue that weighted voting does not meet the constitutional requirement of one person one vote because it does not equalize the mathematic weight of each vote; it does not equalize representation in areas other than voting. Nonetheless, both the New York Court of Appeals and the Second Circuit have consistently upheld the use of weighted voting to preserve unit representation in New York Counties. This Article suggests that New York’s weighted voting system be used to foster regional governance in metropolitan areas.

Alex Pearl

6.4 Race, Place, and Property

“Redsk*n: A Property Right to Racism”

The controversy over the Washington professional football team logo and mascot has reached a high point in 2014. Never before has the debate reached mainstream media and stayed there for this length of time. The owner of the Washington football team, Dan Snyder, once famously stated that he will never change the name—“and you can use all caps.” Given the prominence of the name change issue in mainstream culture, opinions on the matter are not difficult to find. President Obama expressed concern over the name while fifty senators signed their names to a letter expressing support for changing the name. Advocates for a name change have appeared on the Daily Show with a significant amount of fanfare created simply by filming Washington fans interacting with actual Indians.

The article proceeds in five parts. First, I provide background to the mascot controversy by explaining positions of the respective sides, the history of the litigation seeking cancellation of federal trademark registration, data on popular opinion, and empirical studies on the effects of mascots upon Native children. Second, I analyze the proposed legislation and suggest significant revisions to expedite changing the name. Third, I consider legislative issues including interpretation and sources for congressional authority. Fourth, I consider the extent of property rights in trademarks by reviewing the history of intangible property rights and the contours of trademark law protection. Finally, I analyze the possible outcome in an action by the Washington team against the United States under a regulatory takings framework.

Carlo Pedrioli

6.5 Property and Sexuality

“Chief Justice Margaret Marshall, *Goodridge v. Department of Public Health*, and the Creation of a Right to Same-Sex Marriage in Massachusetts”

In 2003, the Supreme Judicial Court of Massachusetts announced its decision in *Goodridge v. Department of Public Health*, which was the first state supreme court decision to strike down restrictions on same-sex marriage. The author of the main opinion in *Goodridge* was Chief Justice Margaret Marshall, an immigrant from South Africa who had a history that embraced the tension between questioning authority and conforming to authority. On one hand, when she studied abroad in the United States during high school, Marshall received encouragement to think for herself, which she had not been taught to do in apartheid-era South Africa, and during her graduate studies in the States, she supported the women’s movement and opposed the Vietnam War. On the other hand, after graduating from law school, she worked in private practice and also acted as general counsel for Harvard University.

This paper examines Marshall’s *Goodridge* opinion to explain how the opinion drew upon Marshall’s background in questioning, rather than conforming to, authority, to promote the right to marriage for all residents of Massachusetts, regardless of sexual orientation. Since *Goodridge* became the model for other state supreme courts, including those in California, Connecticut, and Iowa, to follow, the implications of Marshall’s opinion for the construction of property rights were nationwide in scope.

Carlo Pedrioli

7.4 Property and Pedagogy: Strategies to Engage Students in Property Law

“Property Pedagogy and the Concept of Audience ‘Seriously’”

According to modern rhetorical theory, audience, or “the ensemble of those whom the speaker wishes to influence by his argumentation,” is a key component in the process of persuasion. The skillful communicator must adapt to the audience in the given situation. Knowing the views of the audience, including the values that the audience holds, is critical to such adaptation.

Just as a skillful advocate should be mindful of the audience of persuasion, so should a skillful teacher be mindful of the audience of education. Given that most law students probably did not

come to law school to study Property, and that many law students struggle with studying Property, a required subject, how should a Property professor consider the student audience?

This presentation offers a number of ideas for facilitating connection with students. The presentation suggests that use of humor, current events, practice tips, role-playing, group activities, and other pedagogical techniques can enable the Property professor to connect effectively with students in the classroom.

Gwom Peter (and Ijeoma G. U. Ayuba)

4.4 Comparative Perspectives on Land Use

“Master Planning in Nigeria: Challenges and Prospects for Jos Urban Future”

The Nigerian urban and regional sector is presently suffering from a crisis of planning in every facet of life. There is crisis of governance, housing, sanitation and infrastructure provision. Other areas of crisis include: land use planning, security and transportation. Response to the problems occasioning the crisis come from all levels of government but especially from federal and state and also especially for their capital cities in the state and federal capital territory. This paper examines some of these problem areas, the master planning strategies used for addressing these problem, the town planner’s role in fashioning out what these strategies are or should be, refining the policy environment, preparing relevant plans, implementing plans and programmes and ensuring inclusiveness in decision-making in Jos, Nigeria. It also highlighted the critical issues involved as regards to modern planning, by re-examining the planning tools- legal, policies and institutional- to establish their adequacy in addressing these problems and reshaping the nation’s urban future. The paper concludes by making suggestions of adopting an all-inclusive decision-making plans for improvement in line with best practices in Jos, Nigeria.

Scott Pippin (and Shana Jones)

1.4 Land Use and Environmental Law

“The GeoSpatial Data Revolution at the Local Level: Implications for Land Use and Environmental Law”

In the past twenty years, computing power to map and model the natural and built environment has dramatically increased, resulting in what some call the “Geospatial Revolution.” This data and modeling is informing a great deal of policy research that will shape future land use practices and property management. Currently numerous major efforts are underway to build libraries of the basic data needed to run these analyses and to extend that computing power to local governments, state agencies, and other interest groups that previously lacked the resources to use these tools. As the availability and accuracy of the data and tools improve, they will increasingly be used to shape property management, environmental regulation and land use controls. This paper will provide case studies of several projects -- from identifying likely properties with clouded title to assessing community vulnerability to sea level rise -- currently being conducted by the Carl Vinson Institute of Government that demonstrate how advances in geospatial modeling have the strong potential to change the structure and practice of land use and environmental law.

Marc Poirier

6.5 Property and Sexuality

“Things, Places, Neighborhoods: Placing the Official Memory of LGBTQ Identity”

This paper reflects on a “theme study” announced by the National Park Service in June, 2014. The study’s goal is to identify places related to LGBT history worthy of inclusion as National Historic Monuments or for listing on the National Register of Historic Places. It will rely on some twenty experts, and will last for a year.

Currently, there is exactly one National Historic Monument, the Stonewall Inn in Greenwich Village (1999); and four listings, the earliest of which, the Frank Kameny House in Washington, D.C., was listed in October, 2011. The three other listings date from 2013 and 2014. All are in the New York City metropolitan area; and two of them relate to the recreational community in Fire Island and Cherry Grove. There are no monuments or listings west or south of Washington, D.C., and none involving women.

There are some obvious remarks to be made about the politics of the theme study at this juncture. Likewise on the dearth of LGBT group history and the lack of readily identifiable permanent LGBT places prior to about 1965. Yet LGBTQ historians have shown how important place has been to the expression and exploration of LGBTQ identity, for socializing, arranging and carrying out sexual encounters, and eventually for community-building and collective political expression. Many of these places were concealed from outsiders. They were, moreover, moveable. Gay and lesbian spaces often have had a clandestine and nomadic quality. The paper also reflects on the relative ease, for individuals and communities that need to remain hidden or mobile or to cover, of using things and stories to memorialize, as opposed to places or neighborhoods. Consequently, archives and museums are easier to produce than monuments.

The paper questions a decision, announced in June, not to seek to memorialize places related to the lives of important personages who were closeted during their lifetimes. Unless the decision is reversed, the laudable effort to create permanent markers is seriously compromised, as it will reproduce the mechanics of the closet on an official level.

Most interesting, perhaps, Secretary of the Interior Sally Jewell’s remarks at the press conference on the theme study stressed that communities remember themselves through cemeteries. The paper asks, where is the gay (or lesbian) cemetery? It offers some thoughts. Identity-based cemeteries are typically attached to communities that have places because they have families that inherit residences and maintain a neighborhood. Therefore, racial and religious identities, typically transmitted through families, typically produce both neighborhoods and cemeteries. LGBT individuals are born into families, but do not acquire their identity from them. For this reason, there is no natural place for the intergenerational remembrance effected by cemeteries. Not even in so-called gay or lesbian neighborhoods. There is, nevertheless, a gay cemetery. It is not a place. It is mobile, and can be made invisible or covered. A riddle--to be resolved during the presentation.

Natalie Pratt

7.2 Critical Perspectives on Property

“Property, Personhood and the Community Claim”

Under the property and personhood theory the extension by individuals of their personhood into the physical world anchors them to the geographical setting that they occupy. However, the property and personhood theory is generally used as a justification for private property, and it is not clear whether a community personhood can be extended into the physical world, giving rise to communal claims over property.

The property and personhood theory distinguishes between two types of proprietary claim: fungible and personal. Fungible property refers to property that is held purely instrumentally, whereas personal property is property that is bound up with the holder, and should be protected against competing fungible claims.

I argue that community claims to property can be justified by the property and personhood theory, and that the law should recognise these claims, although it fails to do so. The personal claim anchors the community to its geographical setting and should prevail over the fungible claim of a private landowner. However, current practice does not prioritise the community claim, because the claim is not universally understood. The dominant voice in society is not that of a cohesive and mutual self-interest group, but rather the self-interested individual. Recent legislative amendments have purported to implement the policy of empowering local communities, in particular by increasing community participation in deciding on the use and allocation of resources. However, these policies have proved little more than a Trojan Horse that have perpetuated the favouring of the private property holder over a community claim.

Rhonda Reaves

6.5 Property and Sexuality

“Dress and Appearance, Performing Identity in the Workplace: A Property Law Perspective”

Increasingly employers use grooming and dress codes to sculpt the employers’ public image, its “brand.” In these situations, the employee’s own identity is treated as a blank billboard upon which the employer superimposes the employer’s own image. Corporately imposed image requirements seem to be tied to the idea that outward appearance is a commodity separate from identity such that manipulation of “image” causes no harm to “self.” Further, that the employee has no rights in her outward image in the workplace, or her rights are so substantially impaired, such that whatever rights the employee did have she has relinquished to the employer as part of her employment agreement. I argue that outward appearance cannot be completely separated from the employee’s concept of identity. In some circumstances, identity has some property like characteristics. Further, acceptance of employment does not constitute a complete relinquishment of those rights. As such the ability of a corporation to impose an image on its employees must be balanced against the employee’s right to control her outward appearance. Part I of the paper discusses the historical role grooming and dress codes have played in the workplace. Part II examines how corporately imposed images often conflict with an employee’s racial, ethnic or gender identity. Part III explains the limitations of anti-discrimination theory as a basis for an employee’s rights in his/her image. Part IV looks at property and other concepts as

a source of an employee's countervailing rights. Part V responds to some likely critiques and argues that existing legal principles provide ample rationale for deriving greater protection for employees from workplace grooming and appearance policies.

Jeff Redding

7.3 Neighborhoods: The In, The Out, The Inclusive, The Invisible

“Queering Geography: From Territory to Commune?”

This presentation explores territorial and other communal ways of making geography. In a number of on-going legal debates—for example, those concerning same-sex marriage, affirmative action, and religious liberty—‘diversity’ has played a prominent role. Yet, this role is usually a negative one, for social liberals and social conservatives alike. Hence, religious liberty is valued, but not religious exceptions; racial equality is prized, but not racial quotas; marriage is dignified, but not gay civil unions. In many ways, these debates reveal an anxiety in the American public about communal ways of belonging and organization that do not depend on nationalistic norms of *liberté*, *égalité*, and *mariage*.

Yet, all the while, territorial diversity—or, in the American lexicon, ‘federalism’—escapes especially critical analysis. Indeed, while Justice Kennedy has been criticized for striking down affirmative action plans while simultaneously invoking federalism with respect to same-sex marriage rights, not enough critical attention has been paid to the deeper incoherence of this set of positions. This presentation brings a critical lens on these debates, puzzling through why it is that diversity is OK with respect to ‘territory’ but not other equally socially constructed and affect-laden categories like race, religion, and sexual orientation.

Meredith Render

2.4 Rethorizing Property

“Forms versus Norms”

The conceptualist/non-conceptualist divide within property theory is deeply contested. The divide centers on whether the legal concept of ‘property’ can be said to have criterial features. Conceptualists understand the concept of ‘property’ to include one or more criterial features. Most commonly, conceptualists understand ‘property’ to necessarily include the principle of *numerus clausus*, a common law rule that imposes a restriction on allowable forms of ownership. In contrast, non-conceptualists do not view form restriction as a necessary or important (or in some versions, extant) feature of property or property systems. Moreover, some non-conceptualists have criticized the conceptualist emphasis on *numerus clausus* as a misplaced and as unduly formalist.

Yet too often, the nuances of this division have been obscured by reductive political caricature. Conceptualists are facilely (and inaccurately) described as uniformly politically conservative, while non-conceptualists are (also inaccurately) described as universally progressive. The decision even to discuss the criterial features of property is, to some, a political statement in and of itself. To be curious about concepts is not to care about issues like poverty or racial discrimination in the distribution of assets.

Therefore, an objective of this Article is to disaggregate the conceptualist account of property from the overwrought political discourse in which it is enveloped. When correctly understood, the primary points of divergence between conceptualists and non-conceptualists are wholly independent of value or policy commitments.

A second objective of this Article is to demonstrate that the central normative concern raised by critics of the conceptualist account of property is unwarranted. Specifically, concerns that fall within the “realist critique” of formalism do not obtain in the context of the specific type of formalism that property conceptualist embrace.

This Article posits that form restriction in property avoids the pitfalls of formalism generally because the function of form restriction is not to arrive at a correct or even a substantively justifiable classification of interests in a given dispute, but rather to arrive at a classification. Numerus clausus is first and foremost a coordinating tool. Rather than reflecting or directing deep normative commitments about the distribution of assets, form restriction primarily serves to sort interests into a finite (and therefore manageable) set of categories. In this light, form restriction should be evaluated not by the degree that it disallows unjust or unjustifiable outcomes, but solely by the degree that it disallows novel outcomes.

Sally Richardson

5.4 Squatters Rights & Adverse Possession, Part II “Helmholz Revisited”

Thirty-two years ago, Richard Helmholz studied eighteen years of cases on adverse possession, and from that study, drew the conclusion that the faith of the adverse possessor mattered. In particular, Helmholz found that courts were generally unwilling to grant title to land to an adverse possessor who was in bad faith.

Much has changed in adverse possession law since the time when Helmholz’ study. Some states have adopted a good faith requirement in their adverse possession statutes. Others have required that property taxes be paid in order to acquire property through the doctrine. Surveying abilities have improved making boundary lines more accurate, thereby lessening the need to use adverse possession to acquire title to land. In *Helmholz Revisited*, I reproduce the Helmholz study for a ten-year period in the twenty-first century to see how and whether adverse possession case law has changed with the changing times.

Marc Roark

1.1 Squatters Rights & Adverse Possession, Part “Human Housing Impact Statements”

When a city undertakes a development project, low income and homeless persons face risks of expulsion. Public and private developers often target low-income neighborhoods and public lands because those spaces are viewed as economically more attainable or available for development. Moreover, the legal systems preference to treat disputes as individual entitlement claims tends to relegate disputes to broad questions of entitlements rather than unpacking the impacts that property changes have on the vulnerable populations. Whether by gentrification or

by enhancement of city infrastructure, developer decisions disrupt what are already unstable living environments by imposing increased costs of relocation. These changes also destabilize community relationships by separating individuals and families from the support networks, local transportation options, and local employment that they have come to rely on. In short, low-income and homeless persons find themselves even more destabilized when public and private development projects force their evacuation from where they live. This article argues that though development may be necessary, it should not be undertaken without more serious evaluation of the human impacts in relation to the space. Such evaluations should include the impact on communities, employment, education, and environment for impacted persons. Importantly, failure to take notice of these impacts continues to promote cycles of poverty that plague American cities.

Sara Ross

3.1 Housing and Homelessness

“The Waves of Gentrification: The City and the Tide Tables of Human Displacement”

My PhD research at Osgoode Hall Law School revolves around the displacement of people through processes of gentrification and urban planning. The paper I wish to present is entitled “The Waves of Gentrification: The City and the Tide Tables of Human Displacement”.

Many current sites of gentrification have witnessed similar processes in the past, often decades ago. These past scenarios often resulted from attractively low property values that drew cultural producers (forcing out or replacing prior residents); or from past strategic urban planning attempts to address housing issues or other social problems. A current second wave of strategic gentrification is arising in response to developing social pressures for neighbourhoods to increasingly keep up with new social ideals. This wave focuses on commodifying the “grit” or “legitimate” nature of artistic or cultural enclaves that are often comparably economically marginalized, and deriving profit from essentializing the lifestyles and cultural products associated with current residents, all while economically displacing these same cultural producers from their community.

Redevelopment, rejuvenation, and gentrification rely on municipal zoning practices, bylaws, and the enforcement of urban legal frameworks. As new laws are carved to account for the needs or requests of new urban strategies, it is important to consider whose voices are being accounted for. Where the law is intended to address the needs and well-being of all urban citizens, it instead often contributes to a lack of historicity and a serial displacement of the non-dominant—in this case, instead of protecting them from the side-effects of gentrification.

Troy Rule

3.2 Property, Preemption, and Power in Energy Governance

“Utility Regulation and the Transition to Distributed Energy”

As rooftop solar energy systems become an ever more viable alternative to grid-delivered power, electric utilities are understandably scrambling for ways to respond to this growing competitive threat. But what principles, if any, should govern how utilities are permitted to respond? Producers in other industries often respond to disruptive innovation with various strategies aimed at resisting it or at embracing the innovation and its influence on their markets. Unfortunately,

many of the most obvious ways that electric utilities might seek to resist or embrace rooftop solar technologies would generate costly and undesirable policy outcomes.

For example, utilities have long relied on state regulation to ensure them reasonable rates of return and to protect them against competition. Utilities are now increasingly turning to that regulatory structure for help in dampening rooftop solar growth. However, laws designed to shield electric utilities from competition and market risk were never intended to protect utilities against disruptive innovations such as solar energy. Regulators should thus be vigilant to prevent utilities from employing elements of the utility regulatory structure to ward off competition from rooftop solar energy technologies.

Regulators should likewise prohibit utilities from directly competing in the private marketplace for rooftop solar installations—a logical “embrace” response to this form of disruptive innovation. Rooftop solar installation markets are not prone to the natural monopoly problem that justifies existing utility regulation. Policies permitting regulated utilities to compete in these markets would thus constitute an unwarranted and costly government intervention in the absence of a market failure.

Sarah Schindler

6.3 Sharing Economy, Part II

“Regulating the Underground: Secret Supper Clubs, Pop-Up Restaurants, and the Role of Law”

Instagram pictures of elegantly plated dinners, long farm-style tables, and well-to-do people laughing in what looks like a loft apartment are followed by commenters asking, “Where is this?” This is the world of underground dining. Aspiring and established chefs invite strangers into their homes (or their friends’ stores after hours, or the empty warehouse at the edge of town, or the nearest farm) for a night of food and revelry in exchange for cash. Although decidedly anti-establishment, these secret suppers and pop-up restaurants are popular — there are websites to help people locate them, and many respected publications have penned stories about their rise. While some municipalities have been proactive in regulating these events, in other locales these dinners remain completely illegal, violating health, zoning, employment, and business-licensing regulations. At the most basic level, this Essay considers what society should make of these dinners. It asks how we should balance our societal commitments to entrepreneurial innovation, community-building, and eating good food against the rule of law.

Jessica Shoemaker

2.2 Indigenous Land Rights

“The Complexity Problem in American Indian Land Tenure”

This work-in-progress analyzes the myriad ways the complexity of modern rules specific to American Indian land tenure continue to do injustice to indigenous people. Historically, the federal government explicitly and transparently used major land-related legislation, from allotment to removal, to engineer specifically intended social, cultural, and economic transformations within Indian Country. The purpose of this project to expose the more insidious ways ever-increasing complexity in land matters within reservation boundaries continues to do much of this same colonizing and dehumanizing work, but now more shrouded in the shield of complexity and in the rhetoric of the federal trust responsibility.

This piece will build on recent work I have completed about the gradual elimination of Indian co-owners' rights to possess their own properties directly and without intervention by the Bureau of Indian Affairs and the emulsified property problem that has resulted from a false jurisdictional divide between "fee" and "trust" land ownership within reservation properties. Emulsified properties are mixed tenure properties that are jointly owned by co-owners who theoretically share their undivided co-ownership interests but in distinct fee and trust statuses and therefore are subject to entirely different rules and jurisdictions for co-ownership of the same jointly owned resource. This article adds and examines additional examples, including special rules that make permanent improvements on Indian land subject to a different tenure status (and therefore different rules and jurisdictions) than the underlying land; the splicing off of "leases" that are subject to federal jurisdiction on trust lands from "permits" that are now not; and the creation of ever-more complicated new estates on Indian lands, including the new non-Indian life estate "without regard to waste" on some trust properties.

The goal of this piece is to break new ground both by focusing in on the specifics of Indian land tenure that are often ignored in the literature and also by zooming out to assess the larger meaning of these complex institutions. Too often we cast aside the specifics in this area as "just Indian law" idiosyncrasies or as too intricate to reconcile, but this tendency itself reveals more of the injustice. This work will ultimately try to glean a larger

Kenneth Stahl

2.3 Local Government Law

"Local Home Rule in the Time of Globalization"

Cities are increasingly taking the lead in tackling global issues like climate change, financial regulation, economic inequality, and others that the federal and state governments have failed to address. Recent media accounts have accordingly praised cities as the hope of our globally networked future. This optimistic appraisal of cities is, however, undermined by local governments' cramped legal status. Under the doctrine of home rule, local governments can often only act in matters deemed "local" in nature, and cannot regulate "statewide" issues that may have impacts beyond local borders. As a result, the global issues that local governments are being praised for confronting are, almost by definition, the very sort of matters that home rule doctrine prohibits them from addressing.

This article aims to show why home rule has persisted in its present form despite its incompatibility with globalization, to explain some of the implications of our adherence to an outmoded conception of home rule, and then to draw on these observations to craft a new approach to home rule. I argue that the extant conception of home rule is part of an ideology that the judiciary finds attractive, called liberalism. Liberalism seeks to disaggregate various aspects of human life - the state, the market, and the family, particularly - and assign them to distinct spheres. The dichotomy between "statewide" and "local" affairs is a means of preserving the boundaries among the state, the market and the family by tasking the state to regulate the marketplace and local governments to regulate the family. In light of globalization, however, it is clear that the liberal separation of spheres has had a different result. Following Karl Marx, scholars have argued that the separation of spheres has masked the dominance of capitalism, or,

alternatively, the state, in all the putatively autonomous realms. Home rule has precisely this effect. The idea that regulation of the family is "local" disguises the hegemonic role of the state in family matters, while the idea that commercial regulation is "statewide" has enabled capitalism to overwhelm regulatory constraints. I propose a model of home rule that is not married to obsolete notions of separate spheres, and thus enables the local to serve as a vital counterweight to capital and the state.

Justin Steil

8.1 Outsiders, Insiders, and Property Law

“The Legal Geography of Immigration Federalism”

Critical scholars of the legal governance of space have highlighted the role that courts’ conceptions of local political jurisdictions play in limiting legal liability and naturalizing socioeconomic disparities. This paper explores the role that judicial conceptions of local space have on legal reasoning, looking specifically at a recent split in the judicial interpretation of local immigration regulations. Hazleton, PA and Fremont, NE both enacted ordinances that explicitly seek to drive undocumented immigrants out of their respective municipalities by denying rental housing to undocumented immigrants and revoking the licenses of businesses who hire them. In *Keller v. Fremont*, 719 F.3d 931 (8th Cir. 2013), the Eighth Circuit upheld Fremont’s ordinance, concluding that “[l]aws designed to deter, or even prohibit, unlawfully present aliens from residing within a particular locality are not tantamount to immigration laws,” while the Third Circuit in *Lozano v. Hazleton*, 724 F.3d 297 (3rd Cir. 2013) struck down Hazleton’s ordinance, holding that the very same provisions violate the Supremacy Clause of the Constitution because they impermissibly regulate immigration. Drawing on these two contemporaneous appellate court decisions resolving similar challenges to nearly identical local immigration laws, this paper explores the way in which the courts’ differing conceptions of lived space and scale relate to the courts’ diverging reasoning about the effects of the local laws.

Gregory Stein

“Harmonizing Chinese Real Estate Law with the Theory of Law and Development”

5.1 The Chinese Real Estate Market

China’s real estate law is inherently paradoxical, as the nation develops a modern legal system against a backdrop of socialist doctrine. As a result, Chinese laws often display the contradictions referred to as “socialism with Chinese characteristics.” Real estate professionals today make important decisions in an unclear and rapidly evolving environment. Practices that arise in the Chinese real estate industry may conflict with published Chinese real estate laws, while new laws may be inconsistent with business practices that became established before the rules were clarified.

This presentation will address how real estate professionals in China confront these legal inconsistencies and uncertainties. I interviewed numerous real estate professionals in China during the past decade, ascertaining how they operate when the legal environment is unclear and how they have responded when legal rules contradict popular business practices. It turns out that business practices in China frequently conflict with published laws, and the law as practiced differs from the law as published. Lawmakers often look the other way, either because they benefit personally from existing procedures or because they do not wish to disrupt successful

experiments. This presentation concludes by asking whether China is disproving the traditional law and development model, which argues that clear property laws are a prerequisite to robust economic development.

James Stern

1.2 New Directions in Intellectual Property

“Rivalry”

The concept of rivalry is a cornerstone of modern explanations for property law. Some sort of system governing access to resources becomes necessary when one person’s use of a given resource impedes another’s ability to use it as well. Property law is the system of rules developed to resolve the conflicting demands arising from the rival character of different goods. One consequence of this understanding is that it makes it difficult to account for so called “intellectual property,” such as patents and copyrights, since the inventions and creations IP rights concern are thought to be non-rival.

This article examines the idea of rivalry more closely. It argues, first, that goods cannot be classified simply as rival or non-rival, but that rivalry depends on the extent to each person’s desires with respect to a given resource are compatible with the desires of other people. Further, it rejects the usual assumption that rivalry must be determined solely with reference to people’s active use of a resource. In a range of contexts, such as interests in conservation and ideological opposition, a good should be considered rival simply because one person wants to use the good while another wants that person not to use it.

Understood this way, tangible property turns out to be less rival than is commonly assumed and intellectual property more so. The article then considers the implications of this understanding for commercial interests, such as a landlord who has no desire actually to inhabit an apartment she rents out but who does not want others to live there without paying rent, and for interests in spite, revenge, and cantankerousness. It concludes that while our conclusions about which goods are and are not rival is thought of as a purely objective inquiry into the nature of the goods themselves, they in fact embed a substantial element of moral judgment as to the acceptability of different uses and motives. By and large, these reflect sympathy for what Locke called the “industrious and the rational” and scorn for of the “quarrelsome and contentious.”

Shai Stern

2.1 Housing and Social Justice

“Taking Community Seriously: the Effects of Expropriation on Residential Communities”

When the government takes private property, it usually harms property owners. This statement is nothing new and, indeed, most western jurisdictions recognize this harm and require the government to compensate owners for the market value of the property. The market value remedy is supposed to represent the objective value of the loss incurred by the property owner, regardless of the subjective value the owner attributes to the property. In some cases, monetary compensation in the amount of the property’s market value is a suitable remedy. In other instances, however, this “objective” means of valuation cannot fully account for the loss suffered by the aggrieved property owner.

In this article I examine a case of expropriation in residential communities for which market value compensation is an inadequate remedy. This remedy, I argue, fails to recognize that communities enable individuals to fulfill some of their substantive needs for their personhood and to realize their religious, cultural, economic and social conceptions of the good.

Based on a foundational pluralistic conception of property – one that regards community as a fundamental, though not ultimate, value of property – I argue that a liberal state should be obligated to allow its citizens to live in various residential configurations. This pluralistic obligation should apply during each phase of the community's existence: entrance, governance and exit. Yet, the state's pluralistic obligation is most crucial when the state expropriates property owned by individuals who live in strong, tight-knit communities. In recognition of the range of roles communities play in people's lives, I offer an expansion of the range of takings remedies and compensation mechanisms provided by the state. Allocation of these alternative remedies should depend on three factors: the role of cooperation in a property owner's ability to realize a conception of the good he shares with others; the social legitimacy of the owner's community; and the community's political and economic strength.

Edward Sullivan

4.4 Comparative Perspectives on Land Use

“Population Projections, Dueling Experts and Competition for Growth: The Oregon Experience”

In those places where plans are binding and are required to be coherent, the factual foundations of those plans, on which allocation of lands needed for housing, commerce and employment, are critical. Population projections are one foundation for determining needed lands and are necessary for consideration of alternative growth scenarios, rates of growth and selection of areas to be developed. Population projections are even more important in a system that purports to coordinate local and regional plans. As more jurisdictions undertake coordinated planning, a credible and uniform method of growth projections, including population projections, is necessary. Already, there are federal coordination expectations for housing and transportation grants in the United States. Such uniformity and coordination is standard fare in most European jurisdictions.

This paper will present population projections as a symbol of the transition that most American states must deal with in providing a coherent coordinated growth program out of a system that left planning and regulation of land use almost entirely to local governments. Left to their own devices, local governments will often be guided by parochial considerations in undertaking growth projections. Experts can always be found to support almost any view. Growth-demanding governments will hire experts with rose-colored glasses while no-growth governments will stress physical and environmental constraints, pessimistic business projections and the like. Even when there is agreement in a multi-jurisdictional area, allocation of population (and thus of growth) is often hard fought.

Most public agency projections will receive judicial deference if challenged. However while individual projections may be defensible, they may not always mesh to form a coherent whole.

Moreover, when inconsistent projections are made by jurisdictions competing for growth, the planning system is faced with “dueling experts” and the result is confusion in the absence of an entity that is able to resolve conflicts. Even where there is such an entity, it is often caught in the middle and attempts to avoid controversy, to the detriment of coordinated planning. Related conflicts occur over competition among municipalities for planning, annexing, and urbanizing current rural lands. Without a clear, respected and authoritative process, conflict will continue.

This paper will present the resolution of this conflict in Oregon, where coordinated planning has been in place for over forty years. One of the compromises necessary to achieve the establishment of the state system was to allow local governments to make population projections and for counties to “coordinate” population for the cities within the county and for its unincorporated areas. The result was unsatisfactory. First, there was no obligation for counties to justify their own population figures with overall state projections. Secondly, counties found it politically difficult to make hard decisions when the projections of the county and its cities did not match overall population projections for the county as a whole.

After much strife and some stopgap solutions, the Oregon legislature adopted a dual solution. In the Portland Metropolitan Area, which has an elected regional governing body, a politically responsible body, the Metro Council, makes future population and growth allocations for the cities and counties in the region. The paper explains the peculiar dynamics of the Portland Metro Area, which lends itself to this approach.

For the remainder of the state, cities and counties must accept those population projections made by Portland State University’s Population Research Center, which has expertise and now the political responsibility to make binding projections. The decennial census required by the United States Constitution provides a reality check on state projections. Administrative rules now govern the specifics of projections made by the Center.

Disputes over responsibility for population projections and the role of those projections on growth in a region or state over different visions of growth among local governments are not unique. As other states move to a model of coordinated state planning, Attention to those issues will be helpful to a more expeditious resolution of these conflicts.

Kara Swanson

5.5 Book Panel: Kara Swanson’s *Banking on the Body: The Market in Blood, Milk and Sperm in Modern America*

Discussants: Kara Swanson, Gregory Alexander, Douglas Harris, Kali Murray

This panel will review and evaluate the book, *Banking on the Body: The Market in Blood, Milk and Sperm in Modern America*, by Kara W. Swanson of Northeastern University School of Law. The book uses original historical research to trace how Americans came to understand property sourced from the human body through the body bank, an institution that facilitates the exchange of body products among strangers. By following the actions of doctors who established markets in the first body products to be “banked,” human milk, blood and sperm, the book analyzes body products as civic property-in-action, bought and sold to serve medical visions of the public good. The book argues that with the introduction of the “bank” analogy in 1937, body

products started to become more narrowly market property, traded only for private ends. This transition was aided by Cold War battles over health care financing, new product liability doctrine, and persistent racism. In a changing context, supplier gifting came to be preferred over supplier selling. The book uses this history to evaluate the contemporary focus on the gift/commodity dichotomy in body product exchange, and the legal emphasis on supplier compensation, as a harmfully limiting result of this history.

Mary Szto

5.1 The Chinese Real Estate Market

“Chinese Real Estate Investors in the U.S.”

Chinese investors are the second largest group of international buyers in the US real estate market. What is driving this flood of investment? What particular issues do Chinese investors face? This presentation explores the recent explosion in Chinese real estate investors, the background of property law in China, and the political, legal, and cultural factors driving outward investment. Then this presentation reviews US legal, tax, and cultural issues Chinese investors face. This presentation mainly addresses residential property and concludes with proposals for representing Chinese investors.

Rampant corruption and political instability in China have led investors to seek safe investments and educational opportunities in the US. Ancient principles of ancestral ownership and inheritance are reflected in Confucian principles of family residence and schooling. A child's elite education ensures blessing for one's parents and descendants. Thus, Chinese today invest in US homes in areas with both large Chinese populations and access to elite educational institutions. The ancient art of fengshui also influences purchases and prices, demonstrating the close relationship between ritual practice and property ownership. Those who represent Chinese real estate investors in the US should consider that (1) they are representing multigenerational families, not just individuals, (2) education is the most important factor affecting location of residential properties; (3) fengshui is also critical; and (4) as in the past, the Chinese will not hesitate to assert their legal rights in US courts.

Gakuto Takamura

3.1 Housing and Homelessness

“Vacant Properties in Japan and a New Challenge for Property Law”

In Japan, where economic recession and population decrease are ongoing problems, the issue of vacant properties, such as abandoned houses, has become prominent. Based on my field works in Fukui prefecture, this paper examines how the theory of property law should evolve in order to solve the issue of the underuse of resources.

In recent years, most of Japan's local governments have enacted ordinances that impose upon the owners of vacant properties the duty of appropriate management. However, municipal legal enforcement action is rare. It is often the neighborhood or community that persuades owners to take appropriate measures, referring to the municipal ordinance. To avoid having to undertake legal action, the municipality relies on the pressure of the community.

Even though vacant properties often have the potential for habitability, the Japanese, timid around strangers, have a tendency to avoid renting or selling these properties on the market. To reduce the owner's anxiety and to assess the personality of a newcomer, there are community-based organizations that serve as mediators between the parties.

This community-based approach is effective, to some extent, although too much emphasis on the homogeneity of the community—which is often an inevitable consequence of such approaches—tends to exclude diversity. This paper suggests that a rights-based approach, drawing from French Housing Law, in which housing is regarded not as private property but as a condition of human rights, and the American Landbank system's perspective, which relies on Heller's anticommons theory and the pursuit of efficiency, must be combined with the Japanese community approach.

John Tehranian

6.4 Race, Place, and Property

“Selective Colorblindness and the Legal Construction of White Geographies”

This Paper examines the selective invocation of colorblindness in legal and political discourse and argues that the trope has served as a powerful vehicle for the creation, perpetuation and patrolling of white geographies—spaces characterized by an implicit hierarchy privileging white racial identity. After assessing the new rhetoric of race in the Age of Obama, the Paper focuses on identifying and deconstructing the modern paradox of colorblindness jurisprudence. On the one hand, the courts have increasingly hewed to a colorblind vision of the Constitution when weighing the permissibility of race-based admissions and hiring programs for traditionally disadvantaged minorities. And, yet, on the other hand, when confronted with invidious racial targeting—in the name of patrolling our borders, keeping our streets safe from crime, or protecting the homeland from acts of terrorism—the obstreperous advocates of the categorically colorblind Constitution go strikingly silent.

Drawing upon the examples of S.B. 1070 (Arizona's “show-me-your-papers” immigration law), H.B. 2281 (Arizona's legislation outlawing ethnic studies programs in public schools) and a series of racial profiling cases interpreting the Supreme Court's *Brignoni-Ponce* decision, this Paper argues that the discriminate entreaty for post-racialism has, in fact, helped consolidate subordination practices in critical social, economic, and political spaces. In the end, therefore, while we are colorblind in theory, we are color bound in fact. Government regularly uses race in a variety of troubling contexts. Indeed, the very same courts that tell us that we have a colorblind Constitution have also held that one's Latino appearance is a relevant factor in determining reasonable suspicion for an immigration sweep, one's Middle Eastern heritage is a perfectly suitable consideration when ascertaining whether transportation of a passenger is ‘inimical to safety,’ and one's African-American descent can serve as an acceptable indicia of criminality without running afoul of the Fourth Amendment. At a minimum, these practices call into question our fealty to notions of colorblindness that have dominated legal and political discourse in recent years. More perniciously, however, the resulting uneasy gestalt perpetuates long-standing inequities (and forges new ones) by empowering a racialized social geography that continues to privilege white identity.

Rod Thomas

**5.4 Squatters Rights & Adverse Possession, Part II
“Squatter Rights Under the New Zealand Torrens Regime”**

The New Zealand Torrens regime, which was enacted in 1870, did not provide for the concept of a land title to be asserted by a squatter in competition to that of the documented owner.

However, this altered with the 1963 Land Transfer Amendment Act, which enabled applications to be made to the titles registrar for issue of a newly minted, State guaranteed title. To succeed, adverse occupation for an unbroken 20 year period (or in some cases a 30 year period) needs to be proved, and the current registered proprietor not oppose the application.

This paper describes the required processes under the 1963 Act. It considers whether current practices adopted by the registrar for processing such applications are robust enough in terms of the required evidential burden, and whether sufficient notification of the claim is available to possible competing, unregistered third party interests. The paper also considers the extent to which a disaffected party (including a disposed owner) may challenge a newly issued title, if it subsequently transpires the registrar has acted in error.

Hannibal Travis

**2.5 Empirical Methods in Intellectual Property
“Myths of the Internet as the Death of Old Media”**

This presentation analyzes claims that the Internet is destroying the book publishing, music, and movie industries, and that it needs to be strictly regulated by civil and criminal copyright laws to save companies and jobs. I catalogue arguments in favor of efforts such as SOPA and ACTA based upon the adverse impact of the Internet on media corporations' revenues and profits, and I survey evidence that these claims are overstated and that "old media" is doing better than ever, economically and financially speaking. Among other things, I survey empirical evidence that copyright industry sales and profits have increased, that economic trends other than infringement on the Internet drive fluctuations in music sales, and that the incentives to produce copyrighted work do not respond directly to minor variations in copyright doctrine or even to significant new copyright enforcement laws.

The article analyzes ten fundamental myths that may be used to justify Internet censorship and draconian copyright reforms. Four of these myths concern the allegedly negative relationship between Internet usage of various kinds and declining profitability or sales at old media firms. Three of the myths are designed to motivate Congress or the courts to endorse restrictions on Internet content using the justification that old media will benefit from such restrictions, thereby creating jobs and economic growth. The final three myths involve false assumptions that criminalizing Internet activity will save old media firms. Among other evidence that is useful to dispel these myths, this article examines: book and audiovisual media consumption in the aggregate; the continued growth of old-media entertainment sales such as books, music transactions, and entertainment subscriptions or admissions despite massive growth in Internet use since 1994; the findings of regression analyses exploring the relationship between Internet file-sharing software use and the music industry's retail sales; socioeconomic trends other than Internet use that may explain changes in the level of music sales in the United States; an empirical disconnect between the level of Internet-based infringement of recording industry

copyrights and the level of U.S. record labels' sales; the sales, total employment, profits, and market capitalization of firms in the U.S. film and television sectors in an environment of large-scale Internet-based copyright infringement; survey results suggesting that musicians may not see music file-sharing as having a severe impact on their livelihoods; the effects of copyright term extension on the number of feature films released and the aggregate investment in creating and marketing them in the United States, as well as on the number of films released in Europe; the lack of a correlation between copyright criminalization and subsequent reductions in Internet-based infringement in the United States; and the benefits, if any, of a draconian

Deepa Varadarajan

1.2 New Directions in Intellectual Property “The Myth of ‘Definite’ Patent Boundaries”

One of the biggest challenges facing patent law today is the uncertainty of patent scope. For patent owners, competitors, follow-on improvers, and users of a patented technology, it is often difficult (impossible, even) to ascertain, in advance of litigation, how a court will interpret the scope of a patent. While much patent scholarship has critiqued various aspects of claim construction by courts, little scholarship has addressed the closely related issue of claim “definiteness.” A lack of claim definiteness is grounds for rejection by the patent office, or for an issued patent, a court's determination of invalidity. Despite being called the patent statute's “clarity and precision demand,” the definiteness requirement has been fairly peripheral to scholarly debates about enhancing the predictability of patent scope.

Last term, in *Nautilus, Inc. v. Biosig Instruments, Inc.*, the Supreme Court turned its increasingly patent-curious eye to the definiteness requirement for the first time in decades. The Court announced a new (and arguably heightened) requirement for definiteness. In doing so, the Court focused on curbing patentees' incentives to draft deliberately ambiguous claims, ignoring other historical purposes of the definiteness requirement and its close relationship to claim construction. Moreover, by insisting that ambiguities in patent scope can be curbed if patentees grope for more perfect language, *Nautilus* perpetuates the myth of clear boundaries in patent law. This Article argues that given the historical evolution of claiming and definiteness jurisprudence, as well as the modern day realities of claim construction, the definiteness requirement should serve two key purposes: (1) lowering notice and information costs for multiple relevant audiences (e.g., follow-on improvers, the PTO, patent attorneys, and courts); and (2) tailoring patent scope to the inventor's actual contribution.

Mayank Vikas (and Virginius Xaxa)

1.3 The Global Indigenous Peoples Movement

Virtual Panel Paper: “Global Indigenous Peoples Movement Stirring in India”

Indigenous peoples in India have been enumerated at over 104 million, constituting 8.6 per cent of the total population. They remain among the poorest and most marginalized sections of society. However, two developments that led to the process of empowerment had stirrings in the global indigenous peoples movement: the Provisions of Panchayats (Extension to Scheduled

Areas) Act of 1996, which provides space for restoration of traditional system of governance, and the Scheduled Tribes and Other Forest Dwellers (Recognition of Forest Rights) Act of 2006, which aims to redress historical injustices done to indigenous peoples through state control of forests. These two initiatives are an outcome of the struggles of indigenous peoples supported by larger civil society organizations. The paper will discuss social and political contexts of the enactment of the two acts, their goals and key provisions, and obstacles thwarting realization of their goals.

Michel Vols

2.1 Housing and Social Justice

‘Neighbours from hell’: a statistical analysis of eviction litigation

Dutch statistics indicate that over half a million tenants suffer from serious anti-social behaviour from their neighbours (e.g. noise nuisance, intimidation). The most common procedure Dutch landlords use to address this anti-social behaviour is orientated towards eviction. They request a court to force the anti-social tenants to leave their home when the situation becomes unbearable for the neighbourhood.

This paper aims to gain a deeper understanding of the use of eviction in anti-social behaviour cases. In order to gain this understanding, the past and existing litigations concerning anti-social behaviour are analysed statistically with the aid of a unique and manually collected database covering over 550 court judgements.

The paper examines which types of anti-social behaviour constitute a sufficient reason to issue an eviction order. A significant difference in court decision was found between cases concerning drug related nuisance and cases concerning not drug related nuisance. Moreover, it was found that in two-thirds of the cases the tenant advanced a proportionality defence. However, the court ignored this defence in 10% of the cases and issued an eviction order in the majority of all cases. No significant difference was found in court decision between cases in which the tenant advanced the proportionality defence and in cases he did not. The paper concludes that the eviction focused approach exasperates the victims, as processing times of five years are normal.

Bela Walker

8.1 Outsiders, Insiders, and Property Law

“Tracing Parental Status from Property Rights to Fundamental Rights”

This project examines what a property framework can tell us about how we envision the fundamental rights to family and to privacy doctrine: In particular, the structuring of one’s “right” to be a parent amongst adults and vis-a-vis children and children amongst themselves?

One trope of family law is that, once upon a time, children were considered property, mere chattel of their parents. As the courts explained in the subsequent decades, the notion of children as possession was discarded in the enlightened development of privacy doctrines. Parents now derive the ability to rear their children without interference from their fundamental right to family integrity.

This discussion, however, overlooks how theories of property profoundly affected the constitutional rights now accorded to the family. Today, such property rights impact who becomes a (legal) parent, the scope of that parenthood, and the extent the state comes into to interfere with the parenting. Those who once held greater property entitlements—because of whiteness, wealth or gender—continue to have greater protections from their “fundamental rights.” Similarly, the right to family is very narrowly focused on right to the parent: one’s entitlement to manage your child and to exclude interference by other private individuals. The child lacks corollary rights to their parents or to other relatives, such as siblings. Like control of property, fundamental rights to children are viewed as a zero-sum gain where protection given to one relationship weakens another: thus two parents, no more (and no less), are given specific dominion towards the child and against the state.

Matthew Weber

7.1 The Changing Landscape

“Informality as a Mode of Deurbanization: Property and the Shrinking City”

The literature on urban informality frames it as a “mode of urbanization” -- one of the pathways through which the growth of urban areas occurs (Roy, 2005). In this paper, I posit that urban informality also occurs as a mode of *deurbanization* – one of the pathways through which undevelopment occurs. I focus in particular on the incidence of informal property ownership in “shrinking” cities – those urban areas of the American Rustbelt (and elsewhere) that have experienced sustained and substantial depopulation and disinvestment since World War II (see, e.g., Beauregard, 2009). As neighborhoods empty-out, poverty concentrates, and property values fall, the legal, economic, social and spatial mechanisms that ordinarily reproduce formal property ownership break down. Absent appropriate policy interventions, the result is widespread informal property ownership. These informal ownership arrangements can contribute to the decline of neighborhoods but can also make them more accessible and liveable places. I illustrate this thesis through an assessment of informal property ownership in Detroit. This research contributes to the literature on informality in the United States (Devlin, 2011; Larson, 2002; Ward, 2004; Way, 2009-10), on the evolution of property rights (Demsetz, 1967; Merrill, 2002), and on the distinctive processes through which decline proceeds in shrinking cities (Glaeser & Gyourko, 2005; Hackworth, 2014; Maennig & Dust, 2008).

Shelley Welton

5.2 The Geography of Energy Transition: Property Issues in a Changing Climate

“Utility Regulation in a Climate Changing World”

This article traces the ways in which climate change is breaking down the consensus around electricity regulatory models and utility ownership. For almost as long as public utilities commissions and “rate-of-return” regulation have existed, academics have decried the model as susceptible to industry capture and inefficiency. Yet this model of utility regulation trumped municipalization early in the twentieth century, and persisted through the energy crisis of the 1970s and the advent of deregulation in the 1990s. Climate change, however, appears to be re-opening the question of whether rate-of-return regulation retains its dominance as the best way to hold electric utilities accountable to the public interest. For example, in order to better achieve clean energy objectives, several cities – including Boulder, Minneapolis, and Chicago—have considered municipalization to repurchase their electricity grid, or “municipal electricity

aggregation,” with the city using its negotiating power to make purchases on behalf of residents. This article argues that the imperative to decarbonize, which carries with it a multiplying set of often contradictory commands to electric utilities, may give renewed force to old arguments in favor of more public forms of grid ownership. It draws on both the relevant, long-standing theoretical literature on these questions as well as modern case studies to evaluate whether these more public regulatory forms are likely to deliver on proponents’ hopes of cleaner electricity at lower cost than traditional rate-of-return regulation.

Alan White

6.2 Property Law, Foreclosure, and the Home

“Making Banks Talk: Foreclosure Mediation in the States and Under the Model Foreclosure Procedures Act”

Foreclosure mediation and diversion programs adopted in various states in the wake of the 2007 crisis have been effective in achieving workouts and other alternatives to forced home sales, according to the available research. The Uniform Law Commission is nearing the completion of a model Foreclosure Procedures Act that includes a model pre-foreclosure resolution program for owner-occupied homes. This paper will survey the existing empirical research on the mediation and diversion programs now in place, as well as their various legal structures, summarize the model Act provisions and the debates that informed them, and present the case for foreclosure resolution using a third-party neutral that differs from traditional mediation under the Uniform Mediation Act.

Lisa Whitehouse (and Susan Bright)

2.1 Housing and Social Justice

“Does the English Housing Possession Process Provide Effective Access to Justice?”

This paper evaluates the extent to which the system of handling housing possession cases in England offers effective access to justice to those at risk of eviction. The paper proceeds by two stages. The first offers a definition of ‘effective access to justice’ which is that access is achieved only when individuals are able to exercise effective choice in determining whether or not to enforce or defend their justiciable problems. Once individuals have decided to resolve their justiciable problems by recourse to an external adjudication system then the manner in which that system proceeds and its outcome must be perceived as ‘just’. Added to this are the other essential elements of procedural fairness including, ‘voice, neutrality, respectful treatment, and engendering trust in authorities.’

Using the meaning identified in the first stage of this paper, the second draws upon primary and secondary data to evaluate the extent to which the English housing possession process achieves effective access to justice. Particular reliance is placed upon the authors’ recent empirical research which used both interview and survey data to offer an insight into the practical operation of the process. What this and other research reveals is that the eviction process, particularly when combined with the recent changes made to the provision of legal aid, falls short of achieving effective access to justice in a number of respects including a failure:

- to address the apparent non-engagement with the process by a large number of occupiers,
- to demystify the legal process; and
- to ensure consistent levels of advice and support for all defendants.

In particular, the empirical data suggests that it is difficult and daunting for occupiers threatened with the loss of home to access the information, advice and representation they need to assist them in navigating the complex legal terrain associated with housing possession. This paper argues that these failings in the eviction process must be addressed if effective access to justice is to be achieved.

Hannah Wiseman

3.2 Property, Preemption, and Power in Energy Governance “Oil and Gas Intrastate Preemption and Governance Alternatives”

Even with the recent drop in oil and natural gas prices, communities around the United States still house large numbers of drilling and fracturing rigs, trucks, and workers associated with the oil and gas industry. The rapid influx of this type of industry--which is sometimes literally located in residential or agricultural backyards--demands new and creative policy approaches to allowing development while sustaining other local economies, quality of life, and natural resources. Local governments have chosen to govern this industry in a variety of ways: some have banned it, others have moderately or extensively regulated it, and still others have negotiated with oil and gas developers for certain community benefits and organized citizens' boards to informally mediate industry-community conflicts. All of these approaches and more, however, are increasingly under threat. Although New York State banned hydraulic fracturing that uses large amounts of water, the majority of states facing local concerns over oil and gas development have taken the opposite approach: they have welcomed the influx of jobs and dollars while preempting local control over this development. Texas is the most recent state to follow this path. While it previously encouraged local regulation of oil and gas--expressly relying on cities and towns to regulate in areas that the state oil and gas agency did not address--the state took a hardline preemptive stance after Denton voters banned hydraulic fracturing. One Colorado court has also held that a local ban in Longmont conflicts with state law and is therefore preempted. As state-local battles over the control of this high-impact industry continue, and if intrastate preemption becomes the norm in this area, solutions will be needed to avoid long-term environmental and social harm. This paper will explore existing models and potential improvements, including impact fees and tailored taxation schemes, cooperative state-local governance, and “fair share” development schemes.

Katrina Wyman

2.4 Rethorizing Property The New Essentialism in Property

For decades, defining property was not a major preoccupation of property scholars. They generally assumed that property is a “bundle of rights.” Times have changed and the definition of property is the subject of a considerable amount of recent scholarship. Much of this scholarship starts from the premise that the bundle of rights is not a definition of property and

that the bundle metaphor wrongly implies that property is merely a conclusory label attached to legal interests for policy reasons. The “new essentialist” scholarship seeks to offer an alternative definition of property that underscores that property has certain core features and that it is not reducible to endlessly shifting policy and values. Reflecting its impact, the new essentialist scholarship has attracted a large body of criticism.

My paper attempts to extract the essence of “the new essentialism” in property by identifying the key elements of the new essentialist understanding of property. I also argue that the new essentialist approach to property is more malleable than the new essentialists tend to acknowledge, and that many of the critics have exaggerated the extent to which the new essentialism restricts the space for regulation and redistribution of property. I emphasize that the new essentialism provides a loose framework for thinking about property, but few predetermined policy prescriptions. Accordingly, much of the controversy about the new essentialism is misconceived.

Virginius Xaxa (and Mayank Vikas)

1.3 The Global Indigenous Peoples Movement

Virtual Panel Paper: “Global Indigenous Peoples Movement Stirring in India”

Indigenous peoples in India have been enumerated at over 104 million, constituting 8.6 per cent of the total population. They remain among the poorest and most marginalized sections of society. However, two developments that led to the process of empowerment had stirrings in the global indigenous peoples movement: the Provisions of Panchayats (Extension to Scheduled Areas) Act of 1996, which provides space for restoration of traditional system of governance, and the Scheduled Tribes and Other Forest Dwellers (Recognition of Forest Rights) Act of 2006, which aims to redress historical injustices done to indigenous peoples through state control of forests. These two initiatives are an outcome of the struggles of indigenous peoples supported by larger civil society organizations. The paper will discuss social and political contexts of the enactment of the two acts, their goals and key provisions, and obstacles thwarting realization of their goals.

Lua Kamál Yuille

6.4 Race, Place, and Property

“Trespassers Will be Shot, or The Right to Exclude as Right to Kill?”

The deaths of Michael Brown and Eric Garner at the hands of police in Missouri and New York, respectively have been framed as a continuation of abuses against men of color recalled to public attention by the death of Trayvon Martin at the hands of George Zimmerman in 2012. This paper challenges this narrative. It positions the Trayvon Martin controversy as part of a wholly different clash of interests. Trayvon Martin’s death is not part of the #BlackLivesMatter movement. While race and race relations played an important role, Trayvon Martin’s death was also about something else that has never been considered.

Using a pedagogical lens, this paper explores how it is possible to view the legacy of Trayvon Martin and George Zimmerman as asking fundamental questions about property in the U.S. It

argues that the circumstances surrounding Trayvon Martin’s death represented fundamental tensions about the way we understand property, engaging fundamental notions of property rights in the United States and what people are allowed to do to protect those rights. The paper explains that American law, functioning as a societal pedagogy, has a hidden curriculum, a concept born in education research. The hidden curriculum of property law elevates the idea of property above that of one in a series of competing rights to a fundamental element of American ontology. Seen in this way, Trayvon Martin’s death presents a foundational question antecedent to whether or not Stand Your Ground/Right to Kill (depending on your perspective) laws are fair, just, racist, etc. It asks whether property and its protection is a competing interest or whether it is *the interest*.

Kellen Zale

3.3 Sharing Economy, Part I

“Sharing Property”

The emerging – and booming – “sharing economy” represents a paradigm shift in how individuals are choosing to use property. Airbnb, Uber, GearCommons and other collaborative consumption enterprises have reduced the transaction costs associated with small business activities and allowed millions of people to monetize property that was previously not being used for anything other than personal use.

While informal sharing and bartering have always occurred, the scale of today’s property sharing is significantly expanded, both in terms of the number of people sharing and with respect to the types of property being shared. A wide range of legal issues are raised by this activity, ranging from how it should be regulated to who bears the risk when property is damaged to how negative externalities should be addressed. To answer these questions, however, a more fundamental question needs to be considered: what does it mean to “share” property?

This article seeks to answer that question by providing a framework for understanding how activities in the sharing economy fit within the constructs of property law. Considering both an object-focused and a transactional approach, the article analyzes how sharing is represented in various property law doctrines and where activities in the sharing economy fit within this framework. The article also considers the normative and practical issues raised by property sharing, including the potential for property sharing to offer an alternative to the dominant exclusion model on the shape of property rights and responsibilities.

Laura Zanotti (and Pete Brosius)

1.3 The Global Indigenous Peoples Movement

Virtual Panel Paper: “Political Ecologies of Indigenous Transnationalism”

The emergence of the transnational indigenous people’s movement has been accompanied by a parallel shift in Native American cultural production. Since the 1980s, Native art, literature, and film increasingly emphasize social issues and identities that transcend tribal and colonial national boundaries while also contributing to local endeavors to secure land and autonomy, the enduring centers of indigenous politics. The paper analyzes these connections between culture and politics by taking up a series of interrelated questions: how has transnationalism reshaped

contemporary Native culture? How does culture engage issues of land and political autonomy, and what can it contribute to our understandings of them? Finally, how does culture critically reflect on the gaps and erasures of the transnational indigenous people's movement? To analyze these issues, the paper examines visual and literary culture that thematizes the Alaska Native Claims Settlement Act, the establishment of Nunavut, and the James Bay Hydroelectric Project.

Bruce Ziff

8.3 Squatters Rights & Adverse Possession, Part III

“Occupation, Protest, and the University Campus: A Canadian Perspective”

The Occupation Movement gave rise to a number of legal disputes in which rights of protest were pitted against rights over property, both private and public. Indeed, the strategy of occupation was designed in part to contest access over both kinds of places.

In Canada, there is a stark divide between public and private property with regard to the core right of an owner to exclude. Private landowners enjoy a robust power of exclusion; public holders are constrained by the *Canadian Charter of Rights and Freedoms*. Within this simple dichotomy, the Canadian university campus occupies an uncertain position. Most Canadian Universities are non-private institutions. However, title to the lands they occupy is typically held in the name of the University, not the provincial or federal level of government.

This paper explores the appropriate way in which to understand the university campus as a geographic space for protest. It does so by reference to an important and intriguing episode at the University of Alberta campus, in which a phalanx of police, under instructions from the University, precluded participants of an Occupy Edmonton protest from entering the campus. In so doing, the University explicitly asserted its private property rights. This incident will form the foundation for a broader analysis, one with certain comparative facets.