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Research Agenda

Through historical analysis of state and local government records and other primary sources, my work provides new insights on theoretical debates about rules and institutions in property law. I divide my agenda into three component parts: (1) resolving questions of institutional capacity; (2) providing new histories of takings clauses; (3) illuminating connections between the law and theory of property and other doctrinal areas.

1. Questions of Institutional Capacity

My job talk, *Property's Ceiling: State Courts and the Expansion of Takings Clause Property*, was originally conceived as part of a larger project exploring the role of state courts within takings law. Unlike others who have considered these topics in the past, my work delves into thorny state-law issues underlying takings, rather than focusing on the federal clause and federal court rulings. Both my job talk and a past article, *Defining Navigability: Balancing State-Court Flexibility and Private Rights in Waterways*, 36 CARDOZO L. REV. 1415 (2015), engage this topic; each inquires into the permissible range of state-court constitutional property rulemaking, either the upper limit of what qualifies as property (as in my job talk) or the lowest irreducible minimum (in my navigability work). I intend to continue pursuing this question in future projects. State courts can say what property is, and the state constitution and federal Constitution enforce protection for those interests—but a number of theoretical puzzles flow from this arrangement. Should the state and federal terms "property" be interpreted differently? What makes a state-made right "property" for federal Takings Clause purposes—the state's law, widespread recognition, a federal law baseline, or something else? Are there reasons for litigants to prefer that takings cases be litigated in state courts, given the state's traditional power over property law? State property cases are ripe with historical evidence that I believe will shed light on these questions.

In other future work, I plan to continue using historical analyses to explore the consequences of assigning responsibility to different institutions or groups within various areas of property law and land use planning. A number of players make the rules that apply in property and land use; a non-exhaustive list includes social groups, municipal governments, state legislatures, state courts, and federal courts. In two projects using Connecticut archival research, a work in progress called *From Rocks to Rods: Standardized Property Demarcation as an Effect of Development* and *The Failure of America's First City Plan*, 46 URB. LAW. 507 (2014), I have advocated for decentralized, bottom-up property planning by members of local communities, in lieu of rulemaking by legislatures or the executive branch. This contradicts much of the literature touting the economic benefits of top-down planning; my work often examines how social homogeneity and spatial proximity may mitigate the enforcement and administrative costs associated with bottom-up plans. I intend to continue studying land recording and planning in other urban areas, seeing whether the New Haven and Connecticut case studies are outliers or provide further support for my theories. I am also interested in studying infrastructural and planning histories—for example, the processes for designating historic preservation districts and

landmarks or locating highways, roads, and bus routes—to examine the legal and social constraints on institutional decision-making in those areas. I am particularly excited about pursuing projects that examine the unexpected factors that minimize the risks (or benefits) that theoretically would arise from a particular distribution of institutional authority.

2. New Histories of Takings Clauses

The Takings Clause of the federal Constitution receives a great deal of scholarly attention from both property and constitutional theorists. Much of this work, however, neglects state and local histories within federal takings law—let alone state takings law under state constitutions. Another strand of my work aims to provide new historical accounts that crystallize complex issues in these underexplored areas.

I plan to write on each of the four parts of takings clauses—that "property" will not be "taken" for "public use" without "just compensation." I mentioned my work on "property" above, but I am also developing works on both "public use" and "just compensation." I have begun to assemble a base of archival research for two future projects on compensation. First, in my work on New Haven's city plan, I discovered that it was more common for the town of New Haven to compensate individuals with plots of land than with money when property was taken for streets or commons. I am interested in exploring the historical period in which in-kind compensation may have been the norm and what that suggests about the development of the "fair market value" metric for determining just compensation. Second, in recent decisions, courts have begun finding that certain government acts are takings but find that the taking warrants no compensation because the property would be reduced in value had the taking not occurred. This reasoning evokes the doctrine of "offsetting benefits" widely used to reduce compensation for takings by railroads (on account of the increase in value to nearby parcels brought by rail service), which peaked in the nineteenth century, but was sharply constricted by state constitutional amendments and limits on the sorts of benefits that could be used to offset. As adjustments to compensation begin to re-emerge as a way out of challenging takings problems, we need to know more about the historical rise and fall of benefit-offset principles and their effects on infrastructure, development, and decision-making. I am also looking forward to a project exploring "public use": would it be "public use" for the government to take or destroy a property where something tragic has occurred? I am interested in studying past destructions of traumatic sites and the theoretical issues that might be raised by these demolitions.

Another area of interest involves how statutory immunities function within the overarching structure of federal and state takings law. The most famous street grid, the New York City Plan of 1811, raises this issue. In addition to challenging various aspects of the state's eminent domain authority, landowners affected by the grid hauled surveyors into court with suits for trespass and property destruction. Subsequent legislation explicitly eliminated this cause of action against surveyors and even provided that landowners could not seek damages for the injuries to land or crops the surveyors caused. More recent state laws create similar immunities in property law—like right to farm laws, which protect commercial animal feeding operations from nuisance suits. The channeling of property disputes into constitutional takings law, rather than other areas of litigation, is a puzzling issue that I intend to work on in the future.

3. Extending Property Law and Theory to New Areas

Finally, I will continue to pursue projects that bridge traditional doctrinal silos, especially those that use the law of property to illuminate gray areas in other legal subjects. In my recent paper *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection*, 125 YALE L.J. ____ (forthcoming 201[5/6]), I seek to bring the common law of property to bear on criminal procedure law. I also have a longstanding interest in intellectual property law, which I hope to pursue in the coming years. Intellectual property was the subject of my transactional practice, and it was also the subject of my first academic paper, *Leaving Room for Research: The Historical Treatment of the Common Law Research Exemption in Congress and Courts, and its Relationship to Biotech Law and Policy*, 12 YALE J. L. & TECH. 269 (2010). I am interested in drawing further connections between property theory and intellectual property in the future. For instance, I plan to compare the development of American property recording against the evolution of patent registrations, examining why economic and social theories of the benefits of standardized property demarcation have not been brought to bear on intellectual property registration requirements. Moreover, my work on the ever-expanding property rights generated by state courts in the takings context has led to an interest in the development and proliferation of judge-made intellectual property rights. Given that legislatures have generally created rights governing new forms of intellectual property (like sound recordings), what explains the mutation of state-court-made intellectual property rights—like the right of publicity—from their origins in tort or other law toward propertization? Did states develop other intellectual property rights that failed to spread, as some rights failed to cross borders in real property law? Alongside my primary focus on property, I aspire to find niches in intellectual property and other areas where historical analyses and property theories will generate better understandings of legal rules and institutions.