LONG PROGRAM

****Unless otherwise noted, all meeting events are headquartered at the Caruso School of Law*

Thursday, June 13

1:30pm	**Shuttle Pick-Up from Cambria Hotel Calabasas for Optional Field Trip to the Commons at Calabasas** (pre-registration required)
2:00-4:00pm	**Field Trip (*The Commons at Calabasas*)**
4:00pm	**Shuttle Returns to Cambria Calabasas Hotel**
4:30pm	**Shuttle Pick-Up for Welcome Reception from Cambria Calabasas Hotel**
5:00-7:30pm	**Welcome Reception at Duke's Malibu** (*21150 Pacific Coast Hwy, Malibu, CA 90265*)
7:30pm	**Shuttle Returns to Cambria Calabasas Hotel**

Friday, June 14

8:00am	**Shuttle Pick-Up for Conference from Cambria Calabasas Hotel to Caruso School of Law**
8:15-9:00am	**Registration and Breakfast (*Caruso School of Law Atrium*)**
9:00-10:30am	**Concurrent Panels Session I**

1.1 Submitted Panel, Part I: Resilient Property Theory (RPT) - RPT as a Method and Theory (*Classroom B*)

Panel Abstract: Property theory is at a crossroads. Over the years, property has been considered from various angles. Doctrinal and historical scholarship, law and economics and progressive property have all contributed significantly to our understanding of the role property plays in everyday life. Important debates on the role and purpose of property law have brought underlying values and connections to other aspects, such as the market, poverty and place to the surface.

Building on these important contributions Resilient Property Theory (RPT) takes large - and often wicked - societal problems as its starting point and approaches these in a systemic manner. No longer is property only a matter of individuals that are involved, but it also concerns involvement of the state. Considering property from this multi-dimensional angle, it calls for further development of methods of property research and property theory.

Following the publication of 'Squatting and the State. Resilient Property in an Age of Crisis' (Fox O'Mahony and Roark, 2022) this proposal of three linked panels seeks to further develop this work into areas of property methods and theory, vulnerability and power, and consumer protection in property.

These panels are convened by Lorna Fox O'Mahony (Essex), Marc L. Roark (Tulsa) and Bram Akkermans (Maastricht).

***Moderator*: Marc Roark**

- **Marc Roark, *Unpacking the Problem Space & RPT Polyvalence***

States' responses to 'propertised' resource problems go to the heart of property theory and property law, locating the governance of property—through private property rights and commons—at the forefront of current political, legal and scholarly debates. These debates are anchored in liberal theories of property, which in turn are rooted in classical liberal theories of the state. As social, economic, political and environmental transformations have re-configured the state's public power, and private property's power, these implications have not yet been worked through in accounts of private property law. If property theory is to make a meaningful contribution to addressing the wicked property problems that manifest in the global challenges of developing sustainable housing, financial and environmental systems, the approaches and methodologies of property scholarship, and the theories we build to understand, interpret and explain property require fresh attention. This chapter offers a new approach and methodology for thinking and talking about property law and theory, drawing insights from wicked problem theory, vulnerability theory and sustainability theories, and rooted in a realistic account of the nature of the twenty-first century nation state. Taking a methods assemblage approach, RPT avoids framing limitations that narrow the view of problems, and enables a new approach and methodology for property scholarship that focuses on the resilience needs of all stakeholders, including the state.

- **Lua Yuille, *Power, Resilience, & Property***

Sustainability, power, vulnerability, and property constitute a complex interplay that shapes the fabric of contemporary societies. At the nexus of these concepts lies the dynamic tension between environmental stewardship and human agency. Sustainability, as a guiding principle, underscores the imperative to harmonize societal progress with ecological integrity. This involves a delicate negotiation of power dynamics as diverse stakeholders navigate the intricate web of resource distribution and consumption.

Power, a central force in societal structures, plays a pivotal role in shaping the trajectory of sustainability initiatives. The allocation of resources, decision-making processes, and access to opportunities are all contingent on power relations that can either propel or hinder sustainable practices. Examining the intersection of power and sustainability also unveils vulnerabilities embedded within societal frameworks. Vulnerability manifests across various dimensions, encompassing environmental fragility, social inequality, and economic disparities. Addressing vulnerability necessitates a nuanced understanding of power dynamics to ensure that sustainable solutions are inclusive and resilient.

Property rights emerge as a critical dimension in this discourse, serving as a lens through which sustainability and power are refracted. The distribution and management of property—whether natural resources or urban spaces—become crucibles of power struggles that influence the ability of communities to achieve sustainable development. As societies grapple with the challenges of the Anthropocene, an integrated analysis of sustainability, power, vulnerability, and property provides a holistic framework for navigating the intricate terrain of contemporary global challenges.

- **Rachael Walsh, *Deliberative Property: Managing Complexity in Property Systems***

The paper demonstrates how 'deliberative property' offers a pathway for mediating between the complexity-management concerns of two competing schools of thought in property theory, loosely termed 'progressive' and 'information' perspectives. Deliberative property does so by facilitating information-intensive contextualisation of

property disputes and direct stakeholder engagement, while at the same time containing the broader systemic impacts of such engagement. Deliberative property also provides additional points within property systems wherein public concerns about the use and distribution of property can be reflected in the legal ordering of private relations.

Depending on the property problem at issue, tighter or looser connections between deliberative property decision-making and classic bi-lateral private law adjudication may be appropriate. However, deliberative property raises inclusivity challenges, suggesting that it may be an effective complexity-management tool, allowing for contextualisation while containing its ripple effects, it may not offer an easy pathway for better integrating the voice of 'property outsiders' into property decision-making.

The paper advances these theoretical arguments and illustrates them using a number of doctrinal case-studies, including in respect of mortgagor/mortgagee relations and landlord/tenant relations.

1.2 Land Use, Rights, and Sustainable Development (*Classroom C*)

***Moderator*: Brandon Weiss**

- **Robin Malloy*, A Network Capabilities Approach to Land Use and Disability Law***

Our communities must be made safe and easy to navigate by people with disabilities and by those who are seeking to age in place. This requires us to do land planning and zoning in a way that empowers a diverse population to readily participate in community life. Accomplishing this goal involves working at the intersection of land use law and disability law. This means we must work at the intersection of competing legal frameworks, one based on the exercise of the sovereign police powers, and the other based on the prevention of discrimination under civil rights law. The paper explores this intersection.

- **Diego Gil*, How Local Residents Influence Land Use Law?: Evidence from Chile***

Recent scholarly investigations have indicated a relevant shift in the dynamics of urban land use regulations within economically robust cities. Historically, these regulations were predominantly influenced by the real estate sector's interests. However, there is an emerging trend towards these urban areas becoming arenas where local residents increasingly assert substantial influence, advocating for a land use regulatory framework that aligns with their preferences.

In my research, I delve into this phenomenon through a series of semi-structured interviews conducted with key stakeholders, encompassing both public and private entities, who are actively engaged in the land use decision-making process in Chile. This paper aims to unravel the complex interplay of institutional, political, and social forces that potentially catalyze the heightened involvement of local residents in the modification of land use regulations.

1.3 Progressive Property and Property Systems, Financialization, and Conceptions of Ownership (*Classroom E*)

***Moderator:* Adam Hofri**

- **Sarah Schindler*, Non-human Animals Through a Progressive Property Lens***

Non-human animals are legally viewed as property, able to be owned, bought, and sold. But traditional notions of property result in numerous problems when applied to non-human animals. For example, the recovery for a tort against a companion animal is often limited to market value, which may be close to zero. Further, courts and lawmakers typically look at the harm or benefit to a non-human animal's "owner" rather than to the non-human animals themselves. These outcomes logically follow from the application of a traditional ownership model of

property law—one that is informed by law and economics, and which views non-human animals as mere economic assets. However, in recent years, many property law scholars and some courts have embraced a different model for analyzing property ownership: "Progressive Property Theory." This article will call for a move away from the conventional view of property, and toward an acknowledgement that property serves not only economic values but a range of other values as well, including dignity, morality, flourishing, virtue, and equal treatment. The project will examine whether, if this progressive property frame were applied in the context of animal law cases and laws, non-human animals could gain benefits while still retaining their property status.

- **Jan Biemans,** ***Bonds Between Humans and Things (with a Link to Sustainable Use)***

- **Jessica Shoemaker (and non-presenting co-author James Fallows Tierney),** ***Financialized Farmland***

This article explores the asset-classification of farmland and the implications of this turn for rural land ownership, agricultural and food system resilience, and economic justice. Farmland has become an increasingly popular asset class in capital markets, with institutional players taking on a significant degree of absentee investor ownership of farmland. But while financialized farmland was once seen as a threat to rural ways of life, efforts to limit absentee investor ownership of land have largely succumbed to the pro-capital formation policies underlying both real property and securities laws.

In this article, we explore how agricultural and securities policy—as well as private property law itself—contribute to land concentration, rural depopulation, environmental degradation, and labor exploitation. These patterns of asset-classification and elite capture exist across other socio-legal domains, including investor takeover of single-family housing and an expanding suite of other features of everyday life, but here we focus on the American countryside as a landscape in which the tensions and impacts are both acute and particularly visible.

In this article, we examine dynamics of capital ownership intermediation in the context of financialized farmland. We focus on absentee ownership and the legislative attempts, including corporate farming laws, to curb its negative impacts. We also assess possibilities and limits of using securities law to intervene in the intermediated ownership of farmland, with a particular emphasis on disclosure rules (including ESG reporting) and the challenge of nonreporting private funds. We also assess adviser- and fund-level regulation as well as a return to merit regulation as potential tools for addressing inequities raised by financialized farmland.

We end on a more somber note. Doctrinal solutions are not likely to be fixes to the problems of farm-land investments. We identify possible interventions toward a farmland ownership policy in a more equitable and sustainable future.

1.4 Natural Resources: Use, Access, Regulations, and Rights (*Classroom F*)

***Moderator*: Jim Kelly**

- **Kevin Grecksch,** ***Underground Spaces - Stakeholder Perceptions on Sustainable Usage***

In the light of increasing claims on the underground space for fracking, transport or (nuclear waste) storage, I assess the question how an improved and sustainable governance of underground space can be ensured. Geological underground models deliver only frameworks for possible uses and we do not know much about the context between geological characteristics and human uses, demands and changes of underground space. Moreover, governing underground space can be complicated as it involves conflicting objectives and regulatory frameworks. One key objective therefore must be to conceptualise and implement new approaches to underground governance taking into account its diverse uses and various stakeholders' claims.

This research will present preliminary results of a participatory research processes in the UK with stakeholders in underground space use. This ranges from engineers, architects, hydrologists, geologists to archaeologists and social scientists. As such it is the first comprehensive empirical work on this issue in the UK. This is important because although humanity has been using underground spaces for thousands of years for example for extracting mineral resources or water, the systematic use of underground space, especially in urban areas is a developing

field and laws are not keeping pace with the demand for, and opportunities of urban underground space. Hence, the underground has become an economic and political arena with potential consequences for example for safe drinking water supply. Furthermore, the governance of underground space can be complicated as it involves conflicting uses and legal regulations.

- **Dylan Malagrino*, Beach Please: Implementing a New England Coastal States Open Beach Access Act***

The New England states should modify their Coastal Zone Management programs to allow each state to implement a New England Open Beach Access Act. Each state with an ocean coastline would follow a uniform program for coastal zone management instead of following their own respective state-specific programs. Regional specific zone programs, instead of individual state-run coastal zone programs will become more efficient at streamlining daily operations and maintaining a consistent regional coastal program over time. Currently, the federal Coastal Management Zone program allows individual states to manage their coastal programs. The discord occurs when a bordering state defines boundaries, recreational uses, or rights in such a way that the sister state does not. Congress should amend the federal Coastal Management Program to allow for states wishing to join a regional specific Open Beach Access program the ability to do so without impairing their status in the Coastal Management Program or their allocation of federal funds. By implementing a New England Coastal States Open Beach Access Act, a consistent and uniform coastal program will lead to a more effective coastal management program, and to more public beach access in New England.

10:30-10:45am **Health Break** (*Caruso School of Law Atrium*)

10:45am-12:15pm **Concurrent Panels Session II**

2.1 Private Property, Common Property, and the Public Interest: Conflict, Environment, and Animals (*Classroom B*)

***Moderator*: Sarah Schindler**

- **Elisabeth Ahlinder (and non-presenting co-author Dr. Åsa Örnberg), *Managing Conflicts within the Swedish Wild Ungulate Legal Framework***

Exponentially growing populations of wild deer and boar in Sweden cause rapidly rising damages to crops, forests, traffic security and have a negative impact on biodiversity. Restoring the systematic balance between strong and healthy populations of wild ungulates and different land uses, is an urgent societal issue.

It is established that sustainable wild game management can only be achieved through collaboration and collective efforts of hunters, landowners and state authorities. The current system is however characterized by contrapositions regarding how large the ungulate stock ought to be, which measures that should be taken to reduce grazing damages, and which stakeholder that is obliged to take measures to avoid damages.

Wildlife management frameworks are institutionally complex structures, built on the historical yet undefined property right to hunt, and the states´ and EUs authority to restrict and control the hunt. The purpose of the framework is to manage a particular form of the commons. Legally, wild ungulates are categorized as a certain type of common property, yet at the same time, wild animals belong to no-one.

This project examine whether the legislative framework entail the necessary prerequisites to prevent and reduce conflicts, whether there is potential need for changes to the system and how such mechanisms can be successfully implemented. The project builds on the theoretical frameworks of resilience theories on adaptive governance and theories of overregulation focused on overcoming regulatory commons dynamics, and takes a legal perspective on policy output using doctrinal, comparative and theoretical legal methods.

- **Shai Stern, *People and Penguins: The Case for an Environmentally Conscious Property Law***

The mid-20th-century development of environmental law brought forth an enduring conflict with private property rights. While the foundational principles of private property do not inherently obstruct environmental conservation, the predominant legal disputes centered around efforts to enhance natural resource protection. This perceived tension arises from a prevailing concept that limits private property's protective scope to human interests and values, neglecting non-human environmental interests. This dichotomy, referred to as "peoples or penguins" by William Baxter in 1974, hampers the effectiveness of environmental policy by prioritizing human concerns over nature and its resources.

This article contends that there is no need to force a choice between human and environmental interests, as both can and should coexist within the realm of private property. Private property serves as a platform for value deliberation and the harmonization of societal necessities. Excluding environmental values from this deliberation not only represents a normative shortcoming but also impedes addressing pressing environmental challenges effectively. By integrating environmental values alongside human values within private property rights, a comprehensive framework emerges. This incorporation equips courts and decision-makers with the tools to formulate and implement sound environmental policies that balance the interests of both humanity and nature.

- **Jodi Lazare,** ***Private Property and Public Discourse***

In 2023, the founder of the animal rights group Direct Action Everywhere was sentenced to 90 days in jail followed by probation after being convicted of trespass and conspiracy. The charges were brought after he and other activists entered a California poultry farm, removed suffering birds, and documented their activities on video. Similarly, in 2022, leaders of the animal rights group Meat the Victims were sentenced to one month in jail, and probation, following convictions for break and enter and mischief. In 2019, they carried out a sit-in at a British Columbia pig farm and livestreamed it for public viewing.

These offences are primarily aimed at protecting private property — something the legal system takes for granted. But in protecting the private, these and similar offences inhibit meaningful discussion around animal agriculture and food production — subjects that courts and scholars describe as “legitimate matters of public debate.” Indeed, the information that typically flows from this type of activism is fundamental to public discourse, the right to information on which to base consumer choices, and, importantly, democratic debate about the legalities of animal farming and food production — that is, the stuff of free expression.

This presentation queries whether the private property paradigm, where the treatment of animals typically takes place behind closed doors, serves an appropriate social function. It looks at the role/purpose/function of private property in the common law and examines those things in the context of food production and the activism that industrial animal agriculture regularly invites.

- **Timothy Mulvaney,** ***Wildlife: Takings and the Public Interest***

2.2 Submitted Panel, Part II: Resilient Property Theory (RPT) - RPT, Power and Vulnerability (*Classroom C*)

Panel Abstract: Property theory is at a crossroads. Over the years, property has been considered from various angles. Doctrinal and historical scholarship, law and economics and progressive property have all contributed significantly to our understanding of the role property plays in everyday life. Important debates on the role and purpose of property law have brought underlying values and connections to other aspects, such as the market, poverty and place to the surface.

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***Moderator*: Marc Roark**

- **Sue Mari Viljoen, *A Resilient Civil-Law Tradition in South African Property Law***

Pre-constitutional land law in South Africa consisted of two divergent systems. For the black majority it was structured in accordance with regulated customary law or precarious holding from the state being of a feudal nature and founded on liberal notions of paternalism, open to governmental control and prejudice. When apartheid ended, a new democratic, constitutional order set out to reform this division via distinct land and housing imperatives: the redistribution of land, the reform of insecure tenure and provision of access to adequate housing. What this meant for civil-law property was unclear. Thirty years later, pressing questions emerge about property reform in South Africa, conceding that land and housing reform have failed.

The paper sets out to unpack property reform from a civil-law perspective. The property crisis in the context of land and housing reform is first demarcated after which two aspects of the civil-law tradition – the conception of property and the public/private divide – is critically reflected on to trace whether the reform imperative included civil-law property as a means for reform, and therefore also altered some of its underlying apartheid-led conceptions. The paper further reflects on the inadequacy to which property provisions in the Constitution have assimilated with traditional property rules, principles, and practices into one, general, property discourse.

- **Kate O'Reilly, *Vulnerability, Power and Sustainable Energy***

The concept of energy justice and achieving a just transition to clean energy systems is often paired with discourses on human rights. Little attention is paid to the interface between private property regimes and the social inequalities that come to the fore in this transition. Vulnerability theory offers a framework for laying bare the role of property law systems in the reproduction of the social inequalities. This paper will argue that these inequalities are obscured by the current scholarly focus on the supposed emancipatory policies and ideologies of human rights discourses, where human rights are often framed as the appropriate remedy to the problems that emerge in the context of the clean energy transition. This paper will reorientate the debate by adopting the ontological repositioning of the legal subject from vulnerability theory as a lens and starting point for examining whether and how property law and its underlying logic are an inherent part of the problem in the first place.

- **Alexandra Flynn, *The Right to Housing in Canada: A Law with No Teeth***

Despite constitutional protections for 'life, liberty and security of the person', a federal right to housing, and human rights codes, Canada has an alarming (and rising) degree of housing precarity and homelessness. Courts alike have resisted any recognition of 'positive' rights owing from these legal protections, highlighting a recognition of property rights as a specific reason. This paper draws from resilient property theory (RPT) to conclude that the language of positive rights serves as a strong shield to rights recognition in the area of housing. In making this claim, the paper adopts RPT's methodological approach of considering the numerous state structures involved to understand what states – including courts – are doing (and not doing) to maintain their equilibrium.

2.3 Submitted Panel: Public Lands and National Parks (*Classroom E*)

Moderator: **Sheldon Bernard Lyke**

- **Sheldon Bernard Lyke, *Imperial Parks 2.0***

National parks are imperial in nature. They have been rooted in empire since their inception. While US national parks are popularly considered our nation's best idea, recent scholarship has taken a more critical view of this benign characterization. Scholars have documented national parks' colonial and racist origins. For example, it is well documented that national parks are colonial with respect to the invasion of lands of native people. Thinking about parks as imperial allows a framework to see that the problem of what happened to native people in the origin of our national parks is bigger than native displacement. The problem is what happens when we regulate the lands of individuals who have no say in government.

National parks in the U.S. territories is the latest manifestation of the US using the national park as a tool of empire (imperial tool). The national parks in the U.S. territories demonstrate a US problem. What happened to native folks is not a problem in the past. The solution is not to solely give back land to native folks. The problem comes in establishing future parks where shared governance is at issue.

- **Randall Johnson*, Who Has the Most US National Parks?***

It is, often, assumed that U.S. national parks are equally distributed across sub-national space. This assumption, however, has yet to be substantiated by any research. As a result, the Article tests that assumption: in order to explain where U.S. national parks are distributed in 2022. This article does its work by introducing a new U.S. national parks dataset. This dataset is used, at least initially, to identify sixty-one (61) U.S. national parks in the continental U.S. and the fifty (50) states that host them. Later, it points out how the current distribution of U.S. national parks changes when sorted using race, income and location. Finally, my dataset is used to make an important point: that the three (3) types of advantages may inform the distribution of these parks.

- **Edward De Barbieri*, Forever Wild? And for Whom***

In October 1976, two men broke into a state-owned office building in New York's Adirondack Park and attempted to set the building on fire. This arson attempt was but one extreme act in the long-waged war between development and conservation, between urban and rural interests. The building—which on the inside was doused with gasoline—was the headquarters of the Adirondack Park Agency, the government body that regulated development in lands marked for conservation. The alleged arsonists represented the literal chafing of year-round residents affected by state conservation, saddled with regulation in the face of needs for economic development in isolated, rural areas.

Themes of growth and development versus conservation appear throughout the law and rurality legal academic literature. Urban elites, controlling money and political power, conserving and (over)regulating open rural spaces foment unrest among rural residents, furthering the city-country divide. Conservation—through a class critique lens—has largely preserved wild lands for wealthy individuals for recreation to the exclusion of indigenous, poor, and other residents and communities who earn their livelihood from the land.

2.4 A Right to Safe, Healthy, and Adequate Housing? (*Classroom F*)

***Moderator*: John Lovett**

- **Padraic Kenna, *A "Right to Housing" for Ireland***

Politicians in Ireland claim to be among the world's strongest proponents of human rights. Yet, ratified international human rights instruments have no status in domestic law unless legislated. Housing rights adopted in UN and Council of Europe instruments are thus unenforceable due to this dualist system set out in the Constitution. No government to date has passed such legislation. However, rising rents, house prices and homelessness are generating a groundswell of political activity for a right to housing to be inserted into the Constitution. Following major consultation (including with international experts) a proposed wording has been put forward to the Government. This would seek to counterbalance powerful Irish constitutional private property rights, which instill chilling effect on legislators, despite being subject to common good restrictions. Drawing on international models, the proposals would guarantee every citizen a right of access to adequate housing – where a court could hold the State to account for persistent and systemic failings – similar in some ways with South

Africa. This approach would allow space for complex and multi-facetted housing policy options to be exercised within the elaborate institutional (and increasingly internationalised) framework that is the Irish housing system. But it would also go beyond strictly legalist approaches by affirming the fundamental importance of "home," as part of the development of family, social and community relationships. Adopting this holistic interpretation of "home" advanced by Fox-O'Mahony, would capture the essence of the link between people and the buildings they inhabit, giving it protected constitutional status.

- **Michel Vols*, The Progressive Realisation of the Right to Adequate Housing and the Right to Property***

The concept of the right to adequate housing is not a single and unified one. Instead, it is broken down into fragments, with elements of this right found on an international, regional, and domestic level. The right can be seen as a multi-layered construct that affects different dimensions of housing, such as access, occupancy and exit. Furthermore, each country in the world has ratified various treaties and optional protocols related to the right to adequate housing and included different types of housing-related rights in their constitutions. Furthermore, the role of property rights varies across countries, affecting the effectiveness of implementing the right to housing.

This paper presents the findings of the development of a right-to-housing index, which measures the level of acceptance of scrutiny on an international level and the degree of constitutional engagement with the right to housing. The paper also examines the progressive realisation of elements of this right by analysing the temporal dimensions of acceptance of international scrutiny and constitutional engagement, and by comparing doctrinal data on the right to property.

- **Katherine Trisolini*, Getting our Houses in Order: Law and Mold Growth in Water-damaged Homes***

By several estimates, at least half of U.S. homes suffer from ongoing water damage and mold growth. Part of this problem can be attributed to contemporary building techniques that rely on mold-friendly materials such as drywall and, in some cases, inadequate workmanship. Importantly, however, these problems are exacerbated by the lack of legal guidance for building mold-friendly homes, remediating mold when it does happen, and the complete absence of state or federal mold exposure standards for residents. Only a handful of states require licensure for mold remediators, leaving most consumers to the whims of remediation marketers. Moreover, within the medical community, the attempt to discern acceptable exposure levels is confounded by conflict between doctors treated non-allergic mold illness and doctors who serve as expert witnesses for home builders and landlords.

This paper examines how the law be better attuned to the impact of residential mold exposure, aiding in prevention, remediation, and better health for residents. The issue is pressing not only because of the existing health impacts from mold exposure, but also because water damage will become increasingly common due to climate change induced flooding and extreme weather.

12:15-1:45pm **Lunch, Welcome, and Keynote Address by Professor Sheila Foster** (*Classroom D*)
Introductions and Moderation: Sarah Schindler and Shelley Saxer

1:45-3:15pm **Concurrent Panels Session III**

3.1 Comparative Perspectives on Housing Policies: Landlords, Tenants, Eviction, and Repossession (*Classroom B*)

***Moderator*: Jade Craig**

- **Hano Ernst*, Rent and Eviction Control in Post-Socialist Regulated Tenancies in Croatia***

This presentation looks at the controversial developments in Croatian housing law that recently culminated after decades of conflict between property owners and tenants protected under the Tenancy Act of 1996, stemming

from failed post-socialist restitution policies. Socialist tenancies in privately owned units that converted to tenancies subject to strict rent and eviction controls were first challenged under the ECHR in Statileo v. Croatia causing the government to attempt to remove such controls in 2018. This attempt failed after a ruling by the Croatian Constitutional Court striking down the legislation as violating the tenants' right to respect for the home. The Government has now put forward a new bill seeking to remedy the situation by various measures including forced evictions and substitute public housing; however, the bill's future remains uncertain. The presentation discusses the complexities of constitutional review of rent regulation in a broad and comparative perspective. Both rent control and eviction control are ubiquitous in western jurisdictions. In the notable example of rent stabilization in NYC, severe restrictions on landlords' property have consistently been held as compliant with the Fifth Amendment as permissible land use regulation. In this context, the presentation discusses the development of constitutional review of rent regulation before the U.S. high courts, including three recent (2023) cases before SCOTUS that challenge NY's Rent Stabilization Law. The presentation compares and contrasts the arguments presented in these cases against those presented by the ECHR and the Croatian Constitutional Court in analogous cases drawing conclusions about future developments in this field.

- **Andrea McArdle,** ***Risks of Alternate Financing Strategies for the NYC Housing Authority***

New York City's public housing authority (NYCHA) is the nation's largest public housing agency and most deeply affordable housing provider for the City's vulnerable residents. A trajectory of federal disinvestment and NYCHA's own regulatory failures accelerated a downward spiral in housing conditions and public-health risks to NYCHA residents. Now subject to a federal monitor, and struggling to finance nearly $80 billion in repairs to its aging assets, NYCHA is partnering with private entities to refurbish 62,000 units under a federal refinancing strategy, Rental Assistance Demonstration (RAD), operating as Permanent Affordability Commitment Together (PACT) in New York. PACT continues residents' public housing benefits, including rental caps, but access to private capital under RAD triggers loss of the units' public housing status under the Housing Act, resulting in loss of oversight and evidence of rising eviction rates in some PACT-covered complexes.

A second NYCHA rescue strategy, authorized under New York State law, created a public Preservation Trust with bond-issuing authority to finance repairs. A pilot program for renovating 25,000 units not covered by PACT, the plan hinges on apartments qualifying for a "tenant protection voucher" under Section 8 of the Housing Act, an income stream that the Trust can use to service bond debt. As with PACT, residents would retain public housing benefits but lose statutory public housing status.

Recognizing the diminished commitment to the public housing model once embraced in 20th-century national housing acts, this paper considers risks that alternative financing poses for continued public control of NYCHA assets.

- **Joseph Singleton (and non-presenting co-author Allyson E. Gold),** ***Proportional Possession***

American eviction proceedings are a fusion of property and contract law. Superior title to real property dictates ownership; through contract, owners can lease possession to a tenant. When a tenant breaches the lease, an owner can bring an eviction action to retake possession of the property. This narrow view of eviction overlooks a simple concept: a property's significance as a home. Courts render judgment without regard for what will happen to a tenant after displacement, resulting in a system where landlords prevail in over eighty percent of disputes.

In Europe, tenants in an eviction action have the right to a proportionality defense under Article 8 of the European Convention on Human Rights. Once invoked, European courts weigh the harm of tenant displacement against a landlord's ownership rights. In the United States, this judicial balancing can occur when a constitutional right is at stake. The absence of a right to housing in the United States, however, has prevented such balancing tests in American eviction law.

The absence of a constitutional right to housing need not bar proportionality principles in American eviction proceedings. Twentieth century neoliberal policies led to the privatization of housing for marginalized communities, catalyzing the commodification of home, and created systematic exploitation in the rental housing

market. The financialization of home is reinforced by eviction law that favors the interests of property owners at the expense of tenants. Incorporating proportionality principles in eviction hearings is a corrective counterbalance that respects private property rights while recognizing the importance of home.

- **Jenny Russell*, What respite?***

3.2 Submitted Panel, Part III: Resilient Property Theory (RPT) - RPT and Consumer Protection in Property Law (*Classroom C*)

Panel Abstract: Property theory is at a crossroads. Over the years, property has been considered from various angles. Doctrinal and historical scholarship, law and economics and progressive property have all contributed significantly to our understanding of the role property plays in everyday life. Important debates on the role and purpose of property law have brought underlying values and connections to other aspects, such as the market, poverty and place to the surface.

Building on these important contributions Resilient Property Theory (RPT) takes large - and often wicked - societal problems as its starting point and approaches these in a systemic manner. No longer is property only a matter of individuals that are involved, but it also concerns involvement of the state. Considering property from this multi-dimensional angle, it calls for further development of methods of property research and property theory.

Following the publication of 'Squatting and the State. Resilient Property in an Age of Crisis' (Fox O'Mahony and Roark, 2022) this proposal of three linked panels seeks to further develop this work into areas of property methods and theory, vulnerability and power, and consumer protection in property.

These panels are convened by Lorna Fox O'Mahony (Essex), Marc L. Roark (Tulsa) and Bram Akkermans (Maastricht).

***Moderator*: Marc Roark**

- **Lorna Fox O'Mahony*, AI, Consumer Finance, and Real Estate Transactions***

Networked transactions are rapidly changing with the innovation of AI. With the ability to quickly aggregate different points of data, real estate itself is being transformed through data tools that enable long-distance transfers of land for financial rather than material purposes. From buy-to-leave real estate, to long-distance landlords, and short-term rental markets local consumers are disadvantaged by the rapidity of real estate transactions. This paper considers how AI interaction with real estate through the RPT lens, looking particularly at the role of consumer law as a means to regulate.

- **Shelly Kreizcer-Levy*, Consuming Ownership***

Property rights are considered trump cards in many legal disputes. They empower individuals by granting them extended control over various resources, both tangible and intangible. Despite this apparent legal power, the practical significance of property rights has been eroded. Property rights have been replaced by a different set of legal rules that protect individuals as consumers rather than owners. This transition from entitlements to consumer protection is part of a long social, economic, and legal process that redefines forms of protection from power of individuals in a liberal state. As part of this process, areas of the law that traditionally bestow property rights are increasingly defined and regulated under a consumer protection regime instead. Examples vary and include homeownership and mortgages, the rise of leases, shareholders rights, and technological and digital assets.

Property law and consumer law epitomize different legal methods of shielding individuals from power. Consumer law restrains the power of the seller or service provider by setting fair rules for market participation. Therefore, consumer law rules focus on disclosure of information, repair, and products' safety. By contrast, property rights

protect individuals from power by conferring them with authority that allows them to determine their own goals and purposes. The desiccation of property right's practical significance coincides with, and reflects, the rise of corporate control over the use, management, and finance of goods and services. In other words, characterizing owners as consumers reallocates control over resources from individual owners to corporations.

- **Timothy Dodsworth, *RPT, Consumers and Values***

Consumer protection at the European level has been seen as a device to rectify information asymmetries but which has thereby ignored the subjective vulnerabilities of the parties, system and state. Where consumer contracts and property (particularly as characterised by Resilient Property Theory (RPT)) collide, new opportunities arise to identify how underlying values shape (consumer) contract law.

Re-characterising the nature of property related consumer contracts by broadening the field of vision beyond the strict limits of privity of contract and as inherently (re)distributing essential resilience assets, unearths a wealth of underlying values beyond the limitations of the 'certainty/security and flexibility/fairness' paradigm. The institutional relationship between property, contract and the state provides fertile ground for a comparative analysis of the contextually shifting relationships of underlying values. Using RPT, this paper considers how the relative balance(s) of values shift through (and in relation to) the fluid nature of the state's resilience needs.

3.3 Land, Power, and Zoning: Navigating Social, Economic, and Racial Exclusion and Segregation (*Classroom E*)

***Moderator*: Robin Malloy**

- **Jamila Jefferson-Jones, *Land-Lust Lynching: The Theft of Black Property and the Persistence of Racial Spatial Exclusion***

Twenty years ago, at the conclusion of an 18-month investigation, the Associated Press (the AP) published a three-part series entitled, "Torn from the Land," which documented the history and instances of the theft of Black-owned land in the United States. Half of involved "trickery and legal manipulations." The remaining half were violent land takings.

This article examines these "land-lust lynchings" – instances of extrajudicial executions of Black landowners (or the threat of execution) motivated by racial animus and a desire to preserve white supremacist hierarchies. According to the rules of this hierarchy, Black people who attained real property ownership on par with or exceeding that of the whites in their communities needed to be put back into their proper place at the bottom of the socio-economic ladder. One of the means of achieving this reordering was through violence.

Land-lust lynching was also a tool of the racial spatial exclusion that has dominated American legal history and is part of the ongoing quest to exclude Black people from the spaces and places inhabited by white people and ascribed to whiteness. Thus, my project on "land-lust lynching" is an extension of the work exploring two related concepts: (1) the racialization of space and/or the ascribing of racial characteristics to geographic locations and (2) the use of violence by those racialized as white to maintain those spaces as "white spaces."

- **John Infranca, *Zoning and the Police Power: Towards an Intellectual History***

- **Kalyani Robbins, *Redefining Redevelopment***

In the past few decades, the discretion to use eminent domain for sweeping redevelopment projects has grown and solidified. This has caused concern from multiple perspectives, ranging from libertarians worried about protecting property rights to progressives dissatisfied with the tendency to prioritize gentrification over inclusion. In a forthcoming paper I focused on the wide-ranging stories of policymaking via eminent domain, establishing its immense power and suggesting that it may be time to turn our focus to harnessing that power for good. There are some societal problems that are more important than individual property rights (especially given that many such

rights have been inherited via centuries of systemic white supremacy), problems that have proven somewhat intractable via regulation alone.

This article will take a narrower focus, considering one potential use of eminent domain power to address two deeply entrenched problems: racial segregation and environmentally destructive city planning. Euclidean zoning, now over a century old and a way of life across the United States, has entrenched both of these problems. Because so much city planning and development was based on its approach of separating the classes and glorifying car-dependence, it cannot be fixed by rezoning alone. Major redevelopment projects are needed to turn unsustainable and poorly integrated cities into modern mixed-use smart cities with dispersed affordable housing. This article will review the damage caused by the dominant approach to city planning, then it will consider the benefits of and obstacles to redeveloping Euclidean cities into modern cities via eminent domain.

3.4 Eminent Domain and Takings: Reasons, Ramifications, Compensation, and Disaster Management (*Classroom F*)

***Moderator*: Timothy Mulvaney**

- **Laura Hatcher*, The Seventh Amendment, Corporations, and Eminent Domain:* US v. Hess**

- **Jim Kelly, *A Different Kind of Taking?: Surplus vs. Equity in* Tyler v. Hennepin County**

At the close of the 2022 Term, the Supreme Court of the United States unanimously held in *Tyler v. Hennepin* County that the surplus proceeds from a tax sale constitute a property interest of the debtor protected by the Takings Clause and that a governmental creditor can take only what it is owed and nothing more. In defining the constitutionally protected property interest as the surplus produced by the sale, the Court declined to identify the owner's equity—that is, the difference between the property's market value and what the owner owes on it—as the protected interest even though plaintiff's counsel had already persuaded a federal appellate court and state supreme court to do so.

This article will explore the reasons for and ramifications of the justices' united support for tax sale surplus over owner equity as the subject of Takings Clause protection. As unpalatable as allowing strict foreclosure of tax delinquent properties to proceed unchecked was to them, most of the justices did not want to force governmental creditors to guarantee tax debtors full market value on liquidation sales. In defining the protected property interest as the net proceeds from a liquidation, the Court has protected just compensation at full market value but identified the liquidation without sharing rather than the termination of the owner's rights in the land as the taking.

- **Shelley Saxer*, Forfeitures and Takings***

The government has used the common law doctrine of necessity destruction as a defense to takings claims when government action destroys or damages private property during law enforcement. Both state and federal courts have applied this doctrine to deny compensation by distinguishing between the eminent domain power and the police power. However, at least two states, Texas and Minnesota, have compensated individuals for property damages resulting from police action by using state constitutional damagings claims.

This paper will explore whether civil forfeiture against innocent owners and police power actions that "go too far" require compensation because the Fifth Amendment was designed to keep the government from forcing some people alone to bear public burdens which should be borne by the public as a whole. Calling law enforcers "police" does not mean that we should shield their actions from takings liability under "the police power."

- **Gustav Muller*, The potential of urgent expropriations as resilience-creating strategy***

Clause 22 of the Expropriation Bill envisages that an expropriating authority will be empowered to temporarily expropriate the right to use property on an urgent basis if no suitable property is held by any of the spheres of

government. The power to temporarily expropriate the right to use land has not been used often in South Africa and in those circumstances where it has been used focused on roads. However, it remains unclear in what other circumstances the minister could exercise this power to expropriate the right to use land temporarily. The Expropriation Bill remedies this explicitly by stating that an expropriating authority will only be entitled to exercise this power four circumstances.

This exploratory survey is important from a single-system-of-law perspective, but also to ensure that the government is responsive (section 1(d) of the Constitution of the Republic of South Africa, 1996) to the needs of the people in South Africa when it coordinates its disaster management strategy (section 195 of the Constitution). In the context of "disasters" the ability of the state to be "responsive" will be construed as its ability to be "resilient". Resilience, understood as an evolutionary and transformative construct – as opposed to its equilibrist meanings – will be used to argue that the power to expropriate urgently affords the state the ability to adapt to rapidly-changed circumstances as a tool of anticipatory governance.

3:15-3:30pm **Health Break (*Caruso School of Law Atrium*)**

3:30-5:00pm **Concurrent Panels Session IV**

4.1 Local Spaces and Local Stories: Conflict, Zoning, Land Use, and the Everyday of NIMBYism and YIMBYism (*Classroom B*)

Moderator: **Amelia Thorpe**

- **Michael Pollack, *Sidewalk Government: The Legal Future of America's Most Overlooked Resource***

This book paints a portrait of the life and law of one of the most used, least studied spaces in the country: the American sidewalk. And it demonstrates the depth and breadth of the governance challenges that the sidewalk poses.

We take for granted that walking is the primary use of a sidewalk. But while pedestrians are essential users of sidewalks, they are hardly alone. Sidewalks are places where we gather, demonstrate, dine, exercise, rest, and shop. And for that reason, they have long been sites of conflict. For generations, Black pedestrians were forbidden from using sidewalks alongside white pedestrians, and women were expected to not be on the sidewalks unaccompanied. Race and gender politics still play out in these spaces today. And whatever one's identity, sidewalk conflict reaches nearly every facet of our lives.

Nearly nowhere else do these collisions take place with such breadth, frequency, and scale. But what ultimately sets sidewalks apart is that, in big cities and small towns, no one is in charge of managing that conflict.

Employing narratives of visits to cities and towns across the country and drawing on interviews with officials and advocates, this book portrays the complex realities of sidewalk life and sidewalk law--from accessibility to innovative commerce, from climate change to free speech, from policing to homelessness, and more. It demonstrates the depth and breadth of the governance challenges that the sidewalk poses. And it underscores the vital importance of ensuring that these spaces remain safe and vibrant for everyone.

- **Sara Ross, *Halifax's War Against Pizza: Zoning Bylaws, Access, and Safety at Night***

Zoned as "neighbourhood commercial" (RC-1), two Halifax family-run convenience stores across from each other were permitted until recently to remain open and serve hot food until 3am due to a local legal loophole—that is, until complaints to the local city councillor led him to propose "A By-law Respecting Hours of Opening of Food Service Businesses in Residential Neighbourhoods in the Regional Centre" that obliges all stores operating within this zoning category to close by 11pm. The stores' owners and many loyal customers opposed the bylaw, arguing they had not been adequately consulted or informed of the proposed by-law.

While students seeking a late-night slice of pizza might be seen as a noisy inconvenience, there are many others for whom access to late-night food venues is important—shift workers, bus drivers, healthcare workers, etc. These urban spaces are also an open, lit spot when streets are dark, less populated, and can thus provide an element of safety—as noted by the Women's Advisory Committee to Halifax City Council in their motion "Gendered Approach to Zoning Bylaws".

The research for this project has identified a lack of effective municipal legal frameworks within which late-night food providers and spaces can operate and, based on the Halifax case study that draws on ethnographic approaches to the study of urban property and law, narrows in on spatiotemporal equality in the design of urban property law and policy for the 24-hour spectrum of a city regarding access to hot food between the hours of 12-6am.

- **Brian Connolly,** ***Putting the "Why" in YIMBY***

Given their negligible effect, single-family zoning reforms' continuing adoption is curious. Moreover, their acceptance is not readily explained by existing theoretical models of local land-use decision-making, which assert that localities' zoning behavior serves either a "growth machine" of landowning and business elites or "homevoters" who form an anti-development cartel to protect existing home values. Using these models, along with comparative population and election data from localities that have adopted reforms, this project builds upon existing literature by offering one or more explanations for why localities and, to some extent, states adopt these reforms. Anticipated explanations include homevoter self-interest in ensuring access to amenities—such as schools or emergency services—that rely on housing-short service workers, a breakdown in historic barriers to collective action among housing-production supporters, and local officials' hedging against heavier-handed state preemption of local control over zoning. These explanations for zoning reforms' progress will be critically important in informing reformers' continued search for effective solutions to the housing crisis.

- **Douglas Harris (and non-presenting co-author Robert Clifford),** ***The Propertied Landscape of Local Government***

In December 2023, sharpshooters from a helicopter killed 84 deer on Skatamen Sidney Island. In the spring, hunters will continue the deer-eradication project, part of an attempt to rehabilitate the indigenous flora, using fences and dogs on the 2130-acre island in southern British Columbia. Parks Canada, which manages the national park that occupies the north twenty percent of the island, is funding the project, and the WSÁNEĆ Nation, within whose traditional territory the island is located, is in support. However, the decision to proceed with the much-debated and contested deer cull rested not with either the Federal or Indigenous government, but with the owners of the 111 lots in the bare land strata property subdivision that occupies the southern eighty percent of the island. Bare land strata subdivisions use the condominium form to produce single-house lots within a community of owners with governing authority and fiscal capacity. A creature of statute, bare land strata produces the functional equivalent of the homeowners' association. Land use decisions on Skatamen Sidney Island, including whether to proceed with the deer cull, lie with the strata corporation. This decision split the private community and lead to legal action over the appropriate threshold of required support. This paper uses the conflict to reveal the growing layers and complexity of local land use decision-making, in this instance involving the Federal government (through Parks Canada), the provincial government, the WSÁNEĆ Nation, and, the propertied, private local democratic government of bare land strata.

4.2 Takings and Adverse Possession: Past, Present, and Future (*Classroom C*)

***Moderator*: Sue Mari Viljoen**

- **Marcelo Pezzolo Farina,** ***Takings and Property Rights: A Historical and Comparative Sociolegal Study***

This article mobilizes the methodology of Begriffsgeschichte (Reinhart Koselleck) with comparative scope (Marcel Detiénne), and is inserted in the field of sociolegal studies (André-Jean Arnaud). When compared, US and Brazil have different legal structures (common vs. civil law). This reflects on takings law ("desapropriação" vs. eminent domain). Although, there are also similarities.

From the research, three different historical layers are recognizable. What separates them is both positive legal structure and the semantics of the relation between takings and property rights.
Until late 19th century, takings functioned as a fundamental right that protected individuals against sovereign power – a way to overcome colonial structures. Furthermore, served as weapon to avoid or control the abolition of slavery.

Afterwards, the State would begin to control crisis, put capital and rent in equilibrium, and invest in the urban space in order to foster development. Cold War made it even more important to universalize private property through land reforms.

From 1980s, the State fosters competition between cities to attract private investors. Takings help to create and enforce property rights on any object at all – from real state to bacteria. Everything have to be privately appropriated. At the same time, it guarantees that urban restructuring be a matter of market, and that individual will won't stop it.

On the other hand, differences in the abolition process led, in Brazil, to a semantic of unconditional protection of property. Recently, brazilian act proposals, statutes and legal texts are much more focused on financial capital than real state production.

- **Vidir Peterson,** ***Aristotelian Takings Theory***

In this work in progress, I explore how an Aristotelian takings theory would be formulated, with emphasis on regulatory takings. Which parts of the regulatory takings criteria would be same/similar, and which would be different? I highlight two novel aspects.

First, the importance of what I term "quality assurance", which is inspired by Aristotle's discussion on practical wisdom and the political community. In legal terms, this means that a regulation is less likely to go "too far" if the matter has undergone the necessary substantive investigation (often technical research) and thorough deliberation. Although "quality assurance" has some elements of the public use requirement and the principle of proportionality, it is not simply a procedural element – it also ensures a good substantive outcome. Indeed, practical wisdom, according to Aristotle, "makes us take the right means."

Second, I discuss the option of more diverse remedies. Generally, the question of compensation for regulatory takings is binary – either full or no compensation. This creates uncertainty and risk for both the legislature and owners. When the regulation is enacted, it is usually unclear whether the regulation triggers a remedy and who should get it. Aristotle's discussion of equity and the virtue of decency encourages us to explore alternatives that reduce uncertainty ex ante and/or make it easier to calculate compensation ex post. This reduces uncertainty for the legislature and boosts his regulatory confidence. Owners may also prefer to get something instead of potentially ending up with nothing after years of litigation.

- **Paul Diller,** ***Counting Backwards or Forwards in Adverse Possession Cases***

Despite being one of the oldest property doctrines in the Anglo-American common law, there remains a fundamental confusion in adverse possession cases about which way to count: backwards or forwards. To prove adverse possession, a possessor of property must show that he meets the substantive doctrinal requirements (adverse/hostile, continuous, actual, open and notorious) for the statutory period. But how do legal actors calculate the statutory period? From the point at which the alleged adverse possession began, or backwards from the date at which the lawsuit was filed? If one counts forwards, it is possible that the requirements of adverse

possession were met decades ago and -- perhaps through tacking -- the rights therefrom have succeeded to the present possessor. The problem with this approach, however, is that the crucial facts in an adverse possession inquiry may hinge on events that occurred a long time ago. No one alive at that time may still be alive at the time of litigation, thus making the most relevant evidence for the inquiry stale and based on hearsay.

This paper argues that the clear better method is for courts to count backwards from the time the lawsuit was filed. This makes stale and hearsay evidence far less relevant to the adverse possession inquiry, and would result in case outcomes that better comport with perceived social reality. Arguably, courts should even exclude evidence from before the statutory period as irrelevant under their state's version of the Federal Rule of Evidence 403.

4.3 Energy: Renewability and Transition (*Classroom E*)

***Moderator*: Shai Stern**

- **Kara Consalo*, Let the Sun Shine: Expansion of Distributed Solar Electricity Generation***

Solar electricity generation is not only a clean and renewable electricity source, but also has untapped potential to foster energy equity and energy resiliency. Distributed solar, in the form of small-scale, on-site photovoltaic (PV) systems, has the flexibility and cost-effectiveness to provide direct electricity to a variety of residential and commercial buildings. This presentation will briefly explain the engineering and costs associated with PV solar systems. After this practical overview, the presentation will focus on two pressing energy problems. First, energy inequity, wherein the cost of electricity paid by lower-income communities is disproportionate to the energy costs of wealthier communities. Second, energy insecurities brought about by increasing extreme-weather events, such as hurricanes, blizzards, and wildfires, which disrupt utility grid distribution of electricity. The presentation will explain how on-site PV systems would address and mitigate both problems.

Then the legal, political, and financial forces causing many American utility companies to reject distributed solar electricity as a substantial source of grid-provided electricity will be explored. Recent legislative efforts to develop new profit frameworks for utilities to accommodate widespread incorporation of distributed solar will be discussed.

Finally, the presentation will focus on successful laws and policies which have been developed in in three states: Hawaii, California, and Illinois, to rapidly expand distributed solar and to do so in such a way which fosters energy equity. These case studies lead to a list of best practices which may serve as guidance to legislative and administrative officials seeking to expand distributed solar within their jurisdictions.

- **Bjoern Hoops*, The Energy Commons and a Theory of Complexity***

Citizens that join hands to produce renewable energy can make a crucial contribution to the energy transition; they are the Energy Commons. Two EU Directives recognise these Energy Commons as energy communities if their internal governance meets certain conditions. As a reward for adapting to the Directives, the Energy Commons gain privileged access to the energy market and the right to share their energy.

Drawing on empirical research on Energy Commons in Germany and Italy, this paper shows in what respects the conditions under the Directives conflict with established practices among the Energy Commons and gives possible explanations for these conflicts. It argues that normative narratives of the ideal Energy Commons, proposed in scholarly work on the Commons and Energy Democracy, and entrenched by the Directives, can, if unbridled, threaten the flourishing of the Energy Commons. As an explanation for this mismatch between scholarly expectations and the empirical reality, this paper points to the complexity of the energy sector and develops key pillars of a theory of complexity.

The paper recommends that national transpositions of the Directives and Commons theory leave space for established practices or reduce the complexity facing the Energy Commons so much that the Energy Commons can actually realise the normative goals pursued by scholarly work and legislation.

- **Tina Gama-Kotzé,** ***Exploring the Use of Personal Servitudes for Renewable Energy Projects in South Africa: A Common, Irregular or Novel Idea?***

Securing land rights on private or public (agricultural) land is the first step in developing a renewable energy project. There are various ways in which to secure land rights, through acquiring ownership or creating limited real rights, such as a registered long-term lease over the whole of the property or servitude over the property in accordance with the Subdivision of Agricultural Land Act 70 of 1970 (SALA) and other relevant legislation.

This paper considers the creation and use of personal servitudes in favour of a private Independent Power Producer (IPP) for the establishment of renewable energy farms in South Africa.

While most civil law systems recognise and apply a *numerus clausus* of real rights, there is no *numerus clausus* of real rights recognised in South Africa. The flexibility afforded by the fact that South Africa does not recognise a *numerus clausus* principle, means that novel limited real rights can be created. In the renewable energy context, this means that entirely novel limited real rights in general, and more specifically a new category of servitude can in principle be created provided that the right complies with (a) the requirements of section 63(1) of the Deeds Registries Act, (b) the subtraction from the dominium test as laid down in judicial precedent (c) other relevant legislative requirements, such as those provided for in the SALA; the Electricity Regulation Act and the National Environmental Management Act to name but a few, and (d) the requirements for the general establishment of personal servitudes.

The aim of this research is to provide and explore three different categories of personal servitudes that could possibly be used to secure land rights for the development of renewable energy projects on private or public agricultural land. The categories include:

Firstly, the recognised Roman-Dutch common law personal servitudes, specifically usufruct (ususfructus) and use (usus) (servitutus regulares). Secondly, irregular servitudes (servitutes irregulares), namely, servitudes with the appearance and content of commonly recognised Roman-Dutch praedial servitudes, but which are acquired in the form of a personal servitude, because they established for the benefit of a specific person without reference to the dominant tenement. The third category, novel servitudes, are largely similar to servitutes irregulares because they are newly created. However, novel servitudes differ from irregular servitudes because the content thereof is unknown to Roman-Dutch Law, and is rather acknowledged in case law or created in legislation.

The creation of new servitudes, are not without its barriers. There are laws in place to prohibit the proliferation of burdens on land. For example, Akkermans argues that 'open systems' such as South Africa, do in fact adhere to *numerus clausus* of property rights, because the creation of new real rights in South Africa are subject to strict legal requirements such the intention and the subtraction from the dominium test. Moreover, the creation of personal servitudes in favour of IPPs (juristic persons), who fulfil a public function in generating amenities such as electricity, may pose challenges given the nature of the servitude. For example, personal servitudes are non-transferable and are not perpetual in nature, but rather terminates when the juristic person dissolves or after 100 years, whichever comes first.

The no *numerus clausus* principle lays the foundation on which property rules have developed and it forms the outline within which future property legal developments may take place. In the author's tentative opinion, the flexibility afforded by not recognising a *numerus clausus* of limited real rights, coupled with policy considerations, such as the need to accelerate the development of renewable energy sources to offset the climate and electricity crisis in South Africa, justifies the need to create irregular servitudes or novel servitudes in the renewable energy context.

4.4 Property Valuation, Estates, Takings, and Equity: Considerations of Justice, Resiliency, and Reform (*Classroom F*)

***Moderator*: Diane Kemker**

- **Danielle Stokes, *Recouping the Vested Interest***

The historical record indicates that elite power brokers established a complex system of property rights whereby property holders accumulated significant wealth and status, which in turn authorized them to cast the vision for the spaces where we live, work, and play today. This power dynamic resulted in a system that delineated people into groups of winners and losers based upon immutable characteristics and socioeconomic factors. These designations were initially person-centered, but transitioned into place-based marginalization. Power and privilege were ultimately interwoven into the fabric of places such that some areas were sustainable and appreciated in value while others depreciated and were susceptible to degradation. The property valuation origin story has had lasting impacts on both communities and community members.

The disproportionate nature of the impacts suggest that there is a need to address the economically and environmentally unjust margins that were established to reinforce the power structure. This Article calls for a reimagination of property valuation to undergird the Greenlining framework and provide for a comprehensive, place-based theory of reparations more broadly. By analogizing to the volatile nature of the financial market, this Article takes inventory of pivotal inflection points – the redlining era, great recession, the post-pandemic real estate market – to underscore the ways in which the value ascribed to a place impacts environmental, economic, and social resiliency. This exploration into real estate financing and property valuation methods highlight areas of opportunity in marginalized places such that they receive the investment necessary to remediate past and present harm.

- **Emilio Longoria, *Hoardings***

The United States Constitution implicitly grants governmental entities the power to exercise eminent domain. But importantly, the Constitution also limits this power. One such limitation, and the focus of this paper, is the implicit requirement that Governments can only take what they need. Perhaps surprisingly, this imbedded constitutional principle is commonly violated. Government entities or their proxies regularly condemn more private property rights than are necessary for the completion of a given public project—hoarding those extra rights for future use, and sometimes, never using them at all. This acquisition strategy has serious consequences that have largely gone unexplored. And even more disturbingly, current takings jurisprudence prevents the judiciary from reviewing the vast majority of challenges to this practice.

This article builds on prior scholarship that investigates this phenomenon in takings law to more deeply understand the causes and effects of this takings strategy, and it proceeds in three parts. First, the paper describes the current status of the law around hoardings and discusses how the status quo both allows and facilitates this practice. Second, it provides examples of hoardings and discusses how hoardings jeopardize the animating principles of the Fifth Amendment Takings Clause. And third, it identifies tentative solutions to remedy the effects of hoardings. Ultimately, the paper concludes that hoardings law needs to be revisited and changed. If not, the poor, the old, the less-educated, renters, and those who identify as non-white will continue to disproportionately shoulder the burden of hoardings.

- **Adam Hofri, *Rescission in Equity in Canada: The Egalitarian Turn***

In *Canada (Attorney General) v. Collins Family Trust*, the Supreme Court of Canada turned Canadian law away from the use of rescission in equity to retroactively improve tax planning gone wrong. Until Collins, Canadian law allowed parties to voluntary dispositions, including trusts, to draw on the assistance of the courts to have tax planning revealed to have disappointing tax results withdrawn along with those results, with professional involved and their insurers being saved from the threat of suit. A similar approach, using equity to diminish state revenue and impede redistribution by way of tax-and-transfer, is currently law in the U.K. and in most U.S. states. In Collins, the SCC disallowed this use of equity. I analyze this significant turn in Canadian equity and contextualize it in Canadian law's equality commitments.

5:00pm **End-of-Day Snacks & Reception** (*Law School Back Terrace*)

5:30pm **Shuttle Back to Cambria Calabasas Hotel** (*Law School Parking Lot*)

Saturday, June 15

8:00am **Shuttle Pick-Up for Conference from Cambria Calabasas Hotel to Caruso School of Law**

8:15-9:00am **Registration and Breakfast (*Caruso School of Law Atrium*)**

9:00-10:30am **Concurrent Panels Session V**

5.1 Submitted Panel, Part I: Multiscalar Environmental Governance and Justice (*Classroom B*)

Panel Abstract: These two interlinked panels explore issues of environmental governance and justice at multiple scales. They draw from the disciplines of law, anthropology, and geography to consider the ways in which different areas of law and property regimes intersect at local, state, national, and international levels and how that convergence impacts pathways forward. The first panel explores multiscalar environmental governance and justice in the context of local and state law, looking at the examples of New York City's Climate Mobilization Act, the sharing economy and energy transition, and the Lake Merritt Parking Management Plan & Resolution in Oakland, California. The second panel scales up to the national and transnational context, examining novel partnerships in solar-powered ammonia, the interface of mining and water law, and the role of regional trade policy in decarbonization. Across these different substantive areas and geographies, progress on environmental and justice goals requires: (1) understanding and exploring innovative approaches to the interface of legal and property regimes at multiple levels of governance and (2) developing hybrid structures and inclusive partnerships.

***Moderator*: Hari Osofsky**

- **Hari Osofsky (and non-presenting co-author Jacqueline Peel),** ***Litigating ESG and the Business of Climate Change***

ESG has become an important battleground in partisan disputes over the U.S. response to climate change. Pro-regulatory litigation, SEC enforcement actions, and shareholder activism challenge misrepresentation by companies and push them to take action to address climate change. Anti-regulatory litigation challenges SEC rulemaking, other government actions, and companies' inclusion of ESG in investment plans. These disputes parallel the polarization in U.S. national-level and subnational legislative bodies, with Republicans often opposing ESG and Democrats largely supporting it, and contrast with major jurisdictions around the world. Even in jurisdictions like Australia that have seen deep divisions over climate change regulation and extensive climate litigation, the focus is on how to approach reporting requirements.

This Article is the first to analyze the direct and indirect regulatory impacts of this litigation, and of the hyper-partisan environment in which it takes place, on corporate decisionmaking and investment. This situation parallels the dilemmas that automakers were facing two decades ago when U.S. federal approaches contrasted with California and Europe, and Massachusetts v. EPA was winding its way through the court system. However, the over 1700 cases in the United States and over 1000 cases around the world involving climate change since then, together with an increased scientific understanding of climate change and manifestation of impacts, have changed perceptions – amid deep political divisions – of business and investment risks and opportunities. Drawing from a model for analyzing the regulatory impact of climate change litigation that we developed in our book *Climate Change Litigation: Regulatory Pathways to Cleaner Energy*, the Article considers the potential direct impacts of ESG and climate disclosure disputes on U.S. regulation and their potential indirect impacts on how companies and investors are assessing risk.

- **Rebecca Bratspies,** ***Public Problems and Private Landowners***

In the climate world, the focus has historically been on the international realm—on treaties, declarations, and other state-to-state agreements. Yet climate adaptation and mitigation rely on actions taken on the local level as much as on standards set at the national level. During the Trump Administration, when the United States national government abdicated its role in responding to climate change, subnational actors like New York City stepped up to fill the vacuum. Declaring "we're still in" (the Paris Agreement) New York enacted Local Law 97--the Climate Mobilization Act in 2019. This law requires private landowners to retrofit existing buildings in order to attain deep emissions cuts (40% from 2005 levels, equivalent to all of San Francisco's current citywide emissions.) Local Law 97 is the first law of its kind in the United States and possibly the world. All eyes are on New York. If the law can work here it will surely be adopted elsewhere. This year, 2024, is the first compliance period. Private landowners have brought multiple (unsuccessful) lawsuits challenging the law and have lobbied hard for exceptions and revised deadlines. This paper will give an update on the law and the ongoing struggle between private landowners and the city over who should pay for building modifications intended to address climate change. It will offer suggestions for how to learn from the New York experience in order to adopt similar strategies in other places.

- **Lyric Patterson,** ***Metered Exclusion: The Case of Lake Merritt in Oakland, California***

This case study of the Lake Merritt Parking Management Plan & Resolution in Oakland, California, chronicles placement of parking meters around access points to the lake, arguing against them as apolitical technology deployed by underfunded cities. Ethnographic studies reveal experiences of spatial exclusion amid meter-driven threats of gentrification, and scholars argue that such exclusion must be situated amid interlocking historical struggles where establishments have weaponized parking and planning tools for decades against marginalized communities. My interest is rooted in my experience as the eldest child of 6 raised by a single mother who struggled to make ends meet. I can thus imagine how impoverished families with barely enough money for rent, food, and transportation in Oakland, California would experience exclusion from access to Lake Merritt due to this new financial burden. Lower-income community members have expressed concern about being targeted by this policy (Lake Merritt Parking Community Engagement Survey). Further, such restrictions could have further harmful implications for current and future generations given climate extremes and the possibility of future pandemics like COVID 19, which saw rising use of Lake Merritt by families. I review literatures demonstrating that urban green-spaces provide essential services and are vital for public health, especially during high-heat events, when communities of color with less access experienced higher rates of mortality. Further, I argue that meters restrict full curb access to essential services and negatively impact public health and well-being of low income and BIPOC residents of Oakland.

5.2 Towards Good Relations for the Right to Housing, Home Closures, and Landlord-Tenant Interactions (*Classroom C*)

***Moderator*: Alexandra Flynn**

- **Priya Gupta,** ***Race and Housing Insecurity in Canada***

This project examines the various ways racialized people and communities face discrimination, disparity, and insecurity of housing tenure across Canada. This review encompasses municipal, provincial, and federal jurisdiction with special attention to the potential role of the federal government in alleviating the circumstances described.

Through this analysis, a number of structural conditions faced by people of color impacting housing security become clearer, including: the scripting of people of colour as outsiders/non-citizens, lending and other barriers to homeownership, unsuitable housing and poor housing conditions, a severe lack of affordable housing, the deep

historical roots of current racial inequality, the nexus between labor, education, and housing, and the terrible impacts of Covid on racialized communities.

- **Els Schipaanboord*, Home Closures as a Criminal Charge: An Empirical Analysis***

Traditionally, criminal behavior was dealt with through criminal law. However, in recent times, many countries have begun to implement sanctions and enforcement actions through administrative or private law. This means that individuals who engage in criminal behavior may not necessarily be prosecuted with a criminal charge within the meaning of Article 6 ECHR, as they may instead be subject to other types of enforcement.

One example is the closure of drug premises by mayors. This can affect both tenants and owner-occupiers and is meant to be a restorative sanction rather than a punishment. However, recent research has shown that closures are often perceived as punishment by those affected (Bruijn & Vols 2021).

In criminal proceedings, suspects have the right to invoke the protection of Article 6, paragraphs 2 and 3 of the ECHR. However, individuals facing home closure cannot rely on these protections, although their housing and property interests are severely impacted.

This paper analyzes the impact of a criminal charge qualification on restorative administrative sanctions. It will use a detailed dataset that includes all provisional measure rulings, applications for judicial review, and appeals against the imposition of a home closure. Using quantitative data, the paper evaluates the frequency of individuals arguing that administrative sanctions should be considered a criminal charge and the extent to which courts accept this argument.

- **Julie Gilgoff*, Tenants' Associations: Disruptor of Landlord-Tenant Power Structure***

The rise of corporate takeovers of affordable rental units has worsened our already dire housing crisis. My paper will address the potential of tenant ownership and control, specifically through the formation of Tenants' Associations, to promote housing stability for low-income renters. Our current legal service model commonly provides funding for the legal representation of low-income tenants in eviction proceedings. Although fighting for a widespread "Right to Counsel" is an important step in promoting positive outcomes for tenants, it does little to disrupt an exploitative landlord-tenant relationship plagued by a skewed power imbalance. Tenants Associations can change that power structure, providing opportunities for tenants to exert control over their living conditions - ensuring that basic housing repairs are made, and that rents are kept affordable. In exploring the law's potential to promote organizations that challenge the political power of the wealthy, policies that promote tenants' rights to organize, and preserve government-sponsored funding towards forming the associations, will be uplifted as a more sustainable strategy to assist low-income tenants. There are many policies that support the formation of tenants' associations, including anti-retaliation laws, just cause protections, meet and confer requirements and enforcement mechanisms for landlords. This paper discusses them all, but focuses especially on policies that preserve the right of entry for third party organizers, examining possible conflicts with the Cedar Point takings standard. The paper also examines the government's role in funding the formation of tenants' associations, spotlighting DC's TOPA model that may be replicated elsewhere.

- **Martin Lockman*, Mapping a Vanishing Land: The Role of Property Systems in Climate Finance***

International finance pressures legal systems to "map" rights—to outline boundaries around resource uses that make them legible to, and ultimately purchasable by, distant buyers. This has spurred decades of debate around the role of property rights in economic development. Some scholars credit mapping projects with lifting populations out of poverty by connecting them to global markets. Others argue that attempts to make ownership rights alienable have redistributed resources, exacerbated inequality, and entrenched economic precarity.

Climate finance presents a new "mapping" problem. International actors are struggling to compensate countries and communities for loss and damage (L&D) caused by climate change. To avoid creating new disparities among climate-damaged communities, L&D mechanisms need to fairly identify the rights and resource uses harmed by climate change. Climate justice at the international scale demands legal mapping designed for compensation, not markets.

This paper examines the role of formal property systems in international L&D finance, highlights key property considerations for any L&D regime, and identifies areas for further exploration by academics, national policymakers, and international actors. This paper is expected to form a chapter in the Edward Elgar Research Handbook on Climate Justice, forthcoming 2025.

5.3 Navigating Conflicting Approaches to Urban Planning, Land Use, Development, and Real Estate (*Classroom E*)

***Moderator*: Shelley Saxer**

- **Edward Sullivan and Noelwah Netusil, *Land Use Planning and Economic Development***

Planners, developers, lawyers, and economists operate from their own silos in approaching economic development. Each of these callings has its own experience and expertise, but they make awkward colleagues in formulating policy.

An economist and a planning lawyer, examine economic development law from different perspectives. Economists utilize empirical techniques to assess the current state of the economy and to predict future conditions; outcomes of these studies are used by policymakers to formulate economic policy. Developers seek gain in undertaking investments. Planners advise clients on ascertaining, measuring, and achievement of public and private goals. Lawyers advise clients on achieving those goals within a legal structure. However, these discussions often resemble a Tower of Babel.

We suggest this dissonance arises from the different approaches taken by economists and lawyers. The law may only influence the economy, and an ideal economy cannot be legislated. We point to the example of Oregon, which has dealt with land use and economic policy for the last fifty years. The state adopts policy objectives applicable to public and private interests, methodologies measuring economic changes, and uniform processes by which land use plans may be reviewed. Each of these steps is constantly evaluated to assure sufficient responses to insights offered by economic studies and administration of a fair and useful legal process. The Oregon experience, with its constant scrutiny, holds promise for other public agencies and for a successful interaction between these two disciplines in the formulation of public policy.

- **Jordan Barry (and non-presenting co-authors Will Fried and John William Hatfield), *Et Tu Agent? Commission-Based Steering in Residential Real Estate***

Real estate agents are required to serve their clients' best interests. However, policymakers have long suspected that buyer agents steer their clients away from properties that offer low buyer agent commissions. They are particularly concerned that steering is a key reason why agent commissions have remained high in the internet era, while other industries' commissions have plummeted. Analyzing a new dataset, we provide the first systematic, nationwide evidence that buyer agents engage in commission-based steering.

Buyer agents play an important role in helping their clients find homes. If they engage in commission-based steering, low-commission listings would tend to garner fewer page views on public real estate portals like Zillow and Redfin. To test this theory, we track the number of page views that individual listings receive on Redfin. All else being equal, we find that low-commission listings receive fewer page views. This effect is most pronounced for listings with the lowest commissions, but even listings with commissions that are slightly below the going rate receive significantly fewer page views.

We link steering to meaningful economic consequences. Homes with lower buyer agent commissions take longer to sell and are less likely to sell at all. Again, these effects are largest for the listings with the lowest commissions; in a typical geographic market, these listings face a 75% greater risk of not selling at all.

Finally, we explore the policy implications of our findings, including with respect to race-based and other types of steering.

- **Jade Craig,** ***A Right to Shrink: Detaching Land to Manage Population Change***

As of February 2020, at least 80 U.S. cities with 50,000 or more residents are shrinking. For example, Detroit is 139 square miles – more than six times the size of Manhattan – but its population has fallen from more than 1.8 million in 1950 to around 630,000 today. The discourse around shrinking cities often focuses on cities using various urban planning tools to make use of the land within their borders in ways that reduce the impact of population loss on their revenues and residents' quality of life, including tearing down vacant houses and creating urban farms or forests. These changes, however, still require revenue to execute and cost cities with declining incomes money to maintain these spaces. The literature has dealt with the practices that local governments use to control their growth, including strategic annexation and municipal underbounding. There is less attention paid, however, to the legal tools available to cities that want to reduce their size and the hurdles posed to detaching land. This paper explores the law governing changes to a municipality's boundaries, which usually requires legislative consent and/or the consent of its neighbors. It argues that state law should provide more local decision-making authority for cities to unilaterally reduce their size and restrict the ability of county governments and neighboring municipalities from blocking these decisions. A structure that gives cities more authority to cede land to reduce their size is critical for the economic and political empowerment of these communities.

- **Girion Blomdahl,** ***Political Versus Judicial Review of Detailed Development Plans***

At the 2023 conference, I participated in a seminar on the conflict between, on the one hand, that a Swedish detailed development plan may only be revoked by a reviewing body if said plan is "illegal" and not only "inappropriate" (i.e., there is a better solution) and, on the other hand, that some of the standards against which plans are tested concern things such as "due consideration" of individual interests or occurrence of "significant" inconvenience.

This year's topic is a continuation of the same postdoc project, namely suitability and legality in reviews of detailed development plans. This time, the shift from political review by the government, to review before land and environmental courts, which took place just over ten years ago, will be the central topic. Does the change of review body have any effect on the outcome or content of the reviews? Tentatively, it is conceivable that a review in a political body such as the government (which must, however, act impartially in this type of reviews), in comparison with a review before a court, leads to a greater scope for pragmatism and the achievement of the objectives of the legislation, rather than the fulfilment of the letter of the law. In other words, it is conceivable that the political body strives to achieve the laws' objectives, while the judicial body strives to comply with the laws' wordings. – Is it possible to see any such differences, or others, in actual appeal reviews?

5.4 Shapes of Property: Examining Servitudes, Old Covenants, Gifts, and Easements (*Classroom F*)

***Moderator*: Sara Ross**

- **Leigh-Ann Kiewitz,** ***The Permanence of the Termination of a Servitude Upon Merger or the Revival***

- **Jessica Owley (and non-presenting co-authors Jess Phelps and Angelo Gomez),** ***No Standing for Confederate Monument***

Across the United States, communities are removing their confederate monuments. Not all community members are happy about this change. We examine legal challenges to monument removal that resulted in published decisions (n=36). The cases are recent. The oldest case is from 2000, and the frequency increases as the years increase. All originate in 8 states, all former members of the confederacy. Issues of standing (or who has the right to sue) arise in nearly every case. In 70% of the cases, standing is dispositive. In all cases examining standing, the courts find that the plaintiffs lack standing dismiss the suits. The standing claims fall into three categories:

organizations interested in supporting confederate heritage, taxpayer standing, and property-related standing. The property-related standing is of most interest to us as it delves into the complicated property relations we have detailed in earlier work. Most confederate monuments represent a complicated pastiche of public and private ownership. Confederate heritage organizations claim property rights based on old covenants and alleged incompleted gifts. We analyze these claims and cases. While we are unabashedly pro-confederate monument removal, we explore what such standing rulings could mean for property-related claims in other contexts.

- **Vicki Evans and Kate de Contreras, *The UK Supreme Court: 15 Years of Shaping 'Property'***

The UK Supreme Court turns 15 in 2024. As the Court's own materials tell us, '[t]he impact of Supreme Court decisions extend far beyond the parties involved in any given case, shaping our society, and directly affecting our everyday lives.' This provides the ideal opportunity to consider how the Supreme Court has shaped the concept of 'property'.

As Gray and Gray put it, '[p]roperty is a socially contrasted concept, indirectly reflecting and reinforcing an extensive range of the power relations permitted within society.' How has the Supreme Court balanced those power relations? Our research surveys all decisions handed down by the Supreme Court which have a 'property' dimension. Our aim is to thematically analyse the cases as a springboard to finding trends. For example, the Court has on occasion put forth a strong conception of property as exclusion (including cases concerning squatting, freedom from intrusion, etc.). Similarly, there is a dimension of property as offering protection from 'constant observation', as Lord Leggatt put it in Fearn v Tate Gallery. The Supreme Court has equally shown a willingness to help the (relatively) dispossessed of property, as it did in Guest v Guest.

The paper will consider whether the development of property is significant, whether it is welcomed, and where it is likely to lead. Robe has asserted that '…there is certainly no consensus on the definition of what property is': we will find that the UK's apex court has supplied important aspects of the definition, if not quite delivered a consensus.

10:30-10:45am **Health Break** (*Caruso School of Law Atrium*)

10:45am-12:15pm **Concurrent Panels Session VI**

6.1 Submitted Panel, Part II: Multiscalar Environmental Governance and Justice (*Classroom B*)

Panel Abstract: These two interlinked panels explore issues of environmental governance and justice at multiple scales. They draw from the disciplines of law, anthropology, and geography to consider the ways in which different areas of law and property regimes intersect at local, state, national, and international levels and how that convergence impacts pathways forward. The first panel explores multiscalar environmental governance and justice in the context of local and state law, looking at the examples of New York City's Climate Mobilization Act, the sharing economy and energy transition, and the Lake Merritt Parking Management Plan & Resolution in Oakland, California. The second panel scales up to the national and transnational context, examining novel partnerships in solar-powered ammonia, the interface of mining and water law, and the role of regional trade policy in decarbonization. Across these different substantive areas and geographies, progress on environmental and justice goals requires: (1) understanding and exploring innovative approaches to the interface of legal and property regimes at multiple levels of governance and (2) developing hybrid structures and inclusive partnerships.

***Moderator*: Hari Osofsky**

- **Rebecca Hardin, *Catalyzing Decentralized Production of Agricultural Inputs***

Jumping off from National Science Foundation-funded lab and field experiments with solar powered heterogenous catalysis for production of ammonia, this paper considers the administrative and economic aspects of partnership with (and among) campus, tribal and international agricultural organizations for design tweaks and

digital training tools around new technologies. I explore public facing education work with the campus farm at University of Michigan, possible partnerships with successful tribal farms in Michigan and Wisconsin with strong food sovereignty practices, and connections to national agricultural organizations and regional installations for chemical fertilizer mixing, storage and distribution in both Rwanda and South Africa. Finally, I foreground creation of a corporation to expand all these uses of small-scale reactors, localizing production of ammonia for agricultural use. Developed with adequate attention to environmental justice issues and long term ecological resilience parameters (important with any fertilizer application) such technologies at local or regional scales could bolster small holders' livelihoods and their retention of land rights in the face of extreme weather and predatory economies of land appropriation. Solar powered ammonia at scale could not only render small farms more autonomous and adaptive, but also might obviate the need for dangerous current practices of large-scale production and transport of ammonia. These partnership models, however, could have value beyond mere ammonia for technologically and pedagogically innovative sovereignty and justice work in food systems.

- **Taylor Nchako*, Mining for a Clean Future: Lessons from Water Law***

Water and mining in the United States share a long, convoluted history. In the American West, water law emerged through practices employed by mining communities. Over the centuries, however, western water law continued to evolve through water compacts and other regional management structures. Meanwhile, the preeminent mining law, the federal Mining Law of 1872, largely remained static. Indeed, the two regimes even conflict—the mining law prioritizes mining as the highest land use while state water law prioritizes household use, farming, and cattle grazing.

Now, the two regimes require a new stage of co-evolution. The United States has shifted towards domestic mining of critical minerals to diversify its supply chain and to accelerate a mineral recycling industry. This increased demand for minerals also increases the demand for water, as mining requires water in every stage of the mining process and poses water contamination risks. At the same time, many of America's mineral resources are in the arid west, where water rights are complicated and contentious. Yet, calls to reform the Mining Law of 1872 ignore the potential for water conflicts to disrupt America's critical mineral policy.

To address the challenges ahead, this Article reintegrates water law with mining law. It traces the coevolution and subsequent divergence between the two legal regimes before detailing how water governance provides lessons in federalism and co-management for the critical minerals sector.

- **Elizabeth Trujillo*, Multidimensional Compliance Mechanisms in the USMCA: Can Regionalism Serve Environmental Justice Goals?***

Trade goals and environmental justice goals form an unsettling coupling of opposites; and yet, trade agreements like the USMCA provide opportunities for furthering environmental justice goals. This paper will examine the various ways in which the multidimensional compliance mechanisms built into the USMCA provide important tools for furthering environmental justice goals. In doing so, it will situate environmental justice within the sustainability principles that underlie many of the regional agreement's provisions; particularly, as they pertain to environmental sustainability and sustainable development and the sustainable development goals (SDG). This paper asserts that regionalism plays a distinct role in furthering environmental justice goals (EJG) for two main reasons: 1) for its potential to connect the local with the global, and 2) for the way it may leverage local efforts to address environmental justice challenges. Understanding the effectiveness of environmental justice strategies also depends on whether the challenges being addressed are global or local.

The paper will begin with introducing the multidimensional aspects of environmental justice itself, discussing its various meanings as a function of international, national, and local applications. Second, it will demonstrate that in the context of the USCMA, environmental justice is not an obvious goal of the regional trade agreement. Rather, it is interwoven with the sustainability principles that support the social policy goals within the treaty; primarily, in the environmental provisions of Chapter 24. It will discuss the ways that environmental sustainability goals are reflected in the USMCA, highlighting specific provisions, and the work of the Commission on Environmental Cooperation which arguably has been promoting environmental justice goals

since its inception. The paper discusses four ways that the USMCA connects EJG with SDG ones: 1) from a procedural perspective; 2) a structural and institutional one; 3) substantively within the text; and 4) remedially in the ways that compliance mechanisms may be enforced. Finally, the paper provides reflections on the how the multidimensional compliance mechanisms offered by regionalism in this context may on the one hand, offer opportunities for expanding local environmental justice strategies, and on the other, create counterintuitive gaps in implementing environmental justice goals transnationally and globally.

6.2 Local Resistance and Social Movements: Affordable and Fair housing, Zoning, Land Use Regulations, and Urban Innovation (*Classroom C*)

***Moderator*: John Infranca**

- **Brandon Weiss*, An Affirmative Approach to the Supreme Court's Major Questions Doctrine and Chevron Retrenchment***

The Major Questions Doctrine has emerged as a significant limit on the discretion that courts afford administrative agencies in interpreting federal statutes. The doctrine has been used in the last few years to counter claims of agency authority across a variety of areas, including the EPA's regulation of greenhouse gas emissions, the CDC's nationwide eviction moratorium during the Covid-19 pandemic, and the DOE's student loan forgiveness program. Perhaps even more significantly, the U.S. Supreme Court appears poised this term to either overturn the longstanding Chevron doctrine or, at a minimum, significantly curtail its application. For forty years, Chevron has dictated that in the face of statutory ambiguity courts will defer to reasonable agency interpretations.

As the Biden Administration considers options for implementing the Federal Fair Housing Act, some scholars have cautioned against running afoul of the Major Questions Doctrine and have argued for a relatively conservative approach to rulemaking. In this Essay, I argue for a mandatory approach that penalizes jurisdictions that do not comply with strong fair housing rules. I make this argument for two primary reasons. First, under the terms of the Major Questions Doctrine as currently defined by the Court, a voluntary incentive-based approach is no more immune from being struck down than a mandatory one. Second, drawing on recent social movement and administrative constitutionalism literature, it is not clear that losing at the Supreme Court would be more detrimental to the cause of furthering long-term fair housing in the United States than conservatively trimming regulatory sails.

- **Shitong Qiao, *Cooperating to Resist: Society and State during China's COVID Lockdowns***

This article, the result of extensive fieldwork encompassing over ninety interviews and on-site visits to Chinese cities, primarily focusing on Shanghai and Wuhan, where the most significant lockdowns occurred, delves into the intricacies of the Chinese party-state's response to the pandemic. It offers a unique perspective on the constraints that societal forces impose on the party-state's exercise of power and, in doing so, challenges conventional wisdom. This study uncovers the unexamined role of society in monitoring and resisting the party-state's encroachments on individual rights during the pandemic, a phenomenon I term "cooperating to resist." My research reveals the state's inherent limitations in enforcing neighborhood lockdowns and providing essential services to locked-down communities. Crucially, I demonstrate that the cooperation of citizens, particularly homeowners, was indispensable to the state's ability to maintain its COVID-19 control measures. Yet, this cooperation was not without its implications. When homeowners, who had been willing partners of the government, invoked legal narratives to voice their concerns, the government found itself compelled to respond. This interdependence between the government and homeowners unveils a dynamic where dependence begets power, challenging the prevailing narrative of China's "strong state, weak society." It also offers fresh insights into the dynamics of power and legality in authoritarian regimes and casts new light on the relationship between property rights and sovereignty. In an authoritarian regime, property law emerges as a sanctuary of resistance for citizens.

- **Elizabeth Elia, *Is Anything of Purely Local Concern Anymore?***

The history of imperio home rule is based on the idea that some issues are properly governed only at the local level. State or even regional regulation of these purely local issues is a violation of local authority. But a locality loses this coveted authority if an issue is of concern beyond local boundaries. When we consider land use regulation in the face of climate change adaptation, it seems inevitable to question whether anything is really of purely local concern anymore. Local laws that exclude housing density, renewable energy development, and transportation and energy transmission infrastructure have negative impacts beyond the borders of a locality, leading some legal scholars (e.g. Alice Kaswan) to call for preemption of local land use authority for the purposes of climate change adaptation. However, other scholars, like Alexandra Klass and Rebecca Wilson, have drawn attention to the role that localities can play in promoting progressive policies in conservative states. This article will engage both with scholarship that promotes increased preemption to curtail exclusivity and NIMBYism, and with scholarship that highlights progressive urban innovation in otherwise conservative states. The aim of this article will be to articulate a new rule to insulate local authority from state preemption when all issues are presumed to be of mixed state and local concern.

- **Daniel Rosenbaum, *Local Land Scaffolding***

Public land sits at the heart of local governance, central to both the powers and the purposes of a variety of local entities. School districts manage school properties, for example, while parks departments oversee local parks and sewer authorities operate waste systems. These public assets do not exist in a vacuum. A particular resource is often governed by multiple localities operating in the same space, a fractured ecosystem that has been studied at some length by legal commentators. Less explored is how local administrators respond to fractured public land regimes—and how their responses, while understandable, amalgamate a jurisdictional mess that poses real costs—legal, financial, and democratic—for local communities.

This paper offers an institutional case study on fractured local land management. It interrogates how two particular local entities, the Atlanta Parks Department and the Atlanta Public Schools, have navigated a muddled sphere of mutual authority handed to them accidentally by their state and local forebearers. Their amorphous jurisdictional portfolio is governed reactively and informally, an effective scaffolding much of the time when land management lies comfortably on the administrative backburner, but one that turns problematic when property serves as a proxy for local contestations or becomes a backdrop against which new issues arise. Atlanta's experience counsels rethinking and reframing ongoing debates over local land authority. In contrast to calls for local governments to hold more or less institutional power, this paper argues for a sharper focus upon intersecting institutional practices and upon the ensemble cast of local administrators who navigate them.

6.3 Submitted Panel: Takings in Times of Disruption (book review with a roundtable discussion) (*Classroom E*)

***Moderator*: Björn Hoops**

- **John Lovett, *Abandoned Land and Abandoned Improvements: Responding to Climate Change and the Energy Transition***

- **Hanri Mostert, *Takings and Mineral Extraction***

6.4 Decolonizing and Defining Frontiers and Legal Concepts: Legal Pluralism, Legal Education, Estates, and Indigeneity (*Classroom F*)

***Moderator*: Jessica Shoemaker**

- **Diane Kemker, *Teaching Property in the Age of Indigeneity and Decolonization***

In the most widely-used Property casebook, indigenous people appear in the very first case: *Johnson v. M'Intosh*, 21 U.S. 543 (1823) - and generally, never again, as the casebook and course turns its attention to the familiar topics of capture, adverse possession, estates in land and future interests, co-ownership/marital interests, leases

and the law of landlord-tenant, nuisance, servitudes, zoning, eminent domain and takings - each and every one of these doctrines explicitly tracing its origins to British (and very occasionally, Spanish) sources, each at least tacitly perpetuating the idea that if North America was not devoid of people when Europeans colonized it, there was neither law nor any understanding of "property" worth attending to.

But the law of property is, necessarily and among other things, a theory of the human relationship to land and to all the means of sustenance it provides. Transplanting English law onto the British Colonies, including re-shaping the contours of private property law for a new continent, were acts of legal creativity and also violence; the way it happened was in no sense natural or inevitable. In today's world, at least two bodies of theory now critically challenge the centrality and supremacy of the Anglophone paradigm in the land law, and force a re-evaluation of the development of the American law of property: indigeneity and decolonization. This paper provides some first steps towards thinking about how to integrate the challenge posed by these ideas and theories into the teaching of Property in the 1L curriculum.

- **Theodore Seto*, A Structured Approach to the Common Law Rule Against Perpetuities***

This article sets forth a structured approach to the common la+A30w Rule Against Perpetuities. I have taught this approach for over two decades. It works. For students, at least, it eliminates the uncertainty and confusion that the classic approach to the Rule often generates. To provide context for its hypotheticals, the article begins with a stylized but historically accurate outline of the Anglo-American system of estates in land – an outline that includes all of the major structural elements of that system but is sometimes phrased in simpler terms than those used by courts and treatise writers. The article then offers a new, mechanical approach to the common Rule, with examples illustrating application of that approach in various contexts. My purpose is to assist courts in their analysis of cases involving the Rule and instructors in their presentation of the Rule and the system of estates in land to their students.

- **Amelia Thorpe (and non-presenting co-authors Andrew Leach, Jasper Ludewig, Dallas Rogers, and Laurence Troy)*, Defining the Private Property Frontiers of Australia***

How does Country become property? As Justice Brennan explained in *Mabo v Queensland (No 2)* [1992] HCA 23, "Aborigines were dispossessed of their land parcel by parcel, to make way for expanding colonial settlement. Their dispossession underwrote the development of the nation."

This paper engages with the legal devices that define those parcels. We discuss the conceptual underpinnings of a current project in which we are developing a technique to map each parcel of property that was alienated from Crown lands in the New South Wales colony since 1788, and thereby also to account for records, instance by instance, where the creation of private property first occurred, when, and over what extent of territory. Identifying and documenting private property in both individual cases and in aggregate over a large geography offers a compelling approximation of the appearance and spread of British–Australian settlement. We contend that the concept of private property sits in tension with an Aboriginal Country invisible in the landscape and not served by British or Australian law. This paper considers the legal issues exposed by tracking the plot-by-plot advent of private property in New South Wales. Using critical GIS, our aim is to render private property an unnatural layer of governance that arranges patterns of colonial control and land based violence. The project draws together geographical, historical and legal evidence to reconceptualise what property has been in that territory—allowing plots and patterns of private land ownership to be read in relation to other forms of land use, tenure and governance, with important insights for property and legality both in the colonies and beyond.

- **Margaret Stephenson and Bradford Morse*, Indigenous Land Rights and UNDRIP***

In 2007 the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the UN General Assembly. This paper will review the current responses of Canada and Australia in implementing UNDRIP standards regarding Indigenous traditional lands, territories and resources.

UNDRIP provides that 'Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired' and are entitled to 'own, use, develop and control' such lands, territories and resources. Other key UNDRIP provisions, dealing with Indigenous peoples' rights to their traditional lands and resources and Indigenous peoples' free, prior, and informed consent prior to actions infringing Indigenous rights, will be examined.

Canada, in 2016, announced unqualified support for UNDRIP. Legislation officially recognizing UNDRIP was passed by British Columbia in 2019 and by Canada in 2021. Pursuant to both provincial and federal legislation, the governments are mandated to develop Action Plans to achieve UNDRIP objectives, to ensure laws are consistent with UNDRIP and to provide annual reports on the progress of the implementation of UNDRIP. Canadian Courts have found that UNDRIP, as an international instrument, can be used to inform decisions in a range of cases including consultation regimes. Australia has not yet implemented UNDRIP into domestic law, although a private Bill to adopt UNDRIP was introduced to Parliament. The question of the application of UNDRIP has been referred to the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs. To date, no Report has been released.

12:15-1:45pm **Lunch** (*Caruso School of Law Atrium*)

- ALPS announcements and subcommittee meetings

1:45-3:15pm **Concurrent Panels Session VII**

7.1 Author Meets Reader: *The Making of Modern Property* (*Classroom B*)

Moderator: **Rashmi Dyal-Chand**

Author: **Anna di Robilant**

Readers:

- **Greg Alexander**
- **Larissa Katz**
- **Eric Claeys**
- **Diego Gil**

7.2 Submitted Panel: Belongings, Dispossession, and Houselessness (*Classroom D*)

- ***(note that this panel is accompanied by the theatre piece* Belongings Precede Belonging - Echo Park Lake Research Archive *– to be performed subsequently at 3:30pm in Classroom D)***

Panel Abstract: Unhoused and precariously housed people own belongings. As many precariously housed people do not have fee simple tenure, their belongings are located on the land (and thus control) of private and public agents, such as landlords, churches, not-for-profits, corporations, and the state. As they move between these spaces, their possessions become subject to the will of others.

While there is a substantial literature on the governance of poor people who use public spaces, particularly unhoused people, there is no systematic research that addresses the manner in which poor people's belongings are governed and, in turn, how people are also governed through their things. This panel brings together i) scholars from Canada, who have been addressing this topic through community-engaged research; ii) community based researchers and organizers in Los Angeles and iii) LA-based lawyers working with unhoused people, who have deployed 14th Amendment/property based arguments. One of our aims is to highlight the local urgency of this research issue to people living in LA.

The panel will explore the significance of belongings and their seizure and destruction, the role of property-based logics and rationales in the process of seizure, and the potential of property-based legal arguments in resisting such forms of dispossession.

***Moderator*: Alexandra Flynn**

***Participants*:**
- **Nicholas Blomley**
- **Gary Blasi**
- **Shayla R. Myers**
- **Jennifer Blake**

7.3 Theoretical Approaches to Property: Property Performance, Innovation, Possession, Human Consciousness, and Gender (*Classroom E*)

***Moderator*: Jessica Owley**

- **Christian Turner (and non-presenting co-author Sandy Mayson),** ***Law, Property, and Consciousness***

- **Ernst Marais,** ***Possessory Protection of Water and Electricity Supply: A Resilient Property View***

In South African law, the mandament van spolie (mandament) is a possessory remedy. It protects peaceful and undisturbed possession of things against unlawful dispossession. It focuses on who dispossessed the possessor in an extra-judicial manner. A court will order the dispossessor to restore the status quo ante before the parties may litigate on the merits.

During the 1980s, courts extended the mandament to protect the quasi-possession of water and electricity supply used on land against extra-judicial disconnection. However, since 2003 courts began deciding that if the supply is sourced in contract, then its quasi-possession does not enjoy possessory protection. As water and electricity supply invariably flows from a contract for the provision of these services, the mentioned trend effectively excludes the mandament in most cases. This exclusion undermines the rule of law by encouraging extra-judicial self-help in resolving disputes pertaining to water and electricity supply. Such self-help exacerbates the vulnerability of marginalised persons and the law as an institution itself.

My paper investigates the above development by using resilient property theory to argue that courts should return to the pre-2003 legal position. That position is preferable because it promotes the resilience of water and electricity users, given the essential nature of these supply forms to human survival. It also promotes the resilience of the law by ensuring that legal subjects follow court procedures to resolve disputes instead of engaging in extra-judicial self-help, which may lead to anarchy and chaos, thereby increasing (instead of reducing) the vulnerability of the law.

- **Tabrez Ebrahim,** ***Comparative Intellectual Property and Religion***

- **Ariel Decoster,** ***On Performing Property and Gender as Intertwined Social Practices of Power***

This contribution aims to reconsider what property is and how it functions in order to critically scrutinize it as a matter of power. I rely on gender performativity theory to interpret contemporary research on property as a social practice and offer to think about property as equally performed. I suggest that property, just like gender, functions as a script for interpersonal engagement that determines what one can or cannot do and requires social recognition or enforcement as well as repetitive enactment to produce effect, that is, to operationalize a relationship of power. Reconceptualizing property as performance also helps to elucidate how property participates in gendering the social world. Having argued that property and gender constitute intertwined practices of social power, I suggest

that to perform property is, at least in some instances, to perform gender and vice versa. As a result, I contend that subversive gender practices can be read as subversive property practices, and that property law constitutes a promising yet often looked-over site for feminist theorizing and reform.

7.4 Climate Justice, Climate Crisis: Finance, Pricing, Access, Obligations, and Protection (*Classroom F*) - CANCELLED

***Moderator*: Jessica Owley**

- **[MOVED TO PANEL 5.2] Martin Lockman, *Mapping a Vanishing Land: The Role of Property Systems in Climate Finance***

International finance pressures legal systems to "map" rights—to outline boundaries around resource uses that make them legible to, and ultimately purchasable by, distant buyers. This has spurred decades of debate around the role of property rights in economic development. Some scholars credit mapping projects with lifting populations out of poverty by connecting them to global markets. Others argue that attempts to make ownership rights alienable have redistributed resources, exacerbated inequality, and entrenched economic precarity.

Climate finance presents a new "mapping" problem. International actors are struggling to compensate countries and communities for loss and damage (L&D) caused by climate change. To avoid creating new disparities among climate-damaged communities, L&D mechanisms need to fairly identify the rights and resource uses harmed by climate change. Climate justice at the international scale demands legal mapping designed for compensation, not markets.

This paper examines the role of formal property systems in international L&D finance, highlights key property considerations for any L&D regime, and identifies areas for further exploration by academics, national policymakers, and international actors. This paper is expected to form a chapter in the Edward Elgar Research Handbook on Climate Justice, forthcoming 2025.

- **David Driesen (and non-presenting co-author Michael A. Mehling), *Pricing, Decarbonization, and Green New Deals***

This article evaluates literature claiming that carbon pricing has not performed very well and therefore cannot be the basis for the transformative change required to address the climate crisis. This is an important claim, as carbon pricing has been viewed as being at the heart of global efforts to the climate crisis.

We provide theoretical and empirical support for these critics' claim that carbon pricing by itself cannot catalyze the technological transformation now required, and that other approaches have done and will likely do better. We also agree with the critics' claim that pricing approaches have suffered from insufficient ambition and effectiveness in routine emission reductions. But the critics have not shown that alternative approaches will perform better in those terms. We develop a framework for enhancing empirical evaluation of past programs, as we now have a wealth of experience with both carbon pricing and a variety of alternatives, but a dearth of econometric comparative studies of past performance.

We also explore the normative implications of the critics' claims. We argue that even if they are entirely right, we should welcome even insufficiently ambitious pollution taxes as likely to enhance other programs and raise revenue to support them. We point out, however, that the trading programs now common around the world may undermine rather than support more successful programs and suggest that regulators consider cap-without-trade (imposing mass-based caps on pollution sources without allow the trading around of obligations) as an alternative.

3:15-3:30pm **Health Break** (*Caruso School of Law Atrium*)

3:30-5:00pm **Final Performance Event: *Belongings Precede Belonging***
Presented by: **Echo Park Lake Archive Collective** (*Classroom D*)

5:00pm **End-of-Day Snacks & Reception** (*Law School Back Terrace*)

5:30pm **Shuttle Back to Cambria Calabasas Hotel** (*Law School Parking Lot*)