

# The AALS PROPERTY LAW SECTION NEWSLETTER

November 2008

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## AALS Annual Meeting San Diego, CA January 6-10, 2009

This year's AALS Annual Meeting in San Diego, California will offer several programs of interest for property scholars. **More information on these programs is included on Pages 4-6.** Here are the day-by-day highlights:

Wednesday, January 7

2:00 P.M. — 5:00 P.M.: **Hernando de Soto and Property in a Market Economy.** This panel brings together a group of diverse scholars to assess the legacy of Hernando De Soto's works, *The Mystery of Capital* and *The Other Path*.

Thursday, January 8

7:00 A.M. — 8:30 A.M.: **The Property Section Breakfast.**

Friday, January 9

8:30 A.M. — 10:15 A.M.: **Property Scholars Works-in-Progress Panel.** This panel will allow junior scholars the opportunity to present their work. Two papers will be presented, Daniel Kelly, *Strategic Spillovers: Using Externalities to Extract Payments* and Leah Theriault, *An Efficient Breach of the Numerus Clausus*.

## A Note from the Incoming Chair

Carol Necole Brown, The University of North Carolina School of Law

Gosh, since we last gathered as a Section at the AALS Annual Meeting in New York (January 2-6, 2008) the nation has been almost defined by issues of property law. One might even say that property related issues are the dominant themes of the year which only reinforces what every "good" property professor tells his or her students, right – that the property course is the most important class they will have in law school.

## **A Note from the Incoming Chair**

**Carol Necole Brown, The University of North Carolina School of Law**

Certainly it is the most important first year course in law school. (Though I jest, I only jest a bit.)

The origins of the current credit crunch reside, almost undisputably, in the housing market. The demand for more income-producing investment assets fueled the demand for sub-prime mortgages that could be securitized and sold on Wall Street. The inflated housing market could not sustain itself; when the housing bubble burst and prices began to fall, the nation felt the consequences of past decisions and government responded.

Aside from the impacts of property and property-related issues on the financial sector and the economy in general, important environmental and housing concerns across the world and nation have affected millions already this year. So, as we consider the year in review, who can doubt the centrality of property to all that has been occurring in our economy. Please indulge me while I try to make my case.

### **2008 In Review – A Property Prof's Perspective**

On January 18, 2008, President Bush responded to the housing crisis with a multi-billion dollar stimulus package proposal intended to “provide a shot in the arm” to the economy. That same month, stock markets around the world plunged, responding to fears that the United States was headed toward an imminent recession (January 21, 2008). In response to the international perception of the poor health of the United States economy, the Federal Reserve cut interest rates by .75% (January 22, 2008), perhaps the largest single-day reduction in the Federal Reserve's history.

On February 7, 2008, the Senate voted in favor of a \$168 billion dollar stimulus package. The economy lost jobs for the first time in 52 months. The labor statistics increased fears of an imminent recession that first surfaced in the prior month.

In March, the federal government intervened in an attempt to avert a financial crisis. The Federal Reserve outlined a \$200 billion loan program to allow the country's biggest banks to borrow Treasury securities at discount rates and post mortgage-backed securities as collateral (March 13, 2008). The White House announced a plan that would require states to tighten rules for mortgage brokers and called upon lenders to fully disclose payment terms to buyers (March 16, 2008). And, the Federal Reserve, hoping to avoid a financial crisis, approved a \$30 billion loan to JPMorgan Chase so it could take over Bear Stearns which was on the verge of collapse. Bear Stearns sold for 1/10th of its market price. The Federal Reserve also cut short-term interest rates by .75% that same month.

## A Note from the Incoming Chair

Carol Necole Brown, The University of North Carolina School of Law

On April 10, 2008, the United States Senate approved a measure that would give a \$7,000 tax credit to individuals who purchased foreclosed houses and allocated \$4 billion to localities that purchased foreclosed buildings. The measure also provided \$150 million to be used to counsel home buyers.

The month of May brought different, but equally sad news related to property. On May 2, 2008, nearly 350 homes and businesses in Arkansas were destroyed or badly damaged by tornadoes and storms. Internationally, cyclone Nargis ravaged Irrawaddy Delta and Yangon killing 78,000 people and leaving millions homeless.

In June, Governor Schwarzenegger of California officially declared that his state was in a drought and warned of potential water rationing (June 4, 2008). He reported reservoir levels well below average and that the state was experiencing its driest spring in eighty-eight years. On June 9, 2008, the states of Iowa, Indiana, and Wisconsin experienced severe flooding. Thousands evacuated their homes, roads were closed and lives were lost.

Fannie Mae and Freddie Mac topped the news in July. On July 23, 2008, the House voted in favor of legislation giving the Treasury Department authority to rescue, if necessary, the two largest mortgage companies in the country. The Senate approved the legislation three days later. Fannie Mae and Freddie Mac either own or guarantee one-half of the mortgages in the United States.

On August 30, 2008, our dear fellow Americans in New Orleans prepared for Hurricane Gustav. One day after the third anniversary of Hurricane Katrina, the mayor of New Orleans ordered residents to begin leaving the city (August 31, 2008). Nearly two million people evacuated New Orleans in anticipation of the storm.

September was another difficult month for the nation's housing market. On September 7, 2008, the United States government placed Fannie Mae and Freddie Mac under government conservatorship, akin to bankruptcy reorganization. Treasury Secretary, Henry M. Paulson, Jr., stated that the decision was necessary to avoid turmoil in the international and national economies. He opined that "[t]his turmoil would directly and negatively impact household wealth: from family budgets, to home values, to savings for college and retirement. . . ." One week later on September 14, 2008, Merrill Lynch agreed to be acquired by Bank of American for \$50 billion and Lehman Brothers prepared to declare bankruptcy when it failed to find a buyer. The next day, September 15, 2008, the Dow Jones industrial average dropped more than 500 points (4.4%) amid concerns of a financial crisis. This was the worst one-day loss since the September 11, 2001 attacks. The Federal Reserve agreed to a \$85 billion rescue of the American International Group on September 16, 2008. The American International Group is an enormous insurance company that covers financial institutions. On September 20, 2008, the Bush administration sought congressional authority to allow the Treasury Department to purchase up to \$700 billion in bad mortgage assets from private investment companies, the largest proposed bailout in the history of the United States.

## **A Note from the Incoming Chair, Carol Necole Brown, The University of North Carolina School of Law**

Congress began debating the bailout package on September 22, 2008. Federal regulators seized Washington Mutual, the nations largest savings and loan on September 26, 2008 and almost immediately afterwards, JPMorgan purchased Washington Mutual. On September 28, 2008, Treasury Secretary Henry Paulson and congressional negotiators agreed on a \$700 billion bailout plan but the House rejected the bailout plan (September 29, 2008).

October opened with the Senate passing the bailout plan days after the House rejected it (October 1, 2008). On October 3, 2008, the House reversed an earlier vote and approved the bailout package and President Bush signed the measure into law. October 6, 2008 was the first day of trading since the bailout bill was signed into law and stock markets in America, Europe and Asia experienced their steepest declines in two decades. On October 14, 2008, the Bush administration announced plans, as part of the \$700 billion bailout package, to invest \$250 billion in nine of the largest United States banks in its continued effort to control the financial crisis.

The remaining two months of the year promise even more activity in the area of property law. The economy is not yet showing signs of recovery and housing prices are still down in many areas of the country. Nevertheless, we remain optimistic. The Property Section views these world events of the past ten months as an opportunity to consider the critical role of property rights in a mature market economy such as the United States.

On Wednesday, January 7, 2009 from 2:00 p.m. until 5:00 p.m. we will sponsor a panel on Hernando de Soto and Property in a Market Economy. As you know, Hernando de Soto is a respected Peruvian economist and a champion of property rights and of market economics.

On Friday, January 9, 2009 from 8:30 a.m. until 10:15 a.m., we will have our Junior Property Scholars Works-in-Progress panel. Two property scholars, Daniel Kelly and Leah Theriault, have been selected by blind peer review to present their papers. These authors will receive commentary from senior colleagues knowledgeable about their topics. Links to both papers will be posted on the Property Prof Blog and circulated on the Section listserv in advance of the meeting. Though this session begins early, please make plans to attend. It promises to be most interesting and our junior colleagues deserve our enthusiastic support.

Please do not forget about the Property Section breakfast on Thursday, January 8, 2009 at 7:00 a.m. and Section officers should also try to attend the AALS Workshop and Continental Breakfast for 2008 and 2009 Section Officers on Saturday, January 10, 2009 at 7:00 a.m. Finally, please do not miss the Section's business meeting which will directly follow the panel on Hernando de Soto.

I look forward to an exciting 2009 Annual Meeting. Our Section has made important and lasting scholarly contributions since we last met, as is evident from the list of recent scholarship. Our formal and informal discussions at the upcoming meeting will be fertile ground for innovate and exciting ideas as we come together, once again, as property enthusiasts.

## AALS Meeting Program



**Wednesday, 2:00 – 5:00 p.m.**

### **Hernando de Soto and Property in a Market Economy**

Program Chair/Moderator: D. Benjamin Barros, Widener University School of Law

Speakers: Gregory S. Alexander, Cornell Law School; Nestor Davidson, University of Colorado School of Law; Rashmi Dyal-Chand, Northeastern University School of Law; Nicole Stelle Garnett, Notre Dame Law School; Larissa Katz, Queen's University, Ontario; Daniel B. Kelly, Harvard Law School; Eduardo M. Peñalver, Cornell Law School; Carol Rose, University of Arizona Rogers College of Law; Ezra Rosser, American University Washington College of Law.

Hernando de Soto is one of the world's leading public intellectuals. His books *The Mystery of Capital* and *The Other Path* have been tremendously influential. He has been included on *Time*'s list of the 100 most influential people in the world, and has received praise from politicians from across the political spectrum. His work also has been controversial, and some of his arguments have received sustained criticism.

One of de Soto's core ideas is that the institution of private property is necessary for the proper functioning of a market economy. Many property scholars closely follow de Soto's work, but de Soto's ideas have been strangely neglected in property scholarship within the legal academy. His work has been widely discussed in the context of property in developing countries, but has not had the same impact on the property issues that arise in mature market economies like the United States.

This program seeks to remedy this neglect. It brings together a diverse group of scholars to apply de Soto's work to a wide range of contemporary issues in property law and theory.

**[Property Section Business Meeting immediately follows Panel]**

## Recent Scholarship By Section Members

D. Benjamin Barros (Widener School of Law). *Toward a Model Law of Estates and Future Interests*, 66 WASH. & LEE L. REV. \_\_ (forthcoming 2009); *Legal Questions for the Psychology of Home*, 83 TULANE L. REV. \_\_ (forthcoming 2009); *Property and Freedom*, 4 NYU J. OF LAW & LIBERTY \_\_ (forthcoming 2008); *Group Size, Heterogeneity, and Prosocial Behavior: Designing Legal Structures to Facilitate Cooperation in a Diverse Society*, 18 CORNELL J. OF LAW & PUB. POL'Y \_\_ (forthcoming 2008).

Michael C. Blumm (Lewis and Clark Law School) with Sherry L. Bosse. *Norton v. SUWA and the Unravelling of Federal Land Planning*, 18 DUKE L. & POL'Y F. 105 (2007); *Justice Kennedy and the Environment: Property, States Rights, and a Persistent Search for Nexus*, 82 WASH. L. REV. 667 (2007).

Michael C. Blumm with Erik Grafe. *Enacting Libertarian Property: Oregon's Measure 37 and its Implications*, 85 DEN. L. REV. 279 (2007).

Sara C. Bronin (University of Connecticut School of Law). *The Quiet Revolution Revived: Sustainable Design, Land Use Regulation, and the States*, 93 MINN. L. REV. \_\_ (forthcoming 2008).

Marcilynn A. Burke (University of Houston Law Center). *The Emperor's New Clothes: Exposing the Failures of Regulating Land Use Through the Ballot Box*, 84 NOTRE DAME L. REV. \_\_ (forthcoming 2009).

Alejandro E. Camacho (Notre Dame Law School). *Beyond Conjecture: Learning about Ecosystem Management from the Glen Canyon Dam Experiment*, 8 NEV. L. J. 942 (2008) (invited); *Can Regulation Evolve? Lessons from a Study in Maladaptive Management*, 55 UCLA L. REV. 293 (2007).

Nestor M. Davidson (University of Colorado Law School). *Property and Relative Status*, 107 MICH. L. REV. \_\_ (forthcoming 2009); *Values and Value Creation in Public-Private Transactions*, 94 IOWA L. REV. \_\_ (forthcoming 2009); *Essay, Reconciling People and Place in Housing and Community Development Policy*, 17 GEO. J. POVERTY L. & POL'Y \_\_ (forthcoming 2009); *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. \_\_ (forthcoming 2008); *The Problem of Equality in Takings*, 102 NW. U. L. REV. 1 (2008).

Jorge Elorza (Roger Williams University School of Law). *Absentee Landlords, Rent Control, and Healthy Gentrification: A Policy Proposal to Deconcentrate the Poor in Urban America*, 17 CORNELL J.L. & PUB. POL'Y 1 (2007).

Lee Anne Fennell (University of Chicago Law School). *Homeownership 2.0*, 102 NW. U. L. REV. 1047 (2008); *Order with Outlaws?* 156 U. PA. L. REV. PENUMBRA (2007), <http://www.pennumbra.com/responses/12-2007/Fennell.pdf>; *Response to Eduardo Moisés Peñalver & Sonia K. Katyal Property Outlaws*, 155 U. PA. L. REV. 1095 (2007).

Paula Franzese (Seton Hall School of Law) with Steven Siegel. *Trust and Community: The Common Interest Community as Metaphor and Paradox*, 72 UNIV. OF MISSOURI L. REV. 1110 (2007); *The Twin Rivers Case: of Homeowners Associations, Free Speech Rights and Privatized Mini-Governments*, 4 RUTGERS J. LAW & PUB. POL'Y 1 (2008).

Susan F. French (UCLA) with Wayne S. Hyatt. COMMUNITY ASSOCIATION LAW: CASES AND MATERIALS ON COMMON INTEREST COMMUNITIES (2d ed., Carolina Academic Press, 2008).

Tom Gallanis (University of Minnesota Law School). *"Reasonable Doubt and the History of the Criminal Trial"* 76 U. OF CHI. L. REV. \_\_ (forthcoming 2009); *"Frontiers of Succession"* REAL PROPERTY TRUST AND ESTATE LAW JOURNAL \_\_ (forthcoming 2009).

Alan R. Madry (Marquette University Law School). *Judging Ziervogel: The Twisted Path of Recent Zoning Variance Decisions in Wisconsin*, 91 MARQUETTE LAW REVIEW 485 (2007).

## Recent Scholarship By Section Members

Matthew J. Parlow (Marquette University School of Law). *Greenwashed? Developers, Environmental Consciousness, and the Case of Playa Vista*, 35 B.C. ENVTL. AFF. L. REV. 513 (2008).

Jonathan R. Nash (Emory University School of Law). *Economic Efficiency versus Public Choice: The case of Property Rights in Road Traffic Management*, 49 B.C.L. REV. 673 (2008).

Aaron Schwabach (Thomas Jefferson School of Law). "Harry Potter and the Unforgivable Curse," chapter in THE LAW & HARRY POTTER (Jeff Thomas ed., forthcoming 2008-09); (*File Sharing*), WORLD HISTORY ENCYCLOPEDIA (forthcoming, Fed Nadis ed., Santa Barbara: ABC-CLIO 2008); *Intellectual Property, 1945 to Present*, WORLD HISTORY ENCYCLOPEDIA (forthcoming, Fred Nadis ed., Santa Barbara: ABC-CLIO 2008); *Intellectual Property Piracy: Perception and Reality in China, the United States, and Elsewhere*, 2 J. INTL. MEDIA AND ENT. L. 65 (2007).

Aaron Schwabach with Liang Qinghua, "Measures to Protect the Tibetan Antelope under the Cites Framework," *Endangered Species and Forests: LEGAL PERSPECTIVES* 145 (A. Usha ed., 2008).

Gregory M. Stein (University of Tennessee College of Law). *Mortgage Law in China: Comparing Theory and Practice*, 72 MISSOURI LAW REV. 1315 (2007); *The Chinese Land Use Right: Is It Property?*, 21 PROBATE AND PROPERTY, No. 5 at p. 22 (2007); *Doomed to Re-Repeat History: The Triangle Fire, The World Trade Center Attack, and the Importance of Strong Building Codes*, 21 ST. JOHN'S JOURNAL OF LEGAL COMMENTARY 767 (2007); *Note from the Dean: Send after U.S. News Rankings are Published*, THE CHICAGO TRIBUNE, April 6, 2008.

Gregory M. Stein with Morton P. Fisher, Jr., & Marjorie Fisher. A PRACTICAL GUIDE TO COMMERCIAL REAL ESTATE TRANSACTIONS: FROM CONTRACT TO CLOSING (2d edition 2008).

Joseph W. Singer (Harvard Law School). *Things That We Would Like To Take For Granted: Minimum Standards for the Legal Framework of a Free and Democratic Society*, 2 HARV. L. & POL'Y REV. 139 (2008).

Joshua C. Tate (Southern Methodist University). *Marilyn Monroe's Legacy: Taxation of Postmortem Publicity Rights*, 118 Yale L.J. Pocket part 38 (2008), <http://thepocketpart.org/2008/09/08/tate.html> <<http://thepocketpart.org/2008/09/08/tate.html>>; *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. \_\_ (forthcoming 2008); *Inheritance Rights of Nonmarital Children in Late Roman Law*, 4 ROMAN LEGAL TRADITION \_\_ (forthcoming 2008); *Codification of Late Roman Inheritance Law: Fideicommissa and the Theodosian Code*, 76 LEGAL HIST. REV. \_\_ (forthcoming 2008).