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Introduction to Property, History & Climate Change in the Former Colonies Symposium Special Issue

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Introduction to *Property, History & Climate Change in the Former Colonies Symposium* Special Issue

Jill Fraley¹

The concept of property determines rights, often exclusive rights, to things. Within any given socio-legal system, models of ownership and theories of property evolve over time. With that said, one of the core components of the idea of property is its intractability. Vested interests prevent property from being malleable. In layman's terms, that means property is something you can count on. Economies depend on the reliability of property interests and the security of property is a major theme of political stability.

Culturally, the U.S. has tended toward a near worship of this aspect of property. Takings and eminent domain are among the few core constitutional concepts well understood by the general public. As the saying goes, a man's home is his castle. Within films and literature, the idea of taking away any unfettered right to property often plays villain to the ordinary citizen. While there is abundant evidence to the contrary, socio-culturally property is thought of in terms of exclusive rights and absolute dominion.

In recent years, legal theorists such as Margaret Jane Radin and Jeremy Waldron have affirmed these cultural beliefs by emphasizing the connection of property to individual freedom and the development of personhood. More than owning property, people may well be bounding themselves up within it—a sentiment that naturally supports the intractability of property rights.

On the other hand, property is not all about the individual. Theorists of property have long commented on the social nature of property. Property is better understood as a social system of distributing rights. Property relates to belonging, to social control, and to institutional authority. While property is possessed by small groups and individuals in many, if not most, circumstances, property serves greater social purposes.

The social approach to property weighs somewhat against the traditional rhetoric of vested, intractable rights. Historically, the ideas of exclusive rights and absolute dominion have often been abrogated in favor of greater social goods. An easy example is, of course, guaranteeing equal access to property to people of all races, ethnicities, and religions.

When it comes to climate change, these two histories are at odds. Many property doctrines date back centuries and leave us with vested interests that prevent property law from adapting to modern problems as rapidly as other areas of law do. Still, modern history demonstrates how greater social goods are capable of trumping the idea of unfettered individual control. In the near future, the challenge will be balancing these competing social goods, adjusting or maintaining theories and doctrines of properties while coping with the impacts of climate change, particularly on coastal properties. This symposium formed around the idea of bringing together legal theorists who focus on property with scientists who deeply understand the specific impacts that climate change brings in terms of impacts for land and landowners, and the planning implications for state and local governments.

The mid-Atlantic presents a global hot spot for climate change vulnerability and emerging adaptation needs. Governments are preparing for sea level rise and problems in shoreline management, along with the potential for unprecedented storms. This same region also boasts some of the most historical irregularities in terms of property law due to the long and experimental colonial period. Thus, the interface of property law and climate adaption is particularly relevant to the mid-Atlantic.

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This issue of the *Sea Grant Law and Policy Journal* begins with the article of Dr. Larry Atkinson, Professor of Oceanography at Old Dominion University, and Dr. Tal Ezer, a professor in Old Dominion University's Department of Ocean, Earth, and Atmospheric Sciences, which discusses sea level rise and how this phenomenon is being and will be experienced in Virginia. Virginia coastal cities are challenged today to plan for how to combat and address sea level rise to save coastal cities from flooding in the future. Dr. Atkinson and Dr. Ezer review the past history of sea level, the changes in sea level locally in the Norfolk/Virginia Beach region, and future predictions of sea level in the region. Figures and graphics illustrate how minor flooding, sometimes called nuisance flooding, has increased in the region in recent years. In addition, their article briefly reports on how some communities are planning their adaptation to sea level changes.

William Stiles, Molly Mitchell, and Troy Hartley provide an overview of the climate change adaptation policy, planning, and implementation landscape in Virginia on both the state and local level. Adaptation planning and policy action has arisen in Virginia from many drivers, including incentives from the federal, regional, and local level. The authors review some of the major adaptation initiatives and milestone events in Virginia's consideration of climate change. Although some Virginia localities have launched community engagement efforts focused on concerns over increased flooding risks, state-level engagement on the issue has been less consistent. The authors argue that this has left a leadership void on climate adaptation issues and created a challenging environment to align interests for broader regional responses.

Moving from the science to the problems brought on by the state's unique legal history, James Jennings and Erin Ashwell, both of the law firm Woods Rogers, discuss the issue of navigable waterways and private ownership of the river bottoms in Virginia. In particular, they highlight a conflict between a policy announced by a Virginia Attorney General's Opinion and the Virginia Marine Resources Commission that presumes state ownership of submerged lands with decisions of the Virginia Supreme Court recognizing some private ownership. Their article concludes by analyzing the criteria used by Virginia courts to determine ownership of streambeds and attendant rights in the encompassed waterways.

My own contribution focuses on a specific example of how property law poses unique challenges for climate change. Taking Virginia as an example, the article explains how an ancient type of land grant, called a King's grant, provided additional rights to waterways that later colonial grants did not include. As a result, Virginia has privately owned dams, some of which are categorized as high hazard dams. Rising water levels and high intensity storms in the coastal areas tax the resources of private owners who often have neither the funds nor expertise to face these challenges. Private ownership requires individuals to act in concert with government officials to control flooding in the event of significant storms; to date there are very limited and ad hoc agreements in place to deal with such scenarios. I suggest evaluating the possibility of state acquisition of dams, at least in instances where the dam could contribute to systematic control of a river.

This symposium issue of the *Journal* concludes with an article about the public trust doctrine. Blake Hudson, Associate Professor of Law at Louisiana State University and the LSU School of the Coast and Environment, highlights the legal tension between the Takings Clause and public trust doctrine and its implications for coastal zone resources in a time of climate change. His article explores what this tension means with respect to (1) the resolution of future legal controversies related to climate change along the coast; (2) a potential rebalancing of modern takings jurisprudence, which has arguably disturbed the appropriate balance between private property protections and the public good; and (3) the creation of better governance structures through institutional design enhancements and adjustments.