The 'Grandparent' Problem: Encouraging a More Relational Approach Towards Child Arrangements via Mediation

SCALING PROPERTY LAW

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1. Introduction

Property law's most pressing problems, from housing and commercial property transactions to land use, planning and environmental sustainability, are complex, wide-ranging, and multi-dimensional. They typically involve multiple stakeholders with implications that range across local, regional, national or transnational issues and interests. In engaging with these problems, academics, judges, and attorneys are constantly engaged in the processes of scale-making. Yet, surprisingly, relative to other disciplines, the use of scale as an analytical concept to evaluate the role of law in shaping and resolving disputes has emerged rather late in legal scholarship. Reasons for this may include the tendency for property scholarship to focus on mono-scalar jurisdiction-level case-law as a primary source,[1] and on 'ownership' as the primary register. Ironically, another possible reason for this relative neglect of scale in legal analyses is that, as well as producing scaled productions (like the state), law itself is a scaled operation.

In our book, *Squatting and the State: Resilient Property in an Age of Crisis*,[2] we apply the theories and methods of "scale" to examine the complex, wide-ranging, multi-dimensional issues and interests at stake when states respond to homeless squatting on empty land. The methodology we developed in this book offers a new toolkit for understanding and addressing 'wicked' property problems. Resilient Property resists the use of narrowing frames, which reduce the scale of problems by adopting partial[3] perspectives; instead, our aim was to develop a method to grapple with the 'whole problem space' of complex property problems, and to build our theoretical insights on this approach. We use ideas of scale to describe the relationships between competing interests and claims of individuals (owners, squatters, neighbors), collective interests (neighborhoods, markets, societies), and the interests and responses elicited at different levels of the state, and across institutions of the state. The concept of 'scale' helps us to build a more complete understanding of how state actors and institutions, across multiple layers of the state (local/city, regional/state, national/federal and transnational), respond to competing claims and conflicts.

The concept of 'scale' measures and compares how phenomena are "produced".[4] Applied to physical assets or operations, the term "scalability" refers to the ability to expand an existing concept or organization without changing the frames that supported it in the first place.[5] A project or concept that can be "scaled up" is one that can be expanded beyond its natural parameters without changing the premise on which it was based. Scalability is not an "ordinary feature of nature";[6] making projects "scalable" requires significant work and still, some features of the expansion may be "unscalable."[7] As

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[1] Hanoch Dagan, *The Realist Conception of Law,* 57 U. Toronto L. J. 607 (2007).

[2] L Fox O'Mahony & Marc L Roark, Squatting and the State: Resilient Property in an Age of Crisis (2022, Cambridge University Press).

[3] We use 'partial' here both in the sense of incomplete or fractional; and biased or distorted.

[4] ANNA LOWENHAUPT TSING, *Some Problems with Scale, in* THE MUSHROOM AT THE END OF THE WORLD 37–38 (2015)

[5] *Id.* at 38.

[6] *Id.* at 43.

[7] Sometimes, legal regimes can be replicated across different settings, without rendering imposing greater costs on the legal setting. But mostly, because legal problems arise in context-specific settings, they often require significant effort to effectuate the same results

Susan Gal writes, recognizing scale necessarily implies positioning, point of view and perspective from which modes of comparison are constructed.[8]

Legal systems reduce the complexity of empirical problems by structuring and defining conflicts in relationship to individuals, things, and claims.[9] Understood as a production of the state, property law reveals how states perceive, prioritize and respond to collective problems.[10] Like the Fordist factory model, that itself provided the framework for the manufacturing state,[11] property law simplifies conflicts by imposing structured rules on messy real-life problems. For example, zoning law ensures the development of cities in organized and efficient patterns. This process supports the regulation of the city by rendering the city more legible. Rather than allowing organic and highly disorganized collections of streets and buildings emerge, cities are produced as highly organized and predictable locations, where activities can be contained through common, predictable, and easily map-able plots.[12]

The production of law uses scale in a cognate way, by re-producing complex and unique fact patterns in simplified, legible conceptual terms: for example, the recognition of ownership as a *de jure*[13] right with conceptual priority over *de facto* possession.[14] Law scales conflicts by creating hierarchies of actors, rights and claims.[15] Examples include the use of categories to define common law interests in land (such as found in landlord tenant law, servitudes, co-ownership, and freehold property claims); categories of immovable and movable interests in the civil law; and the limitation of categories through *numerus clauses*. Disputes concerning land are scaled through pre-determined, 'official hierarchies' of relative claims.

Scale-making is inherently relational and comparative, often "conflating what is geographically, geopolitically, temporally or morally 'near' while simultaneously distinguishing that nearness from what is "far."[16] Real property law similarly operates as a scaled hierarchy, by sorting, grouping, and categorizing: "things, people, and qualities in terms of relative degrees of elevation or centrality."[17] For example, real property claims are usually organized around the identities assigned to the individuals

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at a different scale than the one the regime was designed for. In contrast, the Uniform Commercial Code has been the exception to the rule, often fitting across regimes.

[8] S. Gal, E., *Scale-Making: Comparison and Perspective as Ideological Projects*, in S. CARR & M. LEMPERT (EDS.), SCALE: DISCOURSE AND DIMENSIONS OF SOCIAL LIFE at 91 (Berkeley, CA: University of California Press). *See also* Fox O'Mahony and Roark noting the role of property as a framing device to flatten problems rather than critically evaluate their perspective.

[9] The often-quoted phrase that appears at the beginning of the classic Dukeminier case book is that "property is not the study of things but rather the study of relationships between people in relation to things."

[10] James Scott defines this as a process of making problems more legible. Thus, just as states used maps to make tax collection more efficient and adopted official languages to make government bureaucracy accessible, law adopts approaches that seek to reduce problems into solvable units. J. C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED NACHDR. ED. (New Haven: Yale University Press 2008). Property law's reliance on entitlements as a starting point for understanding how and when entitlements shift helps courts and law makers understand how the property system operates. G. Calabresi & A. D. Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARVARD LAW REVIEW 1089–1128 (1972).

[11] C. Waldheim, *Post-Fordist Economies and Logisitics Landscape* [in] C. WALDHEIM, LANDSCAPE AS URBANISM: A GENERAL THEORY 69–85 (Princeton; Woodstock; Princeton University Press 2016).

[12] S. HIRT, ZONED IN THE USA: THE ORIGINS AND IMPLICATIONS OF AMERICAN LAND USE REGULATION (Ithaca: Cornell University Press 2014).

[13] Hickey (2014); J.C. Tate, *Ownership and Possession in the Early Common Law*, 48 THE AMERICAN JOURNAL OF LEGAL HISTORY 280–313 (2006); J. Gordley & U. Mattei, *Protecting Possession*, 44 THE AMERICAN JOURNAL OF COMPARATIVE LAW 293–334 (1996).

[14] R. Hickey, *Possession as a Source of Property at Common Law* [in] E. Descheemaeker, THE CONSEQUENCES OF POSSESSION 77–94 (Edinburgh: Edinburgh University Press 2014).

[15] E. S. Carr & M. Lempert, *Introduction: Pragmatics of Scale* [in] E.S. CARR & M. LEMPERT (EDS.) (2016).

[16] *Id.*

[17] *Id.*

who assert them.[18] 'Owners' have special standing in relationship to land through both constitutional recognition and legal protections afforded to their claims. Property law categorically distinguishes between those who are invited onto land (invitees) and those that are not (trespassers). These categories create *de facto* hierarchies of interests: defining the actors and conferring a legally determinative property 'identity' based on their relationship to the land.[19] Sometimes, distinctions are drawn between types of property depending on whether or how they are used or occupied: for example, in some jurisdictions, homes are treated differently from commercial properties.[20] A primary home may receive different protections compared to a second home or a vacation home. Properties classified as 'investment properties' may be subject to different tax rules, reflecting policies to promote investment; or the impact of absent ownership on local communities and housing markets.

As a tool for measurement and comparison, scale can be understood on three distinctive planes: comparing resources, rhetoric, and capabilities. Resources can be scaled according to size (50 acres versus 10 acres), distance (a plot of land situated 1 mile or 100 miles from an urban center), tenure or time (a fee simple estate versus a life estate or a leasehold). Rhetorical scale measures property law's discourses: for example, claims of validity (moral absolutism versus moral relativeness); or the frequency of use and impact of certain arguments within legal analyses. The scale of capability measures the ability to exercise power: for example, in relation to competencies (the powers that an entity can *lawfully* exercise) or procedures (barriers that limit exercise or access to powers). For every dimension of property disputes, decision-making about 'relevant' facts frames legal analyses. The three planes of scale: the nature of the land (eg rural/urban); property identities (e.g., owner, tenant, trespasser); and the powers available at different levels of the state to regulate the land; all reflect legal and policy decisions that determine how problems are seen and understood, and how states, through law, respond to property problems.

Property theories that advance particular normative frames (for example, rights-based, utilitarian or progressive theories) also scale property problems by defining and delimiting the dimensions of the problem: asserting normative justifications for preferred hierarchies of values and applying these to analyze problems and produce preferred solutions. Law-makers, advocates and judges articulate scaled value-claims to reach preferred outcomes. Through processes of analyses and advocacy, lawyers, legislators, courts and scholars direct the frames through which property problems are scaled, steering analyses towards immanent solutions. Attention to how scaling-techniques frame property problems is important for property scholarship, because choices about scale determine how, and to what extent, property problems are *seen*. While conventional analytical techniques simplify problems through the use of selective or single-scale registers (for example, the ownership register), in reality, conflicts involving property are multi-scalar. This chapter explains how attention to scale can improve property scholarship and highlights a range of techniques for scaling, comparing and validating property relationships.

2. Scaling Property as a Resource

[18] This starting point has raised criticism from progressive scholars, like Joseph Singer, who have articulated that law's implied preference for ownership by noting that property disputes often wrongly start from the question of who owns the property. J. W. Singer, *The Reliance Interest in Property*, 40 STANFORD LAW REVIEW 611–751 (1988). Likewise, other scholars have focused on the question of "who" gets to assert claims to ownership through structural problems like racism, access to wealth, or geographic isolation (ruralism). M. L. Roark, *Under-Propertied Persons*, 26 CORNELL J. L. & P.P. 1 (2017); J, *Singer, The Reliance Interest in Property,* 40 STANFORD L. REV. 611 (1988).

[19] M. L. Roark, *Homelessness at the Cathedral*, 80 MISSOURI LAW REVIEW 53 (2014).

[20] L. FOX O'MAHONY, CONCEPTUALISING HOME: THEORIES, LAWS AND POLICIES (Oxford: Hart Publications 2007).

a. The scales of measurement in law

The scale of property 'as a resource' refers to (a) the 'size' of the resource, (2) the location or 'distance' between the resource under consideration and other vital assets, and (3) the 'time' or duration of the interest or claim that is recognized by law. The scale of resource determines the economic value of land: land in urban locations is often more valuable than land in rural locations; larger quantities more valuable than smaller quantities; and longer-term claims more valuable than shorter-term claims. Real property law enables owners to structure their interests across size, place, and time; as well as providing the toolkits for policy-makers to structure land-holdings. Red-lining practices in the U.S.[21] and Apartheid policies in South Africa[22] excluded black people from access to land in particular locations; while legal structures that enable owners to preserve family wealth across generations limit access to rights in land for other stakeholders.

'Size' and 'time' are important scales for legal claims to adverse possession. Many U.S. states have adopted the 'Connecticut Rule', which requires that dispossessed owners have been placed on actual notice if intrusions are *de minimus*.[23] The small-scale of border disputes between neighbors are also treated differently compared to claims over larger-scale occupations.[24] Limitation periods for actions to recover land set time-limits for owners to take action against trespassers. Likewise, the concept of an 'estate' in land—the conceptual foundation of 'ownership' in common law systems—is anchored in the duration of interests of land. Co-ownership regimes enable choices to be made between the presumption of consolidation in fewer owners (joint tenancy) or division amongst more owners (tenancy in common). Choices about how individual interests are structured have broader structural consequences when aggregated from individual transaction to impacts on communities. For example, Mitchell's work on 'heir's property' in the U.S. highlighted the structural legacies of fractured titles for black land-ownership in the U.S.; and developed new structural mechanisms for land law reform to address the legacies of disadvantage this produced.[25]

The scale of 'time' underpins the concept of 'waste', which governs the extent to which occupiers can change landscapes. Land has a memory. It bears legacies of prior use: this is reflected in concepts of 'greenfield' or 'brownfield' land; which are both a product of, and reflected in, planning and zoning laws. The common law concept of waste restricts the entitlements of shorter-term occupiers (for example, tenants and holders of life estates) to alter the landscape, compared to fee simple owners.[26] The civil law imports a similar distinction, between owners and derivative interest-holders, by limiting entitlements to benefit from improvements or alterations during the period of tenure. Scaling-techniques that govern 'time on the land' produce social and economic hierarchies. Shoemaker's *Fee Simple Failures* highlighted how land law mechanisms that lock-in land relationships for the longer-term have harmed black and Latino populations. Scaling land relationships over time sustains the *status*

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[21] R. ROTHSTEIN, COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 127 (New York: Liveright Press 2017)

[22] A.J. Van der Walt, Property in the Margins (Hart Publishing 2009).

[23] J. Lovett, *Disseisin, Doubt, and Debate: Adverse Possession Scholarship in the United States*, 5 Texas A&M L. Rev. 1 (2017).

[24] For example, in England, boundary disputes are an exception to the requirement for registered proprietor notification and consent under the Land Registration Act 2002

[25] T. Mitchell, *Destabilizing the Normalization of Rural Black Land Loss: A Critical Role for Legal Empiricism*, 2005 Wis. L. Rev. 557, 563-564 (2005); T. W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Ownership, Political Independence, and Community through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505 (2001).

[26] J. Lovett, Doctrines of Waste in a Landscape of Waste, 72 Missouri L. Rev. 1209 (2007).

quo, benefitting people who land-banked when minority populations were legally excluded from land acquisition.[27]

b. Scaling the stakes of 'Ownership'

In his classic law review article *Property in Land*, Ellickson observed that initial choices about the nature, norms and rules of ownership regimes determine the scale at which certain interactions or conflicts are located.[28] Starting from the simple construct of 25 owners who share control over land,[29] he described how the decisions each owner makes impact other owners and the group. These decision-events are scaled interactions with different levels of impact: small events (like the cultivation of a tomato plant), medium events (like the building of a small dam to create a pond from a flowing stream), and large events (like fire causing significant environmental impacts on neighboring lands or partitioning the ownership interest into separate parcels).

High-stakes impacts and events invoke different types of response from stakeholders (owners, trespassers, neighbors or collective interests), compared to lower-stakes. In our book, *Squatting and the State*, we describe how laws governing squatting and adverse possession have been re-cast: from low-stakes private disputes (where owners were empowered with legal tools to remove trespassers) to high stakes events (criminal sanctions against trespassers). When states perceive the actions in respect of land as "high-stakes events" or as having "high-stakes impact", the state is more likely to respond: by mobilizing support for the ownership regime; or by legitimating or validating non-owners' conduct. Conversely, low-stakes events are less likely to elicit state responses; unless these have high-stakes impacts. In some cases, land-owners are required to endure minor inconveniences: not all harms or impositions are actionable.

The higher the perceived impact of the event, the more likely states will respond. In mapping states responses to events and impacts, the mobilization of state-resources on behalf of owners or other stakeholders reveals whether the event is viewed by the state as a "high-stakes" or "high-impact" event. Thus, the methodologies of scale reveal the state's stake in property conflicts. When states 'upscale' "events" like squatting through criminalization this reveals underlying changes in the state's stake in this conflict: either the presence of squatters has become a high-stakes event for the state, and/or the stakes have been raised in relation to impact for owners.

c. Scaling Claims to Property Through Discursive Practice

Law itself is scaled as a discursive practice in the ways that both insiders (for example, owners) and outsiders (non-owners) relay and validate claims.[30] Property law uses scale to re-produce complex and unique fact patterns in simplified, legible conceptual terms: for example, the recognition of ownership as a *de jure*[31] right with conceptual priority over *de facto* possession.[32] As well as shaping claims to

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[27] J. Shoemaker, *Fee simple Failures*, 119 MICHIGAN L. REV. 1695, 1701 (2021). Brown has also described the impact of land tenure in disadvantaging wealth accumulation for black communities in the U.S: D. BROWN, THE WHITENESS OF WEALTH 65-66 (New York: Crown Publishers 2021).

[28] Robert C. Ellickson, *Property in Land*, 102 YALE L. J. 1315 (1993).

[29] *Id. at* 1323.

[30] Gerald J. Postema, *Custom, Normative Practice, and the Law,* 62 DUKE L. J. 707 (2012).

31 Hickey (2014); J.C. Tate, *Ownership and Possession in the Early Common Law*, 48 THE AMERICAN JOURNAL OF LEGAL HISTORY 280–313 (2006); J. Gordley & U. Mattei, *Protecting Possession*, 44 THE AMERICAN JOURNAL OF COMPARATIVE LAW 293–334 (1996).

32 R. Hickey, *Possession as a Source of Property at Common Law* [in] E. Descheemaeker, THE CONSEQUENCES OF POSSESSION 77–94 (Edinburgh: Edinburgh University Press 2014).

resources through concepts of measurement (like time and distance), law also directly scales conflicts by creating hierarchies of actors, rights and claims.[33] Legal remedies are scaled according to which issues are deemed actionable, and the hierarchical identities of parties who can assert claims. In defining "what is property?" and "who is entitled to property?", the processes of discursive scale are deployed to selectively upscale and downscale rhetorical tropes to produce preferred outcomes.

a. What is property?

Definitions of "what" constitutes property establish hierarchies over resources. For example, Roman law divided resources into private things, public things, common things, and sacred or religious things.[34] Only private things constituted 'property' on the grounds that these were the things of 'commerce'. Modern civil law countries continue to define 'things' by type; but allow public things to be "property" where the state intends to own the thing as a private person would. Radin's 'personhood' theory demonstrated how property claims are scaled in relation to self-actualization.[35] 'Personal' property in objects deemed to be closely-constituted in personhood (e.g., wedding rings, home) were contrasted with 'fungible' property; this categorization has been reflected in legislative protections (e.g., bankruptcy codes). Noting that designations of property as 'personal' are socio-culturally subjective, we observe that, in protecting personhood property, states are scaling up the social relationships represented or supported by these objects (e.g., marriage or family).

The legal recognition of new rights in property reveals the state's stake in emerging property problems (for example, carbon-credits for environmental sustainability); or the re-scaling of the state's position on legacy problems (for example, post-colonial land reform).[36] Land reform movements deploy discursive scaling devices to re-calibrate property registers, making visible subjects who were previously concealed, as well as implicating stake-holder states as essential actors in these processes.[37] In other cases, the creation of new regulatory or procedural frameworks enable nonowner-claimants to assert claims that rival the established rhetorical power of ownership. Constitutional movements advancing the human right to housing or regulatory limits on evictions seek to upscale claims that can rival property rights.[38] In the U.S., legal claims brought by public-housing residents based on constructive demolition theories effectively 'mimicked' property rights,[39] securing state-support, on the same plane as the property rights of owners.

A third type of rhetorical upscaling de-limits 'what is property' in relation to moral obligations to limit adverse outcomes. For example, Claeys argued that property's utility should shape the way adverse possession claims are enforced, embedding within the definition of ownership an implicit duty to make productive use of land.[40] Singer's articulation of 'reliance' upscales a discourse of limitation

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[33] E. S. Carr & M. Lempert, *Introduction: Pragmatics of Scale* [in] E.S. CARR & M. LEMPERT (EDS.) (2016).

[34] G. MULLER, R. BRITTS, J. M. PIENAAR, Z. BOGGENPOEL, SILBERBERG AND SCHOEMAN'S THE LAW OF PROPERTY (6th ed) 31-37 (Lexis-Nexis 2019).

[35] M. Radin, *Property and Personhood,* 34 STANFORD L. REV. 957 (1982).

[36] R. KING, LAND REFORM: A WORLD SURVEY (Routledge 1977); J. BAXTER, INALIENABLE PROPERTIES: THE POLITICAL ECONOMY OF INDIGENOUS LAND REFORM (UBC Press 2020).

[37] M. ALBERTUS, AUTOCRACY AND REDISTRIBUTION: THE POLITICS OF LAND REFORM (Cambridge University Press 2015); D. JAMES, GAINING GROUND: 'RIGHTS' AND 'PROPERTY' IN SOUTH AFRICAN LAND REFORM (Routledge 2007).

[38] *See* G. MULLER & S-M VILJOEN, PROPERTY IN HOUSING (Juta 2021); P.KENNA, S. NASSARRE-AZNAR, P. SPARKES,& C. U. SCHMID (EDS.), EVICTED: LOSS OF HOMES AND EVICTIONS ACROSS EUROPE – A COMPARATIVE LEGAL AND POLICY EXAMINATION (EE Press 2018).

[39] M.L. Roark (2017).

[40] E. Claeys, *Labor, Exclusion and Flourishing in Property Law*, 95 UNC L. REV. 413 (2017).

within the concept of ownership,[41] while the decision in *State v. Shack*[42]—and its status as a 'case célèbre' for 'progressive' property scholars—illustrates the power of rhetorical scale in enabling human dignity considerations to limit—or down-scale—the power of ownership. Similarly, in *Jones v. City of Los Angeles,* the city's prerogative to control sidewalks was effectively down-scaled in the face of powerful rhetorical claims invoking the city's failure to tackle housing and homelessness.

b. Who can assert claims to property?

Questions about who can assert claims to property have been foregrounded as the politics of identity and polarization have re-shaped state responses to property problems. In *Squatting and the State,* we describe this process using the case study of criminalization of trespass—and of trespassers. Manjikian observed that:

> "…today's social and political conversation about squatting…is no longer merely 'about' real estate. Rather, it is about questions of identity: who belongs in our community and who does not? What should our community look like?"[43]

By deploying punitive sanctions (for example, criminalization), states up-scale squatting events. In a context of high-stakes for homeless squatters, states deploy rhetorical tactics to justify such moves, re-casting squatters (as an identity group) as dangerous outsiders, a threat not only to the individual dispossessed owner but to *ownership*, to communities and to society at large.

The governance of homelessness is rooted in rhetorical scale, because it toggles between the high-status interests of owners (and the state-backed concept of ownership) and the low-status position of homeless people. As Anoya Roy observed, the identification of homeless people as "aberrant," and requiring disciplinary action[44] facilitates the down-scaling of their claims, compared to the claims of owner-citizens. This is recursively rooted in the hierarchies produced by legal structures and discourses. Thus: "expressions of identity – one claiming membership in democratic citizenship and the other excluded by propertied citizenship – are rooted in systems of rights."[45]

d. Scaling Hierarchies in Property Disputes

The institutions of the modern state are produced, and in turn produce property, and property law, on multiple levels. The multi-level state allocates powers to regulate property to specific agencies and actors across those levels: for example, powers to tax property interests; to levy fines for harmful uses of property; and to determine property disputes. Additionally, states facilitate the acquisition and securitization of property interests. These functions are scaled not only within states, but across states. Globalized market actors respond to property policies by allocating, investing or withdrawing resources across jurisdictional scales.

The multi-level state is a complex matrix of interacting institutions and actors. In federal systems like the U.S. and Spain, powers are shared across federal and state/regional scales, while state/regional institutions grant devolved powers to the local/municipality-level.[46] In non-federalized systems, like

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[41] J. W. Singer (1988).

[42] *State v. Shack,* 58 N.J. 297 (1971).

[43] M. MANJIKIAN, SECURITIZATION OF PROPERTY: SQUATTING IN EUROPE 13 (New York: Routledge Press 2015).

[44] A. Roy, *Paradigms of Propertied Citizenship: Transnational Techniques of Analysis*, 38 URBAN AFFAIRS REV. 463 (2003).

[45] *Id.* at 474.

[46] Michael Brown notes in his work on the autonomy of the Local government that the U.S. state is divided between tiers of the state. "The locality is a creature of the state. Municipal budgets are constrained by variable federal and state funding. The centralized

the UK, Ireland, and South Africa, national-level states devolve powers and responsibilities to act to local governments. In either case, different levels of the state have different powers to act (competencies), resources to deploy (capabilities), and face different burdens (costs) of action. These determine how differently-situated state actors and agencies perceive and respond to property problems.

State institutions and actors at different levels exist in recursive relationships, where action by one can trigger a response from another. Jason Hackworth observed that in the neoliberal era, increased local autonomy to address problems has removed some of the barriers that state competencies (or divisions of power) had imposed on city decision making. Yet, he adds, the broadening of local decision-making powers (competencies) has not necessarily translated to increased capabilities:

> "To the contrary...the policy imagination in the current regulatory context has narrowed considerably as neoliberalism has risen to hegemonic status. The "opening" of power has been a lopsided affair because it has taken place within a context that heavily favors the aforementioned global institutions at the expense of cities, towns, PHAs, and so on. Moreover, the power propelled "downward" to localities often amounts to little more than increased responsibility for social reproduction and economic risk, while that propelled "upward" enables greater capital mobility. Many localities are left with little practical choice other than to pursue an "entrepreneurial" path of their own."[47]

The emergence of entrepreneurial cities can be understood as the latest step in the evolution of local-level state interaction with property problems, including affordable housing, land use and the leveraging of private investment to fund infrastructure and facilitate service-provision. Fainstein and Fainstein's identified three distinct periods in the development of local government: (1) the 'directive period' from 1950-1964, when local decision making and access to federal funding were constrained by federal requirements; (2) the 'concessionary period' from 1965-1974, triggered by political and financial crises that forced decision makers at the local level to make concessions to lower income and minority constituents; and (3) the 'conserving period', from 1974-1984, when federal resources dried

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power of the state leaves local government as largely a bureaucratic apparatus." M. Brown, *The Possibility of Local Autonomy*, 13 URBAN GEOGRAPHY 257, 257 (1993). In the U.S., Dillon's Rule has captured the general statement regarding how municipalities receive power vis-à-vis other levels of the state:

> "It is a general undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and not others: first, those granted in express words; second those necessary or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation – not simply convenient but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.

J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 448 (Boston: Little, Brown, and Co., 1911). This view was captured by the U.S. Supreme Court in Trenton v. New Jersey:

> The City is a political subdivision of the State, created as a convenient agency for the exercise of such of the governmental powers of the state as may be entrusted to it… The State, therefore, at its pleasure may modify or withdraw all such powers… expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the character, and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme.

Trenton v. New Jersey*,* 262 U.S.182, 195-96 (1923).

[47] J. HACKWORTH, THE NEOLIBERAL CITY: GOVERNANCE, IDEOLOGY, AND DEVELOPMENT IN AMERICAN URBANISM43 (Ithaca: Cornell University Press 2007).

up, forcing municipal governments to retrench.[48] Building on this, Hackworth identified a fourth 'entrepreneurial period' in which local-level governments are required to engage with new financial partners to finance development.[49]

In the entrepreneurial period, cities facing local problems including homelessness and the lack of affordable housing, policing and public order, turned to public and private partners to finance public functions.[50] Public participants (city hall, development authorities, and housing authorities) worked with private counterparts (wealthy individuals, finance firms, and influential corporations) to secure investment or delay disinvestment.[51] The emergence of the 'entrepreneurial city' across the U.S., Europe, Asia, and in the developing world, fueled two key changes in relationships between the city and private property, particularly land. Firstly, financialization emerged as an important tool for development at the city or local level; and secondly, public-private partnerships were leveraged to fill gaps in service-provision, enabling cities to tap into additional resources to "position themselves to be globally competitive in a more mobile world." Entrepreneurial cities leveraged the opportunities of globalized capital and finance to tackle localized problems that the national-level state either didn't see or couldn't solve. On both national and local levels, states compete for private finance to secure investment.

e. Conclusions

The financialized age of 'glocalization' has re-located political action towards local state/global capital partnerships. At the same time, these influences continue to be mediated through the institutions, norms and capabilities of nation-states,[52] creating hybridized, multi-scalar modes of governance. National state level decisions (like funding allocation, national legislation effecting property claims, and taxation schemes) interact with local decision making to tackle complex problems such as housing shortages, environmental challenges, and municipal regulation.[53] The scale of the challenges that property systems are embroiled in has intensified the demands and pressures on property, particularly land, as resource; at the same time as questions of ownership and exclusion, wealth and inequality, investment and entrepreneurialism, and land use and sustainability, animate political and legal discourses. Property scholars who are interested in understanding and addressing the urgent issues these challenges present will benefit from paying attention to the theories and methodologies of scale.

De Sousa Santos described law as a mapping exercise through which multi-scalar systems converge to create the legal order.[54] Yet, the relative absence of scale theory and techniques within property

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[48] N. Fainstein & S. Fainstein, *Regime Strategies, Communal Resistence, and Economic Forces,* [in] N. FAINSTEIN, S. FAINSTEIN, R.C. HILL, D. JUDD, & M.P. SMITH (EDS.) RESTRUCTURING THE CITY: THE POLITICAL ECONOMY OF URBAN REDEVELOPMENT (NEW YORK: LONGMAN 1983); N. Fainstein & S. Fainstein, *Is State Planning Necessary for Capital?: The U.S. Case*, 9 INTERNATIONAL J. OF URBAN AND REGIONAL RESEARCH 485 (1985); *see also* J. HACKWORTH (2006) at 61.

[49] J. HACKWORTH, (2006) at 61.

[50] J. HACKWORTH (2006) at 43, 44 ("Though the boundaries for acceptable policy action have narrowed, localities have been thrust into the position of determining exactly how to address, contest, or embrace larger shifts in the global economy). Hackworth notes the impact of this shift: "One consequence in the United States, the United Kingdom, and other countries that have pursued neoliberal paths is an acceleration of uneven development within and across localities. Local variation in the quality, quantity, and maintenance of public housing, for example, has increased significantly in recent years, less because of differences in federal funding or landscape features conducive to investment than because of the kaleido-scope unleashed by the rescaling of regulation." *Id.*

[51] J. Hackworth (2006) at 46.

[52] L. Weiss, The Myth of the Powerless State (Ithaca:, NY: Cornell University Press 1999).

[53] B. Jessop, *The governance of complexity and the complexity of governance*, [in] A. AMIN & J. HAUSNER (EDS) BEYOND MARKETS AND HIERARCHY (Northampton: Edward Elgar 1997).

[54] B. De Sousa Santos, *Law: A Map of Misreading - Toward a Postmodern Conception of Law*, 14 JOURNAL OF LAW AND SOCIETY, 279 (1987).

analyses has allowed the assumption that "law operates on a single scale, the scale of the state"[55] to go unchallenged. While legal pluralism opened up the horizontal scale, de Sousa Santos argued that the emergence of 'world law'—the transnational legal space through which globalized flows of capital are regulated—revealed the importance of the vertical dimension: "of three different legal spaces and their correspondent forms of law: local, national and world legality."[56] Each of these scales—and the interactions and interdependencies within and between scales—produce different legal realities. Through these processes, property law produces social scale or dimensionality:[57] by scaling the resource of property, through the scaled discourses of property law and in conjunction with the hierarchies of the scaled state.

[55] B. De Sousa Santos (1987) at 287.
[56] B. De Sousa Santos (1987) at 287.
[57] MARIANA VALVERDE, EVERYDAY LAW ON THE STREET: CITY GOVERNANCE IN AN AGE OF DIVERSITY 141 (2012).