

## The Illusory Promise of General Property Law

*Maureen E. Brady*

**ABSTRACT.** Federalized, jurisdictionless property law is ascendant in the Supreme Court’s recent majority opinions on the Takings Clause – and in *The Fourth Amendment and General Law*, Danielle D’Onfro and Daniel Epps tout the benefits of courts developing a national law of property and torts in assessing whether a person has suffered an unlawful search or seizure. In this Response, I criticize the version of “general law” outlined in their Article, both on its own terms and for its implications for property law specifically. The development of takings law teaches that efforts to make a national law of property are inevitably indeterminate and may threaten the existence of beneficial variation in property rules at the state level. After advocating against the use of general law in constitutional contexts that involve property, this Response concludes by sketching a “patterning approach” to the Fourth Amendment: an approach, first developed by scholars in takings law, that defines protected interests by reference to uniform federal criteria met (or unmet) by nonconstitutional state law. A patterning approach to the Fourth Amendment might offer one of the attractions of the general law model – the way it reasons usefully from private-law doctrines – without the associated costs.

### INTRODUCTION

In *The Fourth Amendment and General Law*, Danielle D’Onfro and Daniel Epps endorse an approach to the Fourth Amendment that brings together some promising recent developments in the field.<sup>1</sup> The authors construct their vision of a better way to assess the constitutionality of searches and seizures against two previously proposed versions of the “positive-law approach.” In the first positive-law version, to determine if a Fourth Amendment search or seizure occurred, courts would look at whether the activity would have violated the common law of 1791.<sup>2</sup> In the second positive-law version, now associated with the

- 
1. Danielle D’Onfro & Daniel Epps, *The Fourth Amendment and General Law*, 132 YALE L.J. 910 (2023).
  2. Although D’Onfro and Epps describe this as a “dominant” or “leading positive-law approach,” *id.* at 917, 939, and although Justice Gorsuch recently suggested in his *Carpenter v. United*

work of William Baude and James Y. Stern,<sup>3</sup> courts should determine searches and seizures by looking to actual background law—typically state private-law rules—in effect in the time and at the place of the conduct being challenged and assessing “whether government officials have engaged in an investigative act that would be unlawful for a similarly situated private actor to perform.”<sup>4</sup>

D’Onfro and Epps take a different approach, arguing that courts deciding Fourth Amendment cases should draw on broad “general law” in all steps in a Fourth Amendment inquiry: whether a search or seizure has occurred, whether the claimant’s rights were violated, and whether an exception to the warrant requirement is nonetheless justified.<sup>5</sup> I will explore their definition of the “general law” in much greater detail later on, but for now, it suffices to say that general law is not dependent on the law of any one jurisdiction; instead, it is uniform law discerned from and informed by the rules of multiple jurisdictions, as well as widely shared customs. General law is typically associated with the era of *Swift v. Tyson*,<sup>6</sup> a decision under which federal courts hearing cases in diversity jurisdiction deferred to state-court decisions on matters of “local” law, but independently drew on a range of authorities rather than state-specific common law to pronounce the applicable rule for matters of general law.<sup>7</sup> Over time, litigants went to different forums and pushed on the definitions of “local” and “general” in an effort to extract the most favorable ruling, since state and federal courts might reach different conclusions on matters involving general law.<sup>8</sup> Eventually, these indeterminacies led the Supreme Court to repudiate *Swift* in *Erie Railroad Co. v. Tompkins*, declaring that “[t]here is no federal general common law” and

---

*States* dissent that courts could look at 1791 common law, 138 S. Ct. 2206, 2268 (2018) (Gorsuch, J., dissenting), the authors do not clearly identify scholars who suggest that some static version of 1791 common law furnishes the correct standards. Indeed, the authors note that “many scholars reject the notion that the Fourth Amendment simply freezes in place 1791 common law.” D’Onfro & Epps, *supra* note 1, at 941.

3. Before Baude and Stern, other scholars, including Daniel Yeager and Orin Kerr, described some version of a positive-law theory. See Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 516-19 (2007); Daniel B. Yeager, *Search, Seizure and the Positive Law: Expectations of Privacy Outside the Fourth Amendment*, 84 J. CRIM. L. & CRIMINOLOGY 249 (1993).
4. William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1825 (2016).
5. D’Onfro & Epps, *supra* note 1, at 932-36.
6. 16 U.S. (Pet.) 1 (1842).
7. See *Balt. & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 372 (1893).
8. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938) (referring to “the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law”); *Baugh*, 149 U.S. at 401 (Field, J., dissenting) (“[W]hat has been termed the general law of the country . . . is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject.”).

requiring deference to state rulings on state law<sup>9</sup> – though as D’Onfro and Epps point out, scholars have argued that something like general law persists even in modern doctrine.<sup>10</sup>

D’Onfro and Epps ground their argument that general law can be used to resolve Fourth Amendment questions in part on this persistence. Under the general-law model, courts would use common-law concepts from property and tort law – things like trespass, abandonment, and the privacy torts – to define uniform rules applicable in Fourth Amendment cases. According to the authors, this approach would carry several benefits over alternatives. As opposed to the positive-law approach, which might lead to variations depending on the jurisdiction in which the violation occurred, the authors contend that the general-law approach will yield desirably uniform results.<sup>11</sup> Further, the authors contend that the general law would balance flexibility and determinacy better than either current privacy-based analyses or an approach tethered to the common law of 1791.<sup>12</sup>

There is much to like about certain aspects of the general-law approach. For one thing, the general-law approach, like the positive-law model, recognizes the utility and centrality of private law as a mode of analyzing legal problems. For much of the last century, private law was often neglected as a worthy subject of study. And when studied, it has been in crudely instrumental terms, as essentially public regulation in disguise.<sup>13</sup> A new generation of scholars associated with the New Private Law movement is seeking to renew interest in private-law structures – especially those within tort, contract, property, equity, and unjust enrichment – as having an important internal logic and instantiating philosophic commitments, social values, customs, and mores.<sup>14</sup>

Indeed, a possible salutary effect of both the positive- and general-law approaches is that either would encourage litigants to take private law seriously, bringing relevant common-law precedents as well as applicable public-law

---

9. 304 U.S. at 78.

10. D’Onfro & Epps, *supra* note 1, at 919, 928-30; see Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 532-36 (2019).

11. D’Onfro & Epps, *supra* note 1, at 917.

12. *Id.* at 917-18.

13. See Andrew S. Gold, John C.P. Goldberg, Daniel B. Kelly, Emily Sherwin & Henry E. Smith, *Introduction to THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW*, at xv, xv (Andrew S. Gold et al. eds., 2021).

14. E.g., John C.P. Goldberg, *Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1651-63 (2012); Paul B. Miller, *The New Formalism in Private Law*, 66 AM. J. JURIS. 175, 175-77 (2021); Dick Dahl, *New Private Law: Looking at Traditional Interpersonal Law in a Different Light*, HARV. L. SCH. (Aug. 31, 2015), <https://hls.harvard.edu/today/new-private-law> [<https://perma.cc/JVR7-242Y>].

sources to courts' attention.<sup>15</sup> One of the great pleasures of the authors' Article is the way it argues from these traditional common-law concepts, demonstrating the continued utility of frameworks from bailments to abandonment, even in a teched-up, statutory world. Courts using either the general-law or positive-law model are likely to have to grapple with blackletter law rather than engage in sometimes fuzzy and inconsistent—if not incoherent—inquiries about whether an individual's "reasonable expectations of privacy" have been violated. This has been the dominant question in Fourth Amendment analyses since Justice Harlan penned the phrase in his 1967 concurrence in *Katz v. United States*.<sup>16</sup> Indeed, *Katz* itself could perhaps have been decided by reference to enduring common-law principles. *Katz* famously held that the government violated the Fourth Amendment when it recorded an individual's conversation in a public phone booth without a warrant.<sup>17</sup> But legal precedent dating back to the time of Blackstone recognized eavesdropping by a private party as an actionable public nuisance.<sup>18</sup>

While this and other private-law doctrines have largely been forgotten today, the authors' proposal could help resurrect them as a more concrete guide to help courts reach the right conclusions in Fourth Amendment cases. The Supreme Court has already indicated its willingness to use property concepts to define the scope of constitutional protection from searches and seizures. In the 2012 case of *United States v. Jones*,<sup>19</sup> the Court re-emphasized that "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test."<sup>20</sup> Accordingly, as D'Onfro and Epps acknowledge,<sup>21</sup> adding private-law concepts into Fourth Amendment analyses may not result in much of a difference from the status quo; courts interpreting the Fourth Amendment might reach the same results with slightly different concepts and cases. But in at least some instances, moving common law toward the forefront might help

---

15. See also Richard M. Re, *The Positive Law Floor*, 129 HARV. L. REV. F. 313, 332-37 (2016) (proposing an alternative approach that bears some similarities to both the positive-law and general-law approaches, in which property law would furnish a presumptive minimum for Fourth Amendment inquiries).

16. 389 U.S. 347, 360-62 (1967) (Harlan, J., concurring).

17. *Id.* at 353 (majority opinion).

18. See generally Julia Keller, *Eavesdropping: The Forgotten Public Nuisance* (Sept. 12, 2022) (unpublished manuscript) (on file with author) (outlining the history of eavesdropping as a public nuisance at common law).

19. 565 U.S. 400 (2012).

20. *Id.* at 409.

21. D'Onfro & Epps, *supra* note 1, at 948-50.

courts avoid some of the most questionable denials of Fourth Amendment protection.<sup>22</sup>

Unfortunately, however, the specific general-law model outlined by D’Onfro and Epps suffers from both serious internal flaws and unaddressed external effects. In this Response, I investigate the authors’ case for courts to divine some kind of general law in search-and-seizure cases and find their arguments in need of further defense, particularly where the authors’ core example – property – is concerned.

In Part I, I probe the authors’ definition of “general law,” which has the potential to be far more open-ended and unconstrained than the general law as it has previously been understood. Even if it did more closely resemble traditional general law, a court’s resort to general law in a particular context is typically justified by some federal interest or power meriting the application of uniform rules. The authors do not satisfactorily explain that need here, especially given traditional deference to positive state law – and the desirability of some variation reflecting local conditions and expertise – in matters involving property questions in other areas of constitutional law. Further, in justifying reliance on the general law, the authors oversell its determinacy and stability vis-à-vis existing approaches, even though – as D’Onfro and Epps themselves point out – the general law often reaches the same results as courts applying *Katz*. But given the vagaries of some common-law standards and the breadth of the sources of general law, courts will still be faced with unclear choices within and among these sources. The general-law approach that D’Onfro and Epps propose offers no guidance on how courts should resolve these conflicts and uncertainties, dooming it to the same indeterminacy for which the authors (and others) criticize *Katz*.<sup>23</sup> The authors’ own case studies illustrate this problem.

In Part II, I turn to a doctrinal area where the pitfalls of general law – and specifically, general *property* law – can already be observed: in recent decisions under the Takings Clause of the Fifth Amendment. Decisions interpreting the Takings Clause, which prohibits private property from being “taken for public use without just compensation,”<sup>24</sup> traditionally “emphasiz[ed] the role of non-constitutional state property law in defining both what counts as constitutional property and in measuring whether a taking has occurred.”<sup>25</sup> The presumption

---

22. As I have explored at length elsewhere, the turn toward privacy in post-*Katz* doctrine has, over time, paradoxically led to less protection for certain property interests than might have been available under an approach more clearly tied to the common law. Maureen E. Brady, *The Lost Effects of the Fourth Amendment: Giving Personal Property Due Protection*, 125 YALE L.J. 946, 948-50 (2016).

23. See, e.g., *Carpenter v. United States*, 138 S. Ct. 2206, 2265-66 (2018) (Gorsuch, J., dissenting).

24. U.S. CONST. amend. V.

25. Maureen E. Brady, *Property Convergence in Takings Law*, 46 PEPP. L. REV. 695, 705 (2019).

of deference to state-specific property principles in takings law was grounded in a belief that property is an inherently local matter and that different states might opt to recognize and regulate property interests differently. However, two Supreme Court decisions within the last five years have unsettled that longstanding tradition. Both *Murr v. Wisconsin*<sup>26</sup> and *Cedar Point Nursery v. Hassid*<sup>27</sup> relied on something approximating a general law of property in conducting takings analyses, and both leave the Justices vulnerable to the criticism that they cherry-picked rules from various jurisdictions for instrumental purposes—a likely consequence of the general-law approach in the Fourth Amendment context, too. Takings law also teaches that decisions by courts in federal constitutional cases can influence the direction of nonconstitutional state law, even though that result is not compelled. The authors waver on whether this sort of influence is a benefit of their approach or an avoidable consequence. If the authors see some value to state-level property variation, as I do, then they have unexplained optimism in state courts’ willingness to contravene nonbinding statements made in constitutional precedents issued by the U.S. Supreme Court.

In Part III, I use other lessons from the law of takings to gesture at an approach that would carry some of the benefits of the general-law model while leaving most of the development of property law to the states. In articles covering the Due Process and Takings Clauses, Thomas Merrill has advocated for a “patterning definition” of constitutional property—a set of federal criteria that are met (or not) by the characteristics an interest has under nonconstitutional state law. The idea behind patterning is to provide a baseline, uniform constitutional standard across the states—one of the key purported advantages of the general-law model over the positive-law one—without having courts make a confusing national law of property specifically for federal purposes. While I only sketch the outline of what such an approach might look like, it bears close resemblance to the status quo, and for that reason (among others), it might be unpalatable for the authors. Nevertheless, although I agree with D’Onfro and Epps about the potential of private law to frame and elucidate Fourth Amendment problems, their proposal for using “general law” to decide such problems fails to make a strong case for uniformity, oversells the determinacy of such an approach, and neglects to address the risks that this approach poses for the viability of variable state property law.

---

26. 137 S. Ct. 1933 (2017).

27. 141 S. Ct. 2063 (2021).

## I. CONSTRUCTING THE GENERAL LAW

### A. Radically Inclusive General Law

What is the “general law” that D’Onfro and Epps describe? From the outset, the Article frames the meaning of the general law by two things that it is *not*: (1) the positive law of 1791; and (2) today’s jurisdiction-specific positive law.<sup>28</sup> From there, the authors quote Caleb Nelson’s definition of the general law as “rules that are not under the control of any single jurisdiction, but instead reflect principles or practices common to many different jurisdictions.”<sup>29</sup> The general-law approach thus evaluates whether a search and seizure has occurred and, if it has, whether it infringed on one of the constitutionally protected categories of “persons, houses, papers or effects” by reference to multijurisdictional rules and principles. The authors’ stated advantage of this “commonsense” approach is that it would prohibit “untethered and speculative inquiries into ‘reasonable expectations of privacy,’” and would thus be “more straightforward to apply and produce[] more attractive results.”<sup>30</sup> Similarly, because the inquiry into the appropriate standard is neither historical (requiring examinations of the law in 1791) nor tied to jurisdiction-specific positive law (like the model proposed by Baude and Stern), they argue that the general-law approach would encourage beneficial uniformity and avoid well-rehearsed problems associated with narrowly positivistic approaches (for instance, enabling government manipulation of positive law to favor expansive search-and-seizure power, or yielding arbitrary results).<sup>31</sup>

When we turn from what the general law is *not* to what it *is*, however, its sources prove quite varied. As D’Onfro and Epps make clear, a dominant source of general law is state “common law” and especially the “private law”: in their Article, concepts like property licenses and bailments fill in much of the scope of Fourth Amendment protections and intrusions.<sup>32</sup> State-specific positive law is “persuasive evidence” of the general law, but so is “the positive law governing in other jurisdictions.”<sup>33</sup> Because the American Law Institute’s *Restatements of the Law* can elucidate dominant approaches in multiple jurisdictions, they are also evidence of the general law (even if those Restatements are not binding).<sup>34</sup> But the majority rule is not necessarily the “general law”: a court might choose to

---

28. D’Onfro & Epps, *supra* note 1, at 914.

29. Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 505 (2006).

30. D’Onfro & Epps, *supra* note 1, at 914-15, 917.

31. *Id.* at 917.

32. *Id.* at 915.

33. *Id.* at 935.

34. *Id.* at 959.

follow “a minority position” if it better reflects its vision of the general law and if the majority rule appears “ill advised.”<sup>35</sup> At a later point, the authors reiterate that federal courts need not follow state-court precedent “if they determine that state courts are out of sync with the general law.”<sup>36</sup> There is some circularity here: state-court precedents and majority rules are ordinarily the general law, but other precedents and majority rules are not general law because they do not comport with general law.

The general law has still more sources, though. D’Onfro and Epps assert that the general law can also derive its content from (1) statutes, including federal, state, and local laws (presumably, also, other states’ and localities’ positive laws); and (2) “societal norms and practices not codified as positive law.”<sup>37</sup> Furthermore, it appears that *constitutional decisions*—including past Fourth Amendment decisions—might also inform the general law by, at the very least, shaping social norms and expectations. The authors’ discussion of the law of curtilage suggests this possibility.<sup>38</sup>

---

35. *Id.* at 936.

36. *Id.* at 978.

37. *Id.* at 935; *see also id.* at 927 (posing a question suggesting that all sources of positive law should matter, including “municipal ordinances and administrative regulations”). Notably, elsewhere, the “general law” approach seems to allow common law to override statutes, but it is unclear why. *See id.* at 977 (suggesting that the general-law approach deriving from the common law of bailment “would also be more protective than a positive-law approach, in that statutes authorizing landlords and bailors to search property would not necessarily authorize warrantless searches.”). *But see id.* at 979 (suggesting that general law is composed in part from “existing privacy statutes”).

38. “Curtilage” is now a uniquely Fourth Amendment concept with limited application in non-constitutional law, although it does appear that the concept was historically useful in determining whether an act constituted burglary, and perhaps, in conveyancing. *See id.* at 934-35 & nn.131-32. (I will note that in researching for an article on conveyancing and land demarcation, I reviewed hundreds of deeds over centuries in Connecticut, *see* Maureen E. Brady, *The Forgotten History of Metes and Bounds*, 128 YALE L.J. 872 (2019), but not one used the term “curtilage” in a property description.) As D’Onfro and Epps acknowledge, there is convincing evidence that the “traditional definition [of curtilage] included only outbuildings that were to be considered part of the home itself,” as opposed to some amount of land surrounding a dwelling. D’Onfro & Epps, *supra* note 1, at 935 n.132 (citing Chad Flanders, Collins *and the Invention of “Curtilage,”* 22 U. PA. J. CONST. L. 755, 755 (2020)). The authors nonetheless state that “‘curtilage’ has long been used to describe the land essential to support nonmortgage liens against property.” *Id.* (citing *Derrickson v. Edwards*, 29 N.J.L. 468, 474 (1861)). In the cited case (and many others) that term was statutory—part of the jurisdiction’s statute on mechanic’s liens—and further, subject to fluctuation. *Derrickson*, 29 N.J.L. at 473-74. In leaving the question of curtilage to the jury, the *Derrickson* court observed that “the idea of a curtilage may be expanded or contracted by the character and location of the erection standing upon it, and by the nature and extent of the business to be done there.” *Id.* at 474. A few years later, because a new mechanic’s lien statute had been passed, another New Jersey court defined curtilage



The authors acknowledge that, given these plural sources, courts might have to choose from conflicting ones. Here, given the repudiation of state-specific positive law, the term “conflict of laws” seems inapt, so “conflict of principles” might better describe the problem faced by a judge confronted with irreconcilable general-law sources. Faced with such a conflict, D’Onfro and Epps leave it to courts to work out these conflict-of-principles problems through “the age-old tools of common-law reasoning.”<sup>39</sup>

To begin, this vision of the “general law” — one that includes majority and minority rules, all federal, state, and local statutory law, as well as social norms — is more radical than the authors let on.<sup>40</sup> We can begin where the authors get their definition. D’Onfro and Epps cite Caleb Nelson’s 2006 *Columbia Law Review* article frequently to provide examples of the persistence and acceptance of general law.<sup>41</sup> Despite the demise of federal general common law in *Erie Railroad Co. v. Tompkins*,<sup>42</sup> Nelson describes how something like it persists to this day in a variety of different contexts. He gives the following examples, which D’Onfro and Epps also list: federal common law applied when the federal government is a party to a contract, federal common law controlling on the high seas, and a sort of federal common law used to understand the scope of evidentiary privilege pursuant to the Federal Rules of Evidence.<sup>43</sup>

There are two interrelated questions that Nelson’s article raises: (1) On what occasions should courts invoke general law? And (2) for such occasions, to what sources should courts look for its content? On both scores, Nelson’s answers seem far more circumscribed than those that D’Onfro and Epps have provided. We can take the second question first. For Nelson, instead of giving judges broad discretion and an unlimited range of sources to choose from, the general law is a *limit* on judicial discretion, blunting the “creativity of federal judges” with rules

---

either as the scope of an entire mapped building lot or, if not mapped into building lots, no more than half an acre. See *James v. Van Horn*, 39 N.J.L. 353, 364 (1877).

39. D’Onfro & Epps, *supra* note 1, at 935-36.

40. The authors’ vision of general law is constructed by reference to sources discussing “federal common law,” but as this Section explains, it bears an attenuated resemblance to that traditional category. A better fit seems to be what Melvin Eisenberg has called “national law.” Melvin A. Eisenberg, *The Concept of National Law and the Rule of Recognition*, 29 FLA. ST. U. L. REV. 1229, 1230 (2002) (“The concept of national law is that there is a body of law in the United States that is made by officials across jurisdictions, legal scholars, and scholarly institutions, which constitutes law despite the fact that it is not binding in, and is not necessarily made by, officials of a deciding jurisdiction.”). As with general law, though, Eisenberg contends that national law has no place when there are “highly localized” legal rules. *Id.* at 1233.

41. See D’Onfro & Epps, *supra* note 1, at 927-30.

42. See *supra* notes 6-9 and accompanying text.

43. Nelson, *supra* note 29, at 504, 514, 546 n.209 (emphasis added); D’Onfro & Epps, *supra* note 1, at 927-30.

that ordinarily “mirror doctrines recognized in a majority of states or other relevant jurisdictions.”<sup>44</sup> Though this need not entail counting noses, it does suggest a constraining principle that prevents the use of sources of authority without the weight of some significant consensus behind them.<sup>45</sup> In Nelson’s view, a hallmark of the general law is that it does *not* leave a court with the “freedom to establish whatever rules it will,” declaring whichever rule they choose the “general law.”<sup>46</sup> Nelson’s vision of general law is, therefore, quite different from the version described by D’Onfro and Epps, which would appear to grant judges substantial flexibility and discretion in the scope of material they can draw upon.

Other general-law authors likewise have a narrow view of the sources of general law. For their assertion that the general law can include “custom, tradition, and social facts,” D’Onfro and Epps rely on Anthony J. Bellia and Bradford R. Clark’s article *General Law in Federal Court*.<sup>47</sup> Yet, once again, custom is a more limited notion for Bellia and Clark than it is for D’Onfro and Epps. Bellia and Clark’s primary example of general law is the general commercial law derived from the “medieval law merchant,” a body of transnational customary law.<sup>48</sup> Bellia and Clark thus use custom to describe the “shared commercial customs and practices among nations,” gleaned through actual interactions among market participants,<sup>49</sup> not arbitrary reconciliation of the practices and beliefs of citizens

44. Nelson, *supra* note 29, at 506-07.

45. Nelson cites *McDermott, Inc. v. AmClyde*, 511 U.S. 202 (1994), in which the Supreme Court, deciding an admiralty case, chose from among three common-law approaches to an issue relating to the apportionment of damages. *Id.* at 519 n.83 (citing *McDermott*, 511 U.S. at 208-17). Notably, the Restatement provision cited to lay out the three possible approaches described “[c]ase authorities and statutes” as “divided” with “no semblance of a consensus” on the issue. RESTATEMENT (SECOND) OF TORTS § 886A cmt. m (AM. L. INST. 1967). The Supreme Court considered itself bound to follow one of the three extant approaches – not to reject all of them and choose its own alternative. *McDermott*, 511 U.S. at 209 n.8. And further, it did not follow a “minority” common-law approach; it chose among relatively coequal options in an area with no majority approach. Likewise, even in recognizing some of the sources for general law beyond common law – like statutes – Nelson points to something like widespread consensus, rather than silence or minority approaches. *See, e.g.*, Nelson, *supra* note 29, at 518 (discussing a case where the Supreme Court recognized wrongful death as a cause of action in maritime law because all states and Congress had enacted analogous wrongful-death statutes); *id.* at 545-46 & n.209 (discussing the derivation of general law from similar statutory consensus in tort law and the law of evidence).

46. Nelson, *supra* note 29, at 512.

47. Bradford R. Clark & Anthony J. Bellia, *General Law in Federal Court*, 54 WM. & MARY L. REV. 655, 658 (2013); D’Onfro & Epps, *supra* note 1, at 946 n.194.

48. Clark & Bellia, *supra* note 47, at 677-78.

49. *Compare id.* at 658 (“General commercial law, or the law merchant, referred to shared commercial customs and practices among nations.”), *with* D’Onfro & Epps, *supra* note 1, at 936 (suggesting that “courts should draw on the laws, customs, and expectations that prevail in the country as a whole”).

of a diverse polity who might never meet. Custom does not always operate well on the national level: indeed, according to at least some property theory, custom is only truly prevalent and effective at the local level.<sup>50</sup> And furthermore, the sorts of customs that judges tend to recognize, both now and historically, have a long pedigree and are marked by a high degree of certainty.<sup>51</sup>

In addition to this limited view of the sources of general law, other general-law authors have traditionally conceived of general law as most useful or defensible when there is a background federal interest or power providing a special reason for uniformity. In Nelson's 2006 article, examples of general law come from "narrow areas"<sup>52</sup> where the application of general law is justified because the area involves some overriding federal or cross-jurisdictional concern, including the "rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases," as well as certain matters involving Indian tribes.<sup>53</sup> In later work, Nelson argued for the application of general law outside of these enclaves, pointing out how federal courts also look to "the dominant consensus of common-law jurisdictions" in situations where a federal statute uses a familiar common-law term or "preempts state law throughout an entire field but does not itself answer all questions within that field."<sup>54</sup>

The need for uniformity in many of these contexts is obvious: a patchwork of random state approaches to international or maritime law would generate serious problems for the nation's foreign relations. In the statutory-interpretation context, if Congress has authority to regulate in the field, then federal courts apply the statute uniformly and use common-law consensus to understand Congress's meaning.<sup>55</sup> Even where the federal interest is slightly less obvious, as

---

50. As Henry Smith has argued, custom—at least in the context of property law—seems to depend on a "high degree of common knowledge," and courts are hesitant to formalize custom into law governing large heterogeneous groups. Henry E. Smith, *Community and Custom in Property*, 10 THEORETICAL INQ. L. 5, 6-7 (2009).

51. See *State ex rel. Thornton v. Hay*, 462 P.2d 671, 677 (Or. 1969) (summarizing Blackstone's requirements for custom to be recognized as law, including that custom be ancient and certain); Andrea C. Loux, Note, *Persistence of the Ancient Regime: Custom, Utility, and the Common Law in the Nineteenth Century*, 93 CORNELL L. REV. 183, 184 (1993) (describing the durability of the four-part test for whether a common law court would recognize custom and requiring that custom be "ancient, continuous, certain, and reasonable").

52. Nelson, *supra* note 29, at 507.

53. *Id.* (quoting *Tex. Indus., Inc. v. Radcliff Materials, Inc.* 451 U.S. 630, 641 (1981)).

54. Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA. L. REV. 1, 35-36 (2015).

55. Statutory interpretation is probably the use of the common law in Nelson's article that most resembles the sort of constitutional interpretation that D'Onfro and Epps discuss. But there are important potential differences between the two contexts that merit further discussion. Have federal courts decided that Congress intends to use the consensus meaning when it uses

when courts use the general law (i.e., the Uniform Commercial Code) in interpreting the law governing federal contracts, there is no substantive variation in the law that different states follow, making a uniform approach uncontroversial and free from choice-of-principles problems.<sup>56</sup>

Similarly, Bellia and Clark observe that general law traditionally “addressed matters of concern to more than one sovereign.”<sup>57</sup> They explain that uniform general law is desirable in these matters “beyond the authority of states,” like interstate disputes and foreign relations,<sup>58</sup> and at least historically, “to encourage trade by subjecting commercial transactions to uniform rules across state lines.”<sup>59</sup> As to this commercial context, though, Bellia and Clark are careful to note that federal courts could not pronounce general law contrary to positive state legislation, the spread of which – they argue – contributed to the demise of general commercial law.<sup>60</sup>

With this background, it becomes apparent that there are multiple issues with D’Onfro and Epps’s proposed general-law approach. Most basically, because the general law in their Article can be derived not only from prevailing case law but also from minority approaches and a range of statutes and social norms, it would seem to be radically open-ended to an early American audience (and likely also to the authors on whom D’Onfro and Epps rely). Perhaps this is why they end up backing away from their initial claim that their theory is most compatible with an originalist approach to the Fourth Amendment.<sup>61</sup> Second, even

---

a familiar common-law term? Assuming for the moment that in lieu of the drafters’ intent, the meaning to the public is the relevant inquiry in constitutional interpretation, would the public have a more general-law or a more positive-law conception of terms like “property”? Would members of the diverse public be aware of other states’ laws and regulations affecting property?

56. Nelson, *supra* note 29, at 511. Along similar lines, another example that Nelson cites, *id.* at 546 n.209, and that D’Onfro and Epps discuss in detail, *supra* note 1, at 930, is *Jaffee v. Redmond*, 518 U.S. 1 (1996), in which the Supreme Court found it relevant in interpreting the Federal Rules of Evidence that every state recognizes a psychotherapist privilege. As Nelson notes, however, the *Jaffee* Court merely used multistate law to “support” its recognition of such a privilege. Nelson, *supra* note 29, at 546 n.209. The Court stated that universal state acceptance of such a privilege “confirmed” their interpretation of the Federal Rules by reference to other sources including the 1972 Judicial Conference Advisory Committee’s recommendations. *Jaffee*, 518 U.S. at 10-12.

57. Clark & Bellia, *supra* note 47, at 658; *see id.* at 659, 664.

58. *Id.* at 706-23.

59. *Id.* at 695.

60. *Id.* at 696.

61. Compare D’Onfro & Epps, *supra* note 1, at 918 (“[I]t is also easier to square the general-law approach with the originalist methodology endorsed by Supreme Court Justices attracted to a positive-law model.”), with *id.* at 939-40, 945 (noting substantial variation among jurisdictions in the application of search-and-seizure rules at the Founding, declining to “conclusively

the broadest arguments in previous scholarship in favor of a return to the general law hinge on an important subsidiary argument: that uniformity is particularly desirable in light of the downsides of variation. The next Section turns to that issue.

*B. The Missing Argument for Uniformity*

Where is the need for uniformity in the Fourth Amendment, according to D’Onfro and Epps? Although the topic is not given sustained treatment, there are a few justifications scattered throughout the Article, especially in how the authors distinguish their arguments vis-à-vis Baude and Stern’s positive-law model. Apart from the fact that courts “need not wait for state-court precedent” or positive state legislation to apply common-law concepts,<sup>62</sup> D’Onfro and Epps argue that the general-law model will avoid legislative manipulation of positive law and generate a homogenous standard to apply across the states.<sup>63</sup> While state tort rules for what counts as an aerial trespass or nuisance might understandably vary, the authors assert that “it makes little sense to say that federal constitutional rights are subject to the same level of variation.”<sup>64</sup> Elsewhere, they repeat this idea that because “[t]he Fourth Amendment is a federal constitutional guarantee that binds law enforcement across the entire country,” underlying uniform tort and property law is desirable.<sup>65</sup> Possible interstate variation is criticized because it might “create a confusing morass for multijurisdictional law-enforcement efforts and for courts trying to resolve Fourth Amendment questions”;<sup>66</sup> the authors offer as one example the issue that drones might easily cross state borders

---

resolve this question,” and maintaining the “belie[f] that [their] theory offers *more* continuity with the Founding Era than the available alternatives . . . [without] certainty on that point”). Given the scarcity of available sources, I am not sure how one *could* ever definitively solve the question the authors decline to explore—whether early “courts *understood* themselves to be” looking at general or state-specific law in analyzing searches and seizures. *Id.* at 945.

62. See *id.* at 978. On this last point, it does not appear that the Baude and Stern model would require federal courts to point specifically to directly controlling precedent or statutes, see, e.g., Baude & Stern, *supra* note 4, at 1883-84 (suggesting that courts should look at the common law of trespass to resolve drone-related controversies), so I am not convinced that is a difference between the positive-law and general-law approaches. As Richard Re has pointed out, however, the Baude and Stern model may draw negative inferences from legislative inaction—so instead of being forced to “wait” under their model, courts deciding Fourth Amendment cases might actually be encouraged to draw conclusions too favorable to the government where there is regulatory silence. Re, *supra* note 15, at 334.

63. D’Onfro & Epps, *supra* note 1, at 917, 959.

64. *Id.* at 959.

65. *Id.* at 936.

66. *Id.* at 952-53.

in the course of some police activity.<sup>67</sup> These points can be distilled into two arguments: (1) federal constitutional law demands uniformity in underlying rights or rules, either simply because it is federal or because too much deference to positive law in constitutional settings might invite manipulation; and (2) uniformity is required because law-enforcement activities might cross jurisdictional boundaries.

Although the first argument is not fleshed out, we can supplement it with work by another author. Before D’Onfro and Epps, Richard Re also advocated for uniformity in the Fourth Amendment context in his response to the Baude and Stern article. He suggested that it would be “more appealing” for courts to “consider the laws of multiple jurisdictions when fashioning nationwide Fourth Amendment rules” rather than solely relying on local law<sup>68</sup> and cited as a virtue the “uniformity and stability” that would result from such an approach.<sup>69</sup> Further, he argued that reliance on multijurisdictional law would bring Fourth Amendment doctrine into harmony with courts’ approaches to other constitutional concepts like substantive due process and cruel and unusual punishment.<sup>70</sup>

Although Re rightly points out a few constitutional contexts in which courts look to multistate norms, neither he nor D’Onfro and Epps grapple with the fact that courts in these contexts have been more than willing to defer to variable state-law property rights. As Stern has observed in his work on the Takings and Due Process Clauses, “it is black letter law that ‘the Constitution protects rather than creates property interests,’ and that whether a person has a property right protected by the Constitution ‘is determined by reference to existing rules or understandings that stem from an independent source such as state law.’”<sup>71</sup> In the positive-law model, Baude and Stern point out that constitutional nondiscrimination rules—including under the First Amendment, the Fourteenth Amendment, and the dormant Commerce Clause—vary in their application from state to state, depending on other rules of state law.<sup>72</sup> In brief, then: simply pointing out that the Constitution is federal does not itself demand the underlying rights be structured by a homogenous body of law.

Before returning to some illustrations of this principle, D’Onfro and Epps’s second argument—that uniformity is necessary because law-enforcement

---

67. *Id.* at 959.

68. Re, *supra* note 15, at 334.

69. *Id.*

70. *Id.*

71. James Y. Stern, *Property’s Constitution*, 101 CALIF. L. REV. 277, 286 (2013) (quoting *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) (citations omitted)).

72. Baude & Stern, *supra* note 4, at 1858–60.

activity might cross state borders – is less compelling than other previous justifications for general law.<sup>73</sup> The infrastructural projects and regulatory activities that draw scrutiny under the Fifth and Fourteenth Amendments can cross borders, too, yet this potential variation has not led to abstract calls for a universal law of constitutional property. I would wager that most invocations of the Fourth Amendment occur not in complex cases involving multistate investigations but rather in objections to the activities of local police forces.<sup>74</sup> Another possibility – though not raised by the authors – is that law enforcement is special, meriting uniformity in this context even though variation is tolerated elsewhere. Perhaps the constitutional law of policing requires uniform background rules to best facilitate individual security and safety. More pessimistically, variation might seem intolerable because of a fear that individual jurisdictions or police forces will try to license discriminatory or draconian practices by manipulating state positive law. To this latter point, it bears mentioning that other law – including the Equal Protection Clause and antidiscrimination statutes – continues to limit the scope of state and local actors’ variation. And as I shall explain in further depth, deference to local practice need not mean blind acceptance.<sup>75</sup>

To return to the question of whether the Constitution enshrines multistate norms or more tailored local rules, the nature of the underlying right matters in other constitutional contexts. Importantly, both the Takings and Due Process Clauses and the Fourth Amendment (at least in some, though not all applications) protect *property*. Granted, the Fourth Amendment uses more homespun terms – “houses” and “effects” – than the other clauses, which explicitly include “property.” Then again, the terms “houses” and “effects” “obviously evoke[]”

---

73. See *supra* notes 53-60 and accompanying text.

74. See Wayne A. Logan, *Fourth Amendment Localism*, 93 IND. L.J. 369, 370 (2018) (“American policing, like American politics, is a decidedly local affair. While the image of federal ‘G-Men’ might preoccupy the public imagination, in reality, local police have long dominated law enforcement, reflecting the needs, values, and characteristics of the communities they serve . . . .” (footnotes omitted)); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 786 (2006) (noting that “local governments do most criminal law enforcement”). Even *within* states, a recent count suggests that of the 787,000 sworn law-enforcement personnel in the country, roughly 660,000 (or 84%) are in local police forces, sheriff’s offices, or tribal departments. *Census of State and Local Law Enforcement Agencies, 2018 – Statistical Tables*, U.S. DEP’T OF JUST. 4 tbl.1 (Oct. 2022), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/csllae18st.pdf> [<https://perma.cc/KPN2-P8UR>]. There are only roughly 100,000 federal police officers. See *Federal Law Enforcement Officers, 2016 – Statistical Tables*, U.S. DEP’T OF JUST. 6 tbl. 4 (Oct. 2019), <https://bjs.ojp.gov/content/pub/pdf/fleo16st.pdf> [<https://perma.cc/6E3H-RX9L>]. Even assuming – implausibly – that every federal officer is engaged in multistate activity, this would still be a significant minority of investigations nationwide.

75. See *infra* notes 125-130 and accompanying text.

protections for realty and personalty.<sup>76</sup> The constitutional contexts that Re identifies in which courts draw on analyses of multistate principles and norms – the Eighth Amendment’s prohibition on cruel and unusual punishment and the Fourteenth Amendment’s protection of unenumerated rights under substantive due process – are at least somewhat distinct in this respect.<sup>77</sup>

What about property has led courts in the Takings and Due Process contexts to defer to variable state law? To begin, the law of property – especially real property – has always been considered a matter of special local interest and expertise. As D’Onfro and Epps observe, even in the era of *Swift v. Tyson*, when general law was at its apex, federal courts deferred to state property rules.<sup>78</sup> Although federal courts appear not to have engaged in much express discussion of their reasons for that deference, we can find a few clues in the writings of authors closer to the time of *Swift*.

First, the idea of “local law” contemplated a kind of local expertise necessitating tailoring, shaped by longstanding practices and conditions.<sup>79</sup> “Local law” was often linked to the terms “local custom” or “local usage,”<sup>80</sup> and property rules and rights have long been deeply connected to customary practice.<sup>81</sup> In 1931, the author of an annotation in the *American Law Reports* thought that the very idea of local law contemplated tailoring to “the local physical conditions of

---

76. Baude & Stern, *supra* note 4, at 1842; Brady, *supra* note 22, at 985-87.

77. See Re, *supra* note 15, at 334.

78. D’Onfro & Epps, *supra* note 1, at 936; see also *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 591 (1973) (“Even when federal general law was in its heyday, an exception was carved out for local laws of real property.”); Blewett Lee, *Is There a Federal Common Law?*, 2 NW. L. REV. 200, 212 (1894) (“So extensive has been the scope of the doctrine of general law, that about the only state common law we can be sure will be followed in the United States courts is that of real property.”). Even before *Swift*, federal courts were deferring to state law in matters involving property. See William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1534-35 & n.105 (1984).

79. One early commentator thought the writings of Justice Story before his opinion in *Swift* indicated a solicitude for local expertise over matters involving land. J.B. Heiskell, *Conflict Between Federal and State Decisions*, 16 AM. L. REV. 743, 750 (1882). Confusingly, the passage that the author cites is about commercial law, but Story’s passages on real property in his works on conflicts seem to support a similar position. See JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 424 (Boston, Hilliard, Gray & Co. 1834).

80. *Swift v. Tyson*, 16 U.S. (1 Pet.) 1, 18 (1842) (describing local law as “ancient local usage”); see George Rutherglen, *Custom and Usage as Action Under Color of State Law: An Essay on the Forgotten Terms of Section 1983*, 89 VA. L. REV. 925, 933-34 (2003).

81. THOMAS W. MERRILL, HENRY E. SMITH & MAUREEN E. BRADY, PROPERTY: PRINCIPLES AND POLICIES 255 (4th ed. 2022) (“Custom plays an important role within and outside the law, and nowhere more so than when it comes to property law and institutions.”); see Henry E. Smith, *Community and Custom in Property*, 10 THEORETICAL INQUIRIES L. 5, 6 (2009).



the state,”<sup>82</sup> such as the nature of the land. Importantly, this sort of tailoring is not and was not just hypothetical. The differences that these customs and traditions produced did indeed lead to variation. In the same year that *Erie* was decided, one commentator, in predicting that the decision would be of little consequence to “title men,” observed wryly that “[t]here just isn’t any such thing as a common law of Real Property in this country.”<sup>83</sup> The year before, a law professor had opined in the pages of the *University of Pennsylvania Law Review* that “[t]here is no ‘American law of property,’ and there can be none so long as the present federal system of government persists.”<sup>84</sup>

Second, scholars have long emphasized the special need for determinacy and prospective rulemaking in property law – both of which are facilitated by ensuring that rules derive only from a single source. A pair of commentators in 1929 asserted that conflicting state and federal pronouncements on rules of law “would be especially undesirable in the field of real property, where predictability has always been the desideratum.”<sup>85</sup> An author who criticized the special treatment of real property – as “a tradition of the prejudice of the English ruling classes in favor of landed property”<sup>86</sup> – still acknowledged that courts’ reluctance to question state property rules reflected the need to operate “prospectively” in that domain.<sup>87</sup> These early justifications likely derived from nineteenth-century notions of the inviolability of “vested rights” – the paradigmatic example being property interests – that could not be deprived either by legislatures or retroactively by judges.<sup>88</sup> Today, theorists like Thomas Merrill and Henry Smith have added an economic gloss to explain why property tends to exhibit a high degree of standardization.<sup>89</sup> As in rem rights, the contours of property rights affect the obligations of myriad third parties, meriting clear delineation both so that those third parties can avoid violating the right and to facilitate transfer in the market.<sup>90</sup>

---

82. Annotation, *Duty of Federal Courts to Follow State Court Decisions as Regards Torts Affecting Real Property*, 71 A.L.R. 1102 (1931).

83. This was a self-burn, since the author was “partly responsible for th[e] Restatement.” Charles C. White, *Uniform Laws of Real Property*, 12 U. CIN. L. REV. 549, 554-56 (1938).

84. William R. Vance, *The Restatement of the Law of Property*, 86 U. PA. L. REV. 173, 178 (1937).

85. H. Parker Sharp & Joseph B. Brennan, *The Application of the Doctrine of Swift v. Tyson Since 1900*, 4 IND. L.J. 367, 378 (1929).

86. Heiskell, *supra* note 79, at 753.

87. *Id.* at 759.

88. See John Harrison, *Legislative Power and Judicial Power*, 31 CONST. COMMENT. 295, 304 (2016).

89. See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 8 (2000).

90. *Id.*

Perhaps for these reasons, at the height of general law, property was the canonical example of the local.<sup>91</sup> Federal courts deferred to state property law in cases involving aspects of conveyancing, like the law of mortgages, deeds, and wills,<sup>92</sup> but also in matters involving the law of trespass and ejectment,<sup>93</sup> and sometimes even in cases more broadly involving damage to property.<sup>94</sup> In fact, as an indication of just how much this local conception of property predominated during the *Swift* era, the Supreme Court several times deemed the *United States* to be governed by state property law in its capacity as a landowner.<sup>95</sup> Of course, as with most things in the era of general and local law,<sup>96</sup> one can find evidence of federal courts meddling in property—though almost always with some hesitation or qualification.<sup>97</sup> The point is not to try to define precisely the

- 
91. See *Sauer v. City of New York*, 206 U.S. 536, 548 (1907) (“[T]his court has neither the right nor the duty to reconcile these conflicting decisions nor to reduce the law of [property of] the various States to a uniform rule which it shall announce and impose.”); *Balt. & Ohio R.R. Co. v. Baugh*, 149 U.S. 368, 372 (1893) (“Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate, and the construction of state constitutions and statutes.”); Comment, *What Is “General Law” Within the Doctrine of Swift v. Tyson?*, 38 *YALE L.J.* 88, 94 (1928) (“The only consistency to be found is in the field of real and personal property, so-called ‘rules of property’ being considered binding on the federal courts as local questions.”).
92. *Smith Middlings Purifier Co. v. McGroarty*, 136 U.S. 237, 241 (1890); *Buford v. Kerr*, 90 F. 513, 514 (8th Cir. 1898).
93. *Scott v. Min. Dev. Co.*, 130 F. 497, 500-01 (6th Cir. 1904); Annotation, *supra* note 82 (“Nothing is better settled in the common[]law system of jurisprudence than that an action of trespass . . . is a local action.”) Although the author used the term “trespass quare clausum fregit,” that Latin phrase is synonymous with the tort of “trespass to land.” See *Trespass*, *BLACK’S LAW DICTIONARY* (11th ed. 2019).
94. *E.g.*, *Hartford Fire Ins. Co. v. Chi., Milwaukee & St. Paul Ry. Co.*, 175 U.S. 91, 100-01 (1899); *Sullivan v. Am. Mfg. Co. of Mass.*, 33 F.2d 690, 693 (4th Cir. 1929) (noting that because the action arose from “the ownership and enjoyment of real property . . . [i]t is governed, therefore, by the law of the state where the property is situate.”); *Smith v. Staso Milling Co.*, 18 F.2d 736, 737 (2d Cir. 1927) (“As this case concerns the enjoyment of land in the state of Vermont, and depends upon the relative interests of two landowners, we are to decide it in accordance with the common law of that state, so far as it is disclosed by the decisions of its highest court.”). *But see* *Cole v. Pa. R.R. Co.*, 43 F.2d 953, 957 (2d Cir. 1930) (using general law, not New York law, to decide a property tort case).
95. *Mason v. United States*, 260 U.S. 545, 558 (1923); see Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 *COLUM. L. REV.* 489, 533 (1954).
96. Benno Schmidt, *Substantive Law Applied by the Federal Courts—Effect of Erie R. Co. v. Tompkins*, 16 *TEX. L. REV.* 512, 515 (1938) (“[T]he line separating general law from local law has never been clear.”).
97. See, *e.g.*, *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 529-31 (1928); *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 360 (1910); *Yates v.*

difference between general and local, but to show that some features of property led courts to recognize its jurisdictional variability even at the height of general law's acceptance.

Although matters involving real estate were most clearly local law in the era of *Swift*, matters involving personal property were at least sometimes also considered local.<sup>98</sup> Admittedly, the general-versus-local status of trespass to chattels, bailments, abandonment, and other such personal-property doctrines is not entirely clear. As one author put it, “In the domain of personal property the line of demarcation is not always carefully defined between the law affecting transmission of title and the law of contracts[]—the former being considered by the Federal courts as local State law, and the latter as ‘general commercial law.’”<sup>99</sup>

In at least some instances, courts sidestepped the question by suggesting that the general rules affecting personal property were the same regardless of which type of law applied<sup>100</sup>—a fact that raises an important point both about personal-property rules and about the general-law model. Rules governing personal property can at once be very generalizable and, in other respects, highly contextual. Take, for example, the maxim that “first possession is the root of title,” a maxim that is widely applied to all sorts of chattels from “wild pigs” to “abandoned treasure.”<sup>101</sup> If this rule was truly universal across all contexts and geographies,

---

City of Milwaukee, 77 U.S. (10 Wall.) 497, 506 (1870). In *Kuhn*, the Court noted federal courts' obligation to follow established rules relating to real estate made in state courts, but asserted that “where the law of the state has not been thus settled” or “when there has been no decision by the state court on the particular question involved,” federal courts could make independent pronouncements. *Kuhn*, 215 U.S. at 360 (emphasis omitted). Justice Holmes wrote a strident dissent noting the local nature of real estate and criticizing *Swift v. Tyson*. *Id.* at 370 (Holmes, J., dissenting). Taking *Kuhn* at its most extreme would perhaps mean that D’Onfro and Epps’s argument for general law is strongest in areas where the courts have not yet acted, and less so where established and variable state precedents exist. In any event, at least one general-law author—Bradford Clark—has argued that the expansion of general law into traditionally local areas like property doomed general law as a whole. Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1413–14 (2001); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1290–91 (1996).

98. Note, *Questions of State Law as to Which the Decisions of the Highest State Court Must Be Followed in Actions Originating in, or Removed to, the Federal Courts*, 40 L.R.A. 380, 392 (1912) (“Rules established by the decisions of the state courts in respect of tangible real or personal property are doubtless in general rules of property . . . .”); see Sharp & Brennan, *supra* note 85, at 379–80; cf. *W. Union Tel. Co v. Kirby*, 37 F.2d 480, 481 (3d Cir. 1930) (deferring to a Pennsylvania law that used “indicia of ownership” to distinguish between a car owned as a business versus a private car).
99. William B. Hornblower, *Conflict Between Federal and State Decisions*, 14 AM. L. REV. 211, 220 (1880).
100. *E.g.*, *Hoffman v. Carow*, 22 Wend. 285, 323–24 (N.Y. 1839).
101. Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 75 (1985).

it could easily be adopted under the general-law model, but this would present little advantage over the positive-law model since either would ultimately yield the same result. Digging deeper, however, the nature of “possession” may, in some instances, vary not just by state but also by locality and, further, by the nature of the resource.<sup>102</sup> Even if courts applying the general-law approach could be sensitive to local “social cues” and variation in the treatment of chattel property,<sup>103</sup> it is harder to square that possibility with the uniformity that the general-law model contemplates elsewhere. A federal rule sensitive to localized social cues would not seem to give much guidance to police engaged in cross-border enforcement.

Up until now, I have mostly described the reasons that property stayed local even at the height of general law. It goes without saying that after *Erie* was decided, courts continued to reiterate the special, local nature of property.<sup>104</sup> In Takings Clause cases both in this century and the last, the Supreme Court has indicated its “great respect” for state-court determinations on matters involving the condemnation of property because state courts are closest to considerations touching the “resources, the capacity of the soil, the relative importance of industries to the general public welfare, and the long-established methods and habits of the people.”<sup>105</sup> Further, in some of these cases, the Court has gone so far as to say that because these “conditions vary so much in the states and territories of the Union[,] different results might well be expected.”<sup>106</sup> To put it bluntly, both then and now, courts “routinely list . . . property law [as an] area[] where they should abstain or defer to allow ‘expert’ state courts to resolve ambiguities in the doctrine.”<sup>107</sup>

---

102. See, e.g., *Ghen v. Rich*, 8 F. 159, 162 (D. Mass 1881) (using custom on Cape Cod to determine who possessed a whale).

103. For instance, in citing my own work on “effects,” D’Onfro and Epps suggest that their approach and mine can be similarly sensitive to the “social cues surrounding property.” D’Onfro & Epps, *supra* note 1, at 962 & n.280.

104. *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 155 (1944) (“The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state.”); see *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977).

105. *Kelo v. City of New London*, 545 U.S. 469, 483 (2005) (quoting *Hairston v. Danville & Western R. Co.*, 208 U.S. 598, 606-07 (1908)); see also Ilya Somin, *Federalism and Property Rights*, 2011 U. CHI. LEGAL F. 53, 54 (2011) (citing the “superior knowledge and expertise of state and local governments in catering to the diverse needs of their communities”).

106. *Hairston*, 208 U.S. at 606.

107. Brady, *supra* note 25, at 703; see James Y. Stern, *Property, Exclusivity, and Jurisdiction*, 100 VA. L. REV. 111, 120, 157-58 (2014) (discussing the function of the situs rule in the conflict-of-laws context as important in real property and as enhancing competition among states).

In other work, I have argued for the benefits of this persistent variation in interstate property law.<sup>108</sup> Some carry over from the justifications for leaving property local in the era of *Swift*. In particular, longstanding practices and conditions in a particular area might necessitate tailoring by state courts, reflecting a kind of expertise. Property law does differ across borders both in the forms of rights recognized and in the limits that state and local law place on those rights.<sup>109</sup> This has resulted in a property system that is “dynamic and divergent, as state legislatures and courts create new property rules or extend, trim, or modify old ones.”<sup>110</sup> We now recognize experimentation as a corollary benefit of this approach to property.<sup>111</sup> States are free to follow or reject one another’s approaches to a particular right or rule.<sup>112</sup>

This is not to say, of course, that variation exists at every turn in either the real or the personal property context. D’Onfro and Epps are undoubtedly right about the “identifiable core” that exists in state common law.<sup>113</sup> But even Restatement projects recognize the need for “local custom” or “local law” to shape an area’s development where variability is significant or longstanding.<sup>114</sup> It is also striking that while European Union projects seeking to unify or harmonize different member nations’ rules have succeeded in doing so for contract law, the treaties governing European Union relations explicitly carve out property law as an area of continued member-state expertise.<sup>115</sup> Whether harmonization of local European property law is possible is still a topic of perennial debate.<sup>116</sup>

---

108. See, e.g., Brady, *supra* note 25, at 702-05; Maureen E. Brady, *Penn Central Squared: What the Many Factors of Murr v. Wisconsin Mean for Property Federalism*, 166 U. PA. L. REV. ONLINE 53, 63 (2017).

109. See Brady, *supra* note 25, at 700-05; Brady, *supra* note 108, at 59-64; see also Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 YALE L.J. 72, 80-100 (2005) (summarizing variations and benefits of competition among states in the property-law context).

110. Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings “Muddle,”* 90 MINN. L. REV. 826, 835 (2006).

111. Bell & Parchomovsky, *supra* note 108, at 78-79; Brady, *supra* note 25, at 704.

112. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

113. As an Associate Reporter on the *Restatement (Fourth) of Property*, I am estopped from arguing anything to the contrary.

114. Among many other examples, see RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.1 cmt. a (AM. L. INST. 2000); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 68 cmt. b (AM. L. INST. 2011); RESTATEMENT (THIRD) OF TORTS: APPOINTMENT LIAB. § 10 cmt. a (AM. L. INST. 2000); and RESTATEMENT (SECOND) OF TORTS § 330 cmts. e & f (AM. L. INST. 1965).

115. See Treaty on the Functioning of the European Union art. 345, Dec. 26, 2012, 2012 O.J. (C 326) 194.

116. See, e.g., Bram Akkermans & Eveline Ramaekers, *Article 345 TFEU (Ex Article 295 EC), Its Meanings and Interpretations*, 16 EUR. L.J. 292 (2010); Daniela Caruso, *Private Law and Public*

D’Onfro and Epps do acknowledge the traditionally local nature of property law in passing.<sup>117</sup> They counter both (1) that nonconstitutional state law might continue to vary because state courts will be free to reject general-law interpretations; and (2) that uniformity is nonetheless required because “[t]he Fourth Amendment is a federal constitutional guarantee.”<sup>118</sup> I will return to my doubts about this first point,<sup>119</sup> but as to the second, the takings example shows that this is not a sufficient answer.

The fact that courts deciding takings cases have traditionally deferred to state law on the contours of property rights subject to protection has had significant consequences for the development and application of property law. Several takings cases treat as property the idiosyncratic rights recognized by the positive law of the specific state where the case arose.<sup>120</sup> These state innovations in property law have sometimes inured to the benefit of owners, including politically marginalized groups.<sup>121</sup> And this federalist structure has also allowed governments to adopt differing approaches to the regulation of property that are sensitive to local conditions. Courts can determine that certain laws are *not* takings in part because of state-specific law.<sup>122</sup> As Stewart Sterk has illustrated in his article *The Federalist Dimension of Regulatory Takings Jurisprudence*, New Hampshire recognizes no rights for the public to use dry-sand areas of the beach, whereas Oregon recognizes that right as a matter of custom.<sup>123</sup> If Oregon passed a regulation

---

*Stakes in European Integration: The Case of Property*, 10 EUR. L.J. 751 (2004); Antonio Gambaro, *Perspectives on the Codification of the Law of Property: An Overview*, 5 EUR. REV. PRIV. L. 497 (1997).

117. D’Onfro & Epps, *supra* note 1, at 936.

118. *Id.*

119. See *infra* Section II.B.

120. See *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922) (considering “estate-in-land” as a relevant property interest, per Pennsylvania’s property law); *Cont’l Res. v. Fair*, 971 N.W.2d 313, 325 (Neb. 2022) (declining to follow *Rafaeli, LLC v. Oakland Cnty.*, 952 N.W.2d 434 (Mich. 2020), in recognizing surplus proceeds from a tax-debt sale as constitutional property in light of different common-law precedents in the two states); see also *City of Chicago v. Taylor*, 125 U.S. 161, 167 (1888) (deferring to Illinois state courts’ recognition of a right of access to the street—albeit in a state, rather than federal, constitutional case).

121. Brady, *supra* note 108, at 63.

122. See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029-30 (1992) (noting the relevance of state-specific law in assessing “background principles of nuisance and property”); see also JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 17 (2018) (“Does anyone doubt that the Wyoming Supreme Court might look at property rights—and takings claims—differently from the New York Court of Appeals?”).

123. See Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 223 (2004).

forbidding the erection of structures in the dry-sand portion of the beach, state-specific law would likely insure the state against a claim for compensation.<sup>124</sup>

The example of the Takings Clause carries another lesson: an approach to the Fourth Amendment need not be all or nothing with regard to uniformity. More than two decades ago, in an article about the meaning of “property” in the Takings and Due Process Clauses, Thomas Merrill suggested that the best way to view the relationship between state positive law and the scope of constitutionally protected property rights is through a “patterning definition.”<sup>125</sup> According to Merrill, a patterning definition sets “general,” uniform criteria defined by the Constitution and then assesses whether those criteria are met by examining whether state law recognizes “interests . . . that correspond to the federal criteria.”<sup>126</sup> The patterning approach is meaningfully different than the one proposed by D’Onfro and Epps because it would not have judges pronounce a *homogenous body* of property or tort law in Fourth Amendment cases. Instead, a patterning approach sets a uniform constitutional *standard* that rises or falls with the contours of state private law. That standard may be substantive and it may come in a variety of forms<sup>127</sup>: Merrill suggested that in the context of the Takings Clause, for instance, courts should assess whether there is a constitutionally protected property interest by determining “whether nonconstitutional sources of law confer an irrevocable right on the claimant to exclude others from specific assets.”<sup>128</sup> Accordingly, it would not be determinative if a state government passed a positive law that said a specified interest was or was not “property”; the question would be whether under all state law, the interest had substantive characteristics meeting the federal definition. Other authors have suggested a more procedural spin, in which positive state law is owed deference on matters of property unless there is some reason to suspect that state actors have manipulated or unfairly interpreted existing rules.<sup>129</sup>

---

124. *Id.*; see also Brady, *supra* note 25, at 706–07.

125. Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 893 (2000).

126. *Id.* at 952.

127. In subsequent work, Merrill has described patterning as “a continuum with many conceivable patterning definitions” ranging from “thin,” in which “federal constitutional law imposes only a mild constraint on the range of permissible variations,” to “thick,” which leaves “relatively little room for variations based on state law.” Thomas W. Merrill, *Choice of Law in Takings Cases*, 8 BRIGHAM-KANNER PROP. RTS. CONF. J. 45, 51 (2019).

128. *Id.* at 969.

129. No source has described this approach as a patterning definition in so many words, but it is similar in that it imposes standard federal criteria for determining whether to follow (or not to follow) nonconstitutional state law. See Maureen E. Brady, *Defining Navigability: Balancing State-Court Flexibility and Private Rights in Waterways*, 36 CARDOZO L. REV. 1415, 1462–67 (2015); Note, *Judicial Takings, Judicial Federalism, and Jurisprudence: An Erie Problem*, 134

A patterning definition is thus distinct from two alternatives that will also sound familiar from the D’Onfro and Epps piece. One of these alternatives, which Merrill called “pure positivism,” would define constitutional property rights by examining nonconstitutional law to determine whether that law purports to create a property right by its terms. But this approach inevitably “leads to the positivist trap, in the form of too much or too little property relative to social expectations or other normative commitments”<sup>130</sup> — one of the same problems D’Onfro and Epps identify with the jurisdiction-specific positivism that Baude and Stern advocate in the Fourth Amendment context.<sup>131</sup>

At the other end of the spectrum, what Merrill called a “natural property” approach would define the existence and scope of property rights without reference to the particular background law that would otherwise apply to the property-law issue in question outside the constitutional context. Instead, a natural-property approach would superimpose a special, uniform body of federal property rules applicable in certain constitutional disputes. Such a body of rules could be generated in several different ways. One possibility would be to define constitutional property as “the set of interests that would have been recognized as property by an informed participant in American society of 1791 or 1868” — an approach that would unduly and anachronistically freeze the scope of protection (once again, sounds familiar).<sup>132</sup> Another possibility — the “evolutionary version of natural property” — would permit courts to recognize and protect an evolving set of broadly recognized rights, including those that receive wide legislative recognition.<sup>133</sup>

This evolutionary approach seems analogous to the general-law approach that D’Onfro and Epps promote.<sup>134</sup> But Merrill notes a few problems with it. First, a broadly applicable natural-property approach to the Takings and Due Process contexts might affect state-level variation. Merrill highlights the same virtues of variation that I have already described: jurisdiction-specific tailoring and increased determinacy. He suggests that a “layer of constitutional common law” will confuse existing property doctrine and contravene the general principle that property rights are determined and “modified by legislation, not through

---

HARV. L. REV. 808, 833-39 (2020); Erin Brantley Webb, *How to Review State Court Determinations of State Law Antecedent to Federal Rights*, 120 YALE L.J. 1192, 1196-98 (2011).

130. Merrill, *supra* note 125, at 950; Note, *supra* note 129, at 837.

131. D’Onfro & Epps, *supra* note 1, at 952.

132. Merrill, *supra* note 125, at 944-45.

133. *Id.* at 945-46.

134. Merrill describes this approach as an outgrowth of an examination into whether a right is “deeply rooted” in “history and traditions.” *Id.* at 945-46. The “general law” approach might care less about the history or “rootedness” of a particular right, but it appears to similarly use deeper legal and normative principles to resolve new cases.



common-law decision-making.”<sup>135</sup> Similarly, an approach to Takings or Due Process rights that calls on federal courts to craft a universal law of property might threaten one of the virtues of our federalist system: the capacity for states to engage in “substantial experimentation,” permitting the “evolution of property institutions over time.”<sup>136</sup>

Furthermore, however, Merrill highlights the fact that a natural-property approach will end up yielding undesirable indeterminacy in at least some instances. If “half the states” recognize a particular right but half go the other way, the evolutionary approach seems to give “no obvious answer[.]” as to which should be followed.<sup>137</sup> I turn to this sort of indeterminacy in the next several Sections.

### C. *The Indeterminacy of General Law*

Another argument that D’Onfro and Epps offer in favor of the general-law approach, here in comparison not to *Katz* alternatives but rather to *Katz* itself, is that it is more stable and predictable.<sup>138</sup> The closer one looks at this version of general law, however, the more it resembles the status quo, both in method and in effect. To begin with method, especially after *United States v. Jones*<sup>139</sup> – which reiterated the importance of property concepts alongside privacy expectations in determining whether a Fourth Amendment search has occurred<sup>140</sup> – courts can and do look to sources of common law (and obviously, social expectations) to understand the scope of Fourth Amendment rights.<sup>141</sup> As for effect, D’Onfro and

<sup>135.</sup> *Id.* at 946-47.

<sup>136.</sup> *Id.* at 954; see Baude & Stern, *supra* note 4, at 1828-29. Takings doctrine has more to teach us on this point, and I will return to the subject. Any feature that pushes toward homogenization could throttle broader and beneficial legal evolutions. See *infra* Section II.B.

<sup>137.</sup> Merrill, *supra* note 125, at 946.

<sup>138.</sup> See D’Onfro & Epps, *supra* note 1, at 934 (“[T]he general law can provide more predictable guidance . . . .”); *id.* at 951 (discussing how the general-law approach balances “law’s need for stability and continuity with the need for evolution and change”); *id.* at 964 (suggesting that the outcome in a case decided under *Katz* would be better decided under the general-law approach because privacy analysis is “mushier” than property); *id.* at 971 (“Property would be a more predictable foundation because it avoids the most difficult ambiguities of privacy analysis.”).

<sup>139.</sup> 565 U.S. 400 (2012).

<sup>140.</sup> Brady, *supra* note 22, at 958.

<sup>141.</sup> *E.g.*, Kerr, *supra* note 3, at 516-17; see Baude & Stern, *supra* note 4, at 1827-28. These articles and others indicate that even before *Jones*, judges were drawing on property concepts in deciding search-and-seizure cases; see also Brady, *supra* note 22, at 973-74; *State v. Crandall*, 697 P.2d 250, 256 (Wash. Ct. App. 1985) (McInturff, J., dissenting) (“The common law property right to exclude others creates a legitimate expectation of privacy protected by our constitution.”).

Epps themselves tout as a benefit of their approach that the results under *Katz* and the general law will often be the same.<sup>142</sup> But it will often yield the same sorts of questions and ambiguities. This is not a problem unique to these authors. As Orin Kerr has recently argued, many of the *Katz* alternatives proposed by judges or scholars end up clearly reconcilable with *Katz*, with more changes to “form” than to “substance.”<sup>143</sup>

Indeed, in many cases, the authors’ broader criticisms of *Katz* and its progeny can be understood as disagreements with results reached through its application, even though courts might have still arrived at the same results under a “general law” approach. In one section, the authors suggest that the problem with *Katz* is that the judges deciding Fourth Amendment cases use their “own views about reasonableness” rather than “social expectations,”<sup>144</sup> but this problem seems likely to arise under their approach, too. In many instances, the general law will replace “reasonable expectations of privacy” with a similarly, if not identically, fuzzy test from multijurisdictional common law, swapping out one reasonableness regime for another.<sup>145</sup> Given the wide and varied sources of general law and the vagaries of common-law standards, judges could certainly find justifications in the “general law” under which to smuggle in their own views of the proper scope of a person’s Fourth Amendment rights, just as judges in different jurisdictions have found supports in tradition and precedent to reach contrary results in similar cases under the common law for centuries.<sup>146</sup>

Further, many torts are awkward fits for Fourth Amendment fact patterns, meaning judges will have some built-in discretion in how they import common-law concepts. Take “trespass to chattels,” which has already made an appearance in Fourth Amendment law in *United States v. Jones*.<sup>147</sup> The majority opinion referred to “trespass” repeatedly in determining that the placement of a GPS

---

142. D’Onfro & Epps, *supra* note 1, at 948-50.

143. Orin Kerr, *Katz as Originalism*, 71 DUKE L.J. 1047, 1084-85, 1104 (2022).

144. D’Onfro & Epps, *supra* note 1, at 941-42.

145. *E.g.*, RESTATEMENT (SECOND) OF TORTS § 652D (AM. L. INST. 1977) (describing the standard for the tort of public disclosure of private facts as whether disclosure to public “would be highly offensive to a reasonable person”).

146. Many scholars have argued that judges instrumentally bend the law to reach desired outcomes. *See, e.g.*, MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* at xvi (1977). But as a matter of fact, even assuming no intentional gymnastics, one can find scores of Supreme Court decisions in which a majority and dissenting opinion read common-law cases in different ways. *See, e.g.*, *Giles v. California*, 554 U.S. 353, 402 (2008) (Breyer, J., dissenting) (“While I have set forth what I believe is the better reading of the common-law cases, I recognize that different modern judges might read that handful of cases differently.”); *Owen v. City of Independence*, 445 U.S. 622, 676 (1980) (Powell, J., dissenting) (reading common law differently than the majority did).

147. *United States v. Jones*, 565 U.S. 400, 405, 419 (2012).

tracker on a vehicle was a search. But a car is a chattel—not real property—and as Justice Alito’s concurrence pointed out, the majority opinion ignored the prevailing tort-law requirement that for a trespass to a chattel to be actionable, it must result in damage.<sup>148</sup> This example suggests that courts purporting to apply tort law may not always do so in harmony with common-law strictures, again raising indeterminacy problems. To provide yet another illustration, D’Onfro and Epps suggest that courts evaluating whether police examinations of personal information are Fourth Amendment searches should look to the tort of “public disclosure of private facts.”<sup>149</sup> This tort assesses whether the disclosure of a private matter to the wider public “would be highly offensive to a reasonable person.”<sup>150</sup> Incidentally, another element of the tort is “public disclosure” such that the information is sure to become “public knowledge.”<sup>151</sup> The authors do not explain why disclosure to law enforcement necessarily meets that standard, or why that element of the tort gets selectively dropped.

There will be many cases in which an expansive conception of the general law will give judges ample room to justify any conclusion. As the last Section described, there are persistent differences in state property law that a court might draw on in a Fourth Amendment case. Even the simplest property concepts—like trespass, which the authors describe as “straightforward”<sup>152</sup>—vary between states. Generations of property students have learned about New Jersey’s peculiar approach to the right to exclude in cases like *Uston v. Resorts International Hotel, Inc.*<sup>153</sup> and *State v. Shack*.<sup>154</sup> Over the years in which I have taught *State v. Shack*, I have certainly known many of my students to argue passionately in defense of the result in *Shack* (if not *Uston*), but the position taken in that case (allowing a medical and legal worker access to property to reach migrant farmworkers) conflicts with what might be thought of as the general law of trespass in most other states. To take another example, several states adhere to a “modern view” of trespass that treats invasions by intangible objects as trespasses if they

---

148. *Id.* at 419 n.2 (Alito, J., concurring in the judgment).

149. D’Onfro & Epps, *supra* note 1, at 984-86.

150. *Jones*, 565 U.S. at 60 (citing RESTATEMENT (SECOND) OF TORTS § 652D (AM. L. INST. 1977)).

151. See, e.g., *Cnty. Health Network, Inc. v. McKenzie*, 185 N.E.3d 368, 382 (Ind. 2022); RESTATEMENT (SECOND) OF TORTS § 652D cmt. a (AM. L. INST. 1977).

152. D’Onfro & Epps, *supra* note 1, at 957.

153. 445 A.2d 370 (N.J. 1982).

154. 277 A.2d 369 (N.J. 1971).

cause substantial harm.<sup>155</sup> Many other states reject that approach.<sup>156</sup> One can easily imagine futuristic law-enforcement technologies that could call on courts to assess these sorts of intangible border-crossings under the Fourth Amendment.<sup>157</sup> If even the “straightforward” law of trespass creates these kinds of conflict-of-principles problems, it is hard to see how the general law approach offers more determinacy than the current framework.

The issue is exacerbated when we consider not just the role of conflicting state precedents in general-law analyses but also the role of conflicting social expectations. D’Onfro and Epps cite *Georgia v. Randolph*<sup>158</sup> only to show that Justice Scalia supported the use of evolving understandings of property concepts in Fourth Amendment analyses.<sup>159</sup> But the case is illustrative of the ambiguities entailed in importing property and tort law into Fourth Amendment law. It involved an estranged husband and wife who were co-occupants of a house; after a dispute, the wife told officers that the home contained drugs. The husband objected to a search of the home, but the wife gave her consent, and the Supreme Court granted certiorari to resolve “whether one occupant may give law enforcement effective consent to search shared premises, as against a co-tenant who is present and states a refusal to permit the search.”<sup>160</sup> Disclaiming property law and relying instead on “widely shared social expectations,” the majority determined that one cotenant cannot give police authority to search over the objection of another present cotenant.<sup>161</sup> Justice Scalia (and others) dissented, noting that at common law, one occupant clearly has the capacity to grant a license to private

---

155. Maureen E. Brady, *Property and Projection*, 133 HARV. L. REV. 1143, 1158, 1160 (2020). My intrepid torts friends point out that the distinction between “modern trespass” and nuisance or negligence law is more nominal than real because of this added “substantial harm” requirement. But the Supreme Court’s treatment of “trespass to chattels” in the Fourth Amendment case of *United States v. Jones*, see *supra* notes 147–148 and accompanying text, suggests that courts purporting to apply tort law may not always do so in harmony with common-law strictures.

156. See Brady, *supra* note 155, at 1160 n.115.

157. One police force, for example, is already touting “microdots” that are “naked to the eye and smaller than a grain of sand” to help locate stolen property. The dots can be placed with a Q-tip. It does not take much imagination to see how that technology might be used for surveillance. See Bob Jones, *This Microtechnology is Free and Helps Police Find Your Stolen Property*, NEWS 5 CLEVELAND (June 13, 2018, 5:03 PM), <https://www.news5cleveland.com/news/local-news/oh-medina/medina-township-police-offer-free-microdot-kits-to-mark-and-protecty-personal-property> [<https://perma.cc/B4ZL-DUHP>].

158. 547 U.S. 103 (2006).

159. D’Onfro & Epps, *supra* note 1, at 924, 947.

160. *Randolph*, 547 U.S. at 108.

161. *Id.* at 129.

parties (and thus, should be able to consent to a police search).<sup>162</sup> There are thus two conflicting rules here: the exclusionary right vindicated by the majority, supported by some social expectations, and the rule that would obtain under the common law of licenses and cotenancies. It bears mentioning that Justice Scalia's side is supported by social expectations of its own: it is highly counterintuitive to think that a cotenant could not have a friend over if the other cotenant objected, given that both have the right to possess the whole property.

The problem of indeterminacy grows only more acute as one tries to divine general law in disputes involving new technologies, further away from easy cases and well-worn concepts. The capacity to address technological change is allegedly a selling point for the general-law approach over Baude and Stern's jurisdiction-specific positive-law approach, which D'Onfro and Epps interpret to offer limited guidance "where state legislatures and courts have not yet spoken."<sup>163</sup> Yet it is unclear what the advantage of the general law approach would be over the *Katz* and *Jones* regimes in addressing new technology. While a judge faced with determining general law in a new Fourth Amendment context may be "no worse off than any common-law court,"<sup>164</sup> the authors' own examples provide fertile ground for considering how plagued the general law approach is with choice-of-principles problems.

Take, for example, drones.<sup>165</sup> In arguing for the general law, D'Onfro and Epps do highlight some benefits of uniformity, and then state that the general law would provide a "more consistent and less speculative" approach than *Katz*.<sup>166</sup> From there, however, the authors suggest that the question is "whether the drone trespassed, violating the defendants' right to exclude,"<sup>167</sup> an analysis that "might depend on the altitude of the drone or other factors."<sup>168</sup>

How to determine those factors? Well, as the authors note elsewhere, the *Restatement (Fourth) of Property* is taking up how a trespass framework should apply to aerial drones.<sup>169</sup> The authors contend that, while not definitive, the Restatement's perspective might offer particularly useful insight into general law in areas where no doctrine has yet evolved.<sup>170</sup> The Restatement's current draft of

---

162. *Id.* at 143 (Scalia, J., dissenting).

163. D'Onfro & Epps, *supra* note 1, at 952. As I have indicated, I do not read the Baude and Stern model the same way. See *supra* note 62.

164. D'Onfro & Epps, *supra* note 1, at 916.

165. See *id.* at 957-60.

166. *Id.* at 959.

167. *Id.*

168. *Id.*

169. *Id.* at 954.

170. *Id.* at 959.

the section on “Trespass by Overflight” distinguishes between intrusions on land in the actual possession of owners and intrusions on airspace subject to the owner’s right to possess.<sup>171</sup> If the latter, the Restatement suggests that there is “trespass liability only if the entry interferes substantially with the other’s use and enjoyment of the land.”<sup>172</sup>

This standard is hardly a bright line; indeed, it evokes the standard for another messy property tort, nuisance,<sup>173</sup> famously described as a “garbage can of law.”<sup>174</sup> Notably, the Uniform Law Commission’s project on a uniform law of drones – also cited by D’Onfro and Epps<sup>175</sup> – arrived at a completely different set of factors. The same year that the Restatement draft was circulated to the American Law Institute’s Council, that group drafted a thirteen-factor test for aerial trespass that was much more favorable to drones.<sup>176</sup> It would take into consideration “the amount of time” a drone was on the premises, whether the drone “directly caused physical or emotional injury to persons or damage to real or personal property,” “the time of day,” and “whether an individual on the property saw or heard” the drone.<sup>177</sup> As this example illustrates, and perhaps especially where new technologies are concerned, courts tasked with determining the general law will be faced with competing sources both from inside and outside the common law. Any determinacy hinges on precise rules for how they should choose among them. While one can be optimistic that there will soon be more consensus as stakeholders work together and the Restatement drafting process continues,<sup>178</sup> the general law would at this stage scarcely be a balm to a court faced with a Fourth Amendment drone problem.

Further, to the extent that the D’Onfro and Epps approach privileges consensus in the common law, the approach could in practice depend heavily on sources like the Restatements and perhaps leading treatises on torts, property, and other subjects. This allocates substantial authority to the drafters of these

---

171. 2 RESTATEMENT (FOURTH) OF PROPERTY § 1.2A (AM. L. INST., Council Draft No. 2, Nov. 27, 2019).

172. *Id.*

173. Maureen E. Brady, *Turning Neighbors into Nuisances*, 134 HARV. L. REV. 1609, 1612-13 (2021).

174. MERRILL, SMITH & BRAY, *supra* note 81, at 933.

175. D’Onfro & Epps, *supra* note 1, at 954 n.241.

176. UNIF. TORT L. RELATING TO DRONES ACT (UNIF. L. COMM’N, Draft for Approval July 2019), <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=a870dac3-db42-85cd-197d-abbf2d32e30d> [https://perma.cc/K7JD-N5PR].

177. *Id.* §§ 4, 5, 7, 9.

178. The Uniform Law project on drones eventually collapsed. See *Drone Laws: A Look in the Future*, U.S. CHAMBER OF COMMERCE INST. FOR LEGAL REFORM (Feb. 15, 2022), <https://instituteforlegalreform.com/blog/drone-laws-a-look-in-the-future> [https://perma.cc/SMH5-BDFH] (noting that after heavy criticism, the project stalled).

documents—who, meaning to impugn only myself, may be more likely to be thinking of livery of seisin than some futuristic technological law-enforcement application. To be more serious, since the inception of the Restatements, critics have accused the American Law Institute and the drafters of its many projects of stating aspirational rules, rather than restating broad general principles adopted by a majority of courts.<sup>179</sup> That criticism may be somewhat unfair, but the fact remains that Reporters are permitted in many cases to restate minority rules or clarify unclear doctrines, as long as they give their reasons.<sup>180</sup> At least historically, this has led some Justices to view the Restatements with some skepticism—as when Justice Scalia called “modern Restatements . . . of questionable value,” contending that they “should be given no weight whatever as to the current state of the law, and no more weight regarding what the law ought to be than the recommendations of any respected lawyer or scholar.”<sup>181</sup> In many instances, drafters in particular legal areas may only be anticipating the likely impacts their drafts will have on a given state’s law within their direct field of expertise. They would need to take on much greater power and responsibility if their draft provisions are likely to carry the force of national constitutional law.

D’Onfro and Epps invoke another technological case study that suffers from a similar issue as the drone example: the utility of bailment doctrine and its application to intangibles, which the authors suggest would provide clarity surrounding Fourth Amendment searches of digital files stored in a cloud or on a server.<sup>182</sup> Bailments are legal relationships in which one party transfers temporary custody of personal property to someone else.<sup>183</sup> The bailor is the true owner, and the bailee the party with temporary custody. The authors argue that digital files should be understood as goods delivered to a bailee (think pictures hosted by some company’s site). They suggest that, although companies regularly disclaim this status in the terms of service to which users agree, such disclaimers—as in the law of tangibles—should not necessarily invalidate a bailment relationship and its attendant duty of care.<sup>184</sup>

This explanation obscures choice-of-principles problems as well. It would be an overstatement to claim that limits on and disclaimers of liability are

---

179. Richard L. Revesz, *The Debate over the Role of Restatements*, ALI REP., Summer 2019, at 1, [https://www.ali.org/media/filer\\_public/6b/9f/6b9faoa6-daf7-4361-ba94-9b461ac80bd2/ali\\_summer\\_reporter-3150-web.pdf](https://www.ali.org/media/filer_public/6b/9f/6b9faoa6-daf7-4361-ba94-9b461ac80bd2/ali_summer_reporter-3150-web.pdf) [<https://perma.cc/YL2Z-T6DP>].

180. *Id.* at 4.

181. *Kansas v. Nebraska*, 574 U.S. 445, 476 (2015) (Scalia, J., concurring in part and dissenting in part); see also *Progressive Nw. Ins. Co. v. Gant*, No. 15-9267-JAR-KGG, 2018 WL 4600716, at \*6 (D. Kan. Sept. 24, 2018) (declining to follow Restatement for similar reasons).

182. D’Onfro & Epps, *supra* note 1, at 977-79.

183. MERRILL, SMITH & BRADY., *supra* note 81, at 450.

184. D’Onfro & Epps, *supra* note 1, at 977.

unenforceable in the bailor-bailee context.<sup>185</sup> In the law of bailments for tangibles, contractual disclaimers of a bailment relationship are most likely to be ineffective in two contexts: where the effort to disclaim liability is against public policy (like an effort to disclaim intentional malfeasance or gross negligence), and where the bailee has in effect facilitated the conversion of the goods by misdelivering them.<sup>186</sup> But outside these contexts, bailees readily and frequently limit their liability by contract without issue under the common law.<sup>187</sup> The scope of a bailee's liability may also be limited by local or industry custom.<sup>188</sup>

Even more fundamentally, for a bailment to exist, possession must be transferred from bailor to bailee, and that has traditionally meant a transfer of exclusive physical custody.<sup>189</sup> The bailor thus risks loss of the physical thing if the bailee misdelivers the item or fails to take due care when transferring it.<sup>190</sup> These broader principles of tangible bailment law do not point in a very clear direction when it comes to the Fourth Amendment law of intangibles. In the Fourth Amendment context, the problem is usually wrongful *access* by others, not damage to, loss of, or exclusion from one's own data. There may be contexts in which a cloud-storage company destroys, erases, or corrupts someone's files, making the analogy to tangible bailment law more apt. But the broader underlying rationales for assigning liability for loss in bailment law could certainly lead courts to find waivers of liability *more* effective in the cloud-storage context than in the ordinary law of tangible bailments, since individuals do not lose and often retain access to their data even when it is searched.

---

185. Danielle D'Onfro, *The New Bailments*, 97 WASH. L. REV. 97, 136 (2022) ("There is enough room in the tests for enforceability that it can be difficult to know ex ante which [exculpatory] clauses courts will enforce.").

186. *Id.*

187. *E.g.*, *Graham v. Rockman*, 504 P.2d 1351, 1354 (Alaska 1972) ("The rule whereby a bailee bears the risk of injury to the bailed property resulting from his negligence can be modified by the contractual agreement between the parties or by custom or usage." (footnotes omitted)); *Davis v. M.L.G. Corp.*, 712 P.2d 985, 988 (Colo. 1986) (providing that bailor and bailee "are free to alter their common law obligations by contract, provided their agreement does not contravene public policy or violate a statute"); *United Truck Rental Equip. Leasing, Inc. v. Kleenco Corp.*, 929 P.2d 99, 101 (Haw. Ct. App. 1996); 8A AM. JUR. 2d *Bailments* § 90 (2022).

188. *See, e.g.*, *Graham*, 504 P.2d at 1354.

189. NOAH ROTWEIN, PERSONAL PROPERTY § 61 (1949). Ordinarily, the transfer of possession to the bailee had to be to the exclusion of the owner/bailor. *See Albanese Confectionery Grp., Inc. v. Cwik*, 165 N.E.3d 139, 148 (Ind. Ct. App. 2021); *Se. Fair Ass'n v. Ford*, 14 S.E.2d 139, 140 (Ga. Ct. App. 1941); *Reimers v. Petersen*, 22 N.W.2d 817, 820 (Iowa 1946).

190. One of the oft-cited justifications for strict liability is that the bailor has "incomplete information about the risk of misdelivery," as compared to the bailee, who is likely to be better informed about both its precautions against misdelivery as well as "how difficult it will be to recover the property" from some third party. Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 815-17 (2001).



More basically, bailment law depends on the characterization of some item provided from bailor to bailee as property. A digital file might uncontroversially be considered property of the party transmitting it to another for storage. But other cases are harder: for instance, self-driving cars are now storing data in the cloud on drivers' routes, a process that is often automatic rather than self-initiated, and that drivers may be completely unaware is taking place.<sup>191</sup> Should those data be considered a user's property? And do we really want courts, rather than legislatures, making that kind of consequential pronouncement?<sup>192</sup> These distinctions make the extension of bailment principles to the cloud-storage context much less clear than the Article lets on.

There are additional problems more endemic to the general-law approach. Disclaimers of liability are extremely common in cloud-storage companies' terms of service.<sup>193</sup> These contracts may constitute sources for general law, at least insofar as these agreements may be seen as expressive or constitutive of social norms and expectations that users have.<sup>194</sup> And there is another source of general law here—a federal statute, the Electronic Communications Privacy Act—that deems electronic communications abandoned after a certain period of time.<sup>195</sup> Why does the common law of tangible property deserve primacy over that source? There are forceful arguments that, in light of the power dynamics between users and major digital file storage companies, courts *should* modify the law of bailments to protect consumers from the ordinary harshness of contract law; perhaps such disclaimers should be deemed against public policy.<sup>196</sup> But for the general-law approach to be more predictable and less subject to judicial whim than *Katz*, it needs justification for why some sources of general law win out over others.

---

191. Alex Heath, *Inside Elon Musk's First Meeting with Twitter Employees*, VERGE (Nov. 10, 2022, 9:16 PM EST), <https://www.theverge.com/2022/11/10/23452196/elon-musk-twitter-employee-meeting-q-and-a> [<https://perma.cc/Ry4R-Y8J3>] (“[A]ll [our] cars are connected globally. We know where people went. In fact, we intentionally do not store the last half mile or so of where people went . . . because, you think about it, a Tesla has surround cameras going.” (quoting Tesla CEO Elon Musk)). This provokes technological hypotheticals analogous to the canonical case of *United States v. Jones*, 565 U.S. 400 (2012), where law-enforcement officials attached a GPS tracker to a car.

192. See Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2056, 2057 (2004); James Grimmelman & Christina Mulligan, *Data Property*, 72 AM. U. L. REV. (forthcoming 2023), <https://ssrn.com/abstract=4251825> [<https://perma.cc/ZQD3-4KZ4>].

193. Grimmelman & Mulligan, *supra* note 192, at 43-44.

194. Cf. Miller, *supra* note 14, at 224 (describing a strand of New Private Law scholarship that looks at how “instruments enable norm expression”).

195. D’Onfro & Epps, *supra* note 1, at 970.

196. D’Onfro, *supra* note 185, at 138-39.

To be sure, the general-law approach to any given issue will be most indeterminate before any court has ruled on how the issue should be decided under the Fourth Amendment. Once the Supreme Court or a jurisdiction's highest court applies general law to a particular fact pattern, that decision will have precedential weight, mitigating some of the danger of future arbitrary decision-making. Still, at a minimum, different states or lower federal courts might reach conflicting results with plural sources—and time has taught that even within a single jurisdiction or court, *stare decisis* can be a slender reed on which to build expectations.<sup>197</sup>

## II. THE GENERAL LAW APPLIED: LESSONS FROM THE FIFTH FOR THE FOURTH

We do not need to consider these sorts of problems in the abstract. In an adjacent constitutional context that I have already begun to discuss, and one that the D'Onfro and Epps mention in passing,<sup>198</sup> something like the general-law approach is also ascendant. In at least two of the latest major Takings Clause decisions issued by the Supreme Court, a majority of Justices have turned to unmoored multistate law to construct property rights in ways theoretically at odds with how state-specific positive law might have defined them. After describing these developments, I explore some lessons that the history of takings law can teach. First and foremost, these decisions illustrate the indeterminacy of general law and its vulnerability to the claim that it empowers judges to select sources that support a desired outcome. More broadly, the development of takings law illustrates the real and challenging prospect, mentioned briefly in Part I, that federal-court decisions may influence nonconstitutional state law. Before insisting that courts deciding Fourth Amendment cases should make their own property law, it is important to be aware of the likelihood that state courts will not feel as free to reject and ignore those decisions as the authors suggest.

### A. Indeterminate General Law in Recent Takings Doctrine

Two of the most important recent Takings Clause decisions issued by the Supreme Court exhibit the sort of multistate legal reasoning that the authors

---

197. Although I provide some specific examples of courts reversing themselves in the general-law era, see *infra* notes 236–241, for work on the historical evolution of *stare decisis* generally, see Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 648 (1999).

198. D'Onfro & Epps, *supra* note 1, at 992.

suggest is characteristic of the general-law approach: *Murr v. Wisconsin*<sup>199</sup> and *Cedar Point Nursery v. Hassid*.<sup>200</sup> Intriguingly, these cases were celebrated by different sides of the political spectrum. The majority opinion in *Murr*, authored by Justice Kennedy and joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, concluded that an environmental regulation was not a taking.<sup>201</sup> In *Cedar Point*, on the other hand, the majority opinion authored by Chief Justice Roberts and joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett determined that a California regulation granting labor organizers a time-limited right to access agricultural farmworkers on private property was a per se physical taking.<sup>202</sup>

*Murr* concerned what is known in takings law as the “denominator” problem: how a court assessing a takings claim should define the relevant unit of property for performing various regulatory takings analyses. Several of the Supreme Court’s precedents ask courts to look at the extent to which a regulation reduces the value of some unit of property – the numerator – against the value of the entire property, or the denominator.<sup>203</sup> It thus matters whether the court uses a bigger unit of property, such as multiple rights or multiple parcels, or a smaller unit of property, because the same reduction in value may look paltry if the denominator is big but severe if it is small.<sup>204</sup> Although it might not have made much of a difference for the plaintiffs in *Murr* – who probably would have had a weak takings claim even if the Court had accepted their proposed definition of the relevant denominator<sup>205</sup> – in many other cases, determining the denominator can drastically affect an owner’s likelihood of success.

In *Murr*, the Supreme Court constructed the scope of the plaintiffs’ affected property interest by reference to multistate law.<sup>206</sup> And the tripartite test that the Court announced for lower courts to use in calculating the denominator permits them to “incorporate the property law of [multiple] jurisdictions to determine the scope of the interests protected.”<sup>207</sup> *Murr* directs courts to examine

---

199. 137 S. Ct. 1933 (2017).

200. 141 S. Ct. 2063 (2021).

201. *Murr*, 137 S. Ct. at 1950.

202. *Cedar Point*, 141 S. Ct. at 2072.

203. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992); Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 RUTGERS U. L.J. 663, 666–67 (1996).

204. See Brady, *supra* note 108, at 53–54.

205. See *Murr*, 137 S. Ct. at 1957 (Roberts, J., dissenting) (pointing out that even if the Court used a single lot, rather than two lots, as the relevant parcel for performing takings analyses, the Murrs would likely face obstacles to succeeding in bringing a takings claim under either *Lucas* or *Penn Central*).

206. See Brady, *supra* note 108, at 66.

207. *Id.*

denominator issues by examining “(1) the treatment of the property under [reasonable] state and local law”;<sup>208</sup> “(2) the physical characteristics of the property,”<sup>209</sup> including whether the land was in an area “subject to, or likely to become subject to, environmental or other regulation”;<sup>210</sup> and “(3) the effect of the regulation burdening one portion on the value of unregulated portions,”<sup>211</sup> in determining overall what the owner might reasonably expect the appropriate unit of property to be.<sup>212</sup> In applying this test – and, specifically, in determining what counts as “reasonable” state and local law and what shapes the owner’s reasonable expectations – the *Murr* majority looked beyond Wisconsin law, which arguably recognized the plaintiffs as possessing two distinct parcels. In doing so, the majority looked to a much longer history of regulations from as far away as New York that would treat their two parcels as one.<sup>213</sup> It is not hard to see how a test that also makes space for courts to assess the “likel[ihood] . . . of regulation” will lead litigants “to marshal evidence from across time and space” in developing or rebutting takings claims.<sup>214</sup>

In *Cedar Point Nursery v. Hassid*, by contrast, the Supreme Court found that a regulation constituted a taking. Yet the decision similarly minimized state-specific law in reaching its result. The California regulation at issue granted “union organizers a right to physically enter and occupy the growers’ land for three hours per day, 120 days per year.”<sup>215</sup> In the majority’s view, this appropriated “the owners’ right to exclude” and thus constituted a per se constitutional violation, without need for resort to any of the more nuanced balancing approaches to evaluating whether a taking had occurred.<sup>216</sup> To emphasize the importance of the right to exclude, the Court cited not California precedents but rather its own past constitutional decisions.<sup>217</sup>

---

208. *Id.* at 54. For the interposition of “reasonable,” see *Murr*, 137 S. Ct. at 1947.

209. Brady, *supra* note 108, at 54.

210. *Murr*, 137 S. Ct. at 1945-46.

211. Brady, *supra* note 108, at 54.

212. *Murr*, 137 S. Ct. at 1945.

213. Brady, *supra* note 108, at 67. The fact that a Wisconsin law merging their parcels predating the plaintiffs’ ownership by eighteen years could likely have yielded the same outcome under state-specific positive law, but the Court’s approach sure made the plaintiffs look more unreasonable for ignoring a century’s worth of regulation.

214. See *id.* at 68-69. In a post-*Murr* Takings Clause case that also involved a merger regulation, the Court of Appeals for the Fourth Circuit cited *Murr* for the proposition that such regulations are commonplace rather than assessing the regulation under Maryland state law. *Quinn v. Bd. of Cnty. Comm’rs*, 862 F.3d 433, 441 (4th Cir. 2017).

215. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2069 (2021).

216. *Id.* at 2072.

217. *Id.* at 2072-74.

In addition to constructing the property owner's rights through general law, the *Cedar Point* majority also used general law to construct the limits of its new doctrine. In explaining that not every regulation that grants access to other parties is a taking, the Court explained that regulations "consistent with longstanding background restrictions on property rights" would not be affected by its ruling on appropriations of the right to exclude. These "background restrictions" include "traditional common law privileges" to enter property, such as the necessity privilege, which authorizes entries onto land to protect life and, in some instances, property.<sup>218</sup> As examples of sources for this and other common-law privileges, the Court cited provisions of the *Restatement (Second) of Torts* and a Massachusetts case, suggesting that "background restrictions" are assessed by something like the general law as opposed to a specific state's positive law.<sup>219</sup>

Notably, had the Court focused on specific rather than general law, it would have had to grapple with whether the California access regulation itself, which dated back nearly fifty years,<sup>220</sup> qualified as a "background restriction" affecting the scope of a California owner's right to exclude. The Supreme Court has been inconsistent about whether the "background" law that limits an owner's capacity to bring takings claims includes longstanding statutes or not. The inconsistency really springs from a difference in opinion between two of the giants of takings jurisprudence: Justice Scalia and Justice Kennedy. In one of the first decisions discussing the relevance of "background" principles to the Takings Clause, *Lucas v. South Carolina Coastal Council*, Scalia considered it relevant to an owner's takings claim if the use regulated was "always unlawful" in light of "pre-existing" state nuisance and property law.<sup>221</sup> Concurring in the decision, Kennedy noted that he would assess limitations on the owner's title "in light of the whole of our legal tradition," including not just common-law rules but also some preexisting regulations.<sup>222</sup> In a later decision, *Palazzolo v. Rhode Island*,<sup>223</sup> the shoes were on the other feet. Now writing for the majority, Kennedy reiterated that legislative enactments could form background principles limiting an owner's title, but noted that the mere fact that a regulation predated an owner's acquisition was not determinative.<sup>224</sup> Scalia disagreed in a separate concurrence, arguing that preexisting regulation outside the common law "[has] no bearing upon the

---

218. *Id.* at 2079.

219. *Id.*

220. *Id.* at 2069.

221. 505 U.S. 1003, 1028-30 (1992).

222. *Id.* at 1035 (Kennedy, J., concurring).

223. 533 U.S. 606 (2001).

224. *Id.* at 629-30.

determination of whether the restriction is so substantial as to constitute a taking.”<sup>225</sup>

In *Cedar Point*, the Court used a selective general-law approach to elide the question whether the longstanding California access regulation should constitute a background principle limiting agricultural owners’ title. The majority opinion suggests that *some* statutes count as background principles for the *Cedar Point* court but provides limited guidance on how to determine which. The majority favorably cites *Heart of Atlanta Motel, Inc. v. United States*,<sup>226</sup> a 1964 decision in which the Supreme Court rejected a property owner’s claim that the Civil Rights Act was a taking because it compelled access to his property by Black customers.<sup>227</sup> *Heart of Atlanta* is a scant decision, stating only that the owner’s claim was not meritorious due to “cases . . . to the contrary,” none of which involved access rights.<sup>228</sup>

There is a way to read *Heart of Atlanta* and *Cedar Point* together: they might suggest that *federal antidiscrimination* laws like the Civil Rights Act and the Fair Housing Act, specifically, are valid “background restrictions” on property rights that impose valid limitations on the owner’s rights to exclude.<sup>229</sup> But this reading would only pose more questions. Why can the Civil Rights Act operate as a background restriction on property rights, when the California access regulation—passed scarcely a decade later—does not? Is it because one is federal rather than state law? Because most states have adopted companion civil-rights acts, whereas California is an outlier in its labor law? Because the California approach is misguided policy? The *Cedar Point* majority’s universalizing approach will prevent the Court from ever having to answer these questions about the source of background principles because deviations from state-specific law need no explanation. Although a general-law approach could technically allow for consideration of state-specific statutory law like California’s, its indeterminacy means there is no guarantee that a court will have to take up contrary state precedents and statutes in practice.

Both *Murr* and *Cedar Point* illustrate the consequences of giving courts license to pick from a generalist tradition of property principles to define the relevant interest invaded or affected by a government act. For one thing, there is a

---

225. *Id.* at 637 (Scalia, J., concurring) (citation omitted).

226. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2076 (2021) (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964)).

227. *Heart of Atlanta*, 379 U.S. at 243–44; see Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 190 (2021).

228. *Heart of Atlanta*, 379 U.S. at 261 (citing *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1870); *Omnia Com. Co. v. United States*, 261 U.S. 502 (1923); *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958)).

229. See *supra* note 218 & accompanying text.

basic and obvious lesson from the Takings Clause: given a sufficiently broad and conflicting range of authorities, appeals to uniformity do not always cut in favor of individual rights.<sup>230</sup> In constructing universal principles, courts may elevate some sources and ignore others. Indeed, in the Fourth Amendment context, the virtues of uniform standards have already been used to justify law-enforcement conduct that might not have been reasonable in light of specific positive law. In *Whren v. United States*, with which D’Onfro and Epps conclude their Article, Justice Scalia cited the need for uniformity as a reason to reject certain specific positive-law examples the petitioners had offered to argue that the Court’s Fourth Amendment analysis should examine whether a “reasonable officer” would have stopped an individual in assessing whether there has been a seizure.<sup>231</sup> *Whren* teaches that given a broad enough range of sources, courts can just as easily reach outcomes that give law enforcement a wide berth, rather than outcomes that champion individual property and privacy rights.<sup>232</sup>

Further, both *Murr* and *Cedar Point* illustrate the unpredictability of a general-law approach. Take one example from *Murr*. The majority suggested that the Murr family should have been aware that their two lots would be treated as one under a particular regulation because “real estate[] men usually keep informed” of the statutes affecting their rights.<sup>233</sup> It strains credulity to think that over in Wisconsin, the Murrs should have been aware of the 1926 ordinance from Great Neck, New York, that formed the basis for the Court’s assertion of a century-long “history” of similar regulations to the one in Wisconsin that should have put them on notice.<sup>234</sup> That ordinance only came to the attention of the

---

230. I do not mean to suggest that the authors are unaware of this. They cite some examples, like the exigent-circumstances doctrine, where they view it as a benefit that the general law would allow some types of law-enforcement conduct under the Fourth Amendment. D’Onfro & Epps, *supra* note 1, at 990. Still, much of their argument elsewhere in favor of the general-law approach is couched in terms of enhancing individuals’ rights. *See id.* at 969-71.

231. 517 U.S. 806, 815 (1996). The authors suggest that the general-law approach would “[p]erhaps” counsel against the Supreme Court’s widely criticized determination that a pretextual traffic stop does not violate the Fourth Amendment. D’Onfro & Epps, *supra* note 1, at 991-92. The authors do not resolve whether a general-law approach would yield a different outcome, though they suggest it would be possible, since judges could draw on a wide variety of anti-discrimination laws and norms in constructing the scope of an individual’s rights. *Id.*

232. Indeed, the history of the doctrine of qualified immunity raises concerns on this front. A person suing a state officer cannot recover damages for a violation of their constitutional rights pursuant to 42 U.S.C. § 1983 unless the officer violated “clearly established law.” Determining what counts as “clearly established” in light of multiple jurisdictions and multiple levels of courts has proven both difficult and controversial. *See, e.g.,* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 77 (2018).

233. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1945 (2017) (quoting *Ballard v. Hunter*, 204 U.S. 241, 262 (1907)).

234. *Id.* at 1947; Brady, *supra* note 108, at 68 n.94.

Supreme Court because of well-resourced amici.<sup>235</sup> But in both takings and Fourth Amendment cases, not all litigants will have amici, nor will all litigants necessarily have lawyers with the capacity to scour every jurisdiction's law for cases and statutes supporting a claim.

The general law may have the virtue of forcing courts to grapple more extensively with common-law concepts. But in doing so, without an accompanying theory of how courts should choose among competing principles, litigants (and judges) can pluck relevant precedents, statutes, and norms from arbitrary sources and freely shut their eyes to others. In the heyday of general law, neither the Supreme Court nor lower federal forums were always consistent about what exactly the general law said.<sup>236</sup> Take the 1871 case *Pumpelly v. Green Bay & Mississippi Canal Co.*, in which the Supreme Court interpreted as a matter of general law whether the Wisconsin Constitution's takings clause required the state to pay compensation when a canal company that it authorized flooded an individual's land.<sup>237</sup> The Wisconsin Supreme Court had just issued a ruling finding that flooding was a "consequential" injury not compensable under the state constitution.<sup>238</sup> Relying on a "general weight of authority," the *Pumpelly* court decided that compensation was required for these damages deemed consequential.<sup>239</sup> Just fourteen years before, incidentally, the Supreme Court had denied a landowner compensation under federal law for consequential damages because it was "well settled" that such compensation was not due "both in England and this country."<sup>240</sup> And just seven years after *Pumpelly*, the Supreme Court declared

---

<sup>235</sup>. *Murr*, 137 S. Ct. at 1947.

<sup>236</sup>. *Compare, e.g., Cadillac Motor Co. v. Johnson*, 221 F. 801, 803 (2d Cir. 1915) ("[O]ne who manufactures articles dangerous only if defectively made, or installed, e.g., tables, chairs, pictures or mirrors hung on the walls, carriages, automobiles, and so on, is not liable to third parties for injuries caused by them, except in case of willful injury or fraud . . ."), *with Johnson v. Cadillac Motor Car Co.*, 261 F. 878, 883-86 (2d Cir. 1919) (rejecting that rule *in a different appeal in the same case*, in part because of changes in the court's membership, and concluding that the earlier rule had produced "a principle of law for future guidance which is unsound and contrary to the interests of society").

<sup>237</sup>. 80 U.S. 166, 177 (1871). Recall that before the decision in *Erie*, federal courts were arguably free to rely on "general" law, rather than specific local law, in assessing state-law claims brought under diversity jurisdiction. This is how the Supreme Court could end up interpreting state constitutions. See Michael G. Collins, *Before Lochner—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263, 1264-65 (2000); Michael G. Collins, *October Term, 1896—Embracing Due Process*, 45 AM. J. LEGAL HIST. 71, 72 (2001); Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92 MINN. L. REV. 1, 59-64 (2007).

<sup>238</sup>. *Alexander v. Milwaukee*, 16 Wis. 247, 256-57 (1862).

<sup>239</sup>. *Pumpelly*, 80 U.S. at 180.

<sup>240</sup>. *Smith v. Corp. of Washington*, 61 U.S. (20 How.) 135, 149 (1857). The opinion does not cite or discuss the federal Constitution directly, but given that the case took place in the District of Columbia, that would seem to be the source of law.



consequential damages unavailable in takings cases in yet another decision, citing an “immense weight of authority” for that proposition.<sup>241</sup> Put simply, takings law teaches that the general law is unlikely to yield more definitive answers than those produced as things stand.

*B. Effects on State Private Law*

The takings context also illustrates another issue with a general-law approach: the way it might affect state property law. I have already contended that property tends to be localized for a reason: property rights and rules can be tailored to local conditions, which both increases determinacy by making the applicable rules confined to a single jurisdiction and fosters experimentation by enabling states prospectively to learn from one another.<sup>242</sup> Further, narrowing the range of rules that apply to a particular interest serves an important, market-facilitating role; as Thomas Merrill and Henry Smith have observed, property rights are generally modified by legislation rather than the common law because it is desirable for in rem entitlements affecting the rights of third parties to be as clearly delineated as possible.<sup>243</sup>

D’Onfro and Epps are aware that the general-law approach may affect the content of state law, but they take inconsistent views of what exactly this effect may be. By the end of the Article, they claim as a virtue of the general-law approach the potential that it will force courts to *make* property and contract law — law that fails to develop in courts due to arbitration agreements (and, just as likely, in my view, meager damages).<sup>244</sup> D’Onfro and Epps also suggest that the general law may be normatively *superior* to state common law because issues are likely to be “well-litigated” in Fourth Amendment cases (and apparently less well litigated in private-law disputes).<sup>245</sup> Elsewhere, though, the authors reassure the reader that “local law” will persist undisturbed because state courts are free to follow the federal courts’ general-law pronouncements or reject them.<sup>246</sup>

There is reason for caution on this score. Let us return to *Pumpelly v. Green Bay & Mississippi Canal Co.*, the case in which the Supreme Court issued an interpretation of the general law underpinning the Wisconsin constitution. Before

---

241. *N. Transp. Co. v. City of Chicago*, 99 U.S. 635, 642 (1878). The Court declared *Pumpelly* the “extremest qualification of the doctrine” and stated that the “physical invasion” in *Pumpelly* was the reason compensation was required. *Id.*

242. See *supra* notes 86-90, 108-112 and accompanying text.

243. See Merrill, *supra* note 125, at 946-47; see also Merrill & Smith, *supra* note 89, at 8.

244. D’Onfro & Epps, *supra* note 1, at 978-79.

245. *Id.* at 959.

246. *Id.* at 936, 993.

the decision came down, the Wisconsin Supreme Court had interpreted its own constitution not to require damages for flooding. After *Pumpelly*, in theory, the Wisconsin courts were free to reject the Supreme Court's view of its state constitution as a matter of general law.<sup>247</sup> Spoiler alert: they did not. In a succession of cases after *Pumpelly*, the Wisconsin Supreme Court cited and deferred to the U.S. Supreme Court's interpretation of their own state constitution.<sup>248</sup> This is not the only example where a Supreme Court pronouncement on state constitutional law affected subsequent interpretations by that state's courts (and other states' courts, too). After the Supreme Court interpreted a provision of the Illinois Constitution requiring compensation for property "damaged" for public use in *Chicago v. Taylor*,<sup>249</sup> in interpreting analogous state constitutional language, numerous state supreme courts adopted the test that the Supreme Court had endorsed for assessing a "damaging," noting the Supreme Court's approval.<sup>250</sup> This ended the bubbling cauldron of pre-*Taylor* experimentation in different states developing different approaches to their similar constitutional provisions.<sup>251</sup>

To be sure, before *Erie*, state courts apparently continued to disagree with federal courts on some matters of general law.<sup>252</sup> In the canonical tort law case of *MacPherson v. Buick*,<sup>253</sup> for instance, future Justice Cardozo – then a New York Court of Appeals judge – famously refused to follow the Second Circuit's general-law ruling holding auto manufacturers liable for injuries caused by negligently made cars only if the injured person purchased directly from the manufacturer.<sup>254</sup> In this opinion and others, Justice Cardozo apparently held the view

---

247. See Caleb Nelson, *A Critical Guide to Erie Railroad Co. v. Tompkins*, 54 WM. & MARY L. REV. 921, 929 (2013) ("Except in unusual situations when the 'general' law had been federalized by a federal statute or the Federal Constitution, state courts were not obliged to defer to the Federal Supreme Court about its content.").

248. See, e.g., *City of Janesville v. Carpenter*, 46 N.W. 128, 132 (Wis. 1890); *Arimond v. Green Bay & M. Canal Co.*, 31 Wis. 316, 331 (1872); see also *Jones v. United States*, 4 N.W. 519, 519 (Wis. 1880) (treating *Pumpelly* as having settled the question of compensability under the federal Constitution).

249. 125 U.S. 161 (1888).

250. Maureen E. Brady, *The Damagings Clauses*, 104 VA. L. REV. 341, 388 (2018).

251. *Id.* at 378-82. The *Taylor* rule itself was derived from an Illinois case, but not even the most recent Illinois case. *Id.* at 387.

252. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938).

253. 111 N.E. 1050 (N.Y. 1916).

254. See *Cadillac Motor Car Co. v. Johnson*, 221 F. 801 (2d Cir. 1915); see generally John C.P. Goldberg, *Benjamin Cardozo and the Death of the Common Law*, 34 TOURO L. REV. 147, 149-50 (2018) (describing the different interpretations of general tort law between *MacPherson* and *Johnson*). Goldberg also notes that Justice Cardozo fell ill and died as *Erie* was being argued and decided. *Id.* at 147-48. For recent work contesting the narrative associated with *MacPherson*, see

that federal courts were inferiorly positioned relative to state courts to make common law “in synch with prevailing norms and practices.”<sup>255</sup> Perhaps other state judges today would have a similar perspective.

But after a century without general law, the picture looks somewhat different than it did in 1916. Since that time, and for complex reasons,<sup>256</sup> lawyers, law schools, and the legal media have elevated federal courts and their judges on a pedestal.<sup>257</sup> That adulation is now coming under sustained critique,<sup>258</sup> but psychology is hard to change – and many state-court judges went through those law schools or sought the prestige of a federal clerkship en route to their ultimate destination. It may take time and fortitude for a modern state court to ignore a federal court’s pronouncement of idealized property or tort law. As any state-constitutional-law scholar knows, even in interpreting their own constitutions, state courts often follow federal courts’ interpretations of the federal Constitution in lockstep rather than charting their own course.<sup>259</sup> There are exceptions, of course,<sup>260</sup> but state judges most frequently diverge from federal-court interpretations when there is a textual difference in the language they are interpreting, not when the two are looking at the same body of sources.<sup>261</sup>

---

Alexandra D. Lahav, *A Revisionist History of Products Liability* (Jan. 9, 2023) (unpublished manuscript), <https://ssrn.com/abstract=4321152> [<https://perma.cc/VK7P-N9J5>].

255. *Id.* at 150.

256. Among other things, the prestige of the federal courts likely increased in light of their role in school desegregation and other civil-rights victories of the mid-twentieth century. See Brad Snyder, *The Supreme Court Has Too Much Power and Liberals Are to Blame*, POLITICO (July 27, 2022, 10:49 AM EDT), <https://www.politico.com/news/magazine/2022/07/27/supreme-court-power-liberals-democrats-00048155> [<https://perma.cc/X5TL-KEMX>]; Benjamin Rossi, *The Liberal Case for Federalism*, PRINDLE POST (Oct. 25, 2022), <https://www.prindleinstitute.org/2022/10/the-liberal-case-for-federalism> [<https://perma.cc/DZX9-JMC9>].

257. See Staci Zaretsky, *The Law Schools Where the Most Graduates Got Federal Clerkships* (2020), ABOVE THE L. (May 23, 2021, 12:45 PM), <https://abovethelaw.com/2021/05/the-law-schools-where-the-most-graduates-got-federal-clerkships-2020> [<https://perma.cc/L88J-HX4V>] (characterizing federal clerkships as the “most prestigious jobs”); Christopher E. Smith, *Federal Judicial Salaries: A Critical Appraisal*, 62 TEMP. L. REV. 849, 861 (1989) (describing the “greater prestige” of federal judges as opposed to state-court judges).

258. See, e.g., Suzanna Sherry, *Our Kardashian Court (and How to Fix It)*, 106 IOWA L. REV. 181, 182 (2020) (criticizing the culture of celebrity around Supreme Court Justices); Aziz Z. Huq & Jon D. Michaels, *Law Schools Have a Supreme Court Problem*, CHRON. HIGHER EDUC. (July 18, 2022), <https://www.chronicle.com/article/law-schools-supreme-court-sycophancy> [<https://perma.cc/M7YJ-8NKE>].

259. Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 707-28 (2016).

260. SUTTON, *supra* note 122, at 3.

261. Maureen E. Brady, *The Domino Effect in State Takings Law: A Response to 51 Imperfect Solutions*, 2020 U. ILL. L. REV. 1455, 1475 (2020).

It can be difficult to disentangle whether state courts agree with federal courts because the state court perceives the federal judgment to be right or because of the ambient influence of federal supremacy. There is certainly some evidence to suggest that the Supreme Court's endorsement of a particular rule is a persuasive thumb on the scale for state courts, even where it is not binding.<sup>262</sup> But regardless of whether state courts are following federal courts' lead as a matter of deference or genuine agreement, the result is still the same for purposes of the broader institutional concern. If federal courts take the lead on developing the common law, it could have the effect of homogenizing state rules and chilling beneficial experimentation.

Indeed, the law of takings suggests that at a minimum, states will draw on the rhetoric of federal constitutional decisions when making nonconstitutional law. Long predating *Cedar Point*, and at least since the 1970s, the "right to exclude" has been lionized in the Supreme Court's takings cases.<sup>263</sup> The Court's broad statements about the primacy of the right to exclude have frequently been cited in nonconstitutional cases involving the law of trespass.<sup>264</sup> Take, for example, one of the mainstays of first-year property courses, *Jacque v. Steenberg Homes, Inc.*,<sup>265</sup> in which the Wisconsin Supreme Court evaluated the damages available to a couple whose property had been crossed by a mobile-home seller in the course of a delivery. In considering state trespass law, the *Jacque* court "turn[ed] first" to the United States Supreme Court's recognition in constitutional cases that "the private landowner's right to exclude others from his or her land is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"<sup>266</sup> Although there is little question that exclusion is

---

262. See, e.g., *Ala. Power Co. v. City of Guntersville*, 177 So. 332, 337 (Ala. 1937) (adopting the Illinois approach to its analogous state constitutional language in part because of the Supreme Court's "approval" of that interpretation); *Blincoe v. Choctaw, O. & W.R. Co.*, 83 P. 903, 906 (Okla. 1905) (same); *Lambert v. City of Norfolk*, 61 S.E. 776, 778 (Va. 1908) (same).

263. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979).

264. See, e.g., *People v. Pennington*, 178 Cal. Rptr. 3d 135, 143 (Cal. Ct. App. 2014) (citing *Loretto* in finding evidence sufficient to show person had committed criminal trespass on a marina by "injuring the City of Santa Barbara's right to exclude"); *Allred v. Harris*, 18 Cal. Rptr. 2d 530, 533 (Cal. Ct. App. 1993); *HDH P'ship v. Hinsdale Cnty. Bd. of Equalization*, 459 P.3d 586, 592 (Colo. 2017) (citing *Loretto* in determining true owner of property by examining which party had right to exclude); *Anderson-Bey v. Martin*, 2012 IL App (2d) 110311-U, ¶ 9; *Ohio Power Co. v. Burns*, 176 N.E.3d 778, 798 (Ohio 2021); *Ogg v. Mediacom, L.L.C.*, 142 S.W.3d 801, 807 (Mo. Ct. App. 2004); *Movrich v. Lobermeier*, 905 N.W.2d 807, 819-20 (Wis. 2018); *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 159-60 (Wis. 1997).

265. *Jacque*, 563 N.W. 2d 154.

266. *Id.* at 159-60 (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994)).

fundamental to the structure of property law,<sup>267</sup> the right to exclude has always been subject to more nuance than some of these Supreme Court soundbites let on.<sup>268</sup>

It is not hard to see other ways in which Supreme Court pronouncements on property might influence subsequent common-law developments. Take, for instance, the 2010 case *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*.<sup>269</sup> The case has ended up in property casebooks for its provocative opinion by Justice Scalia contending that “judicial takings”—changes in state common law that affect property rights—are constitutionally cognizable.<sup>270</sup> While much of the opinion was unanimous, that part was joined only by three Justices.<sup>271</sup> Perhaps somewhat less famously, the opinion is also striking for its declaration of Florida’s law of avulsion. An avulsion is a “sudden or perceptible loss of or addition to land by the action of the water or a sudden change in the bed of a lake or the course of a stream,”<sup>272</sup> as contrasted with accretion, which more gradually changes the course of a waterway by slowly depositing land on the bank of one side.<sup>273</sup>

In *Stop the Beach*, the Supreme Court interpreted Florida law to draw no distinction between natural and artificial avulsions.<sup>274</sup> This was consequential because the “avulsion” at issue in the case had been Florida’s deposit of sand at the edge of the plaintiffs’ beachfront property (an anti-erosion measure). When an avulsion occurs, boundaries remain where they were prior to the change in the

267. See, e.g., Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 752 (1998); Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453, S455-56 (2002).

268. In a piece cited much less frequently than his article in the preceding footnote, Thomas Merrill criticized people for caricaturing his view on the “right to exclude,” stating:

Does the right to exclude capture every relevant attribute of the institution of property? No, but I did not argue that. I said only that it was a foundational attribute of property. Is the right to exclude the end or the ultimate value to which the institution of property aspires . . . ? Obviously not. . . . [T]here will inevitably be exceptions and qualifications to the right to exclude. But I also said this explicitly in [the] Nebraska essay.

Thomas W. Merrill, *Property and the Right to Exclude II*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 1, 1-2 (2014); see also Bethany R. Berger, *Property and the Right to Enter*, WASH. & LEE L. REV. (forthcoming 2023), <https://ssrn.com/abstract=4078255> [<https://perma.cc/YHH4-DQYK>].

269. 560 U.S. 702 (2010).

270. *Id.* at 713-15.

271. *Id.* at 706.

272. *Id.* at 708-09 (quoting Bd. of Trs. of Int’l Improvement Tr. Fund v. Sand Key Assoc., 512 So. 2d 934, 936 (Fla. 1987)).

273. MERRILL ET AL., *supra* note 81, at 154-55.

274. 560 U.S. at 730-33.

water's course, as opposed to shifting with it.<sup>275</sup> This meant that the state's deposit of sand had, in effect, created land belonging to the state, and the beachfront owners lost the contact of their properties with the ocean. Intriguingly, the Florida state decision from which the owners appealed had *not* relied on the same grounds in deciding the merits of the beachfront owners' takings claims.<sup>276</sup>

State-court decisions after *Stop the Beach* have, perhaps unsurprisingly, tended to follow its statement about the equivalence of artificial and natural avulsions (although always relying on both state and federal precedents).<sup>277</sup> In my experience teaching 1L Property, however, I have found that many students have worried about the consequences of such a doctrine as a matter of private law. What if one party has artificially altered the course of a waterway strategically, whether by accretion or avulsion?<sup>278</sup> Should private parties be able to self-deal in this way? Or the state? It turns out that earlier private-law decisions in some states considered it relevant if a party sought to add to their own land by artificial means, denying them the land so created.<sup>279</sup> At least one jurisdiction – California – has treated artificial accretions like avulsions, leaving the boundaries in the same place they were prior to the change, *unless* it is the *state* that has benefitted

275. *Id.* at 709.

276. The Florida Supreme Court instead determined that the owners had no “right of contact with the water under Florida common law,” and cited the law of avulsion only in order to contend that the state had the “right to reclaim its land lost by an avulsive event,” the hurricanes that had led to the beach erosion program in the first instance. See *Walton Cnty. v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1116 (Fla. 2008).

277. See *City of Long Branch v. Jui Yung Liu*, 4 A.3d 542, 551 (N.J. 2010); *Texas Gen. Land Off. v. Porretto*, 369 S.W.3d 276, 286 (Tex. Ct. App. 2011). *But cf.* *Severance v. Patterson*, 370 S.W.3d 705, 722 & n.20, 724 (Tex. 2012) (declining to decide whether to follow *Stop the Beach* as a matter of state law, determining instead that there was no “rolling” easement under Texas law allowing the public to access previously unencumbered land because of environmental changes).

278. The first episode of popular television show *Yellowstone* involves this sort of maneuver as a plot point: angered by a potential luxury development that would be dependent on an adjacent waterway, rancher John Dutton blows up a hillside to reroute the river. Ryan Ariano, *Things You Never Noticed in the First Yellowstone Episode*, LOOPER (Feb. 7, 2022, 12:47 PM EST), <https://www.looper.com/364435/things-you-never-noticed-in-the-first-yellowstone-episode> [<https://perma.cc/4ATM-K36K>].

279. See, e.g., *Reid v. Ala. State Docks Dep't*, 373 So.2d 1071, 1074 (Ala. 1979); *Brundage v. Knox*, 117 N.E. 123, 128 (Ill. 1917) (“The authorities are generally agreed that the riparian owner will not be permitted to increase his estate by himself creating an artificial condition for the purpose of effecting such an increase . . .” (citation omitted)); *Coastal Indus. Water Auth. v. York*, 532 S.W.2d 949, 952 (Tex. 1976); Mark S. Dennison, *Proof of Accretion or Avulsion in Title and Boundary Disputes Over Additions to Riparian Land* § 11, 73 AM. JUR. PROOF OF FACTS 3d 167 (2003). Other courts seem not to have followed this rule. See *Kansas v. Meriwether*, 182 F. 457, 464 (8th Cir. 1910); *Grant v. Fletcher*, 283 F. 243, 270 (E.D. Mich. 1922) (finding that “made” accretions belonged to shore owner).

from the artificial accretion.<sup>280</sup> It remains to be seen after *Stop the Beach* whether any state court will continue to follow its jurisdiction's preexisting private-law rules if they make distinctions that—in the Supreme Court's view—Florida law did not.

It suffices to say that there is reason to worry that what is said in federal constitutional cases will exert direct pressure on the content of state nonconstitutional law. Again, it is hard to tell whether D'Onfro and Epps think that is a virtue of the general-law approach or merely a potential (but avoidable) consequence.<sup>281</sup> In either event, the general-law approach thus poses countervailing problems at different points of the lawmaking process: it does not provide greater determinacy for courts making constitutional decisions in the first instance, and once a federal court has chosen its preferred (and possibly arbitrary) rule, it threatens to snuff out alternative rules that would develop in private-law cases being litigated in state forums.

D'Onfro and Epps are right that there are some obstacles to the development of private law in state courts, but they leave the complexities of these institutional dynamics underexplored. It is of course true that some private-law cases are never brought because of “access-to-justice problems, arbitration, and waiver.”<sup>282</sup> And if legislatures are inert in addressing novel problems, then perhaps it would on the whole be beneficial that federal courts deciding Fourth Amendment cases would feel less obligated to “def[er] to the legislature” than state common-law courts do in updating property, tort, and privacy doctrine to reflect technological change.<sup>283</sup>

But there are weighty considerations on the other side, too. Although the common law of property is important, its statutory dimensions are equally crucial—and as I have mentioned, given the need for clarity in the scope of property entitlements, several theories hold that state-court deference to legislation is normatively desirable in the field.<sup>284</sup> Further, if a federal court recognizes a novel property right or rule in the Fourth Amendment context, it could have radiating effects even on state *legislation* affecting property interests. Imagine that a federal court deciding a Fourth Amendment case holds that a person has property rights in their data, as a matter of the general law of bailments, that were violated by a police search. It would take guts for a state legislator to try to limit such data property rights in subsequent legislation. This would invite enterprising litigants to challenge any regulation affecting the value of their data under the

---

280. *United States v. Aranson*, 696 F.2d 654, 662 (9th Cir. 1983) (applying California law).

281. See *supra* notes 244–246.

282. D'Onfro & Epps, *supra* note 1, at 993.

283. *Id.* at 980.

284. See Merrill, *supra* note 125, at 946–47; see also Merrill & Smith, *supra* note 89, at 8.

Takings Clause, using the earlier case both to claim that such a property right exists as a constitutionally recognized interest and that the litigant had begun forming “reasonable expectations” around that interest.<sup>285</sup>

### III. TOWARD A PATTERNING APPROACH TO THE FOURTH AMENDMENT

The Takings Clause has at least one more lesson for Fourth Amendment scholars: takings scholarship provides a way of rehabilitating the general-law approach that might offer some of its benefits and fewer of its costs. Earlier in this Response, I described a “patterning” approach that Thomas Merrill has proposed in the context of the Takings and Due Process Clauses.<sup>286</sup> This method is designed to give some degree of uniformity to the scope of federal rights—the major rationale for using general law that D’Onfro and Epps identify—while carefully avoiding disturbance of state positive law.

A patterning approach has two steps. First, courts develop criteria to determine the scope of a protected interest “as a matter of federal constitutional law.”<sup>287</sup> Next, courts “canvas sources of nonconstitutional law,” including “state law” and “social expectations,”<sup>288</sup> to determine whether a purported interest or right meets those criteria.<sup>289</sup>

Although I can only begin to sketch such an approach in this Response, here is what patterning might look like in practice. As I have already explained, in the context of the Takings Clause, Merrill has argued that courts deciding whether a person has a protected property right should examine “whether nonconstitutional sources of law confer an irrevocable right on the claimant to exclude others from interfering with specific assets.”<sup>290</sup> Thus, in assessing whether the loss of some government benefit gives rise to a constitutional violation, a court determining whether a particular interest rises to that level will look to specific positive law. If there is no benefit or interest, like a license to access land, that has been irrevocably conferred to the individual, it is not Takings Clause property. By way of contrast, if some regulation purported to declare tomorrow that all conservation easements were invalidated, a claimant making the case that these

---

<sup>285.</sup> See Brady, *supra* note 25, at 708-10 (discussing factors that courts take into account in assessing an owner’s “reasonable investment-backed expectations,” a factor in the Supreme Court’s regulatory takings test under *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978)).

<sup>286.</sup> See *supra* notes 125-129 and accompanying text.

<sup>287.</sup> Merrill, *supra* note 125, at 893.

<sup>288.</sup> *Id.* at 953.

<sup>289.</sup> *Id.* at 893.

<sup>290.</sup> *Id.*



interests were protected by the Takings Clause could point to preexisting state law making such easements irrevocable and her preexisting right to prevent uses inconsistent with her easement.<sup>291</sup> Notably, courts making decisions under a patterning approach define constitutional criteria in ways that do not threaten to muddle the content of state common law. To illustrate by using the last example, they would not set forth uniform federal criteria for what a conservation easement is; rather, they would determine that state law has created an interest that qualifies for federal protection.

Courts could similarly define protected Fourth Amendment interests not by articulating uniform license or bailment law but rather more neutrally by reference to the criteria an interest must have for constitutional protection. They would then examine both state positive law and expectations constructed from multijurisdictional law and norms to see whether these sources create such an expectation or interest. Full elaboration of a patterning approach would merit its own article. But hypothetically, of course, a court could determine that the Fourth Amendment defines as a search violations of an individual's reasonable expectations of privacy as established by sources of nonconstitutional state law.

This raises an important point. While the patterning approach would not necessarily foreclose a different standard, patterning could ultimately be cast as a modification of or gloss on *Katz*. Courts interpreting *Katz*'s mandate would more explicitly begin with concepts and principles derived from state positive law – including tort and property law – to construct and limit reasonable expectations of privacy. But they would remain free also to draw on other norms and customs in bolstering the positive law's protections or, perhaps, in justifying a departure from them. A few courts implementing search-and-seizure law have used something like a patterning approach in practice (if not in name).<sup>292</sup>

So, in evaluating a particular law-enforcement action – whether the inspection of a pair of shoes or the flyover of a drone – a court would evaluate whether

---

291. For an example of a state law establishing conservation easements as a category of property, see VA. CODE ANN. §§ 10.1-1009-10.1-1010 (2021).

292. See, e.g. *California v. Ciraolo*, 476 U.S. 207, 213-15 (1986) (declining to recognize an individual's "reasonable expectation of privacy" in their backyard in part because officers observed unlawful conduct from aircraft in "public navigable airspace" and in a "physically nonintrusive manner," evoking the nonconstitutional law of trespass and the navigation servitude); *United States v. Salvucci*, 448 U.S. 83, 91 (1980) (noting that "property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated," though not a dispositive one); see also *Rawlings v. Kentucky*, 448 U.S. 98, 112 (1980) (Blackmun, J., concurring) (suggesting that property rights are "weighty factors in establishing the existence of fourth Amendment rights" and observing that the "'right to exclude' often may be a principal determinant in the establishment of a legitimate Fourth Amendment interest"); Kerr, *supra* note 3, at 533 ("Positive law that restricts access to information and places often reflects widely shared notions of which accesses cause significant harms and which do not.").

the federal criteria were met by examining the sources that D’Onfro and Epps envision: the state’s common law, but also pertinent statutes, multijurisdictional rules, customs, and norms. To take one of my favorite examples, imagine that officers search or seize a sweater and other belongings stacked against a tree in a park. In assessing whether a person’s reasonable expectation of privacy was violated (or whatever the federal criteria should be), both common law and social norms play a role: “[l]eaving a plastic bag with one’s other belongings on the side of a basketball court for an hour-long game is commonplace while leaving a gym bag in front of your neighborhood electronics store is not.”<sup>293</sup> Belongings carefully arranged and set aside for a short duration of time would probably not be deemed abandoned under state common law, and even if a state or local statute authorized periodic park cleanup, an officer would likely not be justified in searching and seizing that property absent some health or safety risk. (For what it is worth, Takings Clause jurisprudence also reminds us that state statutes may, in some cases, themselves violate provisions of the Constitution and are thus not always entitled to determinative weight.)<sup>294</sup>

In its similarities to both the general-law approach and to *Katz* itself, the patterning approach shares weaknesses and benefits associated with both. Like the general law model, courts applying the patterning approach would draw on useful private-law concepts, customs, and statutes that are sometimes ignored when courts start only with the language from *Katz*. On the other hand, like both the general-law model and the status quo, a patterning approach might be vulnerable to charges of indeterminacy since fuzzy “social expectations” and arguments from multijurisdictional law can at least in some circumstances override state-specific positive law. At the very least, a patterning approach begins from a more grounded starting point than the general-law model: state-specific rules. And courts could develop the patterning approach in a way that imposes standards on departures from state-specific law while still permitting departures where warranted, which the general law model does not. In takings law, for instance, a court does not treat a state’s extant positive law as conclusive, lest the state manipulate its rules to avoid scrutiny by declaring that some interest is not

---

293. Brady, *supra* note 22, at 1009.

294. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 609 (2001) (“Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.”). Indeed, in at least one case involving the belongings of the unhoused, it was clean-outs pursuant to a local ordinance that itself violated the Fourth Amendment and gave rise to a claim under 42 U.S.C. § 1983. *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1030 (9th Cir. 2012); see also Orin S. Kerr, *The Effect of Legislation on Fourth Amendment Protection*, 115 MICH. L. REV. 1117, 1164 (2017) (arguing for a nuanced role for interactions between positive statutory law and the Fourth Amendment, wherein statutes may sometimes be entitled to weight but where courts would retain independence in review of constitutional problems).

constitutional property.<sup>295</sup> However, if a person claims to have a protected interest that is arguably not recognized by state positive law, the patterning approach would require that nonconstitutional state law and social expectations conform to the specified federal criteria, meriting protection despite contrary authority.<sup>296</sup>

Recasting general law in terms of patterning may not be appealing to the authors (or others, for that matter). It lacks the pizzazz of a wholly new model, and because some versions of patterning would closely resemble *Katz*, it will scarcely appeal to those dissatisfied with the way things are (though, for reasons I have explained, the general-law model should not either). But given the choice among varying indeterminate approaches, a patterning approach would at least not pose the risks to the development of state property law that general law might. Patterning clearly separates the federal criteria for protection from the sources of state common and statutory law affecting property, centering the authority to declare that law where it usually belongs – the states – and not the federal courts.

## CONCLUSION

In this Response, I have highlighted some problems with the general-law approach, both on its own terms and considering the lessons from takings doctrine. General law is like a pointillist painting: at a distant level of abstraction, it seems to provide some guidance, but the closer one looks, the more it collapses into an intractable series of choice-of-principles problems. General law does not yield the benefit of clearer Fourth Amendment doctrine, nor does it guarantee decisions that better balance law-enforcement needs and individual rights. And it comes with a significant risk: the choice to nationalize property doctrine with a potentially arbitrary federal rule threatens our system of interstate doctrinal variation, variation that has yielded positive tailoring, determinacy, and experimentation over the long history of the common law. While I share the authors' belief that private-law analyses can sharpen and support Fourth Amendment reasoning, it would be better to tweak existing doctrine without sacrificing the federalist structure of our property system.

---

295. See *supra* note 291 and accompanying text.

296. Cf. Merrill, *supra* note 127, at 66 (advocating, instead of the approach to defining the relevant parcel for takings analyses adopted in *Murr*, that courts should use a patterning standard “that treats lots lines established under state law as presumptively valid unless a court is convinced that the lines have been manipulated to bolster a takings claim”). This offers an example of a rule that gives presumptive validity to state law while authorizing departures in specified circumstances.

*Louis D. Brandeis Professor of Law, Harvard Law School. Thanks to Jack Brady, Andrew Crespo, John Goldberg, Chris Lewis, Orin Kerr, Kate Klonick, Tom Merrill, Sasha Natapoff, Caleb Nelson, Chris Newman, Joe Singer, Henry Smith, and James Stern for helpful comments and exchanges. I am grateful to Worthy Cho, In Kyu Chung, David Kim, Max Labaton, Michelle Pearse, and Nav Pillai for expert research assistance, and to Nathan Cummings, Cynthia Long, Milo Hudson, Alan Chen, Angela Uribe, and the staff of the Yale Law Journal for their editorial improvements. I am especially grateful to Jack Brady, Martha Boyle, and Margaret Brady, my husband, mother, and mother-in-law, for providing emergency childcare that enabled me to finish a draft of this Response.*