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RESEARCH AGENDA

There is a broad central underlying question driving my research agenda: *How does the law function in the maintenance and/or amelioration of social inequality?* I am specifically interested in the social inequality of oppressed racial and sexual minorities. Social inequality is the result of disparate access to resources. Property law provides an excellent lens to analyze my broad question, because it comprises the rules surrounding ownership and the distribution of resources.

To answer my central question, I utilize a perspective that relies on both sociology and a legal understanding of commons property and public goods. A commons, from a legal perspective, is a shared resource. I believe that where social inequality exists, there is often conflict over some shared resource. Usually, we think of the tragedy of the commons as a lone shepherd who allows his livestock to overgraze to the detriment of the community. This popular representation does not represent the abstract nature of the tragedy, which occurs when individuals who consume the shared resource do not pay the costs and internalize their externalities. The tragedy occurs when individuals prefer to pass the cost of their overconsumption (or their cost to defend and protect the shared resource) to other members of the commons (rather than pay their own costs as individuals).

Methodologically, I rely on empirical social science, specifically qualitative methodologies. These methods include content analysis, participant observation/ethnography, interviews, focus groups, and comparative case study. I find that the value of these qualitative methods is that they better understand social processes and ascertain specifically the ways in which law interacts with inequality, and how it is at times productive of and produced by inequality.

In short, I think of myself as a commons property scholar—with interests in areas of affirmative action, educational access, foreign law and the elimination of social inequality.

RECENT PROJECTS

In *Diversity as Commons*, 88 TUL. L. REV. 317 (2013), I argue that educational diversity is a commons—a shared resource—and that individuals who sue to end affirmative action are agents of enclosure who are trying to enclose and privatize the commons for their own good. The commons property metaphor reveals that universities and minority students who are normally aligned in the protection of the diversity commons have slightly divergent interests, especially when universities refuse to employ equality rationales (in addition to diversity) to protect race-conscious admissions programs. I believe that this piece is emblematic of my theoretical interests and my interest in challenging traditional perspectives in order to find counter-intuitive understandings of social phenomena

My next two articles were companion pieces. In *Making Strange Laws*, 35 U.PA.J. INT'L L. 675 (2014), I draw on a qualitative analysis of the Senate confirmation hearings for justices of the Supreme Court of the United States, and find parallels between senators' conceptions of foreign law and their conservative views of oppressed people—specifically ethnic/racial minorities. The central argument of the Article is that conflict over the judicial practice to use foreign authority leads to the manufacture of foreign law as a dangerous stranger. While the manufacture of the stranger takes place at the level of the senate

judiciary committee, it has some effects on the formation of American society's shared and common understanding of foreign law. In, *Is Resistance to Foreign Law Rooted in Racism?,* 109 NW. U. L. REV. ONLINE 41 (Aug. 31, 2014), I pose the question whether racism is at work in the U.S. Supreme Court's resistance to transnational judicial dialogue. I analyze the case where the Court did not cite recent foreign law decisions on affirmative action in higher education in its own affirmative action decision in *Fisher v. University of Texas*.

CURRENT PROJECT

My current work-in-progress, *Why Malia and Sasha Obama Need Affirmative Action*, is the result of my commons property theory approach to affirmative action, yet I discuss the issue without the distractions of property theory. In this project, I note that many discussions of race based affirmative action take place under the mythical assumption that when a university admits students, particularly white students, they do so by using race neutral measures (e.g., grade point averages, and standardized tests like the SAT, ACT, and LSAT). The myth continues when we start to discuss the ways in which these same universities admit underrepresented minorities. Generally speaking, there is a gap in the scores between overly represented White students and students from specific subsets of our Asian-American population on one hand and underrepresented black and brown students on the other. Using a diversity rationale, schools argue that they need to take the race of a student into account as a plus factor in order to accept students with lower scores.

I argue that there is a problem in how society interprets this gap. The pervasive view is that the gap in test scores is a result of ability. This view believes that underrepresented minorities suffer from a history of discrimination (e.g., black and brown youth have access to poor schools). The pervasive view believes that affirmative action is a preference that offers a boost to these students to make up for past discrimination. I propose a different way of interpreting the gap. Instead of viewing the gap in scores largely as the result of a history of discrimination, it might be more prudent for us to suspend this pervasive way of thinking and instead see the gap in test scores as the result of racial bias.

I argue in this project that schools should be allowed to facially use race in the admissions process as a means to offset the ways the admissions process already uses race, albeit via facially race-neutral measures. I argue that measures like undergraduate GPA and standardized test scores are not racially neutral but racially biased. This project relies on social science studies to understand the various ways that colleges and universities use racially biased measures when making admissions decisions. The paper argues that even if universities stopped affirmative action, their admissions processes would continue to take race into account—simply in a facially neutral way.

FUTURE PROJECTS

The Chicken Little Commons or Why the Law School Crisis is a Social Construction

This project argues that the law school enrollment crisis that schools have experienced over the past four years is a classic tragedy of the commons. Law school administrators and professors have claimed to exist in a crisis due to declining enrollment in law school admissions. I want to argue that while the number of applicants have decreased, there are still more applicants than admissions slots (as measured in 2011). I argue that law schools shrunk their class sizes and played a high stakes game with U.S. News and World Reports in order to increase or maintain their rankings. If every school kept its class size static, admissions scores would have dropped, but relative rankings would have remained the same. Instead schools engaged in a race to the top, and in the process, created a financial crisis for legal education.

Affluent Easements

In my second work-in-progress, , I note that scholars describe antiproperty as a conservation tool that only allows socially desirable development on public and/or common lands. They argue that luxury private property holders with property appurtenant to the public land will act as "public guardians" against the development of public lands in an attempt to protect the value of their own private real estate. According to their argument, these individuals hold de facto negative easement rights that should be formalized and granted to a large number of private actors in order to stop unwanted development of public space. This Article argues that while well intentioned, antiproperty (or negative easements given to proximate owners) requires the creation of more rights and legal power for the relatively more affluent members of society. I question whether it is necessary to give more legal rights and political power to owners. Also I urge considering the effect that an increase in power amongst owners has on conservation efforts, especially if it may mean a corresponding decrease in legal rights and power among the more vulnerable members of society.

This Article tests the anti-property theory in the realm of educational diversity, and argues that educational diversity can be described using a theory of the commons (i.e., diversity is a shared resource). I argue that universities and private charities hold antiproperty rights with respect to which "development" strategies will be used in defending the intangible diversity commons. My observation of universities and private charities is grounded in an ethnography of the Mellon Foundation and its restructuring of a race-based graduate student scholarship pipeline program currently known as the Mellon Mays Undergraduate Fellowship (MMUF). The Mellon Foundation changed the pipeline program from a race-exclusive program (e.g., only blacks and Latinos could apply for admission), to a race conscious one (e.g., any race can apply, however, blacks and Latinos are preferred), following, and in response to, the Supreme Court's affirmative action decisions in *Gratz v. Bolinger* and *Grutter v. Bolinger*.

Despite their management positions, universities and private charities do not advance the strongest arguments and strategies in favor of race-based remedies when they face legal action that threatens race-based affirmative action programs. Ultimately, this Article uses the conservation of the intangible diversity commons as a critique of antiproperty and the creation of easements that, though well-intentioned, give more formal power to the relatively affluent, instead of focusing on those in need. I argue that the affirmative action illustration demonstrates that when elites have veto power over development, that it can suit the desires of the powerful to the detriment of the needs of the vulnerable.

Comparing Affirmative Action Around The World: Judicial Review of Race-Based Affirmative Action Programs

This study combines both my research interests in affirmative action with my interest in comparative and foreign law. This project is a comparative analysis of high court decisions around the world which reviewed race-based affirmative action programs. By examining court decisions, I hope to illuminate the varied affirmative action programs in place throughout the globe, and to compare how nations and their courts treat race and conceptualize affirmative action programs. This is an empirical project. My first task is to identify the universe of court opinions that review programs that resemble US affirmative action cases. My second task is to compare and contrast these decisions using qualitative content analysis. Other work, specifically, Thomas Sowell's *Affirmative Action Around The World,* has examined affirmative action in a comparative context. My goal, however, is to take a more systematic analytical approach than Sowell's normatively driven project. My work will develop a new data set that focuses on courts as the unit of observation in an attempt that they will reveal substantive information about affirmative action programs which are the actual units of analysis.

The Opiate of the Privileged? How Charitable Giving Can Lead To A Concentration of Wealth Amongst Elites

This project proposes to conduct an empirical analysis of the donation patterns of individuals, private foundations and corporations in an attempt to understand how charitable giving is distributed. My preliminary view is that charitable giving disproportionately benefits the wealthy, and does not go to fulfill the basic needs of society. I suspect that charity is redistributed throughout society stays concentrated amongst the rich via institutions that cater to their tastes, (i.e. elite universities, opera houses, parks appurtenant to wealthy estates). Additionally, I propose to conduct interviews to understand how philanthropists understand and make meaning of their own charitable giving. For example, is it a means for alleviating poverty and eliminating inequality? Or does it serve other purposes?

This project fits nicely within my research on the commons and the redistribution of resources, because in a microeconomic sense, one can think of alleviating poverty and the suffering of those at the margins as a commons—something that benefits every member of society. Yet due to its lack of exclusivity and rivalry, society is presented with a free rider problem with respect to the elimination of poverty and suffering. This activity must therefore be provided through non-market solutions. The state has given incentives to those in the private sector who donate to the public good (charity) in attempts to alleviate poverty and cure societal ills.

This is a project that has enormous normative implications, particularly for lawmakers seeking to increase tax revenues who may seize on the image of the self-serving wealthy philanthropists as a means for reducing the charitable deduction. Depending on the findings of my research I can plan to propose reforms that advocate for a shift in the practices of charitable organizations and changes in estate and charitable contributions tax-deduction laws. I would also like to perform this study in a comparative context to see the ways that charity throughout the world may result in a global concentration of wealth amongst elites.