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CHANGING CONCEPTIONS OF WATER IN THE LAW

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This Symposium of the *Marquette Law Review* arises out of a series of happy coincidences. The first happy coincidence is its very subject, *Changing Conceptions of Water in the Law*. “Water Law” as a subject of critical inquiry has undergone intermittent periods of popularity; this Symposium, undertaken jointly by the Property Law and Agricultural Law Sections of the American Association of Law Schools (AALS), reflects the growing awareness of water law’s relevance to national, transnational, and international legal landscapes.

Indeed, as my Board and I met in January 2010 to determine what would be the best subject for the Property Section’s yearly scholarly inquiry, water law emerged as the overwhelming choice. Our reasons were numerous, but one factor was crucial: water law is a subject that built on the work of the Property Section from the five previous years. The Section has examined a multitude of issues, such as the relationships of property to emerging “objects” of property and to the transactional market (including the recent mortgage crisis).¹ The Section has also examined the relationship of property law to other disciplines within the law (including administrative law, intellectual

* Assistant Professor of Law, Marquette University Law School, and Property Section Chair, AALS, 2011. I would like to thank Carole Brown, Benjamin Barros, and John Lovett. Their support and guidance in my work for this Section has been invaluable.

1. See HERNANDO DE SOTO AND PROPERTY IN A MARKET ECONOMY (D. Benjamin Barros ed., 2010) (collecting papers that assessed the implications of De Soto’s work for property law); Symposium, *Law as a Transformative Agent: Thinking and Doing Law in New Categories*, 43 IND. L. REV. 1089 (2010) (collecting papers on topics such as construction of property in the recent mortgage crisis and the laws regarding discriminatory advertisements and Craigslist).

property law, environmental law, local government and land use law, civil rights law, and international law), and its relationship to disciplines outside of the law (including biology, international development, and national disasters).² Thus, a symposium on the subject of water law serves to advance, once again, our Section's responsibility to foster critical engagement with the subject of property.

The focus of the Property Section on water law as a subject of critical inquiry was further confirmed when we approached the Agricultural Law Section to propose a joint program in this subject for the January 2011 Annual Meeting. The second happy coincidence emerged during the planning of our joint program. The Chair of the Agricultural Law Section, David Myers, suggested that we use Dean John E. Cribbet's seminal article on land use development, *Changing Concepts in the Law of Land Use*,³ as a way to frame our critical inquiry, given the diverse topics that would form the core of our joint panels in January 2011. This was a welcome suggestion for two reasons. First, as described by Professor Myers in the essay that accompanies this Symposium, Dean Cribbet had a profound impact on modern property law, exemplified by his scholarly work in property law; by his practice as a teacher, colleague, and administrator at the University of Illinois; and by his service as a member and ultimately President of the AALS (1979). Second, Dean Cribbet specifically contemplated water law as a subject in his own scholarly work, highlighted the challenge presented by water law to the regime of private property rights, and, ultimately, concluded that the inclusion of the law of water in a property framework would foster the emergence of "the public interest" as a defining element in the "property" law of water rights.⁴

Thus, Dean Cribbet's work reflects the tension between private and public interests that seems particular to water law as a subject of property, and a tension that is at the heart of this Symposium. This leads me to a third happy coincidence: the ways in which the works published in this Symposium reveal the wide-ranging and thoughtful program on water law and its role in property and agriculture

2. See, e.g., LAW AND RECOVERY FROM DISASTER: HURRICANE KATRINA (Robin Paul Malloy ed., 2009) (collecting papers on the response of property law to Hurricane Katrina).

3. John E. Cribbet, *Changing Concepts in the Law of Land Use*, 50 IOWA L. REV. 245 (1965).

4. John E. Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1986 U. ILL. L. REV. 1, 23-24 (1986).

undertaken at the 2011 annual AALS meeting in San Francisco. Five speakers from that program contribute to this Symposium: Barton H. “Buzz” Thompson, Jr., Stanford Law School; Joseph Dellapenna, Villanova University School of Law; Shelley Ross Saxer, Pepperdine University School of Law; Kapua Sproat, University of Hawaii School of Law at Manoa; and Asmara Tekle, Thurgood Marshall School of Law.

The final happy coincidence is that a symposium on the subject of water law reflects the sustained institutional commitments of Marquette University Law School, which has embarked on a scholarly and instructional focus on all elements of water law. The support I have received from all components of the Marquette community reflects this commitment. I would especially like to thank Dean Joseph Kearney; Associate Dean of Research, Michael O’Hear; and Associate Dean for Academic Affairs, Matthew Parlow, for their support of this project. In closing, I reserve one last thank you to the members of the *Marquette Law Review* for their hard work on this Symposium, and I reserve a special thanks to Theodore Greeley, Scott Brunner, and James Law for their hard work on every aspect of this Symposium.