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第三版 Third Edition

财产法

PROPERTY LAW

规则 · 政策 · 实务

Rules, Policies, and Practices

[美] 约瑟夫·威廉·辛格 (Joseph William Singer) / 著



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财产法: 规则·政策·实务

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总 序

吴志攀

加入世界贸易组织表明我国经济发展进入了一个新的发展时代——一个国际化商业时代。商业与法律的人才流动将全球化，评介人才标准将国际化，教育必须与世界发展同步。商业社会早已被马克思描绘成为一架复杂与精巧的机器，维持这架机器运行的是法律。法律不仅仅是关于道德与公理的原则，也不单单是说理论道的公平教义，还是具有可操作性的精细的具体专业技术。像医学专业一样，这些专业知识与经验是从无数的案例实践积累而成的。这些经验与知识体现在法学院的教材里。中信出版社出版的这套美国法学院教材为读者展现了这一点。

教育部早在2001年1月2日下发的《关于加强高等学校本科教学工作提高教学质量的若干意见》中指出：“为适应经济全球化和科技革命的挑战，本科教育要创造条件使用英语等外语进行公共课和专业课教学。对高新技术领域的生物技术、信息技术等专业，以及为适应我国加入WTO后需要的金融、法律等专业，更要先行一步，力争三年内，外语教学课程达到所开课程的5%~10%。暂不具备直接用外语讲授条件的学校、专业，可以对部分课程先实行外语教材、中文授课，分步到位。”

引进优质教育资源，快速传播新课程，学习和借鉴发达国家的成功教学经验，大胆改革现有的教科书模式成为当务之急。

按照我国法学教育发展的要求，中信出版社与外国出版公司合作，瞄准国际法律的高水平，从高端入手，大规模引进畅销外国法学院的外版法律教材，以使法学院学生尽快了解各国的法律制度，尤其是欧美等经济发达国家的法律体系及法律制度，熟悉国际公约与惯例，培养处理国际事务的能力。

此次中信出版社引进的是美国ASPEN出版公司出版的供美国法学院使用的主流法学教材及其配套教学参考书，作者均为富有经验的知名教授，其中不乏国际学术权威或著名诉讼专家，历经数十年课堂教学的锤炼，颇受法学院学生的欢迎，并得到律师实务界的认可。它们包括诉讼法、合同法、公司法、侵权法、宪法、财产法、证券法等诸多法律部门，以系列图书的形式全面介绍了美国法律的基本概况。

这次大规模引进的美国法律教材包括：

伊曼纽尔法律精要 (Emanuel Law Outlines) 美国哈佛、耶鲁等著名大学法学院广泛采用的主流课程教学用书，是快捷了解美国法律的最佳读本。作者均为美国名牌大学权威教授。其特点是：内容精炼，语言深入浅出，独具特色。在前言中作者以其丰富的教学经验制定了切实可行的学习步骤和方法。概要部分提纲挈领，浓缩精华。每章精心设计了简答题供自我检测。对与该法有关的众多考题综合分析，归纳考试要点和难点。

案例与解析 (Examples and Explanations) 由美国最权威、最富有经验的教授所著，这套丛书历

经不断的修改、增订，吸收了最新的资料，经受了美国成熟市场的考验，读者日众。这次推出的是最新版本，在前几版的基础上精益求精，补充了最新的联邦规则，案例也是选用当今人们所密切关注的问题，有很强的时代感。该丛书强调法律在具体案件中的运用，避免了我国教育只灌输法律的理念与规定，而忽视实际解决问题的能力培养。该丛书以简洁生动的语言阐述了美国的基本法律制度，可准确快捷地了解美国法律的精髓。精心选取的案例，详尽到位的解析，使读者读后对同一问题均有清晰的思路，透彻的理解，能举一反三，灵活运用。该丛书匠心独具之处在于文字与图表、图例穿插，有助于理解与记忆。

案例教程系列 (casebook series) 覆盖了美国法学院校的主流课程，是学习美国法律的代表性图书，美国著名的哈佛、耶鲁等大学的法学院普遍采用这套教材，在法学专家和学生中拥有极高的声誉。本丛书中所选的均为重要案例，其中很多案例有重要历史意义。书中摘录案例的重点部分，包括事实、法官的推理、作出判决的依据。不仅使读者快速掌握案例要点，而且省去繁琐的检索和查阅原案例的时间。书中还收录有成文法和相关资料，对国内不具备查阅美国原始资料条件的读者来说，本套书更是不可或缺的学习参考书。这套丛书充分体现了美国法学教育以案例教学为主的特点，以法院判例作为教学内容，采用苏格拉底式的问答方法，在课堂上学生充分参与讨论。这就要求学生不仅要了解专题法律知识，而且要理解法律判决书。本套丛书结合案例设计的大量思考题，对提高学生理解概念、提高分析和解决问题的能力，非常有益。本书及时补充出版最新的案例和法规汇编，保持四年修订一次的惯例，增补最新案例和最新学术研究成果，保证教材与时代发展同步。本丛书还有配套的教师手册，方便教师备课。

案例举要 (Casenote Legal Briefs) 美国最近三十年最畅销的法律教材的配套辅导读物。其中的每本书都是相关教材中的案例摘要和精辟讲解。该丛书内容简明扼要，条理清晰，结构科学，便于学生课前预习、课堂讨论、课后复习和准备考试。

除此之外，中信出版社还将推出教程系列、法律文书写作系列等美国法学教材的影印本。

美国法律以判例法为其主要的法律渊源，法律规范机动灵活，随着时代的变迁而对不合时宜的法律规则进行及时改进，以反映最新的时代特征；美国的法律教育同样贯穿了美国法律灵活的特性，采用大量的案例教学，启发学生的逻辑思维，提高其应用法律原则的能力。

从历史上看，我国的法律体系更多地受大陆法系的影响，法律渊源主要是成文法。在法学教育上，与国外法学教科书注重现实问题研究，注重培养学生分析和解决问题的能力相比，我国基本上采用理论教学为主，而用案例教学来解析法理则显得薄弱，在培养学生的创新精神和实践能力方面也做得不够。将美国的主流法学教材和权威的法律专业用书影印出版，就是试图让法律工作者通过原汁原味的外版书的学习，开阔眼界，取长补短，提升自己的专业水平，培养学生操作法律实际动手能力，特别是使我们的学生培养起对法律的精细化、具体化和操作化能力。

需要指出的是，影印出版美国的法学教材，并不是要不加取舍地全盘接收，我们只是希望呈现给读者一部完整的著作，让读者去评判。“取其精华去其糟粕”是我们民族对待外来文化的原则，我们相信读者的分辨能力。

是为序。

Property Law



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*For Martha Minow
who has made all the difference*

*In memory of
Mary Joe Frug*

***Property rights serve human values.
They are recognized to that end,
and are limited by it.***

Chief Justice Joseph Weintraub
Supreme Court of New Jersey, 1971

Preface

The third edition of this casebook has been fully updated and revised. The changes are intended (1) to ensure that the law is up to date; (2) to make the cases and note material easy for students to understand and able to stimulate class discussion; and (3) to make the book more teachable by reflecting more accurately the way in which most teachers present the material and by including new problems based on recent cases or topics of widespread interest and concern.

Major changes are as follows.

Editing. The text has been edited to make the notes both shorter and more user-friendly. Still other changes were implemented to respond to suggestions from those who use the book so as to make the order of materials closer to the order in which most teachers teach the material.

Updated law. Some of the changes were prompted by changes in the law and recent law reform efforts—particularly the publication in final form of the *Restatement (Third) of Property (Servitudes)* in 2000. The notes have also been updated throughout based on recent court decisions. In some situations, I have cited cases that “go the other way,” disagreeing with the rule presented in the principal case. In other cases, I have updated my statements of the law where a minority rule has become the majority rule, either by common law developments or new legislation. I have also corrected and updated material involving religious freedom as it affects both land use regulations and fair housing laws, reflecting the Supreme Court’s decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), holding the *Religious Freedom Restoration Act* to be unconstitutional as applied to the states and the passage in 2000 of the *Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)*, 42 U.S.C. §§2000cc to 2000cc-5. Changes were made to update the law regarding real estate transactions, including the law of brokers, the role of attorneys in real estate sales, and SLAPP suits. Regulatory takings law has

been substantially updated to take into account new decisions by the Federal Claims Court as well as decisions of the Supreme Court (discussed below) and other federal and state courts.

Servitudes. The adoption of the *Restatement (Third) of Property (Servitudes)* by the American Law Institute in 1998, with publication of the permanent edition in 2000, augurs substantial changes in the law of easements, covenants and equitable servitudes, as well as the law of homeowners and condominium associations. It not only unites the law of negative easements, real covenants and equitable servitudes, but proposes to abolish the touch and concern and privity of estate requirements. It would also substantially alter the changed conditions and relative hardship doctrines, as well as the remedies available for breach of a servitude. I have included *Restatement (Third)* provisions in detail in this edition. However, I have retained explanations of the traditional rules because, as of 2001, many states still adhere to some of the traditional approaches to the subject. At the same time, I have substantially tightened and clarified the textual material on servitudes to make it both more readable and comprehensible to students.

Common interest communities. The *Restatement (Third)* unites the rules applicable to homeowners associations and condominium associations, calling both “common interest community associations.” In addition, the *Restatement (Third)* integrated those rules to the new law of servitudes on the sensible ground that nowadays covenants are often, but not always, created in conjunction with a homeowners association. The unification of law in this area strongly suggested that I unify the law of servitudes and condominiums that had previously been in two separate chapters. This allowed me to combine the materials on unreasonable restraints on alienation that had previously been divided between the servitudes chapter and the concurrent ownership/condominium chapter.* The law of homeowners associations in residential subdivisions and condominium associations is now considered together and both are treated as part of the law of servitudes, as the *Restatement (Third)* suggests.

This, in turn, required me to separate the materials on servitudes and future interests that had previously been considered together in a chapter that addressed both contractual agreements to limit land use and contractual separation of present estates and future interests. Although future interests were, at one time, an important element in land use regulation, they are now reserved almost entirely to family real estate, wills, inheritance and trusts. I have therefore returned to the conventional separation of servitudes and future interests, treating servitudes in Chapter 5 and future interests in Chapter 6. Because future interests are generally not used in residential subdivisions or in commercial transactions, they are considered in conjunction with other

* Other material on restraints on alienation is included in Chapter 6 on future interests and Chapter 8 on leaseholds.

materials on regulation of the market for shelter that generally focus on residential housing.

Reorganization. The unification of the law of servitudes and the changes in the law of homeowners associations had ripple effects on the organization of the book as a whole. Trespass law is now included in an initial section on access to property and the relation between access claims and rights to exclude. The first chapter on original acquisition of property has been reorganized to clarify the different sources of property claims in the modern world. The zoning law chapter had previously followed the materials on trespass, easements, covenants and future interests but is now covered later in the book after other materials involving regulation of the housing market. Most teachers address the zoning materials later in the course and this change has been implemented to more closely tie the book to the way most teachers cover the material. I have also unified the materials on concurrent ownership of property and family law after moving the condominium materials to the servitudes chapter, thereby bringing this casebook in line with most others in treating these materials together.

New chapter on intellectual property. There has been a surge of interest among some property law professors in introducing some aspects of intellectual property into the first-year course. This trend is especially evident among new teachers in the field. It is understandable because of the growth of the Internet, biotechnology and new reproductive technologies, and the increasing importance of intellectual property in the economy. Intellectual property issues also involve fascinating fact situations and issues and come up frequently in the news. Having a class discussion about the conflicting arguments in the Napster case, for example, may illuminate issues that otherwise would not usually come to surface in real property cases, such as the conflict that may arise between property claims and free speech claims. There has always been a subset of intellectual property in this and other casebooks, including the law of unfair competition, publicity rights, and the fair use doctrine in copyright law. A number of other casebook authors have unified and expanded this material into a separate chapter and I have now done the same. All the materials in Chapter 15 may be considered at various points in a property law course where they may help illuminate issues that arise in the context of real property or they may be considered together as a separate topic. The content of the first-year property course has changed over time and the inclusion of this material is intended to give teachers an opportunity to introduce students to this area of property law in a more systematic fashion if they wish to do so.

New cases. I have included a number of new cases, some of which supplant older cases and some of which are added to the previous material. I have, for example, included (1) a case on the work/family conflict (*Upton v. JWP Businessland*); (2) Judge Posner's decision on the trespass claim against

the investigative journalists of PrimeTime Live (*Desnick v. ABC, Inc.* and the *Food Lion* case); (3) the decision of the Supreme Court of New Jersey in *Dale v. Boy Scouts of America* (included for purposes of addressing statutory interpretation) that was later overturned by the Supreme Court on first amendment free association grounds in *Boy Scouts of America v. Dale*, 530 U.S. 64 (2000) (which opinion is discussed in the notes following *Dale*); (4) an adverse possession case addressing the issue of color of title (*Romero v. Garcia*); (5) updated versions of the Massachusetts laws and regulations on building construction and lateral support of land (in Chapter 4); (6) a case illustrating the conflicts between developers and homeowners in subdivisions and condominium development (*Appel v. Presley Cos.*); (7) new materials on public policy limits on enforceability of covenants and on the powers of homeowners associations, including the decision on remand of *Davidson Bros., Inc. v. D. Katz & Sons*; (8) two new cases interpreting ambiguous future interests, including *Cathedral of the Incarnation in the Diocese of Long Island, Inc. v. Garden City Company* and *Edwards v. Bradley*; (9) the full text of Justice Oliver Wendell Holmes's opinion for the Supreme Judicial Court of Massachusetts in 1893 in *Johnson v. Whiton*, illustrating the rule against creation of new estates; (10) a new case involving discrimination because of sexual orientation in residential rental housing, *Human Rights Commission v. LaBrie, Inc.*; (11) an updated case on marital status discrimination decided after the Supreme Court struck down as unconstitutional the *Religious Freedom Restoration Act* (*McCreedy v. Hoffius*); (12) changes in *Fair Housing Act* law likely to result from the Supreme Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); (13) the Supreme Court's 1997 decision in *Babbitt v. Youpee*, 519 U.S. 234 (1997) (replacing *Hodel v. Irving*); (14) reference to the Supreme Court's recent takings clause decisions in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) and *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998); (15) new intellectual property cases, including the Supreme Court's recent decisions in *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159 (1995), and *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340 (1991), as well as a fuller version of *Martin Luther King, Jr. Center for Social Change v. American Heritage Products*, 296 S.E.2d 697 (Ga. 1982).

New problems. I have added some new problems based on recent cases that have occasioned controversy or been adjudicated by courts. These new problems keep the book up to date and allow teachers to focus class discussions on issues of contemporary concern. This should make the discussion more interesting to students and also make it easier for them to generate the arguments on both sides of such cases, helping to elucidate the policy concerns and conflicting interests that arise in property law cases.

Joseph William Singer
Cambridge, Massachusetts
5/762/2002

A Guide to the Book

What Is Property?

Property rights concern relations among people regarding control of valued resources. Property law gives owners the power to control things, and it does this by placing duties on non-owners. For example, owners have the right to exclude non-owners from their property; this right imposes a duty on others not to enter property without the owner's consent. Property rights are relational; ownership is not just power over things but entails relations among people. This is true not only of the right to exclude but of the privilege to use property. An owner who operates a business on a particular parcel may benefit the community by creating jobs and providing needed services, and she may harm the community by increasing traffic or causing pollution. Development of a subdivision may affect drainage patterns and cause flooding on neighboring land. Property use makes others vulnerable to the effects of that use, for better or for worse. Power over things is actually power over people.

Property rights are *not absolute*. The recognition and exercise of a property right in one person often affects and may even conflict with the personal or property rights of others. To give one person an absolute legal entitlement would mean that others could not exercise similar entitlements. Property rights are therefore limited to ensure that property use and ownership do not unreasonably harm the legitimate, legally protected personal or property interests of others. The duty to exercise property rights in a manner compatible with the legal rights of others means that *owners have obligations as well as rights*.

Owners of property generally possess a *bundle of entitlements*. The most important are the privilege to use the property, the right to exclude others, the power to transfer title to the property, and immunity from having the

property taken or damaged without your consent. These entitlements may be disaggregated—an owner can give up some of the sticks in the bundle while keeping others. Landlords, for example, grant tenants the right to possess their property in exchange for periodic rental payments while retaining the right to regain possession at the end of the leasehold. Because property rights are limited to protect the legitimate interests of others and because owners have the power to disaggregate property rights, entitlements in a particular piece of property are more often shared than unitary. It is almost always the case that more than one person will have something to say about the use of a particular piece of property. Property law therefore cannot be reduced to the rules that determine ownership; rather, it comprises rules that allocate particular entitlements and define their scope.

Property is owned in a *variety of forms*. An infinite number of bundles of rights can be created from the sticks in the bundle that comprise full ownership. However, some bundles are widely used and they comprise the basic forms or models of ownership. Some forms are used by individuals while others are used by couples (married or unmarried) or families. Other forms are used by groups of unrelated owners. Differences exist between forms that give owners management powers and those that separate ownership from management. Further distinctions exist between residential and commercial property and between nonprofit organizations and for-profit businesses. Within each of these categories are multiple subcategories, such as the distinction between partnerships and corporations or between male-female couples and same-sex couples. Particular models of property ownership have been created for different social contexts and types of property. Each model has a different way of bundling and dispersing the rights and obligations of ownership among various persons. Understanding property requires knowledge both of the individual sticks in the bundle of property rights and the characteristic bundles that characterize particular ownership forms.

Property is a *system* as well as an *entitlement*. A property right is a legal entitlement granted to an individual or entity but the extent of the legal right is partly determined by rules designed to ensure that the property system functions effectively and fairly. Many property law rules are geared not to protecting individual entitlements, but to ensuring that the environment in which those rights are exercised is one that maximizes the benefits of property ownership for everyone and is compatible with the norms underlying a free and democratic society. Some rules promote efficiency, such as the rules that promote the smooth operation of the real estate market. Other rules promote fairness or distributive justice, such the fair housing laws that prohibit owners from denying access to property on the basis of race, sex, religion or disability.

Tensions Within the Property System

In 1990, roughly a year after his nation was freed from Soviet domination, the foreign minister of Czechoslovakia, Jiri Dienstbier, commented that