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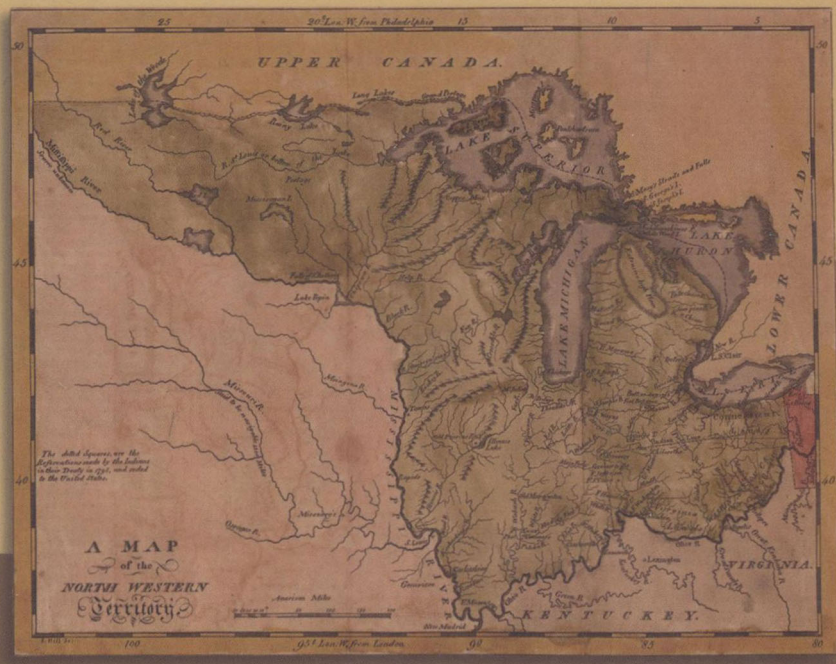
THIRD EDITION



Joseph William Singer

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Third Edition

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Law & Business

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For Justice Morris Pashman
Supreme Court of New Jersey

ז"ל

A leader of state supreme court judges
and a model of the good judge

PREFACE

This Third Edition is fully updated with references to recent Supreme Court cases in the takings area, current information about the status of same-sex marriage, the ongoing changes and repeal of the rule against perpetuities, developing doctrine concerning homeowners associations and servitudes, and changing standards in public accommodations and fair housing law, as well as modern treatment of the estates system.

This treatise is designed with a mission in mind: to explain the law of property clearly, and to do so in a way that will show students, lawyers, and judges the internal tensions and competing policies and values that comprise the property system. I have sought to be accurate in the statement of current law; I have not, however, researched the law of every state on every issue. I have provided recent citations that should provide an entry into the law on each issue, as well as citing secondary sources that have more comprehensive treatments. I have noted some (but obviously not all) statutes that alter common law property rules and I have paid substantial attention to minority rules or disagreements among the states on what the rules of property law are or should be.

There is surprisingly more disagreement about property law than one might imagine. There is good reason for this disagreement. Property law is one of the ways we organize social life; it embodies some of the deepest and most cherished values we possess. Those values sometimes come into conflict with one another. When this happens, we are forced to accommodate these conflicting values. We do this by compromising, placing limits, drawing lines, making distinctions. Yet we do not all agree on the right way to go about drawing those lines. And even when we agree on how to think about the problem, the issues are often hard, requiring judgment, perspective, and the exercise of responsibility. For these reasons, the law of property is conflicted, controversial, and interesting. Accuracy in the description of the law requires attention to these controversies. It is especially instructive to pay attention to the disagreements among courts about the legal rules governing property and the competing values that give rise to these disagreements.

The complexity of the property system comes from the fact that we want conflicting things. On the one hand, we wish owners to have full sets of rights over the things they own. We want this both to protect their autonomy and to promote social welfare. Ownership is a strong claim to be entitled to control things that human beings need. The legal system recognizes and protects those entitlements vigorously. On the other hand, owners do not live alone. Both ownership and use of property affect others — for good and for ill. The law of property recognizes the interests of those others who are affected by the exercise of property rights. It responds to those interests by limiting the entitlements that owners can legitimately claim. It does so to protect the legitimate interests and needs of both other owners and non-owners, as well as the community at large. Because others are entitled to limit what owners can do with their property, no property rights are absolute. Indeed, our property system confers, not absolute ownership, but *shared* ownership — with legal rights in a particular valued resource divided among several, or even many, people.

I sought to make the law both clear and muddy. I have tried to be clear in the presentation of legal rules and doctrine. I have also sought to present clearly the most important competing arguments and policies that animate different doctrinal fields. I have done so because these

arguments are likely to shape both the application of existing law and future changes in that law. I have tried, however, to muddy the waters by emphasizing the disagreements among courts about the rules of property law and by explaining why hard cases are really hard. My idea was to state basic rules with their animating policies while also explaining the competing policies that might well lead to creation of exceptions or counter-rules that would limit the reach of existing rules to protect legitimate competing interests. I do this in two ways. First, at the beginning of each chapter, I explain the fundamental issues likely to arise in that doctrinal field.

Second, each chapter contains a series of "hard cases," which contain difficult issues that may cause judges to disagree about how the case should be resolved. I have explained such hard cases by giving short descriptions of the policy arguments that lawyers might present on both sides of the case. I have sought to highlight issues that arise — or should arise — in choices among alternative rules of property law. These discussions are meant to help students "spot issues." They also model for students what a good answer might look like on a final examination, explaining not why the case must come out a particular way, but why it might come out either way — in other words, why it is hard. I often explain to my students that if they are confused about how the rules apply to a complicated fact situation presented on an exam, they should be happy rather than worried. Law professors usually construct hard cases for exams and if students are confused about how the law applies to these hard cases, they got the point. A good answer will explain clearly the nature of their confusion; it will explain the reasons why the case could come out either way, ending with an educated guess about what an actual court might do with the hard case. Such equivocations are not evasions; nor are they refusals to answer the question. They accurately depict the state of the law, as they accurately describe the reality that a client would need to know about to make informed decisions about how to conform her conduct to the dictates of the law or to challenge existing rules.

Explaining both sides of a contested, hard case is also intended to be useful to judges and lawyers. Understanding the law requires knowledge, not only of legal doctrine and the policies that have been used to justify existing rules, but the policies that might well justify limiting the application of those rules by creating exceptions or counter-rules that apply in distinguishable fact situations. When a case is genuinely hard, a lawyer will be able to explain the strongest arguments on both sides and respond to the strongest arguments on the other side. Seeing these arguments and counterarguments and being able to make them persuasive is a central task of lawyers and part of the way the legal system works to protect the interests of everyone affected by legal rules. Moreover, practicing attorneys also need to know about disagreements among the states because a minority rule elsewhere may be on the table in your jurisdiction — you may even put it there yourself.

In a book of this size and character, there will inevitably be mistakes. I would gratefully receive any comments or criticisms that point out such mistakes to me so that they can be corrected in future editions. I can be reached at: Professor Joseph Singer, Harvard Law School, Cambridge, MA 02138.

Many people helped me with this book over the years, whether or not they knew it. For their companionship — intellectual and otherwise — thanks and affection go to Martha Minow, Michelle Adams, Greg Alexander, Keith Aoki, David Barron, Phil Frickey, Jerry Frug, Kent Greenfield, Duncan Kennedy, Marnie Mahoney, Frank Michelman, Jenny Nedelsky, Nell Newton, Jeremy Paul, Peggy Radin, Michael Schill, Avi Soifer, Debra Pogrund Stark, Laura Underkuffler-Freund, André van der Walt, Johan van der Walt, and Rob Williams. I would also like to thank the numerous anonymous reviewers who made many suggestions, many of which I have incorporated into the text.

I also would like to acknowledge the authors of previous property treatises on whose research I build and to whom I am indebted for their originality, perspicuity, and wisdom. They include the late Roger Cunningham, William Stoebuck, Dale Whitman[1] and John Sprankling,[2] as well as the authors of numerous specialized treatises cited throughout this book.

I would like to thank Alice Feng, George Fibbe, David Foster, Edward Kang, Vikas Khanna, and Loren Washburn for outstanding research assistance. Research assistance for the third edition was provided by Mekonnen Ayano, Benjamin Beasley, Ariane Buglione, Jonathan Gingerich, Joseph Harrington, Brian Korchin, and Sara Madge. And, as always, Patricia Fazzone has facilitated this project with grace and humor.

Martha Minow has sustained me with her encouragement, her example, her humor, and her insight. Mira Singer has inspired me with her imagination, her enthusiasm, and her joy. I look forward to writing more magical mystery books with her about our favorite imaginary creature, the Zoogelhoph.

The late Justice Morris Pashman (ל"ז) served on the Supreme Court of New Jersey with distinction. My time clerking with him taught me much of what I believe I know about making a good legal argument. He tried to see every case from the point of view of both sides. More fundamentally, he considered how the ruling of the court would affect those not in the courtroom — especially those who could not speak for themselves. He sought to explain his decisions to everyone who needed to understand them, including lower court judges, lawyers, the public at large, and, most importantly, the losing party.

Justice Pashman understood that hard cases often require lawmakers to protect one legitimate interest at the expense of another, equally legitimate interest. The doing of justice sometimes implied the doing of injustice. The ultimate constraint on judges, he believed, was not the stricture of rules, rigidly applied, but the obligation to explain to the losing side why they were losing. This required the judge to empathize with both sides and to try to understand — to really understand — the position being rejected.

It is not that he thought that judges could construct arguments that would induce the losing party to agree with an adverse outcome; he did not think formulas put an end to controversy. It is that he thought that the job of judging entailed the attempt to feel the pull of competing values at the moment of making a decision. The obligation to explain the legitimacy of a losing argument also entailed an inherent limit on what the winning side could legitimately claim. To Justice Pashman, judging was not a technical activity, but one that required practical wisdom, a trait he possessed in abundance. I am grateful that I was able to show him the dedication to this book shortly before he died. He will always be for me the model of the good judge.

Joseph William Singer
Cambridge, Massachusetts

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[1] Roger A. Cunningham, William B. Stoebuck & Dale A. Whitman, *The Law of Property* (2d ed. 1993) and William B. Stoebuck & Dale A. Whitman, *The Law of Property* (3d ed. 2000).
[2] John G. Sprankling, *Understanding Property Law* (2d ed. 2007).

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