

# PROPERTY: PRINCIPLES AND POLICIES

THOMAS W. MERRILL

HENRY E. SMITH

FOUNDATION PRESS

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# **PROPERTY:**

## **Principles and Policies**

*by*

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*To Bob Ellickson and Carol Rose*  
teachers, colleagues, and friends

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## PREFACE

This casebook differs from others in that it regards property law as a single subject unified by core principles. There are many important differences between real property (land and buildings), personal property (movable things), intellectual property (original inventions, expressions, and marks), and natural resources (public lands, water, wildlife). Nevertheless, we believe there are certain basic principles that unite these different manifestations of property, and that these principles can and should be the focus of an introductory course.

The most basic principle is that property at its core entails the right to exclude others from some discrete thing. This right gives rise to a general duty on the part of others to abstain from interfering with the thing. This structure of rights and duties leads to characteristic bundles of rights, unites the various institutional forms we call property, and differentiates property rights from personal rights and contract rights. The basic exclusion strategy also serves as the starting point for further elaborations, refinements, exceptions, and overlays, which govern the use of resources with greater particularity. Together these rights to exclude and governance rules collectively make up the law of property and connect property to adjacent areas of contracts, torts, regulation, and public law.

We do not present our foundational principles as dogma. They serve as organizing devices for the casebook. The materials are designed to challenge each student to decide for him or herself whether property is defined by common principles such as the right to exclude others, or whether any such principle is so riddled with qualifications that property can only be regarded as an ad hoc “bundle of rights” without any distinguishing features.

In keeping with our perspective that property law is a unified subject, the casebook does not focus on one type of property such as land, nor does it organize materials into traditional subfields such as real, personal, intellectual, and natural resources. Instead, we draw on cases and materials from each of these areas throughout the book. No attempt is made to provide comprehensive coverage of any subfield; comprehensiveness is not possible, even in real estate law, the traditional focus. Rather our focus is on design principles common to all subfields of property. This reorientation is also appropriate, we believe, given that intellectual property and environmental issues loom much larger in the law school curriculum – and the practice of law – than was true in earlier generations when real estate law was para-



mount. An introduction to property law should provide a grounding that students can build upon whatever direction their future studies and practice may take.

Although our organizing principles are innovative, the selection of materials is deliberately conventional, as befits a field where stability of expectations plays such a large role. Judicial opinions serve as the primary vehicle for instruction, and we have tried to retain a high proportion of the chestnuts that have traditionally featured in property law materials. The cases are punctuated at intervals with short excerpts from the secondary literature or (in some instances) our own short summary of the secondary literature. These excerpts are designed to supply institutional or historical context, or to raise philosophical or policy questions not expressly addressed by the opinions. The secondary-source excerpts can serve as jumping off points for class discussion, or can be assigned as background reading, as the teacher sees fit.

In editing opinions, we have tried to strike a compromise between, on the one hand, burdening the student with extraneous issues and boilerplate and, on the other hand, reducing opinions to squibs lacking any context. We believe it is important, particularly in an introductory course like property law, to see how the characterization of facts in opinions influences legal conclusions, and how procedural and remedial issues interact with substantive issues. We have tried to leave in enough contextual detail to permit these connections to be explored in class. With respect to secondary materials, the editing is much more drastic, and is designed to capture one or two key points rather than the full nuanced argument. Deletions of text in all materials are indicated by three stars (\* \* \*), but citations have often been omitted without any indication. We have frequently modified the citation form in opinions to conform to modern style. Footnotes have generally been deleted, but where they are retained, we have used their original number. Editor footnotes are indicated by symbols (\*, †, etc.).

We have many people to thank for their generous contributions to this book. For their insightful comments on drafts, we would like to thank Richard Briffault, Robert Ellickson, Richard Epstein, Cynthia Estlund, Lance Liebman, Jonathan Nash, Claire Priest, Carol Rose, Sun-Joo Shin, Bruce Smith, Joshua Tate, and the anonymous reviewers for Foundation Press. A special debt of gratitude goes to our students at Columbia, Harvard, and Yale, who participated enthusiastically in our experiments with the earlier versions of this book. For their invaluable assistance tracking down permissions and helping with production, we thank Bradford Connor, P.J. Gach, Monika Piotrowicz, and Sarah Sladen. Our illustrator, Leslie Evans of Seadog Press, provided extensive assistance with illustrations and figures. We have also benefited greatly from the efforts of our research assistants at Columbia and Yale: Mina Farbood, Benjamin Gould, Michael Grisolia, Valerie Jaffee, David Olasky, Matteo Rizzolli, and Mainon Schwartz. Vic Khanna, Alan Schwartz, and the staffs at the Columbia, Harvard, and Yale Law Libraries have also been very kind and helpful in tracking down various materials. We are also deeply appreciative of the many

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