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PROPERTY LAW:
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THE COMMON GOOD



Eric T. Freyfogle
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WEST

PROPERTY LAW: POWER, GOVERNANCE, AND THE COMMON GOOD

■ ■ ■

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610 Opperman Drive
St. Paul, MN 55123
1-800-313-9378

Printed in the United States of America

ISBN: 978-0-314-91174-2

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PREFACE

Casebook prefaces are written for two audiences: instructors and law students. Our comments are intended mostly for the former, but students might also find them interesting, if a bit challenging.

This casebook differs from others in current use in rather significant ways. The arrangement of material is atypical, as are some of its topics. The book differs also in format and pedagogical approach (e.g., the inclusion of free-standing essays; notes with fewer questions and more explanation and critical depth; occasional, practice-oriented exercises). The main difference, however, comes because we take property seriously as a foundational social institution and as a body of law with distinct features and challenges. For us, property is not simply a blend of contract and tort principles applied to tangible and intangible things. Similarly, property does not arise from abstract models and ahistorical claims. Property is more distinct than these views suggest; more institutional and problematic. It reflects the choices and power struggles of generations of citizens and lawmakers, which is to say it is embedded in time, culture, and experience. Property is an evolving institution of vast economic, political, and moral significance. It is appropriate if not essential for us to take care of this vital institution, ensuring that it benefits us as much as it can. To do that, we need to think critically about the elements of ownership and to update governing norms. Only in that way can private property remain legitimate and fully promote the common good.

The current generation of property casebooks began life about a half-century ago, perhaps with the book that long dominated the law-school market: John E. Cribbet and Corwin W. Johnson, *Property: Cases and Materials* (first edition 1960; 9th ed. with added authors, 2008). Our casebook, with its search for critical distance, bears similarities with a classic work from an earlier time, Myres McDougal and David Haber, *Property, Wealth, Land: Allocation, Planning and Development* (1948). Yet, even as our book displays a critical, scholarly feel it is also distinctly practical: It gives primacy to causes of action (as would practicing lawyers); it includes exercises in basic legal skills; and it regularly comments on implications for law practice. Moreover, the book recognizes that many property courses are shorter today than they were decades ago. In the instance of various topics (estates in land and future interests; sales of land; landlord-tenant) we have kept coverage of them concise. Finally, the materials are fresh: Nearly half of the 99 main cases date from 2004; 21 of them are from 2009 to 2011.

To elaborate a bit:

- We present property as a *social arrangement based on law and state power*. As such it is morally complex and requires a sound moral grounding. A well-structured property system can bring widespread benefits, to owners and

society at large. A poorly structured system can diminish those collective gains, over time allowing property to become, as it often has been, a tool of domination.

- As we illustrate, *property law has evolved considerably*, even in fundamentals. We draw attention to the most important historic changes. We comment also on the dominant trends of today, helping students anticipate and engage with the law's continued development.

- We downplay simplistic images of ownership and emphasize instead how property rights are *carefully tailored to nature and to the rights of other owners*. Our emphasis on nature—water, minerals, forests, wildlife, recreational lands—could make the book attractive for instructors who also teach natural resources or environmental law.

- Throughout we bring *statutes and regulations* to bear, showing that the common law rarely stands alone, even on foundational issues (e.g., trespass, adverse possession). We also give attention to the *multiple levels of government* (private and public) with lawmaking roles, including new intermediate levels. Similarly we highlight *basic remedies, for both personal and real property*, showing how property rights in practice are shaped by these remedies.

- Our coverage includes express treatment of *public property rights*—too often ignored or downplayed in casebooks—and also property rights that take the form of *land- or resource-use rights* (easements and more).

- A key aim is to help students stand back from property as a field of study to *see larger patterns*. We draw attention, for instance, to the law's ubiquitous role in reconciling conflicts (*ex ante* and *ex post*) among property owners. (On that, we go beyond typical commentary on property rules versus liability rules to explore the various approaches (seven by our count) that the law has used to frame the rights of competing owners; see the essay ending Chapter 3.) Similarly, we consider property reallocation as an integrated issue, highlighting the need for reallocation methods and noting how the law has dealt with market failures. It is in this context that we address condemnation. Just as unusual is our final chapter on legal change.

As noted, the book includes exercises to help students engage with property law and build basic legal skills. Also prominent are the book's eight essays, mostly from 1,500 to 2,500 words. The essays are:

The Labor Theory and Its Curious Path

The Moral Complexity of Private Ownership

The Challenges and Virtues of Common Property

Options for Resolving Property-Use Disputes

The Powerful, Confusing Public Trust Doctrine

The Elements of Resource Use Rights

Property Law's Principal Trends

Protecting Property's Key Functions

We've observed already that this book might prove useful to instructors who also teach natural resources or environmental law. The same can be said for instructors who value history (legal and social) and political theory or who take moral challenges seriously. The book is by no means a scholarly push for progressive change. Still, it does question conservative (particularly neo-liberal) assumptions about property in ways that distinguish it from the various casebooks that have, in recent years, become increasingly conservative. Throughout, the book shines light on the institution's structures and shows how past lawmakers reformed property law to meet their wants and needs. In doing so, the book invites instructors and students, if and as they choose, to consider possibilities for continued reform.

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