

SINGER

PROPERTY LAW
Rules, Policies,
and Practices

*Third
Edition*

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Property Law

Rules, Policies, and Practices

Third Edition

JOSEPH WILLIAM SINGER

Professor of Law, Harvard University

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Third Edition

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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
5/62/2002

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

"[i]t was easier to make a revolution than to write 600 to 800 laws to create a market economy."¹ If anything, he understated the case. Each of the basic property entitlements is limited to ensure that the exercise of a property right by one person is compatible with the property and personal rights of others. The construction of a property system requires property law to adjudicate characteristic core tensions in the system.

Right to exclude versus right of access. It is often said that the most fundamental right associated with property ownership is the right to exclude non-owners from the property. If the right to exclude were unlimited, owners could exclude non-owners based on race or religion. Although at one time owners were empowered (and in some states required) to do this, current law prohibits discrimination on the basis of race, sex, national origin, religion or disability in public accommodations, housing and employment. Although individuals are free to choose whom to invite to their homes for dinner, market actors are regulated to ensure that access to property is available without regard to invidious discrimination. Property therefore entails a tension between privacy and free association norms on one side and equality norms on the other. Sometimes the right of access will take precedence over the right to exclude. The tension between these claims is one that property law must resolve.

Privilege to use versus security from harm. Owners are generally free to use their property as they wish, but they are not free to harm their neighbors' property substantially and unreasonably. A factory that emits pollutants into the air may be regulated to prevent the use of its property in ways that will destroy the individual property rights of others and common resources in air and water. Many uses of property impose "externalities" or spillover effects on other owners and on the community as a whole. Because owners are legally entitled to have their own property protected from pollutants dispatched to their property by others, owners' freedom to use their property is limited to ensure that their property use does not cause such unreasonable negative externalities.

Power to transfer versus powers of ownership. Owners are generally free to transfer their property to whomever they wish, on whatever terms they want. Freedom of disposition gives them the power to sell it, give it away, or write a will identifying who will get it when they die. They are also free to contract with others to transfer particular sticks in the bundle of sticks comprising full ownership to others while keeping the rest for themselves. Owners may even place conditions on the use of property when they sell it, limiting what future owners may do with it. They may, for example, limit the property

1. William Echikson, *Euphoria Dies Down in Czechoslovakia*, Wall St. J., Sept. 18, 1990, at A26, 1990 WL-WSJ 56114.

to residential purposes by including a restriction in the deed limiting the property to such uses.

Although owners are free to disaggregate property rights in various ways, and to impose particular restrictions on the use and ownership of land, that freedom is not unlimited. Owners are not allowed to impose conditions that violate public policy or that unduly infringe on the liberty interests of future owners. For example, an owner could not impose an enforceable condition that all future owners agree to vote for the Democratic candidate for president; this condition infringes on the liberty of future owners and wrongfully attempts to tie ownership of the land to membership in a particular political party. Nor are owners allowed to limit the sale of the property to persons of a particular race. Similarly, restrictions limiting the transfer of property will ordinarily not be enforced, both to protect the freedom of owners to move and to promote the efficient transfer of property in the marketplace. The freedom of an owner to restrict the future use or disposition of property must be curtailed to protect the freedom of future owners to use their property as they wish. The law limits freedom of contract and freedom of disposition to ensure that owners have sufficient powers over the property they own.

Immunity from loss versus power to acquire. Property owners have the right not to have their property taken or damaged by others against their will. However, it is often lawful to interfere with the property interests of others. For example, an owner who builds a house on a vacant lot may block a view enjoyed by the neighbor for many years. A new company may put a prior company out of business or reduce its profits through competition. Property rights must be limited to ensure that others can exercise similar rights in acquiring and using property. In addition, immunity from forced seizure or loss of property rights is not absolute when the needs of the community take precedence. To construct a new public highway or municipal building, for example, the government may exercise its eminent power to take private property for public uses with just compensation.

Recurring Themes

A number of important themes will recur throughout this book. They include the following:

Social context. Social context matters in defining property rights. We have different typical models of property depending on whether it is owned individually or jointly, among family members or non-family members, by a private or a governmental entity, devoted to profitable or charitable purposes, for residential or commercial purposes, open to public use or limited to private use.