

SINGER

**PROPERTY
LAW**

**Rules, Policies,
and Practices**



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Property Law

Rules, Policies, and Practices

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*For Martha Minow
who has made all the difference*

*In memory of
Mary Joe Frug*

A Guide to the Book

Property law is a vital, dynamic subject that is undergoing major changes in many areas. I have highlighted those changes in this book for two reasons: to give students a sense of the ways in which the law may evolve over the course of their legal careers and to focus on controversial topics that usefully illustrate the competing policies and principles underlying the field.

I have tried to communicate my own excitement about the subject. The materials focus on contemporary problems in property law being faced both by lawyers in their daily practice and by members of the community. When necessary to understand current law, I have provided relevant historical material, particularly on the growth of the estates system, the history of slavery and of relations between the United States and American Indian nations, and the history of governmental distribution of public lands.

In certain respects, the organization and scope of materials in this book differ from that in other property casebooks. It may be helpful to provide here a brief explanation of the pedagogical philosophy animating the book.

Property in Social Context

Property law concerns the relations among people regarding the control, use, and transfer of valued resources. *Real property* refers to legal rights regarding land and structures on the land, especially buildings. *Personal property* refers to legal rights both in movable objects, such as cars, furniture, or musical instruments, and in intangible resources, such as bank accounts,

trademarks, stocks and bonds, business goodwill, jobs, pensions, or Social Security benefits.

Property law determines both the initial allocation of entitlements and the scope of those entitlements. These issues often shade into each other since property rights are never absolute; every right is limited by the rights of others. For example, when a property owner opens a restaurant, she is legally obligated not to discriminate on the basis of race. Her general right to exclude nonowners from the property is therefore limited by competing public rights of access in others.

Property rights involve many different kinds of *interests* and *social contexts*. Moreover, the *extent of legal protection* varies depending on the interest being protected and the context in which social conflict about the interest arises. Those contexts include social relations among neighbors, between landlords and tenants, between property owners and government officials, between developers and homeowners, between condominium associations and unit owners, and between neighboring communities.

Because I believe property doctrines should be understood in the social context in which they operate, I have adopted a variety of overlapping organizational principles. Some inform the organization of the book as a whole, others structure the division of chapters within each of the four parts of the book, and still others organize the presentation of doctrines within chapters.

First, because property doctrines serve particular *purposes*, it is useful to focus on (1) the *social problems* the rules are intended to address; (2) the *interests* or *needs* the rules are intended to protect; (3) the *incentives* the rules are intended to create and the *behavior* they are intended to induce or inhibit; and (4) the *social relationships* the rules are intended to shape. Legal doctrine can be understood as addressing a social problem, fulfilling a client's needs, controlling behavior, or shaping social relationships.

One way to think about legal problems is to focus on the way lawyers approach them in practice. Thus, many of the materials in the book are organized in terms of a factual situation and the needs of a client. In determining which rules of law are relevant to the client's problem, traditional doctrinal categories might or might not cohere with the sources of law the attorney needs to consult. Suppose a client who owns a shopping mall has had problems with high school kids hanging out at the mall and bothering the customers. The owner wants to know whether the teenagers can be excluded from the mall unless they are clearly shopping or with an adult. The problem involves drawing lines between the owner's right to exclude others and the public's rights of access to commercial property open to the public. Answering the question requires inquiry into the various laws that accommodate these competing interests, such as the common law of trespass, federal and state statutes governing public accommodations, and federal and state constitutional provisions governing free speech rights. Thus, Chapter 2, which addresses this question, includes common law and statutory and constitutional law relevant to the problem.

Second, it is sometimes useful to categorize property doctrines by the classical distinctions between (1) legal relations among persons in the absence of agreement (tort), (2) laws interpreting and regulating agreements (contractual relationships), and (3) legal relations between property holders and the state (public law). This classical division of tort, contract, and public law is conceptually useful to approach the various ways that property rights are structured by both government regulation and private ordering. For example, Part 2 begins with chapters about trespass and nuisance involving relations among persons in the absence of agreement (a traditional focus of tort law); these are followed by chapters on servitudes and future interests (land use agreements) and a concluding chapter on zoning (direct government regulation of land use). At the same time, some public law doctrines are included *within* each chapter when they are necessary to understand contemporary approaches to the legal issues under discussion. Thus, the trespass materials in Chapter 2 include public accommodations statutes and constitutional free speech rights; the nuisance materials in Chapter 3 include an introduction to building codes.

Third, because property doctrines operate differently in different *social settings*, they should be understood in the social context in which they are relevant. In this way I have structured materials that focus on (1) *residential housing*, including landlord-tenant law, condominiums, real estate transactions, and fair housing laws (all of Part 3); (2) *family property*, including issues of child support, divorce, unmarried couples, discrimination against nontraditional families, and inheritance (Chapter 11); and (3) *business property*, addressing special issues that arise in the context of both complex commercial real estate transactions and intangible property in ongoing business interests, including an introduction to partnerships, corporations, and franchises (Chapter 12). The separation and juxtaposition of materials on residential housing, family property, and business property is intended to encourage students to think about both the similarities and differences in the ways in which property law functions to enable and structure legal relationships among persons.

Because the book is organized around overlapping factors, some cases are included in more than one place. I have included cross-references to the single place in the book where the full text of a case and accompanying note material appear. Such material could appropriately be taught in the context of any of the chapters in which it appears. Different issues are likely to become salient depending on the context in which the material is presented.

Preparation for the Practice of Law

In addition to exploring the competing interests and various sources of law involved in legal problems, the materials attempt to replicate both the certainty and the ambiguity lawyers face when applying the law in practice. Some issues are clearly resolved by current laws, and the lawyer can advise

clients with confidence about the legal consequences of their actions or situation. Uncertainty arises when an issue involves a gap, conflict, or ambiguity in the law. Much legal education has traditionally combined instruction in basic doctrine with the forms of legal reasoning necessary to handle areas of uncertainty. The line between certainty and uncertainty is the focus of many law courses. Wisdom, of course, lies in knowing the difference.

Lawyers are able to find with relative ease the *black-letter rules* generally considered relevant to a particular legal problem. They also know the basic building blocks of *legal argument*. The difficulties arise in applying those rules, finding and handling gaps, conflicts, and ambiguities, learning how to make arguments persuasive, drawing analogies to other areas of doctrine, and developing new arguments. The materials in this book enable students to practice the skills they will need as practitioners by conveying basic rules and arguments and then engaging students in the typical lawyering tasks of predicting, counseling, advocacy, and adjudication.

Rules. Legal doctrine is a crucial component of any field of law. Many basic rules of property law are technical and intricate; often they invoke arcane terminology. At the same time, the basic structure of these rules is often far less complicated than many law students and lawyers assume. I strongly believe that introductory property law casebooks should contain adequate, clear explanations of basic doctrines and terms. It should not be necessary for students to consult commercial outlines and treatises for this purpose. In this book, basic doctrines are explained either in the principal cases or in the notes following them. It may be presumed that the doctrines explicated in the principal cases represent the approach the majority of courts would take. When the principal cases present minority approaches, the notes following the cases make this clear; they also explain the majority rule or the nature of the disagreement among jurisdictions.

Arguments. It is possible to systematize — and to teach — some basic building blocks of legal argument in different fields.¹ The materials in this book contain explicit instruction in legal reasoning in three forms: (1) Most of the principal cases include extensive policy arguments justifying the

1. This approach of systematizing legal arguments used in the context of “gaps, conflicts, and ambiguities” was developed by Professor Duncan Kennedy. Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 Md. L. Rev. 563 (1982); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685 (1976). See also James Boyle, *The Anatomy of a Torts Class*, 34 Am. U. L. Rev. 1003 (1985); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 Yale L.J. 997 (1985); Robert Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 Fla. St. U. L. Rev. 196 (1987); Jeremy Paul, *A Bedtime Story*, 74 Va. L. Rev. 915 (1988); Joseph William Singer, *A Pragmatic Guide to Conflicts*, 70 B.U. L. Rev. 731 (1990).

result reached. (2) Many cases also include excerpts from dissenting opinions so that students may learn about the arguments on the other side that could have been, but were not, accepted by the court. Where there is a disagreement among the states on the law in a particular area, I have often included excerpts from one or more cases that differ from the principal case in their holding or reasoning. Thus, the notes will often contain cases that “go the other way.” Presentation of cases with both policy discussion and dissenting opinions and cases with conflicting results helps teach students about the kinds of arguments that judges find persuasive and about the analytical techniques that lawyers employ. (3) At various points in the book, the text discusses standard arguments and counterarguments on interpretation of law (including statutory interpretation and analysis of precedent) and on supporting policy arguments (including consideration of rights, social utility, legal process, law and economics, institutional roles, and the dilemma of certainty versus flexibility in rulemaking).

Prediction, counseling, advocacy, and adjudication. Given the basic structure of rules and arguments, students are encouraged to seek and explore the difficult interpretive questions they are likely to face in the practice of law. Three techniques are employed: First, the notes following the principal cases often focus on areas of disagreement or development in the law. Sometimes they address ambiguities in the elements of a particular claim. Other times they explore disagreements among jurisdictions on how to adjudicate the problem, often by noting cases that reach an opposite conclusion. The questions contained in the notes focus on issues of fundamental importance that provide a useful focus for reflection and discussion. I have not, in general, provided long lists of questions. In my experience, students are likely to skip or skim laundry lists of questions in preparing for class. It is preferable to focus attention by more targeted and selective questions.

Second, the material is structured so that students and teachers can view each case within each chapter as relevant precedent for the others. For example, Chapter 3 covers a variety of settings in which land use by one property owner interferes with the use or enjoyment of neighboring property. Courts and legislatures have developed a range of approaches in handling this problem. Different rules have developed for problems such as lateral support, subjacent support, access to wellwater and rivers, flooding, light and air, noise, and pollution. Teachers and students might compare the various solutions adopted in these different settings. What justifies different approaches to different kinds of activity or different interests in real property? To what extent should the law be unified to adopt a single standard applicable to all these problems? Is a case concerning subjacent support of land distinguishable from a dispute concerning lateral support of land? Which of the existing rules provides the best model for addressing a new problem, such as a complaint that an owner is allowing her property to be used as a center for the sale or use of illegal drugs? Exploring such questions

fosters discussion of policy arguments about what the rules should be; it also prompts students to consider alternative holdings for the cases, thus teaching them how to distinguish cases and how to generate broad and narrow holdings.

Third, many sections end with problems that resemble both law school examinations and the real-world practice of law. They present fact situations that are similar to the principal cases in crucial ways but that differ in ways that the courts might consider significant. They therefore require students to reexamine the principal cases and to generate alternative readings of them. The problems replicate the experience students are likely to face as lawyers. Lawyers are likely to be presented with situations that fit into established precedents in certain ways but deviate in other ways that may be outcome-determinative. In some cases, attorneys will find no case or statute directly on point. New lawyers are often amazed at how often this happens in practice. In such cases, lawyers must extrapolate from the ways in which courts in their jurisdiction or in other jurisdictions have dealt with analogous problems.

Fourth, in presenting questions and problems, I have adopted a *practical* approach. I have carefully distinguished among different *tasks* lawyers will face. Those tasks include: (1) *predicting* how the rules in force will be applied to a particular situation; (2) *counseling* clients on how to deal with a particular problem, given the rules in force and the costs and uncertainty of enforcing them; (3) *advocacy* of alternative possible interpretations of the rules in force in trial or appellate practice; and (4) *adjudicating* cases by developing normative techniques for deciding cases or proposing the adoption of legislation and then justifying those choices by persuasive argument. It is important to make such distinctions; for example, although it may be possible to predict with great confidence that a certain result will obtain in the courts, it may *also* be possible to come up with strong arguments on both sides of the question, *and* the student may disagree as a normative matter with the result likely to be reached by the courts. Moreover, regardless of how the law applies to a particular situation, the best advice to a client may have little to do with the applicable law; the most effective and least expensive way to handle a landlord-tenant problem or a disagreement between a seller and buyer may be to talk, negotiate, and compromise. At the same time, it is important to note that the rights of the parties will often play a crucial role in determining the relative bargaining power of the parties as they enter such negotiations.

This method — explaining the black letter law and basic structure of legal argument and asking questions about hypothetical problems that constitute hard cases or arguably distinguishable situations — is intended to make legal education congruent with the practice of law. In the real world, lawyers research the law and determine the basic existing doctrine; they then must apply that doctrine to a new fact situation handed to them by their client. The application of prior law to the new fact situation is often likely

to be difficult. The presentation of materials is intended to mimic the actual practice of law, enabling the students to learn and practice the skills they will need as lawyers.

Statutory Interpretation and Common Law Analysis

Throughout the book, problems are discussed in the various contexts of common law, statutory law, administrative law, and constitutional law. The emphasis, however, is on common law and both federal and state statutes. Because many cases involve statutory interpretation, the book includes a large amount of statutory material to reflect more accurately the world of practice. In addition, the actual text of a number of statutes is included, followed by problems asking students to interpret and apply those statutes to particular client problems. At the same time, a very large chunk of the book deals with common law adjudication, and the doctrinal areas traditionally covered by property casebooks are included. I have added statutes where they are relevant; to make room for this, some common law doctrines are covered in notes rather than in principal cases.

Most first-year courses are largely devoted to analysis of common law adjudication. Yet the actual law that contemporary lawyers confront is, and will continue to be, dominated by statutes. New lawyers are often shocked by the extent to which the problems their clients face involve analysis of statutes. To continue to focus almost exclusively on common law reasoning in the first year gives students what I believe is an outdated message — that the common law is the centerpiece of the legal system and that statutes merely deal with details. For a long time, this has been a false description, both of the legal system as a whole and of the practice of law. Statutes represent a major form of lawmaking. Many scholars believe that the democratic process by which legislation is formed gives it, if anything, more legitimacy than common law doctrines developed by judges. It therefore seems wrong to convey to students that legislation is relatively unimportant in the legal system. The casebook is intended to rectify the traditional bias toward common law by introducing more statutory interpretation without sacrificing attention to common law analysis.

Antidiscrimination Laws

The casebook integrates contemporary antidiscrimination laws in the analysis of property rights and claims. Real property law is vitally affected by statutes promoting fair housing and equal access to public accommodations under federal, state, and local law. Covering these laws in depth serves a variety of goals: (1) it makes property law exciting and interesting; (2) it

provides an important context for learning statutory interpretation; (3) it prepares students for representing real estate developers, businesses, landlords and tenants, sellers and buyers of residential property, banks and lending institutions, and municipalities, given the importance antidiscrimination law plays in the actual work lawyers perform for these clients; and (4) it focuses on the policies underlying property law by highlighting the tension between giving owners freedom to do what they want with their property and promoting social interests in regulating property use such as equal access to the real estate market and dispersal of ownership.

For these reasons, the casebook includes a large amount of material concerning state and federal statutes and common law doctrines that regulate discrimination in access to real property. Chapter 2 includes materials on state and federal statutes prohibiting discrimination on the basis of race, color, national origin, religion, and sex in public accommodations. It also includes material on the public accommodations provisions of the Americans with Disabilities Act of 1990. Chapter 10 is devoted to a detailed analysis of the Fair Housing Act of 1968, as amended by the Fair Housing Amendments Act of 1988, with additional material on state fair housing statutes. The chapter addresses challenges to zoning ordinances and to discriminatory practices in the private housing and real estate market. The kinds of discrimination covered by the statute and included in the casebook are race, sex, familial status (children), and disability. Discrimination based on sexual orientation, marital status, nontraditional family relationships, and economic status are prohibited by some state and local laws and are also covered.

Women's Issues

In developing material for this book, I endeavored to include a wide variety of material on property and gender, especially on the topic of women's access to and control of valued resources. Along with the traditional topics of marital property, the book covers such issues as the applicability of public accommodations laws to "private" clubs that exclude women, child support, Aid to Families with Dependent Children (AFDC), domestic violence restraining-order statutes, unemployment benefits for women who leave work to take care of children, enforceability of restraints on marriage, marital status discrimination, statutes prohibiting discrimination against families with children, the relationship between sex and race discrimination, statutes prohibiting discrimination on the basis of sexual orientation, and nontraditional family relationships.

Current Issues and Recent Cases

Many cases in the book are recent; this promotes a focus on both contemporary social settings and developing areas of the law. Traditional

doctrines are often presented in the context of cases raising questions that are still unsettled or that are important to real estate developers, businesses, homeowners, or landlords and tenants. The materials concern issues that students are likely to read about in newspapers, such as challenges to zoning permit denials for AIDS hospices and group homes for persons with mental retardation, regulation of domestic violence by protective order statutes, and regulation of toxic waste as it affects real estate transactions. The cases address property doctrine in the contexts in which students are likely to address it in their practice; thus, litigation over shopping center leases, condominium complexes, and oil and gas exploration is emphasized more than nineteenth century cases about mills and wild animals.

Scope and Coverage

All the legal doctrines traditionally covered in a basic property law casebook — and included on the bar exam — are covered. In order to make room for more statutory material, some of these doctrines are explained in notes rather than in principal cases. In addition to the traditional topics, this book includes a variety of modern statutes relating to the use or control of property that have not traditionally been emphasized, or even included, in property casebooks. They include, for example, public accommodations statutes, building codes, environmental protection statutes regulating the transfer of land contaminated with toxic waste, antitrust laws regulating anticompetitive covenants in shopping center leases, statutes providing for the eviction of tenants or forfeiture of homes or businesses if real property is used to facilitate illegal drug transactions, statutes providing for the exclusion from the household of a person who has engaged in domestic violence against another member of the household, condominium conversion ordinances, consumer protection legislation applicable to landlord-tenant relationships, and state statutes prohibiting discrimination in the housing market on the basis of marital status, sexual orientation, or economic status. Other topics concern family relationships, including children's claims on family assets (child support) and governmental benefits related to family such as Aid to Families with Dependent Children and unemployment benefits.

I have sometimes referred to property treatises and casebooks as sources of authority for particular legal doctrines or interpretations of those doctrines. For the most part, however, I have cited directly to recent cases for authority for prevailing rules of law. Very few references to the law review literature are included, both to save space and because this book is intended for classroom use and not as a reference guide to the vast amount of excellent legal scholarship that influences the direction of the law in this area. Some articles are mentioned in notes when they helpfully illustrate particular ways to analyze the issues in the cases. Excerpts of articles and books are included to bring an outside perspective to the case material. These excerpts often take issue with the way the principal case was decided; this

structure is intended to help students see the arguments for and against the approach taken in the principal case. In choosing these excerpts and notes, I have not made any effort to be complete; rather, I have appealed to a diverse range of scholars, often providing excerpts from two articles presenting sharply contrasting views on the scope and role of property rights.

Notes on Organization

Zoning. Because of the functional organization of the book, zoning issues are covered in three separate places. Chapter 6, as part of the land use regulation materials, covers basic rules about zoning administration, including zoning appeals, prior nonconforming uses, variances and special exceptions, vested rights, and spot zoning. Chapter 10, on discriminatory practices, addresses challenges to zoning ordinances on the grounds that they discriminate on the basis of race, sex, disability, familial status, or economic status. Chapter 13 addresses claims that ordinances limiting property use constitute regulatory takings of property for which just compensation must be provided.

Marital property. Marital property, including tenancy by the entirety, community and separate property, and equitable distribution on divorce, is covered in Chapter 11, with other materials on family property. Chapter 8 covers other kinds of common ownership of property, including joint tenancy and tenancy in common and condominiums and cooperatives, as well as tenancy by the entirety.

Neighborhood associations. This topic is introduced in Chapter 4 along with material on servitudes and is revisited in Chapter 8 in conjunction with the material on condominium associations.

Antidiscrimination laws. Public accommodations statutes are covered in Chapter 2, with other materials on public rights of access to private property. Chapter 10, on discriminatory practices, includes extended treatment of the federal Fair Housing Act, as well as some materials on state fair housing statutes. It addresses discrimination by private housing providers (discriminatory treatment and disparate impact) and exclusionary zoning ordinances. Anti-discrimination issues are also addressed throughout the book in various places, including in Chapter 4 on servitudes, Chapter 5 on future interests, and Chapter 11 on family property.