PROPERTY LAW

ASPEN CASEBOOK SERIES

PROPERTY LAW

Rules, Policies, and Practices

Eighth Edition

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Wolters Kluwer

Published by Wolters Kluwer in New York.

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Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-1-5438-3853-4

Library of Congress Cataloging-in-Publication Data

Names: Singer, Joseph William, 1954- author. | Berger, Bethany R., author. | Davidson, Nestor M., author. | Peñalver, Eduardo M., 1973- author.
Title: Property law: rules, policies, and practices / Joseph William Singer, Bussey Professor of Law, Harvard Law School; Bethany R. Berger, Wallace Stevens Professor of Law, University of Connecticut School of Law; Nestor M. Davidson, Albert A. Walsh Professor of Real Estate, Land Use and Property Law, Fordham University School of Law; Eduardo Moisés Peñalver, President, Seattle University.
Description: Eighth edition. | New York City: Wolters Kluwer, [2022] | Series: Aspen casebook series | Includes bibliographical references and index. | Summary: "Casebook on Property law for law students; includes notes, questions, and problems" — Provided by publisher.
Identifiers: LCCN 2021042514 (print) | LCCN 2021042515 (ebook) | ISBN 9781543838534 (hardcover) | ISBN 9781543838541 (ebook)
Subjects: LCSH: Property — United States. | LCGFT: Casebooks (Law)
Classification: LCC KF560.S56 2022 (print) | LCC KF560 (ebook) | DDC 346.7304 — dc23
LC record available at https://lccn.loc.gov/2021042514
LC ebook record available at https://lccn.loc.gov/2021042515

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For Martha Minow,
who has made all the difference
JWS

For Caleb Berger,
who because of this project has been flipping through
property books since before he could talk
BB

For Clare Huntington,
who always keeps me climbing higher
NMD

For my grandmother, Yolanda Grave de Peralta Peñalver,
whose loss of property
sparked my interest in the subject
EMP

In memory of
Mary Joe Frug
ז"ל

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

SUMMARY OF CONTENTS

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PREFACE TO THE EIGHTH EDITION

This Eighth Edition has been updated to reflect significant changes in the law of property over the last few years. Those include: (1) important U.S. Supreme Court regulatory takings decisions in *Cedar Point Nursery v. Hassid* and *Murr v. Wisconsin*; (2) *Martin v. Boise*, the 2019 Ninth Circuit case holding that the Eighth Amendment prevents prosecution of homeless people for sleeping on the streets; (3) increasing challenges to businesses excluding people because of race or sexuality; (4) contests over rights to frozen genetic material and inheritance rights of posthumously born children; (5) the spread of the Uniform Partition of Heirs Property Act and the adoption of the Uniform Easement Relocation Act; (6) new trends in the property rights from nonmarital relationships; (7) litigation challenging business closure and anti-eviction orders to address the spread of Covid-19; and (8) the enactment of and challenges to regulations implementing the Fair Housing Act by the Obama, Trump, and Biden administrations. For an area one might have thought settled in a mature, free market economy, these developments provide powerful evidence that property law continues to change with surprising regularity. We have also reorganized and added materials in response to increasing concern over the role that race plays in property law. Finally, we have streamlined a number of notes to facilitate covering subjects in manageable reading assignments.

As in the earlier editions, we have attempted to ensure that students and professors can get a clear and accurate picture of the current law, as well as a thorough understanding of the many disagreements among the states on the applicable rules in force. Some of the rules governing property are arcane and complex, and students should be able to learn them without reading a treatise on the side. At the same time, many of the cases have dissents, and almost all have policy discussion justifying the court's approach. Where no dissents are present and the states disagree about the law, we have made this clear in the note material.

In this edition, as in the past, we have included statutory and regulatory text as principal readings throughout the book. It is critical for first-year students to understand that the law is as much a creature of legislatures and agencies as it is of courts, and this is as true in property as in other areas of the law. We have also presented problems that place students in real lawyering roles so that they can use the materials in the book (principal cases, subsidiary cases, textual explanation of the doctrine,

and policy concerns) to make arguments on both sides of hard cases and to learn both to justify their judgments and to criticize the results reached by the courts and legislatures.

For some of the principal cases, we have listed the exact or approximate address of the property considered in the case. Here is an example, from *Glavin v. Eckman* in Chapter 1:

Map: Aquinnah, Martha's Vineyard, Massachusetts 

This will allow students and professors to go to an Internet map service, such as Google Maps (*http://maps.google.com*) or Bing Maps (*http://www.bing.com/maps/*) to view the property in question. Both Google and Bing Maps have satellite or aerial views that help give a sense of how the property is situated, as well as the surrounding terrain, and Google Earth has other features as well. Some of us project satellite images on a screen in the front of the classroom as we teach these cases, and it seems to help give students a sense of the lay of the land and the relations among the neighboring parcels. It is particularly helpful in understanding cases that involve land use conflicts among neighbors.

Note that cases throughout the book have been edited for succinctness and to focus students on the most relevant discussions. Some deletions of text within cases are noted by an ellipsis (. . .), but the bulk of our elisions in the text, as well as internal case citations and most footnotes, have been deleted without notation. When footnotes are retained in cases, they are renumbered so that footnotes are consecutively numbered in each chapter.

As with any new edition, especially one as thoroughly updated as this one has been, some mistakes surely have crept in. We would be delighted to hear about them or about any other feedback from faculty and students who use this book. Such feedback motivated many of the changes in this edition, and we welcome future suggestions from users of the Eighth Edition. Feel free to write to us at bethany.berger@uconn.edu; ndavidson@law.fordham.edu; eduardo@seattleu.edu; and jsinger@law.harvard.edu.

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5782/2022

A GUIDE TO THE BOOK

Organization of the Book

The book is organized around six broad themes. In Part One, we introduce a basic framework for understanding the balance of rights, limitations, and duties inherent in ownership, using the example of tensions between the right to exclude and the right of access. We then address the primary justifications that have traditionally been invoked to justify property rights, including sovereignty, reward for labor, distributive justice, efficiency, recognition of relationships, possession, and personhood. This part also explores the outer boundaries of ownership by examining how the legal system mediates a variety of resources other than real estate and personal goods, notably ideas, culture, human beings, and human bodies. Many of the most important doctrines in property law focus on relationships between neighbors, and Part Two explores adverse possession, nuisance, zoning, and private agreements between owners (called servitudes) as examples. In Part Three, we explore the myriad ways the law allows property to be divided and shared, both concurrently and over time. These forms of ownership in common include concurrent tenancies, family property, corporate and other entity property, leaseholds, as well as the complex system of estates and future interests we have inherited from early English law. Part Four explores two fundamental aspects of the market for real estate, the role of property law and property lawyers in sales and financing, and the importance of antidiscrimination law. Finally, the book concludes in Part Five highlighting the fundamental tension between the role of the state in both defining and defending property rights. The constitutional law of property, most notably under the takings clause, is a fitting way to return to the themes explored throughout these materials. In all of this, we seek to present a contemporary introduction to the law of property, focusing on various pressing issues of current concern as well as the basic rules governing the property system.

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 their 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 facilitate the smooth operation of the real estate market. Other rules promote fairness or distributive justice, such as 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

1. William Echikson, *Euphoria Dies Down in Czechoslovakia*, Wall St. J., Sept. 18, 1990, at A-26, 1990 WL-WSJ 56114.

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 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.

Formal versus informal sources of rights. Property rights generally have their source in some formal grant, such as a deed, a will, a lease, a contract, or a government grant. However, property rights also arise informally, by an oral promise, a course of conduct, actual possession, a family relationship, an oral gift, longstanding reliance, and social customs and norms. Many of the basic rules of property law concern contests between formal and informal sources of property rights. While the law usually insists on formality to create property rights, it often protects informally created expectations over formally created ones. Determining when expectations based on informal arrangements should prevail over formal ones is a central issue in property law.

The alienability dilemma. It is a fundamental tenet of the property law system that property should be "alienable," meaning that it should be transferable from one person to another. Transferability allows a market to function and enables efficient transactions and property use to occur. It also promotes individual autonomy by allowing owners to sell or give away property when they please on terms they have chosen. This suggests that the law should allow owners to disaggregate property rights as they please. However, if owners are allowed to disaggregate property rights at will, it may be difficult to reconsolidate those rights. If property is burdened by obsolete restrictions, it may be expensive or impossible to get rid of them. Similarly, if property is disaggregated among too many owners, transaction costs may block agreements to reconsolidate the interests and make the property useable for current needs. The property may therefore be rendered inalienable.

Many rules of property law limit contractual freedom to ensure that particular bundles of property rights are consolidated in the same person — the "owner." Consolidating power in an "owner" ensures that resources can be used for current purposes and current needs and allows property to be freely transferred in the marketplace. We therefore face a tension between promoting alienability by consolidating rights in owners and promoting alienability by allowing owners to disaggregate their rights into unique bundles constructed by them.

Contractual freedom and minimum standards. Individuals want to be free to develop human relationships without having government dictate the terms of their association with others. Having the ability to rearrange property rights to create

desirable packages of entitlements will help enable various relationships to flourish. However, there are also bounds to what is acceptable; this is why the law imposes certain minimum standards on contractual relationships. For example, although landlords are entitled to evict residential tenants who do not pay rent, the law in almost every state requires landlords to use court eviction proceedings to dispossess defaulting tenants. These proceedings give tenants a chance to contest the landlord's possessory claim and to have time to find a new place to live, rather than having their belongings tossed on the street and being dispossessed overnight. These limitations on free contract protect basic norms of fair dealing and promote the justified expectations of individuals who enter market transactions.

Social welfare. Granting owners power over property ensures that they can obtain resources to satisfy human needs. It also promotes social welfare by encouraging productive activity and by granting security to those who invest in economic projects. Clear property rights facilitate exchange and lower the costs of transactions by clarifying who owns what. At the same time, owners may use their property in socially harmful ways, and clear property rights may promote harmful, as well as beneficial, actions. Property rights must be limited to ensure that conflicting uses are accommodated to minimize the costs of desirable development on other owners and on the community. Moreover, rigid property rights may inhibit bargaining rather than facilitate it by granting owners the power to act unreasonably, thereby encouraging litigation to clarify the limits on the owner's entitlements. Reasonableness requirements, while less predictable than clear rules, may promote efficient bargaining by encouraging competing claimants to compromise in ways that minimize the costs of property use on others. We need to design rules of ownership and transfer that promote efficiency and social welfare by decreasing the costs of using and obtaining property while maximizing its benefits both to individual owners and to society as a whole.

Justified expectations. In a famous phrase, Jeremy Bentham wrote that "[p]roperty is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it."[2] Owners justifiably expect to use their own property for their own purposes and to transfer it on terms chosen by them. However, because the property use often affects others, it must be limited to protect the expectations of others. Property law protects justified expectations. A central function of property law is to determine what the parties' actual expectations are and when they are, and are not, justified.

Distributive justice. Property rights are the legal form of wealth. Wealth takes many forms, including the right to control tangible assets, such as land and buildings, and intangible assets, such as stocks that give the holder the right to control and derive profit from a business enterprise. In fact, any legal entitlement that benefits the

2. 1 Jeremy Bentham, *Theory of Legislation* 137 (Boston: Weeks, Jordan & Co., R. Hildreth trans. 1840).

right holder may be viewed as a species of property. The rules of property law, like the rules of contract, family, and tax law, play an enormous role in determining the distribution of both wealth and income.

How well is property dispersed in the United States? One expert has noted that "[b]y several measurements, the United States in the late twentieth century led all other major industrial countries in the gap dividing the upper fifth of the population from the lower — in the disparity between top and bottom."[3]

One indicator of the distribution of property is income. Since 1967, income distribution has become increasingly unequal in the United States. The Census Bureau reports that the share of total income going to the top fifth of American households increased from 43.6 percent in 1967 to 51.9 percent in 2019.[4] Within the top fifth of the population, the bulk of this increase was obtained by those at the very top. Between 1979 and 2016, the incomes of the top 1 percent of families rose 226 percent, whereas the bottom 60 percent of families saw increases of 47 percent in income.[5]

The distribution of income also varies according to race, gender, and age. The median income of households in the United States was $68,753 in 2019; half of all households received more and half less than that amount. However, differences are substantial along racial lines. While the median income of white, non-Hispanic families was $76,057 in 2019, the median income for African American households was only $45,438 and that of Latino households was $56,113. The median annual household income of American Indians and Native Alaskan households for 2015-2019 was $43,825.[6]

Poverty is similarly unequally distributed by race. While 10.5 percent of all persons were poor by federal standards in 2019, only 7.3 percent of non-Hispanic whites were poor; by comparison, 18.6 percent of African Americans and 15.7 percent of Latinos fell below the poverty line, as were 23 percent of American Indians and Native Alaskans.[7]

Although the gap in incomes between men and women has narrowed over the last quarter-century, men still earn more than women on average. In 2019, men who

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3. Kevin Phillips, *The Politics of Rich and Poor: Wealth and the American Electorate in the Reagan Aftermath* 8 (1990).

4. Unless otherwise specified, data in this section come from Jessica Semega, Melissa Kollar, Emily A. Shrider & John F. Creamer, U.S. Census Bureau, *Income and Poverty in the United States: 2019* (Sept. 2020), *available at https://www.census.gov/content/dam/Census/library/publications/2020/demo/p60-270.pdf*. Almost all of these statistics come from a decade of uninterrupted growth before the COVID-19 pandemic, which likely had a significant impact.

5. Chad Stone, Danilo Trisi, Arloc Sherman & Jennifer Beltran, *A Guide to Statistics on Historical Trends in Income Inequality,* 10 (Center on Budget and Policy Priorities, January 2020), *available at https://www.cbpp.org/sites/default/files/atoms/files/11-28-11pov_0.pdf.*

6. Data for American Indian/Alaska Native income come from Gloria Guzman, U.S. Census, Household Income by Race and Hispanic Origin: 2005-2009 and 2015-2019, American Community Survey Briefs (Dec. 2020).

7. Statistics regarding American Indians/Alaska Natives are from U.S. Census Bureau, 2019: 1-Year Estimates Selected Population Profiles, TableID: S0201.

worked full time earned $57,456 at the median, while the median earnings for women who worked full time was only $47,299, or 81.6 percent of male earnings.

Children are more likely to be poor than adults, and some children are very likely to be poor. Although 10.5 percent of the population fell below the poverty line in 2019, 17 percent of children did so; moreover, 31 percent of African American children, 30 percent of American Indian/Alaska Native, and 23 percent of Hispanic children were living in poverty.[8] Children who live in households without an adult male are extremely likely to be poor. While only 6.4 percent of children in families of married couples were poor in 2019, 36.5 percent of children living in female-headed households were poor. While the median income of married couples was $102,308 in 2019, the median income of female-headed households was only $48,098, and the median income of male-headed households was $69,244.

Inequalities of both income and wealth are somewhat alleviated by transfer payments in the form of public assistance. Until the 1970s, elderly persons were more likely to be poor than the non-elderly. By 1990, however, the poverty rate for persons over 65 was less than that for the rest of the population, and relatively few elderly persons are among the homeless and extremely poor. This change in the position of the elderly was the result of public spending in the form of Social Security pensions, Medicare, and housing subsidies.[9] In 2019, the poverty rate for those 65 and older was 8.9 percent compared to 9.4 percent for those between 18 and 64.

Wealth data show even greater inequality than income data. Far more than income, wealth determines financial security and economic prospects in the United States.[10] In 2020, the top 1 percent of U.S. households owned 31 percent of U.S. family net wealth while the top 10 percent owned nearly 70 percent of all net wealth.[11] The bottom 50%, meanwhile, had just one percent of the nation's wealth.[12] The racial disparities are equally stark. In 2019, the median net worth of Black households was only 12 percent that of non-Hispanic White households, while the median net worth of Hispanic households was only 21 percent.[13] Both figures reflect substantial gains since the years after the 2008 recession, but it is unclear how the COVID-19 pandemic will affect them.

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8. National Kids Count, Children in poverty by race and ethnicity in the United States (Sept. 2020), *available at https://datacenter.kidscount.org/data/tables/44-children-in-poverty-by-race-and-ethnicity#detailed/1/any/false/1729,37,871,870,573,869,36,868,867,133/10,11,9,12,1,185,13/324,323.*

9. Peter H. Rossi, *Down and Out in America*: *The Origins of Homelessness* 193 (1989).

10. Alfred Gottschalck, Marina Vornovytskyy & Adam Smith, U.S. Census Bureau, *Household Wealth in the U.S.: 2000 to 2011* (2013).

11. Michael Batty, Jesse Bricker, Josoph Briggs, Sarah Friedman, Danielle Nemschoff, Eric Nielsen, Kamila Sommer, and Alice Henriques Volz, Nat'l Bureau of Econ. Research, The Distribution of Financial Accounts of the United States (Dec. 2020), https://www.nber.org/system/files/chapters/c14456/c14456.pdf..

12. Ana Hernandez Kent & Lowell Ricketts, St. Louis Fed. Reserve, Has Wealth Inequality in America Changed over Time? Here Are Key Statistics (Dec. 2020), https://www.stlouisfed.org/open-vault/2020/december/has-wealth-inequality-changed-over-time-key-statistics.

13. *Id.*

Individual versus shared ownership. Property may be owned and controlled by individuals; the history of the development of land law in England, for example, may be described as a shift from control over property by feudal lords and family inheritance restrictions to control by individual owners. But shared ownership continues to characterize property, perhaps increasingly so. In marriages and other intimate relationships, for example, ownership of homes and bank accounts is typically in the name of both partners. The assets of Americans, moreover, increasingly consist of investments in corporate stocks and ownership of condominiums or other common interest developments, both forms of property in which ownership and control are shared with many individuals. In addition, because ownership rights affect others, both statutory and common law recognize rights in the community to control property to some degree. The recognition of shared rights in property may differ in different cultures and legal systems. Compared to U.S. property law, for example, continental European systems may do more to recognize and facilitate common ownership, while English and Scottish legal systems recognize greater rights in the community to traverse and enjoy private lands.[14]

One persistent conflict between shared and individualist conceptions of property concerns American Indian nations, the original possessors of land in the United States. With more than 550 federally recognized tribes and scores of unrecognized tribes, it is difficult to generalize about American Indian land use systems, either in the past or the present. Nonetheless, many Native peoples recognized shared and community ownership more explicitly than did European American settlers. Native individuals and families did own property and land was bought and sold, but indigenous property systems often had a robust concept of shared use rights. While a particular family might use a piece of land to plant crops, for example, this would not preclude other tribal members from entering or gathering nonagricultural food on such lands. Much land, moreover, was considered to be owned by a tribe in common, and open to hunting, fishing, or the like by the tribe as a whole. (Note, however, that this sense of shared rights is not so different from rights of villagers to graze on common or uncultivated lands in early England, discussed in Chapter 7, §2.1, or the "right to roam" on unfenced land recognized for much of American history, discussed in Chapter 1, §1.)

More radically, for most indigenous peoples, land was not fungible — it could not simply be replaced with similar land elsewhere. Rather, specific areas were deeply connected to the history and spiritual identity of a tribe. For many Native peoples even today, particular areas may be "the source of spiritual origins and sustaining myth which in turn provides a landscape of cultural and emotional meaning. The land often determines the values of the human landscape."[15] The community, therefore, could

14. *See* Michael Heller & Hanoch Dagan, *The Liberal Commons*, 110 Yale L.J. 549, 610-611 (2001); John A. Lovett, *Progressive Property in Action: The Land Reform (Scotland) Act 2003*, 89 Neb. L. Rev. 739 (2011); Jerry L. Anderson, *Britain's Right to Roam: Redefining the Landowner's Bundle of Sticks*, 19 Geo. Intl. Envtl. L. Rev. 375 (2007).

15. Frank Pommersheim, *The Reservation as Place: A South Dakota Essay*, 34 S.D. L. Rev. 246, 250 (1989); *see also* Rebecca Tsosie, *Land, Culture and Community: Reflections on Native Sovereignty and Property in America*, 34 Ind. L. Rev. 1291, 1302-1303 (2001).

not be excluded from such areas without doing violence to the tribe and its identity. These differences in emphasis on shared versus individual rights in U.S. and Indian property systems were the source of much conflict, as well as repeated efforts by the federal government to inculcate a love of individual property as a tool to encourage tribal assimilation and dissolution.[16]

Normative Approaches

How should courts and legislatures adjudicate conflicting property claims? Various approaches can be used to conceptualize property rights and to adjudicate conflicts among property claimants.[17] Here are brief descriptions of the most common approaches.[18]

Positivism and legal realism. Positivist theories identify law with the "commands of the sovereign" or the rules promulgated by authoritative government officials for reasons of public policy.[19] Those rules may be intended to protect individual rights, promote the general welfare, increase social wealth, or maximize social utility. Judges are therefore directed to apply the law, as promulgated by authoritative government lawmakers, and to exercise discretion where there are gaps, conflicts, or ambiguities in the law while respecting the need for consistency with the letter and spirit of preexisting laws. Jeremy Bentham wrote that the "idea of property consists in an established expectation . . . of being able to draw . . . an advantage from the thing possessed."[20] He believed that "this expectation, this persuasion, can only be the work of law. It is only through the protection of law that I am able to inclose a field, and to give myself up to its cultivation with the sure though distant hope of harvest . . . ."[21] Property exists to the extent the law will protect it. "Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases."[22]

16. *See, e.g.,* Chapter 13, §5.1 (cases and materials on the allotment policy, through which the United States forcibly divided tribal land among individual households).

17. For collections of scholarly approaches to property, see *Perspectives on Property Law* (Robert C. Ellickson, Carol M. Rose & Bruce A. Ackerman eds., 4th ed. 2014); *A Property Anthology* (Richard H. Chused ed. 2d ed. 1997).

18. Many, if not most, scholars combine various approaches. *See, e.g.,* Stephen R. Munzer, *A Theory of Property* (1990) (adopting a pluralist perspective including justice and equality, desert based on labor, and utility and efficiency); Carol M. Rose, *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (1994) (combining economic analysis, justice-based arguments, and feminist legal theory); Joseph William Singer, *Entitlement: The Paradoxes of Property* (2000) (using both justice and utilitarian considerations, as well as narrative theory, feminism, critical race theory, and critical legal studies).

19. John Austin, *Lectures of Jurisprudence* (1861-1863); H.L.A. Hart, *The Concept of Law* (1961).

20. Bentham, *supra* note 2, at 138.

21. *Id.*

22. *Id.* at 139.

Positivists separate law and morals; they emphasize that, although moral judgments may underlie rules of law, they are not fully or consistently enforced by legal sanctions. Positivism was adopted by Progressive-era judges and scholars such as Oliver Wendell Holmes, who suggested analyzing legal rules in the way a "bad man" would. Such a person would not be interested in the moral content of the law but would simply want to predict what legal sanctions would be imposed on him if he engaged in prohibited conduct.[23] This approach was adopted by legal realist scholars of the 1920s and 1930s such as Karl Llewellyn, who argued that the law is what officials will do in resolving disputes.[24]

All lawyers are positivists in some sense because the job of advising clients necessarily entails identifying the rules of law that have been explicitly or implicitly adopted by authoritative lawmakers and predicting how those rules will be applied to the client's situation. Judges may also see their jobs as the enforcement of existing law and leave the job of amending law to legislatures. On the other hand, determining whether an existing rule was intended to apply to a particular situation requires judgment, as well as techniques of *statutory interpretation* and analysis of *precedent*, and a conception about the proper role of courts in the lawmaking process.

Justice and fairness. Positivism has been criticized by scholars who argue that ambiguities in existing laws must be filled in by judges, and that judges should not exercise untrammeled discretion in doing so. Rather, they should interpret gaps, conflicts, and ambiguities in the law in a manner that protects individual rights, promotes fairness, or ensures justice.

Rights theorists attempt to identify individual interests that are so important from a moral point of view that they not only deserve legal protection but may count as "trumps" that override more general considerations of public policy by which competing interests are balanced against each other. Such individual rights cannot legitimately be sacrificed for the good of the community.[25] Some *natural rights* theorists argue that rights have roots in the nature of human beings or that they are natural in the sense that people who think about human relationships from a rational and moral point of view are bound to understand particular individual interests as fundamental.[26] Other scholars, building on Immanuel Kant, ask whether a claim that an interest should be protected could be *universalized* such that every person in similar circumstances would be entitled to similar protection. Still others build on the *social contract* tradition begun by John Locke and Thomas Hobbes and ask whether individuals would choose to protect certain interests if they had to come to agreement in a suitably defined decision-making context. John Rawls, for example, asks what principles

23. *See* Oliver Wendell Holmes, *The Path of the Law*, 8 Harv. L. Rev. 1 (1894).

24. Karl Llewellyn, *The Bramble Bush* (1930).

25. Ronald Dworkin, *Law's Empire* (1986); Ronald Dworkin, *Taking Rights Seriously* (1978); Charles Fried, *Right and Wrong* (1978); Allan Gewirth, *The Community of Rights* (1996); Jeremy Waldron, *The Right to Private Property* (1989).

26. *See* Robert Nozick, *Anarchy, State, and Utopia* (1974); Judith Jarvis Thompson, *The Realm of Rights* (1990).

of justice would be adopted by individuals who did not know morally irrelevant facts about themselves, such as their race or sex.[27]

Some theorists focus on *desert*. John Locke argued that labor is the foundation of property. "Whatsoever then he removes out of the state that nature has provided and left it in, he has mixed his labor with, and joined to it something that is his own, and thereby makes it his property."[28] Other theorists focus on the role that property rights play in developing individual *autonomy*.[29] Hegel believed that property was a way that human beings constituted themselves as people by extending their will to manipulate the objects of the external world.[30] Professor Margaret Jane Radin, for example, has argued that "to be a *person* . . . an individual needs some control over resources in the external environment."[31] She distinguishes between forms of property that are important for the meaning they have to individuals (personal property such as a wedding ring) and property that is important solely because it can be used in exchange (fungible property such as money and investments).[32]

Other scholars focus on satisfying *human needs* or ensuring *distributive justice*. Nancy Fraser has argued that an important way to think about property rights is to focus on the ways we define people's needs and the ways in which the legal system does or does not meet those needs.[33] Frank Michelman has similarly argued that a system of private property requires, by its very nature, that property be widely dispersed. If all property were owned by one person, that person would be a dictator. Private property implies wide availability. It therefore entails a compromise between the principle of protecting possession and promoting widespread distribution.[34]

Utilitarianism, social welfare, and efficiency. Utilitarians focus on the *consequences* of alternative legal rules. They compare the costs and benefits of alternative property rules or institutions with the goal of adopting rules that will maximize *social utility* or *welfare*. Some scholars in the law and economics school of thought measure social utility by the concept of economic *efficiency*. Efficiency theorists measure costs and benefits by reference to what people are willing and able to pay for entitlements, given their resources.[35]

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27. John Rawls, *A Theory of Justice* (1971). *See also* Thomas M. Scanlon, *What We Owe Each Other* (1998).

28. John Locke, *Second Treatise of Government* 17-18 (Bobbs-Merrill ed. 1952) (originally published in 1960).

29. Richard A. Epstein, *Simple Rules for a Complex World* 53-70 (1995).

30. Georg Wilhelm Friedrich Hegel, *Philosophy of Right* 40-41 (T. Knox trans. 1942).

31. Margaret Jane Radin, *Property and Personhood*, 34 Stan. L. Rev. 957 (1982).

32. Margaret Jane Radin, *Market-Inalienability*, 100 Harv. L. Rev. 1849 (1987).

33. Nancy Fraser, *Unruly Practices, Power, Discourse, and Gender in Contemporary Social Theory* (1989).

34. Frank Michelman, *Possession and Distribution in the Constitutional Idea of Property*, 72 Iowa L. Rev. 1319 (1987). *See also* Waldron, *supra* note 25.

35. *See generally* Richard A. Posner, *Economic Analysis and Law* (9th ed. 2014); Steven Shavell, *Foundations of Economic Analysis of Law* (2004).

Individual property rights are thought to increase efficiency by encouraging productive activity and by granting security to those who invest in economic projects. Clear property rights also facilitate exchange by clarifying who owns what. They therefore create incentives to use resources efficiently.[36] On the other hand, Carol Rose has argued that clear definitions of property rights may be overly rigid, upsetting settled expectations and reliance interests.[37] This is why property rights are often defined by flexible standards, such as a reasonableness requirement, that adjust the relations of the parties to achieve a fair and efficient result. Rose has also argued that common ownership is sometimes the most efficient way to manage property.[38] Frank Michelman and Duncan Kennedy have also argued that efficiency requires a mixture of private property, sharing, and deregulation.[39] Cass Sunstein has noted that preferences are partially shaped by law and that cognitive biases may affect individuals' perceptions of their preferences.[40]

Social relations. Social relations approaches analyze property rights as relations among persons regarding control of valued resources. Legal rights are correlative; every legal entitlement in an individual implies a correlative vulnerability in someone else, and every entitlement is limited by the competing rights of others.[41] This analysis was developed by pragmatic legal scholars — called "legal realists" — from the 1920s through the 1930s. Property rights are interpreted as delegations of sovereign power to individuals by the state; these rights should therefore be defined to accommodate the conflicting interests of social actors.[42] Current social relations theorists have broadened the scope of this analysis by examining the role property rights play in structuring social relations and the ways in which social relations shape access to property.[43]

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36. Shavell, *supra* note 35, at 11-23. *See also* Garrett Hardin, *The Tragedy of the Commons*, reprinted in *Economic Foundations of Property Law* 4 (Bruce Ackerman ed. 1975); Harold Demsetz, *Toward a Theory of Property Rights*, 57 Am. Econ. Rev. 347 (1967).

37. Carol Rose, *Crystals and Mud in Property Law*, 40 Stan. L. Rev. 577 (1988).

38. Carol Rose, *The Comedy of the Commons: Customs, Commerce, and Inherently Public Property*, 53 U. Chi. L. Rev. 711 (1986). *See also* Frank Michelman, *Ethics, Economics, and the Law of Property*, 24 Nomos: Ethics, Economics, and the Law 3 (1982) (arguing that the institution of property, by its nature, requires a large amount of cooperative activity). *See also* Anna di Robilant, *The Virtues of Common Ownership,* 91 B.U. L. Rev. 1359 (2011).

39. Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 Hofstra L. Rev. 711 (1980).

40. Cass R. Sunstein, *Free Markets and Social Justice* (1997).

41. Wesley Hohfield, *Some Fundamental Legal Conception as Applied in Judicial Reasoning*, 28 Yale L.J. 16 (1913).

42. Walter Wheeler Cook, *Privileges of Labor Unions in the Struggle for Life*, 27 Yale L.J. 779 (1918); Robert Hale, *Bargaining, Duress, and Economic Liberty*, 43 Colum. L. Rev. 603 (1943); Morris Cohen, *Property and Sovereignty*, 13 Cornell L.Q. 8 (1927).

43. Gregory S. Alexander, *Commodity and Propriety: Competing Visions of Property in American Legal Thought, 1776-1970* (1997); C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. Pa. L. Rev. 741 (1986). *See also* Joseph William Singer, *Property as the Law of Democracy*, 63 Duke L.J. 1287 (2014).

These approaches include feminist legal theory, critical race theory, critical legal studies, communitarianism, law and society, deconstruction and cultural studies.

Feminists such as Martha Minow argue that our identities, values, and needs are developed in relation to and in connection with others. The legal system relies on implicit conceptions of social relations and often implicitly treats certain groups or individuals as the norm and others as the exception. She argues that we must become conscious of the ways those underlying assumptions function in both social relations and the legal system.[44] Elizabeth V. Spelman similarly analyzes the implicit assumptions underlying conceptions of human relations. In particular, she focuses on the role that race, class, and gender play in shaping the concepts with which we understand human relations.[45]

These new insights have permeated recent discussions of property law. Property has traditionally been associated with the idea of autonomy within boundaries; for example, we assume that people are generally free to do what they like within the borders of their land. Yet Jennifer Nedelsky has argued that "[w]hat makes human autonomy possible is not isolation but relationship" with others.[46] She proposes that we replace the idea of *boundary* as the central metaphor for property rights with the idea of *relationships*.[47] Social relations approaches assume that people are situated in a complicated network of relationships with others, from relations among strangers, to relations among neighbors, to continuing relations in the market, to intimate relations in the family. Moreover, many of the legal developments of the twentieth century can be described as recognition of obligations that emerge over time out of relationships of interdependence.[48] The relational approach shifts our attention from asking who the owner is to the question of what relationships have been established.[49]

Feminists[50] and critical race theorists have explored the relationship between race, sex, and property.[51] Patricia Williams has written eloquently about the social meaning

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44. Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (1990).

45. Elizabeth V. Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* (1988). *See also* Allison Anna Tait, *The Beginning of the End of Coverture: A Reappraisal of the Married Woman's Separate Estate,* 26 Yale J.L. & Feminism 165 (2014); Martha Minow, *Forgiveness, Law, and Justice,* 103 Cal. L. Rev. 1615 (2015).

46. Jennifer Nedelsky, *Law, Boundaries, and the Bounded Self*, 30 Representations 162, 169 (1990); *see also* Ana de Robilant, *Common Ownership and Equality of Autonomy,* 58 McGill L.J. 263 (2012).

47. Nedelsky, *supra* note 46, at 171-184; *see also* Jennifer Nedelsky, *Reconceiving Rights as Relationships,* 1 Rev. Const. Studies/Revue d'etudes Constitutionelles 1 (1993); Singer, *supra* note 18.

48. Roberto Mangabeira Unger, *The Critical Legal Studies Movement* 83-84 (1983).

49. Joseph William Singer, *The Reliance Interest in Property*, 40 Stan L. Rev. 611, 657 (1988).

50. Martha Albertson Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (1991); Vicki Schultz, *Life's Work*, 100 Colum. L. Rev. 1881 (2000); Reva B. Siegel, *Home as Work: The First Women's Rights Claim Concerning Wives' Household Labor, 1850-1880,* 103 Yale L.J. 1073, 1077 (1994); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, (1860-1930)*, 82 Geo. L.J. 2127 (1994); Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* (2000).

51. *Critical Race Theory: The Cutting Edge* (Richard Delgado ed. 1995).

of race and gender and their relation to power and to property law.[52] Keith Aoki has described the thinking that led to the alien land laws that denied property ownership to Japanese immigrants and provided the precursor to internment during World War II.[53] Alice Kessler-Harris and many other scholars have explored the social factors that determine the unequal wages paid to women and men as well as the relation between those factors and the distribution of property and power based on gender.[54]

Critical legal theorists have explored tensions or contradictions within property theory and law and used marginalized doctrines to argue for reform of property rules and institutions.[55] Communitarians and environmentalists emphasize the importance of community life as well as individual rights and argue that individuals have obligations as well as rights.[56] Law and society theorists investigate the "law in practice" rather than the "law on the books" to determine what norms actually govern behavior in the real world with respect to property.[57] Other scholars have used deconstruction, poststructuralism, or cultural theory to explore the unconscious assumptions underlying property law.[58]

Human flourishing. In recent years, some property theorists have begun to turn to the Aristotelian idea of human flourishing.[59] Human flourishing theories of property are self-consciously pluralist in their normative outlook. Like utilitarian theory, they view property as an institution that (like other legal institutions) ought to be structured to promote human well-being. Unlike utilitarianism, they understand well-being as comprised of a plurality of goods that are both objectively valuable and not fully commensurable with one another. These include goods like health, practical reason, sociability, personhood, and autonomy. These theorists draw on prior work by economists and philosophers in the Aristotelian tradition, such as Amartya Sen and Martha Nussbaum.[60]

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52. Patricia Williams, *Fetal Fictions: An Exploration of Property Archetypes in Racial and Gendered Contexts*, 42 Fla. L. Rev. 81 (1990).

53. Keith Aoki, *No Right to Own? The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment,* 40 B.C. L. Rev. 37 (1998); *see also* Allison Brownell Tirres, *Property Outliers: Non-Citizens, Property Rights and State Power,* 27 Geo. Immigr. L.J. 77 (2012).

54. Alice Kessler-Harris, *A Woman's Wage* (1990).

55. Singer, *supra* note 18.

56. Mary Ann Glendon, *Rights Talk* (1991); Avishai Margalit, *The Decent Society* (1998); Jedediah Purdy, *For Common Things: Irony, Trust, and Commitment in America Today* (1999). *See also* Nadav Shoked, *The Duty to Maintain,* 64 Duke L.J. 437 (2014).

57. Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (1991); Abraham Bell & Gideon Parchomovsky, *Property Lost in Translation,* 80 U. Chi. L. Rev. 515 (2013) (discussing how localized property norms may be more effective at tailoring a community's economic needs consistently with its ideological preferences and cultural heritage).

58. Jeanne Lorraine Schroeder, *The Vestal and the Fasces: Hegel, Lacan, Property, and the Feminine* (1998).

59. *See* Gregory S. Alexander & Eduardo Moisés Peñalver, *An Introduction to Property Theory*, ch. 5 (2012).

60. *See, e.g.*, Martha C. Nussbaum, *Women and Human Development* (2000); Amartya Sen, *Development as Freedom* (1999); Amartya Sen, *Commodities and Capabilities* (1985).

Libertarian and progressive approaches to property. Property is not only an intensely interesting subject but also an intensely debated one. As much or more than another subject typically covered in the first year of law school, property law is likely to elicit disagreement between libertarians who hope to minimize government regulation of property and progressives who hope to promote more equal opportunities to acquire property. The text will incorporate explicit considerations of these alternative perspectives, as well as the contrast between approaches focused on the normative idea of economic efficiency and approaches focused on norms of liberty, fairness, justice, and democracy. Those who would like background reading may look to Richard Epstein's books and the articles of Eric Claeys[61] for excellent introductions to the libertarian perspective and to the recent Symposium in the Cornell Law Review for an introduction to the progressive approach.[62]

61. *Compare* Epstein, *supra* note 29; Richard Epstein, *Takings: Private Property and the Power of Eminent* Domain (1985). Although he is a natural rights theorist and eschews the libertarian label, Professor Eric Claeys has written extensively, and in a sophisticated manner, in a vein that seeks to limit government interference with the rights of owners. *See, e.g.,* Eric R. Claeys, *Virtue and Rights in American Property Law,* 94 Cornell L. Rev. 889 (2009); Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 Cornell L. Rev. 1549, 1669-1671 (2003). *See also* Eric T. Freyfogle, *Property and Liberty,* 34 Harv. Envtl. L. Rev. 75 (2010); Donald J. Smythe, *Liberty at the Borders of Private Law,* 49 Akron L. Rev. 1 (2016).

62. Symposium*: Property and Obligation,* 94 Cornell L. Rev. 743 (2009), *including* Gregory S. Alexander, Eduardo Moisés Peñalver, Joseph William Singer & Laura S. Underkuffler, *A Statement of Progressive Property,* 94 Cornell L. Rev. 743 (2009); Gregory S. Alexander, *The Social-Obligation Norm in American Property Law,* 94 Cornell L. Rev. 745 (2009); Eduardo Moisés Peñalver, *Land Virtues,* 94 Cornell L. Rev. 821 (2009). *See also* Timothy M. Mulvaney, *Progressive Property Moving Forward,* 5 Cal. L. Rev. Circuit 349 (2014); John Lovett, *Progressive Property in Action: The Land Reform (Scotland) Act 2003,* 89 Neb. L. Rev. 739 (2011); André van der Walt, *The Modest Systemic Status of Property,* 1 J.L. Prop. & Soc'y 15 (2014), *available at http://www.alps.syr.edu/journal/2014/11/JLPS-2014-11- vanderWalt.pdf.*

HOW TO BRIEF A CASE AND PREPARE FOR CLASS

Sources of Law

Legal rules are promulgated by a wide variety of government bodies in a hierarchical scheme. The major sources of law in that system include the following:

1. United States Constitution. The federal Constitution is the fundamental law of the land. It was adopted by state constitutional conventions, whose members were elected by (a small subset of) the people.[63] Constitutional amendments are generally passed by Congress and ratified by state legislatures. The Constitution determines the structure of the federal government, including the relations among the executive, legislative, and judicial branches of the federal government, and the relations between the federal government and the state governments. It also defines the powers of the federal government and limits the powers of both the federal government and the states to protect individual rights, including property rights and other rights such as freedom of speech, freedom from unreasonable searches and seizures, equal protection of the laws, and due process.

2. Federal statutes. Legislation is passed by the Congress of the United States and ratified by the president, or passed over the president's veto. Federal statutes address a wide variety of matters relating to property law; examples include the *Fair Housing Act of 1968,* the *Civil Rights Act of 1964,* the Internal Revenue Code, the *Sherman Antitrust Act,* and the *Worker Adjustment and Retraining Notification Act of 1988.*

3. Administrative regulations. Congress may pass legislation creating administrative agencies, such as the Environmental Protection Agency, the Equal Employment Opportunity Commission, the Federal Trade Commission, or the Internal Revenue

63. It is important to note that when the United States Constitution was adopted in 1789, the voting population in the 13 states excluded women, African-American men, American Indians, and white men who owned less than a certain amount of property.

Service; these agencies may have the power to promulgate regulations in a particular field (environmental protection, employment discrimination, or tax law).

4. State constitutions. Each state has its own constitution defining the structure of state government and defining certain fundamental individual rights against the state. In some instances, state constitutions grant greater protection to individual rights than does the federal constitution. For example, a search by the police that is allowed under the fourth amendment to the U.S. Constitution may be prohibited under the New Jersey constitution. Although state constitutions may not grant citizens less protection than provided by the federal constitution, they may grant their citizens more protection by going further than the U.S. Constitution in limiting the power of state officials.

5. State statutes. State statutes are passed by state legislatures with the consent of the governor (or by a supermajority vote over the governor's veto). Many state statutes deal with property law matters such as landlord-tenant legislation, recording acts, civil rights statutes, and regulation of family property on divorce.

6. State administrative regulations. State legislatures, like the federal Congress, may create administrative agencies that have the power to promulgate regulations in limited fields of law. The Massachusetts legislature, for example, has created a Building Code Commission endowed with the power to promulgate and enforce regulations on building construction and materials to protect the public from unsafe structures.

7. Common law. In the absence of any controlling statute or regulation, state courts adjudicate civil disputes by promulgating or applying rules of law. Judicial opinions explain and justify the rules adopted by judges to adjudicate civil disputes. During the first year of law school, most courses focus on common law rules and the process of common law decision making by judges, but property law is as much a statutory and regulatory topic as it is a product of common law decision making.

8. Local ordinances and bylaws. States delegate to local governments such as counties, cities, and towns the power to promulgate ordinances or bylaws in areas of law that include zoning, rent control, schools, traffic, and parking.

Lawyers' Skills

In reading materials and in preparing for class, you should keep in mind three basic tasks that lawyers perform.

1. Counseling. In advising clients, lawyers perform a variety of roles. First, they answer clients' questions about their legal rights. They do so by looking up the law in statutes, regulations, and judicial opinions. In so doing, they may or may not find legal rules that specifically address the question they need to answer. In either case, lawyers must predict how the courts would rule on the question if they had the opportunity to do so. This requires lawyers to make educated judgments about how prior case law will be applied to new fact situations. Second, lawyers counsel clients on how to conform

their conduct to the dictates of the law and how to achieve their goals in a lawful manner. Third, lawyers draft legal documents for clients, including leases, deeds, purchase and sale agreements, bond documents, and employment contracts. Fourth, lawyers negotiate with other parties or their attorneys to settle disputes or to make deals.

2. Advocacy. If a dispute cannot be resolved amicably, one of the parties — called the "plaintiff" — may bring a lawsuit against the other party — called the "defendant" — claiming that the defendant engaged in wrongful conduct that violated the plaintiff's legal rights. To prevail in such a lawsuit, the plaintiff must be able to (a) prove in court by testimony, documentation, or other admissible evidence that the defendant engaged in the wrongful conduct and that the conduct caused the plaintiff's harm, and (b) demonstrate that the defendant's conduct violates a legally protected interest guaranteed to the plaintiff in a way that violates the plaintiff's legal rights. The parties will normally hire attorneys to conduct the lawsuit. Lawyers argue before judges about what the legal rules are governing the dispute. Sometimes the rules in force are clear. Often, however, the rule governing a particular situation is not clear. The rules contain numerous gaps, conflicts and ambiguities, and lawyers are experts in using the open texture of the law to develop plausible competing arguments about alternative possible rules of law to govern the situation. The attorneys for each side engage in advocacy of alternative possible rules of law, both in written arguments called "briefs" and in oral arguments before judges. In these settings, lawyers attempt to persuade judges to interpret existing rules or to create new legal rules in ways that favor their clients' interests. Lawyers must therefore learn the kinds of arguments judges find persuasive in interpreting and in modernizing the rules in force. Lawyers may also represent clients before legislative committees considering the passage of legislation.

3. Decision making. Finally, it is important to remember that the judges who decide cases are also lawyers. Their role is to adjudicate the cases before them by choosing the applicable legal rules to govern the dispute and others like it in the future. Similarly, legislatures promulgate statutes regulating conduct and resolving conflicts among competing interests. It is also important for you as a participant in the legal system to develop your own views about the wisdom and justice of our legal institutions and rules. Legal education teaches us to consider both sides of important contested questions of law before reaching a judgment about the proper outcome of the dispute. This does not mean we should be indifferent to what those outcomes are or that we should not criticize the rules in force. Your ability to argue for and against a position does not mean that you cannot make up your mind or present persuasive arguments to justify the result you reach; it means simply that your judgment about right and wrong should be true to the complexity of your own moral beliefs and that it is important to recognize what is lost, as well as what is gained, by any choice.

Reading Cases

Rules of law. In researching the law, attorneys might (1) find a rule of law that clearly defines the parties' respective rights; (2) find no rule of law directly on point

(a gap in the law); (3) find a rule of law that does not clearly answer the question (an ambiguity in an existing rule); or (4) find two or more rules of law that arguably govern the dispute (a conflict among possibly applicable rules). Moreover, attorneys might find rules of law applying to situations that are arguably analogous to the case at hand. Lawyers find and exploit the gaps, conflicts, and ambiguities in the law to attempt to define the law in ways that benefit their clients.

In preparing for class, you should try to identify the rule of law — the general principle — each side in the case would like the court to promulgate. Ask yourself: What rule of law did the plaintiff urge the court to adopt? What rule of law did the defendant urge the court to adopt?

This is harder than it seems. Sometimes the parties' proposed rules of law are described in the judicial opinion, sometimes not. In either event, you must ask whether it would be wise to argue for a broad rule of law or a narrow one. For example, one might argue for a broad, rather vague, rule of law: "Non-owners are privileged to enter property when their activity will further a significant public policy." Or one might argue for a narrow rule of law, tied very closely to the facts of the case: "Lawyers and physicians working for agencies funded by the federal government may enter property to give professional assistance to migrant farmworkers." Similarly, an owner might argue for a broad rule of law granting owners the right to exclude non-owners under all circumstances, or she might argue for a narrower rule granting owners the right to exclude non-owners only if the owner can show just cause. It is up to you to identify the different ways each side might have framed its proposed rules of law.

Arguments

After identifying possible rules of law for each side, you should ask what arguments the parties might have given to justify adopting their proposed rules, as well as what arguments they could have given against the rule proposed by the other side. These arguments should include considerations about the fairness of the proposed rules to the parties: Which rule better protects individual rights? You should also consider the social consequences of the competing rules: Which rule better promotes the general welfare?

Briefing Cases

In preparing for class, at least at the beginning, you should brief your cases. This means writing an outline of the important elements of the decision. These elements include the following.

1. Facts. Who did what to whom? What is the relationship between the parties? What is the wrongful conduct the plaintiff claims the defendant engaged in, and how did it harm the plaintiff? What is the dispute between the parties about?

2. Procedural history. How did the courts below rule on the case? First, how did the trial court resolve the matter? Who won, and why? Did the party who lost in the trial court appeal an adverse ruling of law to an intermediate appellate court? If so,

how did the appellate court rule, and why? Did one of the parties appeal the result in the appellate court to the state supreme court? What court issued the opinion you are reading — the state supreme court or some lower court? (Note that because cases in this and other casebooks have been edited, some portion of the procedural history may be omitted from the text reprinted in the book.)

3. Relief sought and judgment. What relief did the plaintiff seek? Did she ask for (a) a declaration of her rights (a declaratory judgment); (b) an injunction ordering the defendant to act or not to act in certain ways; or (c) damages to compensate the plaintiff for the harm? What was the judgment of the court issuing the opinion you are reading? Did it grant a declaratory judgment, issue an injunction, or order the payment of damages? Did it remand the case to a lower court for further proceedings, such as a new trial?

4. Legal question, or rule choice. What legal question or questions did the court resolve? To answer this, you should determine what rule of law the plaintiff favored and what rule of law the defendant favored. What different legal rules did the court consider? What rules should it have considered? What rule of law would you propose if you were the plaintiff's attorney? The defendant's attorney?

5. Arguments and counterarguments. Place yourself in the position of the plaintiff's lawyer. What arguments would you give to persuade the court to adopt the rule of law favored by your client, and what arguments can you give against the rule of law favored by the defendant? Next, place yourself in the position of the defendant's lawyer. What arguments would you give to persuade the court to adopt the rule of law favored by your client, and what arguments can you give against the rule of law favored by the plaintiff?

a. Precedential arguments. These arguments appeal to existing rules of law. You may argue that an ambiguous rule of law — such as a rule creating a reasonableness standard of conduct — entitles your client to win. You may also argue that one of two conflicting rules of law governs the fact situation in your case or that a rule of law applies by analogy. To do either of these things, you must argue that a prior case establishes a principle of law that governs a situation that is identical — or sufficiently similar — to the case at hand such that the policies or principles that underlie and justify the earlier decision are applicable to the current case. Under these circumstances, you can argue that the prior case establishes a precedent that applies to your case. The lawyer on the other side will argue that the case at hand is different in important ways from the prior case and that because of those differences, the policies and principles underlying the earlier case do not apply to the case at hand. When the rule of law in the prior case does not apply to the case at hand, we say the lawyer has distinguished the precedent. What rules have you learned that can be applied either directly or by analogy to govern this case?

b. Statutory interpretation. The rights of the parties may be governed by a federal or state statute that regulates their conduct. Judges must interpret ambiguities in

those statutes by reference to (1) the language of the statute; and (2) the legislative intent behind the statute, which may be elucidated by reference to the policies and purposes the legislation was intended to serve. How can you persuade the judge that your proposed interpretation of the statutory language or purposes best accords with the intent of the legislature? What counterarguments will the attorney on the other side make to answer your claims?

c. Policy arguments. These arguments appeal to a variety of considerations, including (1) fairness, individual and group rights, and justice in social relationships; and (2) the social consequences of alternative rules such that the choice of rules promotes social utility, efficiency, or the general welfare. What reasons can you give to persuade the judge that your proposed rule promotes both justice and social welfare? What counterarguments will the attorney on the other side make to answer your claims?

6. Holding. What rule of law did the court adopt, and how did it apply to the case? In identifying the holding of the case, it is important to consider several possibilities. Try to describe the rule of law in as broad a fashion as possible by (a) identifying a general category or a broad range of situations to which the rule would apply, and/or (b) appealing to general principles such as foreseeability, reasonableness, or promotion of alienability. Then try to describe the rule of law in as narrow a fashion as possible so as to limit the application of the rule to a narrow range of circumstances by (a) identifying the specific facts of the case as necessary to application of the rule, and/or (b) appealing to specific, rather than general, principles. For example, a possible broad holding of a case is that owners have an absolute right to exclude non-owners from their property unless the owner's act of exclusion violates public policy. An alternative narrow holding would be that owners of property open to the general public for business purposes have a right to exclude non-owners from their property unless those non-owners are engaging in expressive political activity that does not interfere with the operation of the business.

7. Reasoning of the court and criticism of that reasoning. What reasons did the court give for deciding the case the way it did? What problems can you find with the court's reasoning? Do you agree or disagree?

Reading Statutes and Regulations

Statutory interpretation can be the subject of entire law school courses, but it is important to become comfortable from the outset with statutory and regulatory language. This is because a great deal of legal practice involves statutory or regulatory questions that have not necessarily been ruled on by the courts.

There are examples of statutes and regulations throughout this book. The task in reading these legal texts is different than briefing cases for class discussion. The goal is to come to class with a broad-brush understanding of how the relevant statute or regulation works. As you prepare, pay attention to the details of the language and the

structure of the text, note the kinds of issues the statute or regulation covers (and does not), what explicit exceptions or exemptions are set out, how the various parts of the text relate to each other, and ambiguities the language creates. It can be hard to master statutory or regulatory language in the absence of a specific conflict or question, but the basic exercise of careful reading will soon come naturally.

ACKNOWLEDGMENTS

Acknowledgments from Joseph William Singer

This book would not have been possible without the substantial help, suggestions, encouragement, and support of many people. I would like especially to thank Duncan Kennedy, whose imprint is evident throughout the book. He is responsible for some of the large structural components of the book, including the idea of organizing materials around the concept of consumer protection in the market for shelter, and many details, such as the inclusion of building code materials in the land use regulation section. He also developed the idea of systematizing legal arguments as a device for legal education. His personal, moral, and intellectual support over the years has been invaluable to me.

Jeremy Paul contributed in fundamental ways to the ideas about property and law school teaching represented in this book. The takings materials especially are shaped by his perspective. I want to thank Jack Beermann for getting me to write this book. His encouragement and intellectual support over the years buoyed me tremendously. Elizabeth V. Spelman has been essential in teaching me to "think about thinking" and to explore gender, race, and class issues in social relations. I would like also to thank Williamson Chang and Robert A. Williams, Jr., for prompting my interest in the legal relations between the United States and American Indian nations and between the United States and Native Alaskans and Native Hawaiians. Their personal insights and scholarly contributions on the property rights of Native American peoples contributed significantly to my own intellectual development and to various aspects of this book.

Various colleagues and friends who have provided detailed suggestions include Kathy Abrams, Greg Alexander, Keith Aoki, David Barron, Jack Beermann, Bethany Berger, Robert Brauneis, Betsy Clark, Alan Feld, Tamar Frankel, Louise Halper, James Holmes, Ian Haney López, Allan Macurdy, Martha Mahoney, Robert Merges, Ron Meyer, Frank Michelman, Nell Jessup Newton, Eduardo Peñalver, John Powell, John Rattigan, Aviam Soifer, Debra Pogrund Stark, Nomi Stoltzenberg, Gerald Torres, Robert Tuttle, Laura Underkuffler, André van der Walt, Johan van der Walt, and Kelly Weisberg.