

PROPERTY
Prof. Sapna Kumar, Spring 2014
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I. Overview

This course covers the basics of property law. We will examine what makes property rights distinctive; how property rights are created, transferred, and destroyed; and what the powers and duties of property owners are. This course will serve as a foundation for a variety of upper-division courses, including land use, environmental law, intellectual property, and commercial law.

Class will meet on Mondays, Tuesdays, and Wednesdays from 2:30pm to 3:45pm. By virtue of extending class from 3:37pm to 3:45pm, we will gain four extra classes worth of lecture time. Consequently, if I am sick, we will not need to make up class. If we get through the semester with extra classes, we will end early.

II. Required Reading

Dukemenier, Krier, Alexander & Schill, Property (7th ed.). In addition to the casebook, I will post supplemental materials as needed.

III. Attendance Policy

Students should attend class sessions and arrive on time. If you arrive late, out of respect for the other students and the class environment, please try to minimize the disturbance. The Law Center attendance policy requires attendance of 80% of all classes or a student risks being dropped from the class.

I will take attendance by distributing a roll sheet at the beginning of class. It is the student's responsibility to sign the roll sheet before you leave the classroom each day or you risk being marked absent. Do not sign the roll sheet if you miss more than 15 minutes of class! Please note that students are responsible for managing your absences from class and ensuring that your total number of absences does not exceed the threshold for the class.

Students do not need to notify me if you will be absent. Also, an absence is an absence, regardless of the reason, except for absences covered by the University and Law Center religious holiday policy.

Students who exceed eight absences will be reported to Dean Alderman. Furthermore, if a student exceeds eight absences, they will go down 1/3 of a letter grade for each additional absence above eight.

IV. Participation

I will call on students, both to discuss assigned cases and to comment on the issues we are discussing. Students are expected to be prepared for every class! If exceptional circumstances make it impossible for you to prepare for a particular class, sign the Pass Sheet by the podium and I will not call on you that day. A student may sign the Pass Sheet four times during the semester without any impact to your class participation grade.

Students with poor class participation will have their final grade dropped by 1/3 of a letter grade. The decision to drop a grade for participation is at my discretion and is non-negotiable. A drop in class participation can result from a combination of unpreparedness, not paying attention in class, and absences (even if you have fewer than eight absences). In rare cases, exceptional students may have their grade raised by 1/3 of a letter grade.

V. Audio Recordings of Lectures

I will endeavor to record all of the lectures and make them available to you. These recordings are for class preparation purposes only, and they are not to be reproduced or redistributed in any manner. I reserve the right to not record a class if more than 20% of the class is absent.

VI. Grading

There will be a three-hour open-book in-class final exam. The exam will be one hour multiple choice and two hours essay. The multiple choice questions will be primarily directed to Part III of the course and leasehold estates, although a few questions will be drawn from other parts of the course. Part III will not be covered in the essay portion of the exam.

VII. Office Hours

Office hours will be held Tuesdays: noon–1pm & Wednesdays: 4pm–5:30pm. These office hours are shared with my patent law students.

Reading: Each bullet point represents one class of reading

Part I: Who Owns Property?

In this part of the course, we will discuss how property gets acquired other than by purchase. We will consider first possession and subsequent possession of property. This part of the course will also introduce themes that we will see throughout the semester.

- **Acquisition by Discovery. p. 1–18 (skim notes)**

In *Johnson v. M'Intosh*, we will look at who holds title the land when there are competing interests. This case gives us perspective on the roots of our current property rights, raises some of the underlying principles animating property law, and allows us to see how the law itself is not based on absolutes.

Focus Questions: (1) What is title? (2) Why is the Supreme Court concerned with the limits of its power? (3) What is Locke's Labor Theory? (4) What is the principle of "first in time, first in right"? (5) How does this case illustrate that property is more a "bundle of rights" than one single right?

- **Acquisition by Capture. p. 18–22 (*Pierson*), 26–28 (*Ghen*), 36–39 (oil, gas, and water), 50–54 (notes 2-5).**

This reading considers who should get a resource when there are competing pursuers. Should it be the party one who did all the work or the one with the resource in hand? *Pierson v. Post* and *Ghen v. Rich* address this issue in the context of wild animals. We will then see how the rule of capture can be applied to natural resources, such as water and oil.

Focus Questions: (1) How can we distinguish *Ghen* from *Pierson*? (2) How does the dissent in *Pierson* invoke utilitarianism? (3) What is customary rules and when should we use them?

- **Property in One's Person. p. 70–84 (through n.2)**

This section examines a current controversy regarding the extent to which we have ownership of things that come from our body—whether it is a unique cell line derived from a tumor, our DNA, or blood that was removed from the body.

- **Acquisition by Find. p. 97–110 (through n.3)** (pay attention to underlying cases in *Hannah*).

When does a person acquire title to personal property that he or she found? The answer depends on whether the land where the object was found of a public or private nature and further depends on the relationship between the finder and the owner of the land.

Focus Questions: (1) What is the distinction between lost, mislaid, and abandoned property? (2) How does the location of where lost property is found impact who gets ownership of the property?

- **Acquisition by Adverse Possession. Read handout on black letter law, p. 116–117 (Powell on Real Property), 134–141.**

Adverse possession is a principle whereby somebody who possesses the land of another for an extended period of time may be able to claim legal title to that land. Acquisition by adverse possession is grounded in the idea that a property owner should not sleep on his or her rights.

Focus Questions: (1) What are the requirements for adverse possession? (2) What is color of title? (3) What are the risks of attempting to adversely possess property?

Part II: Eminent Domain and Zoning

Federal and state governments often takes aggressive actions to control property use by private individuals. Takings and zoning regulations are the strongest weapons that the government has to control land use. The use of these tools is widely debated.

- **The Power of Eminent Domain. p. 1061–1077, also pull the full Supreme Court opinion and read the O’Conner dissent (545 U.S. 494–505).**

Kelo provides a dramatic example of a local government utilizing eminent domain power to advance its own goals. Did the city accomplish what it intended to by condemning Susette Kelo’s property? If so, at what cost?

Focus Questions: (1) What is eminent domain and why does it exist? (2) What are the three forms of public use that O’Connor identifies in her dissent? (3) Where do we draw the line on public use?

- **Physical Occupations and Regulatory Takings. p. 1081–1103**

Often times, the government won’t condemn an entire property. Rather, it will occupy part of the land or will pass regulations drastically affecting a property owner’s use of the land. We will first look at how categorical rules (also known as “per se” rules) are used to address these situations.

Focus Questions: (1) What is a regulatory taking? (2) What is an inverse condemnation proceeding? (3) What happens if the government permanently, physically invades someone’s property? (4) What happens if a nuisance law causes the value of one’s property to drop?

- **Rules Based on Measuring and Balancing. p. 1113–1131**

There are many situations where no categorical rule applies to the physical occupation or regulatory taking at issue. In these cases, courts have traditionally applied a balancing test.

Focus Questions: (1) What is the *Penn Central* balancing test? (2) When do we apply the *Penn. Central* balancing test?

- **A Third Categorical Rule: Regulations Creating Total Economic Loss. p. 1131–1148**

In the 1992 case *Lucas v. South Carolina Coastal Commission*, the Supreme Court changed how we look at harm-preventing legislation that leads to a total economic loss. It created a new categorical rule for cases where regulations create total economic loss and limited an existing categorical rule.

Focus Questions: (1) What are the three categorical rules? (2) Under *Lucas*, when is there a 100% diminution of value in one’s property? (3) After the regulation passed in *Lucas*, what uses of the property were still available to the owner?

- **Finish Regulatory Takings; Exactions. p. 1152–1166, 1170–1178**

Exactions are the concessions local governments require of property owners as conditions for the issuance of the entitlements that enable the intensified use of real property. In *Nollan v. Cal. Coastal Comm.* and *Dolan v. City of Tigard*, we will look at when such a concession will be considered a taking.

Focus Questions: (1) What is conceptual severance and what does the Supreme Court think about it? (2) How does an exaction differ from a regulatory taking?

- **Exactions continued. p. 1178–1189**

Focus Questions: (1) What is the two-part test for determining whether an exaction was impermissible? (2) Why do courts allow exactions at all?

- **Zoning: Introduction. p. 930–952 (through n.3)**

States can exercise their police power to regulate development through zoning laws. Zoning regulates the size and shape of lots; the size, shape, and placement of buildings; and the type of activities that can take place on the lot. Houston is the largest city in the United States that is not subject to zoning restrictions.

Focus Questions: (1) What is euclidian zoning? (2) Why are some people against zoning? (3) What is a non-conforming use? (4) What is amortization and is it permissible?

- **Variances and Special Exceptions to Zoning. pp. 954–966.**

The effects of zoning ordinances can be quite harsh, as it affects the rights of individuals who purchased land with expectations regarding how they could use it. Variances and special exceptions are two methods of adding flexibility to zoning requirements.

Focus Questions: (1) What is a variance? (2) What is the test for receiving a variance? (3) What are special exceptions?

Part III: The System of Estates

This section focuses on the divisions of ownership that are built into the title of real property. From feudalistic times to present, the law has developed various forms of ownership that allow for property interests to be divided across time and among multiple parties. Chapters Three and Four will focus on present possessory estates and future interests, respectively. Chapter Five will look at the relationship among concurrent property owners, and will briefly touch on marital property.

This section is heavily rule-based and will involve outside class time to practice questions in the problem set. Do not be misled by the light reading! Mastery of this material is needed both for the bar exam and for students interested in oil and gas careers.

- **Possessory Estates—Life Estate/Remainder.**
- **Defeasible Estates.**
- **Introduction to Future Interests.**
- **Executive Interests.**
- **The Rule Against Perpetuities.** (You only need to know when RAP is triggered for the exam. This material will not be directly tested, but you do need to know it for the bar exam)
- **Introduction to Tenancy in Common and Joint Tenants.**
- **Relations Among Concurrent Owners.**

Part IV: Leaseholds

In this section, we will learn about the various types of leasehold estates and the rights and responsibilities of landlords and tenants. This material will serve as a foundation for an advanced course in landlord-tenant law.

- **Leasehold Estates.**

This class will cover the different leasehold estates: the term of years (which will be familiar after our discussion of present possessory interests), the periodic tenancy, the tenancy at will, and the tenancy at sufferance. We will also discuss the structure of a lease and delivery of possession.

- **Subleases & Assignments; Evictions.**

If a landlord leases property to Tenant 1, who in turn, assigns the lease to Tenant 2, who can the landlord sue if neither Tenant 1 nor Tenant 2 pays rent? What happens if Tenant 1 subleased the property to Tenant 2? We will see that the distinction between an assignment and a sublease matters with regard to whether privity of estate exists between the landlord and the current occupant of the property. We will also look at situations in which a landlord can use “self-help” and retake property when a tenant is in default of his or her lease.

- **Abandonment of Possession.**

If a tenant abandons rental property, does the landlord have a duty to mitigate damages? If the landlord finds a new tenant for a lower rent, can he sue the old tenant for the difference in rent?

- **Implied Warranty of Habitability.**

What rights does a tenant have if a landlord fails to make repairs? We will look at remedies that the tenant has against the landlord under theories of constructive eviction and breach of the warranty of habitability.

Part V. Land Transactions.

In this section, we will study the process for buying and selling real property. We will also look at the various promises that are explicit and implicit in land sales and learn how the recording system works.

- **Introduction to the Sales Contract.**

This class will provide an overview for the process for buying or selling a home, and will cover how the Statute of Frauds applies to sales contracts.

- **Marketable Title and Duty to Disclose Defects.**

All sales contracts require the seller to be able to provide “marketable title” to the buyer. We will explore what this means. We will also look at what duties sellers have with regard to disclosing latent and patent defects prior to closing.

[Note: *Lohmeyer* is tricky, and I won’t call on anyone for it.]

- **Implied Warranty of Quality; the Deed.**

After closing, the buyer can generally no longer seek rescission of the property sale. What can a buyer do when he or she discovers latent defects after closing? Can the buyer sue the former owner? The builder? We will also look at the deed.

- **Warranties of Title; Mortgages.**

Three present covenants and three future covenants continue to provide protection for the buyer after the property has closed. However, present covenants provide far less protection than the doctrine of marketable title, and future covenants even less so. Moreover, these covenants only allow the buyer to sue the seller for cash damages; rescission is not available.

- **The Recording System.**

The recording system allows individuals to determine what the status of title is to a particular piece of property. In addition to having records for who the owner is to a piece of land, the recording system also tracks easements and other encumbrances. Most states use a grantor/grantee index, which has a number of problems with regard to tracing land ownership accurately. Moreover, because recording is not a necessary step in conveying property (in almost all jurisdictions), problems can arise when there are unrecorded conveyances.

- **Wild deeds, Inquiry Notice, Marketable Title Act**

When does a buyer have notice of a prior conveyance of land? There are actually three types of notice: actual notice, record notice, and inquiry notice. We will also discuss the Marketable Title Act, and how title insurance can be used to protect against some defects in the public records.

Part VI. Land Use Controls

Land use controls have arisen as a way of dealing with the externalities associated with land use conflicts. We have already discussed two of these mechanisms—zoning and regulatory takings. In the final part of the course, we will focus on nuisance law and servitudes.

- **Nuisances.**

What happens when one property owner's use of her land adversely affects other property owners? We will examine how property and tort law resolves conflicting uses of land.

- **Nuisances (cont.).**

- **Easements.**

We will start our discussion of servitudes by examining easements, which are explicit or implied agreements allowing a non-owner to enter upon and use a piece of property.

- **Easements By Judicial Implication.**

There are two types of easements by judicial implication: easements implied by prior existing use and easements by necessity. Both require that the servient and dominant estate were once held by the same owner and that a necessity for the easement exist at the time ownership became divided.

- **Termination of Easements, Easements by Prescription, Negative Easements.**

A property owner can obtain an easement over a neighboring property owner's land through a process similar to adverse possession. We will also look at how easements can be extinguished.

- **Real Covenants.**

There are four traditional negative easements that have been recognized by U.S. courts, plus a relatively new conservation easement. However, we will see that most promises to restrict use of land fall into the category of real covenants. We will also begin discussing a special type of covenant running with the land involving plots of land sold off by a property developer (referred to by courts as a type of negative easement and by your casebook authors as a type of equitable servitude).