

PROPERTY
Prof. Sapna Kumar, Spring 2018
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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 and Wednesdays, from 10:30am to 11:50am, and Thursdays from 1pm-2:20pm. By virtue of extending class by 10 minutes, we will only need to meet for 35 classes. This will avoid us having to make-up classes when I travel and may result in the class ending early.

Please note that I need to cancel class on January 25 and February 15.

Required Reading

Dukeminier, Krier, Alexander, Schill, Strahilevitz Property (8th ed.). A copy of the book will be available on reserve in the library. Please note that we will NOT be using the most recent edition set to come out in December 2017.

Attendance Policy

You 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 for 80% of all classes or you will automatically be dropped from the class.

I will take attendance by distributing a roll sheet at the beginning of class. It is your responsibility to sign the roll sheet before you leave the classroom each day or you risk being marked absent. You may not sign the roll sheet if you miss more than 15 minutes of class. Please note that you are responsible for managing your absences from class and ensuring that your total number of absences does not exceed the threshold for the class. Please do not e-mail when you are going to be absent, unless you are missing several classes in a row.

Participation

I will call on students, both to discuss assigned cases and to comment on the issues we are discussing. You 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. You may do this three 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).

Class Website

There is a class website on Lexis that will become available at the start of the semester. To enroll, follow the following steps:

- . Go to www.lexisnexis.com/lawschool and sign in with your custom ID and password
- . Once on the home page, under “Learning LexisNexis”>“Class Preparation,” select the “Access Web Courses” link. Web Courses will open in a separate page
- . Click on the red “Courses” tab at the top of the page
- . Under “Course Catalogue,” Click the “University of Houston” link
- . Scroll down the list to find “2018 Property” with Prof. Kumar as the instructor
- . Click the “Enroll” button

If, at any point in the semester, you have trouble accessing the class website, please contact our Lexis representative Billy Saqr (billy.saqr@lexisnexis.com).

Please access the class website early in the semester. This is where I post old exams (with model answers and my exam memos), recordings of lectures, all of the handouts, and the like.

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. Please note that technical problems and/or human error may sometimes result in class not being recorded.

Remote Attendance via Zoom

Students will have eight times during the semester where they can attend class remotely via the Zoom internet video conferencing software. I will mark you as “Remote” on the roll sheet for these days. Remote days do not count as an absence.

To participate via Zoom, there are several requirements: (1) you must e-mail me at least 20 minutes prior to class, letting me know that you will be participating via Zoom and you must log in no later than 10:25am, (2) you must have a headset (i.e., the ear buds + microphone that typically come with a cellphone) and may NOT rely on your computer’s built-in microphone, (3) your computer must have a working video camera and quality audio capability (joining by audio-only will be treated as an absence) (4) you must identify yourself with your class roll name in the Zoom videoconferencing software; (5) you must present yourself professionally in the video stream (both in attire and in conduct); (6) you must be able to fulfill your responsibilities if called on to discuss a case; and (7) you must keep yourself muted when you are not speaking.

Assessment Method

Your grade in this class is based on a three-hour open-book in-class final exam. The exam will be approximately 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 of the class will not be covered in the essay portion of the exam.

Office Hours: TBA

I encourage everyone to come to office hours, whether to talk about class material, career goals, or anything else. If you have a question outside of office hours, feel free to e-mail me. Please do not stop by my office outside office hours without e-mailing me first—I am sometimes busy with other tasks.

Learning Outcomes

From taking this course, students will be able to (1) answer all of the focus questions in this syllabus and (2) engage in legal analysis and reasoning, problem-solving, and written and oral communication relating to property law.

Miscellaneous Class Policies

- **First Names.** I call on students by first names, because it is the only way I'll ever learn your first name.
- **Socratic Method.** I will randomly call on students to discuss cases. To do this, I will shuffle a deck of index cards that you fill out on the first day and select a card. This means if you get called on one class, you can still be called on the following class. Or your card may never come up.
- **Volunteering and Class Participation.** Students are always welcome to volunteer to discuss cases. Students can also make comments and ask questions in class. That being said, nobody likes to hear from the same three students for the entire semester, so I will sometimes request to hear from students who haven't spoken recently.
- **Laptop Use.** Use of laptops is permitted, with the caveat that studies indicate students learn more when they handwrite their notes. Although I do not prohibit web surfing, if your behavior becomes distracting to other students or to me, you will risk a 1/3 letter grade drop for poor participation.
- **Use of old outlines on exam.** You are permitted to use any outline you want on the final exam, and you can bring any print materials with you. However, you need to update your old outline. Citing cases or material that was not assigned or discussed in class will cause your answer to be marked down.
- **Exam Grading.** There is a rigid curve for 1L classes. If I have to break a tie between two exams, and if one exam answer is substantially shorter than the other, the shorter exam will get the higher grade. The purpose of this policy is to encourage brevity.

The University of Houston Provost's Office has asked all faculty in professional schools to include the following language on class syllabuses: Counseling and Psychological Services (CAPS) can help students who are having difficulties managing stress, adjusting to the demands of a professional program, or feeling sad and hopeless. You can reach CAPS (www.uh.edu/caps) by calling 713-743-5454 during and after business hours for routine appointments or if you or someone you know is in crisis. No appointment is necessary for the "Let's Talk" program, a drop-in consultation service at convenient locations and hours around campus. http://www.uh.edu/caps/outreach/lets_talk.html

Reading

Each bullet point represents one class worth of reading and all reading is from the casebook unless otherwise specified. When a problem is listed, it means that we will be working on it in class. Problems are available on the class website, but do not need to be completed prior to class.

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. 1–18, Problem 1**

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. 18–23 (*Pierson*), 26–29 (*Ghen*), 36–40 (oil, gas, and water), 51–55 (notes 2-5), Problem 2.**

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.

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. 91–103 (through n.3) (*Moore v. Regents of California*), Eric Posner "A Moral Market," available at**

http://www.slate.com/articles/news_and_politics/view_from_chicago/2014/10/kidney_donation_exchange_how_to_increase_donated_organ_ethically_and_altruistically.html, **Problem 3.**

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. 125–126 (*Armory*), 129– 138 (*Hannah, McAvoy*) (through n.3, pay attention to underlying cases in *Hannah*), Problem 4.**

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.

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. 144–145 (Powell on Real Property), 162–163 (Color of Title), 164–169 (Manillo), Problem 5.**

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.

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.

- **Eminent Domain. p. 1110–1127 (Kelo); U.S. Constitution’s Fifth Amendment, Problem 6**
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?

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. 1131–1153 (Loretto, Hadacheck), Problem 7**
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.

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. pp. 1162–1179 (Penn Central), Problem 8**
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.

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

- **Regulations Creating Total Economic Loss. pp. 1179–1198 (Lucas), Problem 9**
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.

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. pp. 1199–1218 (*Palazzolo, Tahoe*), *Ark. Game & Fish Comm’n v. U.S.* (available on class website), Problem 10**

Questions: (1) What is conceptual severance and what does the Supreme Court think about it? (2) When can a temporary taking trigger compensation?

- **Exactions. pp. 1238–1250, Problem 11**

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.

Questions: (1) How does an exaction differ from a regulatory taking? (2) What is the two-part test for determining whether an exaction was impermissible? (3) Why do courts allow exactions at all?

- **Zoning: Introduction. pp. 971-982 (skip n.2); 987–995 (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.

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. 996–1007 (through n.2), Problem 12.**

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.

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 practicing real estate, wills and trusts, or oil and gas.

For all of the reading in Part III, skip any problems that are in the book. I will go over the useful ones in class. The problem sets are available on the class website.

- **Possessory Estates—Life Estate/Remainder. Briefly skim 209–214 (historical overview). Then read 215–221 (fee simple), 226 (life estate), 240–244 (notes 3-4, seisin, leasehold estates). Attempt Problem Set #1.**

Questions: What is fee simple? What is a life estate? How does one convey a life estate? When does waste occur? What is seisin?

- **Defeasible Estates, Future interests in transferor. p. 244–247 (defeasible estates); 253–256 (notes 1, 3, and 5 only), Problem Set 2, p. 275–279 (future interests in the transferor), p. 280–286**

Questions: How do you convey land in a fee simple determinable versus a fee simple subject to a condition subsequent? How do the two conveyances differ?

- **Future Interests in third parties, Executory interests. p. 290–292 + Estates Problem Set 3 and 4 [note: this material will likely take two classes]**

Questions: What is the difference between indefeasibly vested remainders, vested remainders subject to open, contingent remainders, and vested remainders subject to complete divestment? What is the difference between fee simples subject to an executory limitation, shifting executory interests, and springing executory interests?

- **The Rule Against Perpetuities. Problem Set #5 (covers all material), p. 307–315 (skip problems).**

Note: You only need to know when RAP is triggered for the exam, though RAP questions do appear on the Texas bar exam.

- **Introduction to Tenancy in Common and Joint Tenants. p. 343–353 (cotenancy, *Riddle v. Harmon*).**

Questions: (1) What are the factors for creating a tenancy in common? (2) What are the factors for creating a joint tenancy? (3) What is the practical difference between a tenancy in common and a joint tenancy?

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, Subleases & Assignments. p. 441–445 (term of years, periodic tenancy, tenancy at will); 449–453 (tenancy at sufferance, the lease); 465–471 (subleases and assignments, *Ernst v. Conditt*)**

This class covers the different leasehold estates and the structure of a lease and delivery of possession. We will look at the distinction between an assignment and a sublease, and how it effects privity of estate.

Questions: (1) What is a the term of years? (2) What is a periodic tenancy? (3) What is a tenancy at

will? (4) What is a tenancy at sufferance? (5) How do you recognize the difference between a sublease versus an assignment, and what is the practical difference.

- **Subleases & Assignments (cont.); Evictions, Abandonment. p. 482–502 (skip n.2 on 488) (Berg v. Wiley; Summer v. Kridel); Problem 13**

We will consider situations in which a landlord can use “self-help” and retake property when a tenant is in default of his or her lease. We will also consider whether landlord have a duty to mitigate damages when a tenant abandons property.

Questions: (1) What is the common-law rule and modern rule for self-help? (2) What is the common-law rule for mitigation of damages caused by a defaulting tenant? (3) When does a landlord accept a tenant’s surrender of the lease?

- **Implied Warranty of Habitability. p. 504–525 (Village Commons, Hilder); Problem 14**

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.

Questions: (1) What is the covenant of quiet enjoyment? (2) What is the implied warranty of habitability? (3) Why do we have two similar doctrines?

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.

- **Intro to the Sales Contract. p. 543–544; 559–575 (Licari; Hickey), briefly look over Residential Contract and Seller Disclosure (available on class website)**

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.

Questions: (1) What are the basic steps for buying/selling a house? (2) What is a Purchase and Sale Contract and for how long does it govern? (3) What document transfers the property? (4) How does the Statute of Frauds apply to property sales and what exceptions does it have?

- **Marketable Title and Duty to Disclose Defects. Marketable Title, Duty to Disclose Defects. Skim p. 576–580 (Lohmeyer); read p. 580–593. (Stambovsky; Johnson), Problem 15**

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.

Questions: (1) What is marketable title and how does it protect the buyer? (2) How do restrictive covenants and municipal ordinances affect marketable title? (3) What is equitable conversion? (4) What are the three approaches to the duty to disclose defects?

- **Implied Warranty of Quality; Remedies for Breach of the Sales Contract; Intro. to the Deed. p. 593–606 (Lempke; Jones)**

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.

Questions: (1) What is merger? (2) What is the implied warranty of quality and when does it apply? (3) What are the remedies to breach of the sales contract? (4) If a purchaser defaults, what are the seller's options? (5) What are the elements of a deed and what are the 3 types of deeds?

- **Warranties of Title. p. 614–629 (*Brown v. Lober*; *Frimberger v. Anzellotti*), Problem 16.**

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.

Questions: (1) What are the present and future covenants? (2) When do they respectively apply?

- **Introduction to Mortgages. p. 645–668 (*Murphy v. Fin. Dev. Corp*; *Commonwealth v. Fremont*)**

Most of us who purchase real estate will do so by borrowing money from a bank. We will look at how mortgages are created, what rights the mortgage holders have, and the subprime mortgage crisis.

Questions: (1) How are mortgages created? (2) How does priority work when multiple banks hold mortgages on the same property? (3) What is a subprime mortgage? (4) What are some of the factors that contributed to the mortgage crisis?

- **The Recording System. p. 693–706 (*Luthi*); 715–718.**

The recording system allows individuals to determine what the status of title is to a particular piece of property. 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.

Questions: (1) What is title and how does one search it? (2) What is the difference between a race, race-notice, and notice jurisdiction? (3) What are the three types of notice?

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 servitudes.

- **Intro to Easements and Easements by Implication. p. 809–811; 820–825 (*Holbrook*); skim 825–831 (*Van Sandt*); read 831–833.**

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.

Questions: (1) What is an easement and how is it created? (2) What is the difference between an easement appurtenant and an easement in gross? (3) What are the three types of implied easements? (4) How is an easement by estoppel created? (5) What are the two types of easements by judicial implication and how are they created under the common law?

- **Termination of Easements, Easements by Prescription, Negative Easements. 833–842 (*Othen*); 844–847 (notes 2–5), 874 (notes 5-7), 887–889 (negative easements), take another look at Problem 5.**

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 Running with the Land. p. 892–898, 917–918 (n.4), Problem 17 [note: this material will likely take two classes]**

Real covenants are contractual obligations that relate to land. When certain conditions are met, these agreements can bind future owners of the property.

Questions: (1) What are the four requirements for establishing a real covenant? (2) How do two parties establish horizontal privity? (3) How do parties establish vertical privity? (4) What kind of privity is requirement to make a burden run? (5) What kind of privity is required to make a benefit run?

- **Equitable Servitudes, deed restrictions. p. 898–909 (*Tulk, Sandborn*).**

A covenant is not enforceable as a real covenant if the requirements of horizontal and vertical privity is not met. However, such a promise may be enforceable as an equitable servitude, provided that the property owner who is violating the covenant had some form of notice that the covenant existed.

Note that the remedy for equitable servitude violations is an injunction, whereas the remedy for the violation of a real covenant is cash damages.

- **Flood Discussion Day.** Reading TBA.
- **Exam Review**