

CASES, MATERIALS AND
PROBLEMS IN PROPERTY
Third Edition

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CASES, MATERIALS AND PROBLEMS IN PROPERTY

THIRD EDITION

Richard H. Chused

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MATTHEW  BENDER

THANKS

This book is dedicated to my wife Elizabeth Langer. She practiced law for thirty five years—keeping my academic experience grounded in the real world. Her artistic creativity—now the center of her professional life as a full-time painter—has continually forced me to reevaluate the appearance of both the physical and spiritual world. I hope that all who read this volume have the good fortune to spend a major portion of their lives with a partner as wonderful and supportive as her.

PREFACE TO THE THIRD EDITION

The content and structure of this text is heavily influenced by the Alternative First Year Curriculum first used at Georgetown University Law Center in the early 1990s. That program was designed to resolve several problems. First, those designing the course of study believed that the traditional first year program—heavily weighted toward common law courses—gave short shrift to the development of the administrative state since the New Deal. Second, contemporary culture, politics, social interaction and technology placed new, interdisciplinary demands on the legal profession. Whether law school graduates practiced law, ran businesses or non-profit organizations, worked in government, became judges, or worked in the myriad of other environments now employing those with legal credentials, the questions and issues they faced routinely required them to be multi-dimensional problem solvers rather than legal technicians. Finally, traditional course boundary lines had become artificial. It was time to reshuffle the deck a bit to demonstrate the ways in which legal categories overlapped and intertwined.

The result was a program that merged contracts and torts, as well as, constitutional law and criminal law, offered a new course in Government Processes that has become a standard first year offering all over the country, and placed specific interdisciplinary demands on each course. In addition, each participating student took a seminar on the History of American Legal Thought. That course, which was the spine of the curriculum, combined the study of jurisprudence and history by taking a look at the ways discourse about law and legal institutions changed over time. All the other courses played off the seminar, using the ideas of Classical Legal Thought, Realism, the Legal Process School, Critical Legal Studies, Law and Economics and other forms of discourse to structure thinking about the resolution of legal problems.

All this imposed quite specific goals on the Property in Time course, as it was called in the curriculum. First, it like all the courses, was required to contain materials that mirrored the learning in the Seminar on the History of American Legal Thought. Second, its interdisciplinary obligation was to study important aspects of American legal history. And finally, though the course was still styled as one in Property, traditional reliance on real property materials had to yield a bit in recognition of the variety of ways in which modern societies reposed value in both objects and concepts.

These three goals led to a historically based structure for both the old and new editions of this text. Various portions of property law have been highly controversial at various points in our history. Those eras of legal attentiveness, which typically were influenced by modes of legal thought then in ascendancy, provide both a historical and substantive structure for the materials. Each chapter takes up a set of legal issues important during a particular period of American history, places them in a cultural and political context, and ends with a set of contemporary disputes that echo aspects of the historic tradition. Chapter 1, for example, contains background materials on the importance of property and ideas about Republicanism in early America, explores several classic Native American land claim cases, and concludes with readings on contemporary reservation land use issues and adverse possession disputes involving Native American claims. Chapter 2 covers family property law, which was subjected to searching review during the middle decades of the nineteenth century. Changes in family law mirrored the development of

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both the first major women's movement in America and the broadening democratization of life during and after the Jackson presidency. It opens with a section on common law rules about concurrent and family ownership of property, then tells a story about the gradual reform of rules restricting ownership of property by married women and ends with materials on present-day family property law. Chapter 3 covers the structure of property ownership by large organizations. It describes the late nineteenth century appearance of corporate and other forms of business organization, and ends with materials on ownership of property by present-day corporations. It follows nicely on the heels of the prior chapter, which covers all the forms of individual and small group ownership patterns typically used in our personal and family lives. Chapter 4 contains materials on the gradual opening of property ownership to African Americans after the Civil War. The history of race and property in the late nineteenth and first half of the twentieth centuries is used as the prism for scanning materials on the classic rules on present estates in land, easements, covenants, equitable servitudes and the early law of zoning. The chapter concludes with more modern materials on servitudes and common interest communities.

The post-World War II era spawned some dramatic rethinking about the meaning of property. The growth of the administrative state became the object of intense scrutiny, first by a group of scholars known as the "legal process school" and somewhat later by a bevy of movements interested in wealth redistribution. These events are the focus of Chapter 5, which reviews the ways in which property was partially redefined to include administrative benefits and the consequences for land owners of the growth in federal programs intended to benefit the poor. This chapter lays out much of the theoretical basis for property reforms that occurred after 1960. Landlord-tenant law is the focus of Chapter 6. Debates about rental housing were quite intense among Progressives at the beginning of the twentieth century, but major reforms did not occur until the 1960s and 1970s. The chapter looks at the adoption of tenement house acts early in the century, and then moves to more contemporary efforts to reform tort and eviction rules in rental settings. Chapter 7 covers land transfer. Though many of the parameters of modern residential land sales were established by reforms enacted during the Great Depression, they did not spawn massive suburban growth until the post-World War II housing boom. The massive growth of suburbs in the last forty years of the twentieth century, along with more contemporary problems of land transfer, is reviewed in this chapter.

The book ends with three chapters on more recent property law issues. These materials cover the law of waste and nuisance with the help of the law and economics school, the constitutional law of takings through the prism of jurisprududes writing about the impact of history on the justice of contemporary legal structures, and the law of property in human beings with the guidance of thinkers on individualism and community.

The structure of this book is heavily influenced by two streams of experience in my own career. I've already mentioned the first—participating in Georgetown University Law Center's experimental first year curriculum. The program (now actually a permanent feature of that school's first year life for twenty percent of each entering class) provided me with a rich understanding of the ways modes of legal thought evolved over time. It not only allowed me to organize these materials in accordance with the historical periods in which various property doctrines were the focus of attention, but also to integrate materials about modes of legal thought popular at various times into each chapter. Since moving to the New York Law School faculty in 2008 it has become clear that the lessons

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learned at Georgetown are transferable, that the importance of the ways we think about legal institutions can be extracted from a particular curricular experience and generalized.

The second stream of experience is my decades of teaching and writing about the American legal history of gender and property. This work has given me a deep appreciation for the ways in which we continue to play out the dramas of our ancestors and for the importance of good stories in legal education. It has turned me into a “contextualist” —a believer that full understanding of legal materials is impossible without knowing about the context in which cases, rules and statutes develop. Reading cases as stand-alone entities loses the richness of the lived historical experiences that they exemplify. That is why this text is filled with as much information as I could gather about the historical moments in which cases were decided, the stories behind the disputes and any other information I thought helpful in gaining a full understanding of the importance of the decisions.

We no longer (if we ever did) live in a world in which there is general agreement about the nature of legal institutions, the theoretical justifications for legal actions, or the roles lawyers should play in society. This lack of uniform, systematic understandings has led to a milieu in which lots of people are vying for your intellectual attention. Participants in this vibrant debate take it for granted that non-legal disciplines have something to say about the nature and purpose of legal institutions in an administrative state. Economics, philosophy, and history have become much more important parts of legal discourse and education in the last few decades. While this volume has its economic and philosophical moments, it largely is designed as an historical adventure. I hope you enjoy the journey.

If you have comments or questions about this book, please let me know. Send mail to:

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Richard H. Chused

December, 2009

Editorial Note

Many footnotes have been removed from court opinions and various excerpted materials without any notations or ellipses. Footnotes retained in court opinions and excerpted materials carry their original numbers. Author’s footnotes are numbered consecutively from 1 at the beginning of each chapter.

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