

Concise Introduction to
Property Law
First Edition

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Concise Introduction to Property Law

First Edition

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MATTHEW  BENDER

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Dedication

To

**Laurie Callies
-D.L.C.**

**Monica Walker
-J.G.H.**

**Karen Martinez
-J.M.**

**Marlene Harris
-D.R.M.**

Preface

If there ever was a consensus about what should be taught in the first-year Property course, that consensus disappeared years ago. Rapid technological advances have created many new types of assets to which property rights may attach, while most law schools have shortened the Property course from two semesters to one. Property professors thus have had to make hard decisions about what to cover in their classes and what to omit.

One unfortunate consequence of these developments is that Property casebooks have become compendiums of property-related subject matter that invite professors to pick and choose as they will, leading students to believe that Property law is not an integrated whole, but merely a series of disconnected concepts. While it is probably true that the typical property casebook of today is a bit shorter than its counterpart of fifty years ago, those older books were crafted with the expectation that they would be used in year-long courses. Consequently, casebooks have come to look more and more like hornbooks illustrated by cases rather than like traditional casebooks.

The first version of this book, published in 1998 as “Property Law and the Public Interest,” was a different sort of Property textbook. It was first and foremost a casebook. No excerpts from secondary sources appeared in the book — though students were directed to a wide array of such works through the notes — and all of the note material was written specifically for the text by the authors. The first ten chapters provided a comprehensive survey of real, personal, and intellectual property that could be covered in a single four-credit course. Materials on estates in land and future interests were reduced significantly, whereas it included substantial amounts of material on intellectual property, and brought the materials on the police power, the Takings Clause, and eminent domain from their traditional place in the back of a Property book to the front. For those instructors who wished to add a more pronounced public law emphasis for the course, additional materials on housing discrimination, zoning, and environmental law were provided in the final sections of the book. In addition, the book was designed to expose first year law students to the rich historical heritage of American law. All the most significant cases in the history of American Property law, as well as famous judges, politicians, novelists, and legal philosophers whose work significantly affected Property law appeared throughout its pages.

This First Edition remains true to these original goals, but is retitled “CONCISE INTRODUCTION TO PROPERTY LAW,” to emphasize that it is suitable and teachable in a one-semester Property course. However, while the materials in this edition overlap substantially with those in “Property Law and the Public Interest,” this is essentially a new book.

Chapter 1 provides students with an overall analytical framework for understanding property law. It contains clear, concise explanations of the concepts essential for understanding how property rights arise and are changed over time to serve the interests of individuals and of society as a whole. The chapter begins with the fundamental idea that property rights are “relational,” consisting of the rights that an owner has, in relation to others, with respect to assets. It then introduces several other concepts that play a part in the justification and evolution of property law, including standards of judicial review, federalism, separation of powers, the jurisprudence of legal decisionmaking, judicial

Preface

curtailment of property rights in the face of wealth inequality, and the particularly troublesome problem of retroactivity. Distinctions between tangible and intangible property are then discussed, followed by an introduction to emerging types of assets in the field of intellectual property. The chapter concludes with property rights associated with that most traditional of assets: real property.

Chapter 2 continues the consideration of land as the object of property rights. The chapter examines how governmental conduct may affect land ownership in such ways as to require that the government provide a remedy to the landowner. Outright condemnation through eminent domain receives updated treatment, including discussion of *Berman v. Parker* and post-*Kelo* developments, as does the doctrine of regulatory taking. The various other forms of governmental conduct that may affect real estate rights are reviewed, including local land use controls, the evolution of nuisance law, and environmental protection statutes and ordinances.

Chapter 3 covers the classic property law notions of estates and future interests, concurrent forms of ownership, and marital property. Chapter 4 examines the modern problems that have arisen in landlord-tenant law. We have also included housing discrimination materials because of the importance of housing in property markets.

Chapter 5 covers the field of servitudes — including licenses, easements and equitable servitudes — and discusses constitutional limitations on such property rights. Chapter 6, the book's concluding chapter, covers real estate transactions. The typical real estate transaction is traced, covering the contract of sale, deeds, title assurance, security of title, fraudulent transfers, and real estate liens and their enforcement.

Property instructors will find many of the familiar cases used in most Property textbooks, as well as many new cases that we found exciting for our students. The notes in all chapters not only point out legal developments and new cases, but also provide substantial detail on the historical and social context in which the principal cases arose. The notes also provide a glimpse into the lives of the parties to the cases, some of whom are famous and many of whom are not. The book also has a definite comparative law perspective. This is primarily manifested by special attention to cases arising in the state of Hawaii, the one American jurisdiction whose “property history” departs from the national experience in dramatic ways. (This was also made possible by the encyclopedic knowledge of Hawaii case law by co-author David Callies.) In this edition, we have expanded the comparative focus with a series of notes that examine the ways in which other legal systems address key questions of property ownership and property rights.

This casebook has been a collaborative effort among the four co-authors. In one way or another, each has contributed to every part of the book. The basic framework of the casebook was put together by David Callies and Gordon Hylton, with invaluable help from Dan Mandelker. John Martinez, who joins the book for the first time in this edition, has added his unique perspective on the jurisprudence of Property law.

We owe special thanks and appreciation to Keith Moore of Lexis/Nexis, who is both an extremely capable editor and an extremely patient person. The book has also been much improved by the comments of our colleagues at other institutions who have used prior editions of the book. At the risk of omitting the name of someone who should be on this list, we extend special thanks to all those who shared their comments on what should, and should not, be included in the book. John Martinez is most grateful to his wife, Karen L. Martinez, for being supportively critical of his efforts on the book.

Preface

We also owe a great deal to the library staffs of Marquette University, the University of Hawaii, Washington University, and the S.J. Quinney College of Law at the University of Utah. In addition, we wish to thank our own students at those four universities for their comments — sometimes given freely and sometimes not so freely — and for giving us the opportunity to find out what works in the classroom and what does not. A special note of thanks goes to our student research assistants. David Callies was ably assisted by Nichole Thomas during countless hours spent proofing, integrating and formatting text, and adding dozens of revised and new notes and citations. Gordon Hylton received invaluable help from Andrea Austin and extends special thanks to the law libraries at Marquette and the University of Virginia. Dan Mandelker's work on the book would not have been possible without the help of Arianne Aughey. John Martinez extends special thanks to John Bevan at the S.J. Quinney Law Library for his research assistance.

David L. Callies
J. Gordon Hylton
John Martinez
Daniel R. Mandelker

March 2011

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