

A copy of this syllabus (and of everything else that I hand out or post on the screen in class) is available on the web <http://www.law.harvard.edu/faculty/cdonahue/courses/prop/>.

## Property (Section 2)

### Tentative Syllabus and Assignments

**[I do not allow the use of electronic equipment (laptops, cell phones, etc.) in class. While there are a number of reasons for this, the most compelling from my point of view is that they seem to be a barrier to conversation and thought. For those who are concerned that they might miss something taking handwritten notes, I will have every class recorded, and the recordings will be available online.]**

*Introduction.* Traditionally, property was a six-hour course taught over the entire first year of law school. With the increasing “semesterization” of first-year courses, the tendency is to relegate property to the spring. There are, no doubt, some things about the course that may be a bit easier to understand after one has had a semester of law school; there are also, however, some things about the course that make more sense in the context of the first-semester program. I have taught the course in both the fall and the spring and have found that the advantages and disadvantages of each semester are about evenly balanced.

This semester we’ll be doing it in the spring. You have already been exposed to the two areas of private law that are substantively closely related to property: torts and contracts. You already know that the institution of property is protected, not only in private law, but also in the public law of crime. Most of procedural turns that appear in the cases we will be studying will be familiar to you from civil procedure. You will be taking concurrently a course in legislation and regulation, topics that you will discover are profoundly important for property.

Property begins at the beginning, at least conceptually and methodologically. It asks some basic questions about legal method, particularly about the analysis of cases and statutes, and it introduces us to the basic forms of establishing entitlements in our law of property. It then proceeds to spend about a month on conveyancing and estates in land, about a month on private and public controls on land use, and about a week wrapping up the big ideas. While there are certainly plenty of other topics that we could cover, this coverage manages to introduce most if not all of the major themes in the modern law of property.

*Materials.* The book for the course is C. DONAHUE, *CASES AND MATERIALS ON PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION* (tent. 4th ed., multilith, 2017 ) [DKM4]. The materials are based on C. DONAHUE, T. KAUPER & P. MARTIN, *CASES AND MATERIALS ON PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION* (3d ed., West Publishing Co., 1993) [hereafter DKM3]. You don’t have to buy DKM3. You certainly don’t have to buy a new copy. All the assigned readings in the course will be in DKM4. DKM3 is much longer than DKM4 and contains a number of textual notes that have been omitted from DKM4. It offers a supplement to DKM4, but you may be better off buying either the “Gilbert’s Outline” of property and/or Merrill and Smith’s *Introduction to Property* (see below under “Secondary reading”).

I urge you to read the Introduction to DKM4 now. The Table of Contents of DKM4 and this Syllabus also provides a skeletal outline as we go along. Finally, I will distribute skeletal outlines

of the material as we cover it. (The first one is found on the website under Lectures.) All of these attempt to give you the “big picture” of the material, something we tend to lose sight of in class in our effort to figure out who sued whom in the *Jones* case.

*Secondary reading.* JOSEPH SINGER, INTRODUCTION TO PROPERTY (2d ed. 2005) is a relatively new hornbook that covers most of what we will be covering in the course. It is a long book, but it is probably the best comprehensive, single-volume treatise on the market. W. STOEBUCK & D. WHITMAN, THE LAW OF PROPERTY (3d ed. 2000) is a more traditional hornbook covering much of the same ground. For those seeking more compact coverage J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY (3d ed. 1989) and R. BERNHARDT, REAL PROPERTY IN A NUTSHELL (4th ed. 2000) may be more helpful than harmful if properly used. Some students find C. MOYNIHAN & S. KURTZ, INTRODUCTION TO THE LAW OF PROPERTY: AN HISTORICAL BACKGROUND OF THE COMMON LAW OF REAL PROPERTY AND ITS MODERN APPLICATION (4th ed. 2005) or T. BERGIN & P. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS (2d ed. 1984) useful for the estates section of the course. For various reasons—one of which is ignorance—I do not recommend any of the other standard student books on property, except for the “Gilbert’s Outline” discussed below. You may buy any of the above-cited books (or the Gilbert’s) if you wish, but the only required book is DKM4.

This year I am recommending, but not requiring, that students purchase the “Gilbert’s Outline” of property. The author, James Krier, is a professor at the University of Michigan, and his knowledge of property is profound. His predecessor, Jesse Dukeminier, was a professor at UCLA and one of the leading property scholars of his generation. My problem is not with the competence of the authors; my problem is with the *genre*. This is something that we should talk about during the semester. I don’t always agree with Krier’s statement of the rules, and I frequently would be more qualified than he is. The nature of an outline is to oversimplify.

I have also asked the Coop to stock another recent book THOMAS W. MERRILL & HENRY E. SMITH, THE OXFORD INTRODUCTIONS TO U.S. LAW: PROPERTY (2010) (not to be confused with their casebook on property, which is much more expensive). Merrill and Smith’s ‘take’ on property issues is not quite mine, but that’s a good thing. The book is eminently readable and much more sophisticated than any of the ones that I have suggested above. It’s also quite short, and it won’t cost you an arm and a leg. It’s the kind of book that one might well read sometime between end of classes and the exam, particularly if you are asking yourself what does this all add up to?

*Syllabus Notes.* You will find that the syllabus contains, in addition to page assignments, a brief description of what the class will be about. When a case name or names are given, we will devote much of the class to analysis of that case or those cases. When a case name is not given, we will devote the class to a discussion of problems, doctrine or policy. The fact that a case is not listed in the syllabus does not mean that you should not read the case if it is on the assigned pages; rather the fact that the case name is not mentioned in the syllabus means that I hope you can handle the case by yourselves and will try to put the class emphasis elsewhere. Page references are to DKM4 are indicated by “S,” a holdover from the fact that it began life as a Supplement to DKM3. Since I’m working on updating DKM4, the pages may get out of whack later in the semester. If they do, I’ll issue an updated version of the syllabus.

*How to Proceed.* At the beginning of each of the numbered sections of the book, I recommend that you skim through the section, getting some sense of its basic organization. It will frequently be helpful to read over the textual notes before you prepare the principal cases, but a reading of the notes (and even more of an outline) should never substitute for a reading of the principal cases. On the other hand, the notes are important. They are designed to provoke your thinking on a given topic and to give you doctrinal background which is frequently

important for understanding what is going on in the principal cases.

DKM was designed to be taught out of order. It therefore has more than the usual number of cross-references. Most students find that the cross-references are more useful when they come to review the material than they are when they are dealing with the material for the first time.

You will frequently come to questions in the notes for which you cannot provide a simple answer. This should not concern you. You should, however, begin to ask yourself why it is that you cannot give a simple answer to the question, and if this process provokes some thought on the nature of legal materials generally, so much the better. You should feel no compulsion to look up the authorities cited in the notes unless you really want to. You should, however, familiarize yourself sufficiently with legal citation form that you know what it is that is being cited.

*Question and Answer Sessions.* Beginning in late February (earlier if there is demand), I will schedule weekly question and answer sessions probably on Tuesday at noon (they usually last about an hour). These are not extra classes, and I will cover no new material. Indeed, I won't "cover" any material. These sessions are designed to allow you to ask any questions that you want to ask. Attendance is not required. In the past most students have come to some of them; a few have come to all or none of them. In one of the last question and answer sessions in April, I will go over an essay question from an old exam. I will also schedule one during the exam period before the exam.

*Office Hours.* My office is in Hauser 512 in the Law School. My office hours are currently scheduled from 1:30–3:30 on Tuesdays, or by appointment. There is a sign-up sheet on the door. I don't think that office hours are a particularly good time to ask specific questions about the course. That's what the question-and-answer sessions are for. Office hours are for talking about life.

*Syllabus.* Setting a syllabus for a 1L course is dangerous business. Every class has its own rhythm. I am confident that we will take up the material in this order and that the readings will be no longer than what is given below. I am far less confident that we will take up the material on the specific dates mentioned or that what we will take up will be exactly what is given here. This is the basics; there will probably be variations.

## **Tentative Assignments**

Topic I.

### ESTABLISHING ENTITLEMENTS

Assignment for

#### A. *Possession = Ownership?*

Mon., 23 Jan. *Pierson*, pp. S5–S27. (Read the principal case carefully, probably more than once. Then look at the Questions on p. S10. The Notes that follow give you material that you can use in answering the questions. In the first class, we probably will not have reference to the material in Notes 4–6, but we may well have reference to the Problems on pp. S26–S27. The Note on the Reception will not be the subject of much class discussion.)

Tue., 24 Jan. *Pierson* (cont'd); *Keeble*, pp. S27–S32. Note on Game Laws, pp. S35–S39. (Class will begin with *Keeble* and will then loop back to consider *Pierson*, particularly in the light of Notes 4–6. Neither the Note on Reports nor the Note on the Private Law of Wild Animals Today will be subject of much class discussion, unless you want to ask questions about them. The Note on Game Laws will be dealt with more generally in the next class. For this class you might want to ask whether Livingston, J., was correct when we says "we are without

any municipal regulations of our own” (p. S9), in the light of the paragraph on the New York statutes prior to *Pierson* (p. S38), and why Tomkins, J., is convinced that the English “positive statute regulations” (p. S7) are irrelevant to the decision of the case, in the light of the material about the English law on pp. S35–S36.)

- Wed., 25 Jan. *Agway*, pp. S32–S39. (The Note on Game Laws is important.) Blackstone, Maine, Locke, pp. S39–S47.
- Mon., 30 Jan. *Johnson, Percheman*, pp. S48–S65. (We will not cover the Note on Indian Titles in class, unless you want to ask questions about it.)
- Tue., 31 Jan. Maitland, *Tapscott, Winchester*, pp. S65–S79. (Focus on the principal cases. The notes are placed before the cases because they help explain what’s going on in the cases. You may, however, want to do it the other way around, i.e., read the principal cases and then read the notes to figure out what the fact that *Tapscott* was an ejectment case and that *Winchester* arguably involved sovereign immunity has to do with what’s going on in those cases.)

### B. *Possession vs. Ownership*

- Wed., 1 Feb. Adverse Possession of Land, pp. S79–99. (Class discussion will focus on the questions posed in the notes rather than on the principal cases. We will probably not cover the Note on Disability Provisions in detail, though it provides a nice exercise for self-testing. )
- Mon., 6 Feb. Adverse Possession (cont’d), pp. S99–109. (Class discussion will focus on the questions posed on pp. S104–S106, making use of the analysis suggested by Hohfeld. If you find the concept of life estates briefly discussed on p. S106 note 4 confusing, you might want to read the explanation of them on p. S209–S210.)
- Tue., 7 Feb. Adverse Possession (review the above assignments). Problem, pp. S109–S111. (What we do with the problem on pp. S109–S111 is, to a certain extent, up to you. In the past students have written out answers to it as a practice exam.)

### C. *Possession or Ownership: What is it worth?*

- Wed., 8 Feb. *Geragosian, Peters*, pp. S112–129. Mon., 13 Feb. *Edwards* (2 cases), pp. S129–S143.
- Tue., 14 Feb. Review *Edwards* (2 cases), pp. S129–S143. Note on Present Value Calculations, pp. S143– S145.

### D. *A Very Brief Introduction to the Property You Can’t Touch*

- Wed., 15 Feb. Introductory Note, *INS v. AP; Feist Publications v. Rural Telephone Service Company*, S145–S163.

## Topic II. TRANSFER OF OWNERSHIP OF LAND

### A. *Conveyancing*

- Mon., 20 Feb. *Metzger*, Statute of Frauds, *Hayes*, pp. S164–S185. (Class discussion in the first half of the class will focus on the questions on p. S178. Then we’ll move on to *Hayes*. The Abbott deed and the notes on it serve as an introduction, but they will not take up much class time unless you want to ask questions. The first note on the Abbott deed will merit rereading when we get to estates in land and future interests.)
- Tue., 21 Feb. *Micklethwait, Hood*, pp. S185–S197.

## B. What You Can Transfer

- Wed., 22 Feb. Introduction to Common Law Estates and Future Interests: Present Estates: Fee Simple and Life Estates, pp. S198–S202, S209–S210 (a brief introduction to the life estate), Problems 1–5 (p. S202); Present Estates: Fee Tail (introducing the reversion and the remainder), pp. S202–S204, [we will not do Problems 6 and 7 (p. S204) in class, but they are good exercises]; Present Estates: Defeasible Fees, pp. S204–S205, Problems 8–10, pp. S205; *Storke*, pp. S205–209; Summary, p. S210.
- Mon., 27 Feb. Future Interests: Remainders and Reversions, pp. S211–S213; Problems 12 and 13 (p. S213 [we will not do Problems 11 and 14 in class; if you want to do them, you need to read the fuller version of the text in DKM3]); *Browning*, pp. S214–S220.
- Tue., 28 Feb. Future Interests: Executory Interests, pp. S220–224; Problems 15–16 (p. S224); *Abbott*, pp. S225–S229.
- Wed., 1 Mar. The Policy Against Undue Restraints on Alienation, pp. S229–S233, S244–S246, S247–S258; Problems, p. S258–S260. (Note: I will not hold you to a detailed knowledge of the Rule in Shelley’s Case or the Doctrine of Worthier Title, and we will not do the problems on those doctrines. Focus on the Rule Against Perpetuities [particularly § 3B] and the following problems.)
- Mon., 6 Mar. *Ryan*, pp. S261–S270; *Brown*, pp. S270–S275.
- Tue., 7 Mar. General Introduction to Concurrent Interests and Marital Estates, pp. S235–S243, S275–S279; Problems, p. S237, S240; *Holbrook*, pp. S279–S289; S279–81. (Note: I will not hold you to a detailed knowledge of tenancy in partnership or condominiums and cooperatives, but you should know that they exist. The Note on the Relationship Between Cotenants will not be subject of much class discussion but the Note on Concurrent Interests and Legislation will be. After that, we will deal with the *Holbrook* case.)
- Wed., 8 Mar. *Beal*, pp. S290–S302. Common Law and Community Property, pp. S302–317. (Note: This is long. I don’t expect you to remember the details. What I want you to do is to get some idea of the various ways in which the law deals either positively or negatively with the marital unit.)
- Sat., 11 Mar. Spring vacation begins.
- Sun., 19 Mar. Spring vacation ends.
- Mon., 20 Mar. *Javins, Lemle*, pp. S233–S235, S318–S342. (Note: There’s a long note after *Javins*. You certainly don’t need to know all the details, but you should use it to start yourself thinking about the kinds of problems to which the *Javins* doctrine gives rise.)
- Tue., 21 Mar. *Pennell, Braschi*, pp. S342–S362.

## Topic III. PRIVATE AND PUBLIC CONTROL OF LAND USE

### A. Private Control

- Wed., 22 Mar. *Boomer, Coase*, pp. S363–S382.
- Mon., 27 Mar. *Waldrop, Petersen, Cox*, pp. S382–S403.
- Tue., 28 Mar. *Waldrop, Petersen, Cox* (cont’d); *Cooke*, pp. S403–S414; Introduction to Covenants, pp. S414–S421. The Note on Distinguishing Among Different Types of Easements and Other Related Interests will not be subject of much class discussion unless you want to ask questions about it.
- Wed., 29 Mar. *Charping, Richmond, Riley*, pp. S421–S444.
- Mon., 3 Apr. *Riley* (cont’d), *Ginsberg, Camelback*, pp. S445–460. *Shelley*, pp. S590–S595.

(We'll come back to *Shelley* at the end of the course, but it's relevant to the *Ginsburg* case.)

### B. Public Control

- Tue., 4 Apr. *Preble*, pp. S461–S468; Standard State Zoning Enabling Act, *Euclid*, S468–S479; *Pierro, Stoyanoff*, pp. S480–S492. (This is long; we may not get to *Stoyanoff* until the next class.)
- Wed., 5 Apr. Exclusionary Zoning, pp. S492–S512. (There's an extensive outline of this assignment in the general outline for Topic III, which will be available on the website. We will spend some time on the basic argument in *Mount Laurel I*. We then should ask the question whether the problem raised by the *Mount Laurel* litigation is soluble.)
- Mon., 10 Apr. Takings and the Constitution, pp. S512–S516; *Penn Central*, pp. S516–S526; Note on 1987, pp. S527–S530.
- Tue., 11 Apr. *Lucas*, pp. S530–S549; *Palazzolo*, pp. S549–S558.
- Wed., 12 Apr. *Kelo v. City of New London*, S559–S584. (Careful; this is long; we really should read one Supreme Court case largely unedited. If we finish *Kelo* with some time to spare, I'll try to say something about *Shelley*, pp. S590–S595, which is part of the next assignment.)

### Topic IV. THE WHAT AND WHY OF PROPERTY

- Mon., 17 Apr. Bentham, Demsetz, *Shelley*, Hegel, *Flemming*, Reich, pp. S585–S611.
- Tue., 18 Apr. Marx, *Shack, PruneYard*, pp. S611–S636.
- Wed., 19 Apr. Final lecture.
- Wed., 10 May Final Exam (one hour in-class [short answer questions] followed by take-home for the rest of the day [essay question(s)]).