

Ilya Somin
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Office Hours: Monday 11:45-1:45 PM, or
by appointment.

Property Fall 2021

Course Time and Location

Monday and Wednesday, 6:05-8:05 PM
Room 120

Reading Materials

Textbooks: Jesse Dukeminier, Mark Krier, Gregory Alexander, Michael Schill and Lior Strahilevitz, *Property*, (Aspen, 2018), 9th ed. (listed as “DK” in syllabus); Robert Ellickson, Carol Rose, and Henry Smith, *Perspectives on Property Law*, (Aspen 2014), 4th ed. (listed as “ERS”). Available at GMU Book Store and online.

Cases marked as being on TWEN can be accessed from the class TWEN site, directly from the syllabus there. These cases can also be accessed on Westlaw and Lexis, if you prefer. Several other items on the reading list are available on TWEN, under the “Course Materials” heading.

Grading

Grades will be based on a combination of the final exam and class participation. Specifically, the course grade will be the final exam grade plus a bonus for good class participation worth up to as much as about one half of a letter grade on your final grade for the semester.

The final exam will consist of essay questions and short identification questions. Further details of the final exam will be announced later in the semester. Class participation will be assessed on a combination of quantity and quality. Further details on class participation and final exam grading will be provided during the course of the semester.

Assignments

Although I will try to stick to the schedule, we may occasionally fall behind. In such an unfortunate event, we will begin the next class with the next case or other reading on the

syllabus, unless I say otherwise. The same procedure applies if we have a class cancellation due to inclement weather, the coronavirus crisis, or any other unforeseen event.

Office Hours

I will be holding in-person office hours this semester, unless university policy changes in ways that prevent it. If you need to speak with me but cannot do so during office hours, please let me know and we can arrange an alternate time. We can also talk by Zoom, Skype, or other similar platform, if you prefer. On a few occasions, the office hours time may need to be moved to a different date or time in a given week. If so, I will inform the class in advance.

Learning Outcomes

Students will be expected to learn the basics of a variety of aspects of American property law. They will also come to understand key aspects of the real-world impact of property law, and consider the opposing views on a number of controversial issues in property jurisprudence and policy.

Recording

I hereby authorize students to record sessions of this class, so long as the recordings are not used for any commercial purpose, and not distributed to anyone other than participants in the class.

Coronavirus Contingency Plans

In the event that either state or university guidelines prevent this class from meeting in-person, it will be held online utilizing Zoom or other similar platform. Should this prove necessary, I will inform the class of relevant procedures online. But, to the extent possible, we will observe the same rules and procedures as during in-person sessions.

August 23: Introduction to Property

Richard Posner, "The Economic Theory of Property Rights," TWEN
Margaret Jane Radin, "Property and Personhood," ERS 6-15
Harold Demsetz, "Toward a Theory of Property Rights" TWEN

August 25: Acquisition by Conquest and Capture

Johnson v. M'Intosh DK 19
Pierson v. Post DK 19-23
Ghen v. Rich DK 27-32
Keeble v. Hickeringill DK 35-39

August 30: Acquisition by Creation/Tragedy of the Commons

International News Service v. AP DK 133-39

Feist Publications, Inc. v. Rural Telephone Service Co. DK 141-48

Garrett Hardin, “The Tragedy of the Commons,” ERS 99-107

Michael Heller & Rebecca Eisenberg, “Can Patents Deter Innovation? The Anticommons in Biomedical Research,” ERS 131-39

September 1: Acquisition by Find

Armory v. Delamirie DK 53-57

Hannah v. Peel DK 57-63

McAvoy v. Medina DK 63-64

Notes: DK 64-70

Popov v. Hayashi DK 46-52

Popov v. Hayashi video: https://www.youtube.com/watch?v=af4dRPV_dUc&app=desktop

September 8: Acquisition by Adverse Possession/Acquisition by Gift

Background on Adverse Possession DK 70-75

Mannillo v. Gorski DK 89-95

Howard v. Kunto DK 95-100

Newman v. Bost DK 116-23

Gruen v. Gruen DK 123-30

September 13: The Right to Exclude/Theory of Property Rules

Jacque v. Steenberg Homes DK 205-207

State v. Shack DK 207-11

Alabama Association of Realtors vs. Dept. of Health and Human Services, available at https://www.supremecourt.gov/opinions/20pdf/21a23_ap6c.pdf

Guido Calabresi & A. Douglas Melamed, “Property Rules, Liability Rules, and Inalienability Rules: One View of the Cathedral,” ERS 201-13

September 15: Property Rights in the Body and Inalienability Rules

Moore v. Regents of the Univ. of California DK 167-78

Richard Epstein, “Altruism and Valuable Consideration in Organ Transplantation,” (Handout/TWEN).

Leon Kass, “Organs for Sale? – Propriety, Property, and the Price of Progress.” (Handout/TWEN)

Richard Yetter Chappell and Peter Singer, “Pandemic Ethics: The Case for Experiments on Human Volunteers,” *Washington Post*, Apr. 27, 2020, available at

<https://www.washingtonpost.com/opinions/2020/04/27/pandemic-ethics-case-experiments-human-volunteers/?arc404=true> Also on TWEN

September 20: Estates and Fee Simple/Coase Theorem

R.H. Coase, "The Problem of Social Cost," ERS 173-181
Robert Ellickson, "Order Without Law: How Neighbors Settle Disputes." ERS 181-90
History and origins of estates DK 249-65
White v. Brown DK 266-73

September 22: Life Estates and Defeasible Estates

Baker v. Weedon DK 274-82
Defeasible Estates DK 283-86
Mahrenholtz v. Cty. Bd. of School Trustees DK 286-94

September 27: Future Interests and Trusts/ Concurrent Interests I

Future Interests DK 313-22, 327-35
Rule Against Perpetuities and its Reform DK 345-52
Jesse Dukeminier and James Krier, "The Rise of the Perpetual Trust" DK 379-83
NOTE: The traditional rule against perpetuities will NOT be on the final exam.
Background to concurrent interests DK 387-92

September 29: Concurrent Interests II

Riddle v. Harmon DK 392-97
Delfino v. Vealencis DK 405-15
Spiller v. Mackereth DK 416-19
Swartzbaugh v. Sampson DK 419-24

October 4: Landlord-Tenant Law I – Estates, Delivery of Possession, Sublets

Types of Leasehold Estates DK 461-63
The Lease DK 468-71
Garner v. Gerrish DK 463-66
Hannan v. Dush DK 479-82
Kendall v. Ernest Pestana, Inc. DK 490-97

October 6: Landlord-Tenant Law II - Antidiscrimination Law and Tenants' Rights

Fair Housing legislation 471-74
Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, 135 S. Ct. 2507 (2015), pp. 2513-25, 2532-42 TWEN
Berg v. Wiley DK 500-508
Sommer v. Kridel DK 510-19
Hilder v. St. Peter DK 533-546

October 12 (Tuesday observing Monday schedule): Landlord Remedies and Tenant Rights/Rent Control

Landlord Remedies DK 508-510, 519-21

Tenants' Rights DK 548-551

"Do Rent Controls Work?" *The Economist*, Aug. 30, 2015, available at

<http://www.economist.com/blogs/economist-explains/2015/08/economist-explains-19>

Jake Blumgart, "In Defense of Rent Control," *Pacific Standard*, Apr. 1, 2015, available at

<https://psmag.com/in-defense-of-rent-control-3cb453119116#.4jzgb365d>

Paul Fiorilla, "Rent Control Makes a Comeback as Housing Crisis Grows," Multi-Housing

News, Dec. 26, 2019, available at [https://www.multihousingnews.com/post/rent-control-makes-](https://www.multihousingnews.com/post/rent-control-makes-a-comeback-as-housing-crisis-grows/)

[a-comeback-as-housing-crisis-grows/](https://www.multihousingnews.com/post/rent-control-makes-a-comeback-as-housing-crisis-grows/)

Gianpaolo Baiocchi and H. Jacob Carlson, "The Case for a Rent Moratorium," *New York Times*,

Apr. 1, 2020, available at [https://www.nytimes.com/2020/04/01/opinion/coronavirus-rent-](https://www.nytimes.com/2020/04/01/opinion/coronavirus-rent-freeze.html)

[freeze.html](https://www.nytimes.com/2020/04/01/opinion/coronavirus-rent-freeze.html) Also on TWEN

October 13: Statute of Frauds/The Contract of Sale

Land Transactions DK 553-54 (briefly skim 554-69)

The Statute of Frauds DK 569-70

Hickey v. Green DK 571-76

Lohmeyer v. Bower DK 576-81

Stambovsky v. Ackley DK 581-86

Johnson v. Davis DK 586-91

October 18: The Deed

The Deed DK 595-600

Frimberger v. Anzelloti DK 600-605

Rockafellor v. Gray DK 605-11

Rosengrant v. Rosengrant DK 612-16

October 20: Mortgages (Moved to October 19, 8:15-10:15 PM – on Zoom)

Introduction to Mortgages DK 617-23

Murphy v. Financial Development Corp. DK 623-28

The Mortgage Crisis and the Great Recession DK 631-33

Commonwealth v. Fremont Investment and Loan DK 633-40

John H. Makin, "A Government Failure, Not a Market Failure," *Wall Street Journal*, July 1, 2009 TWEN

John Atlas and Peter Dreier, "The Conservative Origins of the Subprime Mortgage Crisis,"

American Prospect, Dec. 18, 2007, available at <https://prospect.org/infrastructure/conservative-origins-sub-prime-mortgage-crisis/>

October 25: Recording Systems/Easements I

Introduction to Recording DK 661-67
Types of Recording Acts DK 681-85
Messersmith v. Smith DK 686-91
Historical Background of Easements DK 763-66
Willard v. First Church of Christ, Scientist DK 766-772

October 27: Easements II

Licenses DK 772
Holbrook v. Taylor DK 772-77
Othen v. Rosier DK 785-95
Brown v. Voss DK 807-17
Negative Easements and Conservation Easements DK 829-35

November 1: Easements II (Continued)/Real Covenants and Servitudes

Covenants Running with the Land DK 835-38
Tulk v. Moxhay DK 838-42
Sanborn v. McLean DK 854-59
Neponsit Property Owners Association v. Emigrant Industrial Savings Bank DK 843-51
Shelley v. Kraemer DK 859-64

November 3: Common Interest Communities/Discussion of Final Exam

Common Interest Communities DK 873-76
Richard Epstein, "Of Covenants and Constitutions," ERS 361-72
Nahrstedt v. Lakeside Village Condominium DK 876-88
Mulligan v. Panther Valley Property Owners Association, 766 A.2d 1186 (N.J. Super. 2001)
Westlaw/TWEN

November 8: Zoning I

History of zoning DK 895-99
Euclid v. Amber Realty DK 899-909
Structure of zoning laws DK 910-15
Northwestern Distributors, Inc. v. Zoning Hearing Bd. DK 915-22
Variances and Special Exceptions DK 924-30
Zoning Amendments/Spot Zoning DK 930-37

November 10: Zoning II: Flexibility in Zoning/Exclusionary Zoning

State ex rel. Stoyanoff v. Berkeley DK 938-46
Edward Glaeser and Joseph Gyourko, "Zoning's Steep Price," ERS 372-80

William Fischel, “Homevoters, Municipal, Corporate Governance, and the Benefit View of the Property Tax” ERS 380-388

Ilya Somin, “Progress on Exclusionary Zoning, Regression on Rent Control,” *Reason*, Dec. 25, 2019, available at <https://reason.com/2019/12/25/progress-on-exclusionary-zoning-regression-on-rent-control/>

November 15: Takings I - Public Use

The Power of Eminent Domain DK 997-1001

Berman v. Parker, 348 U.S. 26 (1954) (TWEN).

Wendell Pritchett, “The ‘Public Menace’ of Blight: Urban Renewal and the Private Uses of Eminent Domain” ERS 460-69

Kelo v. City of New London DK 1001-1017

November 17: Takings II: What is a Taking?

Physical Occupations and Regulatory Takings DK 1021-22

Loretto v. Teleprompter DK 1022-34

Penn Central Transp. Co. v. City of New York DK 1050-65

Cedar Point Nursery v. Hassid, 141 S.Ct. 2063 (2021) TWEN

Guest Speaker:

Joshua Thompson, Pacific Legal Foundation

November 22: Takings III/End of Class

Friends of Danny DeVito v. Wolf, 227 A.3d 872 (Pa. 2020), pp. 872-84, 893-97, 903-05 TWEN

Pennsylvania Coal v. Mahon DK 1042-1050

Lucas v. South Carolina Coastal Council DK 1068-84

Murr v. Wisconsin 1088-1100

Remedies for Takings Violations DK 1065-68