



Everyone Should Have Some: Inclusion & Equity in Property Law

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Robert Montgomery was a liberal economics professor at the University of Texas. John Kenneth Galbraith tells us those liberal views “made him unpopular with the Texas legislature” which decided to interrogate him. “When he was asked if he favored private property, Montgomery replied, ‘I do—so strongly that I want everyone in Texas to have some.’”¹

Property law, it turns out, is not just about keeping what you have but getting property, that is, the freedom and power to acquire property. In a society that treats each person as equal, this means every person must have a realistic opportunity to acquire property that is both sufficient to live a full and flourishing life and that respects the person’s dignity and autonomy.

A free and democratic society that aspires to treat every person with equal concern and respect does not recognize different statuses like noble and commoner, free and unfree, racially superior and racially inferior. Moreover, such a society constructs property laws with the goal of promoting widespread distribution of ownership: the freedom to buy and sell without discriminatory exclusion from the marketplace, liberty from servitude or other forms of arbitrary hierarchical power that would deny individuals equal concern and respect, and social relationships that promote respect for each person as well as prohibit powers over others that are illegitimate or unjust.

These matters are commonplace in many property law courses that teach the origins of the system of estates in land and future interests. That history explains how feudalism was established in England and how, over time, legal rules were developed to protect peasants from the arbitrary power of lords, eventually promoting the fee simple form of property rights that gives the owner autonomy, freedom from lordly

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1. THE LITTLE, BROWN BOOK OF ANECDOTES 395 (Clifton Fadiman ed., 1985).



prerogatives, the power to move away and sell the land without the lord's consent, security of land tenure, and the freedom to use one's property as one sees fit, subject to legitimate regulations. The antifeudal property system achieved these goals by rules that promoted the alienability of land while protecting owners from loss of their homes, consolidated powers in owners, and limited future interests that might unduly hamper the freedom of individuals to run their own lives, and regulated the powers of landlords. From lords, vassals, and serfs, we moved to a political-legal system that values free and equal citizens; property law both reflected and enabled that change to occur. While those changes in law were imperfect and had limitations—especially with regard to race and gender—there is no doubt that they significantly shifted from norms of hierarchy and servitude to norms of equality and liberty.

This means that the estates system, which serves as the core of many property law courses, teaches us some valuable lessons about inclusion and equity. To move from feudal property relations to democratic ones, laws limited the powers of lords and increased the powers of those who lived on the land. The laws redistributed property rights downwards from lords to peasants and converted a hierarchical system with only a few “owners” to one which had widespread access to ownership as well as freedom to use one's land as one saw fit, subject to laws that applied to all. If property law is built on law reforms that opened access to property to those who had been locked out of the system in the past—or relegated to a subordinate position in it and in social relations—then we can see how fair housing and public accommodation laws further the same values and norms. They open up property to people who were previously excluded from home ownership and full and equal enjoyment of the goods and services offered in public accommodations. Property should be available to all rather than hoarded by a privileged class. Property law changed over time to promote these norms.

This does not mean that either English or American property law was perfect or that either was a model for a property system that included everyone. It is important for students of property law to understand the ways that U.S. law does, and does not, adequately promote inclusion and equity. American property law is filled with acts of oppressive dispossession—through conquest of Native nations, slavery, racial segregation, discriminatory denials of access to housing, public accommodations, employment, and failures to fairly divide income and wealth through economic institutions that actually promote equal opportunity. Property law also fails to recognize and reward the unpaid work done in the home—most often by women—such as cleaning, cooking, and caretaking of children and the elderly.

This suggests that a core topic of property law is the way that it does—and does not—achieve the norms of equality that it embraces. Treatment of the estates system as an antifeudal, pro-egalitarian structure can be reinforced by teaching other subjects that show how these issues play out in modern times. Property law abounds with issues related to discrimination, wealth and poverty, and access to housing affordable by all. My own property law casebook integrates these topics into sections that teach

basic property law rules.² Possible topics that can easily be included in a first year property course include:

Public Accommodations Law

- Federal and state statutes seek to ensure access to the marketplace of goods and services by prohibiting discrimination in places of public accommodation. These laws apply to certain types of markets and certain types of discrimination, but they allow other forms of discrimination to continue to exist. For example, no general federal statute prohibits discrimination on the basis of sex in public accommodations. While most (but not all) states have state laws that do so, half those states do not prohibit discrimination on the basis of sexual orientation or gender identity, and despite the recent case of *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020), those states may continue to interpret their state laws to deny full and equal enjoyment to public accommodations for LGBTQ persons.
- Public accommodation laws include, for example:
 - Title II of the Civil Rights Act of 1964 (the Public Accommodations Act of 1964), 42 U.S.C. § 2000a.
 - Civil Rights Act of 1866, 42 U.S.C. § 1981 & § 1982.
 - Americans with Disabilities Act of 1990, 42 U.S.C. § 12102 et seq.
 - State public accommodation statutes like Mass. Gen. Laws ch.151B.
 - Common law cases like *Uston v. Resorts Intl*, 445 A.2d 370 (N.J. 1982) (holding that all places open to the public have a duty to serve the public unless they have a good reason not to).

Fair Housing Laws

- Both federal and state laws prohibit discrimination on the basis of race, sex, disability, religion, and against families with children. Many state laws also prohibit discrimination on the basis of age, marital status, sexual orientation, and gender identity.³ Each of these types of discrimination has different parameters, and proving discrimination will be a little different for each type. It is valuable to teach examples in some or all of these categories to get a sense of how discrimination plays out in the real world and the ways existing law does and does not help.

2. This may seem self-serving, but my own casebook—although not perfect—does cover all these topics. JOSEPH WILLIAM SINGER, BETHANY R. BERGER, NESTOR M. DAVIDSON, & EDUARDO MOISÉS PEÑALVER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* (7th ed. 2017).

3. After the 2020 *Bostock* decision, it is likely that federal courts will interpret the federal Fair Housing Act to prohibit discrimination in housing on the basis of sexual orientation and gender identity.

- These laws prohibit both intentional discrimination and disparate impact discrimination. They include:
 - The Fair Housing Act, 42 U.S.C. §§ 3601 to 3631.
 - The Civil Rights Act of 1866, 42 U.S.C. § 1982.
 - State fair housing laws like N.J. Stat. § 10:5-12.

Homelessness

- The law of trespass gives owners the freedom to exclude non-owners, but several courts have limited those rights when homeless persons need a place to be.
- Recent cases include:
 - *Commonwealth v. Magadini*, 52 N.E.3d 1041 (Mass. 2016) (holding that a homeless person cannot be criminally prosecuted for trespass if he entered land because of necessity to protect his life when he had no reasonable alternative).
 - *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018) (holding that it violates the 8th Amendment to prosecute a homeless person for sleeping in public if the shelters are full and there is no other place to sleep).

Migrant Farmers

- People who live in precarious housing, like migrant farmers living in barracks, may have rights to visitors and charitable and governmental aid; those rights limit the powers of the farmer to exercise the right to exclude.
- See, e.g., *State v. Shack*, 277 A.2d 369 (N.J. 1971) (allowing migrant farmworkers to receive visitors in their barracks on the farmer's land despite his objections, including services from doctors, lawyers, and activists).

Exclusionary Zoning

- This issue has rocketed into public debate in the last few years as housing becomes more and more expensive and incomes do not keep pace. Zoning laws shape municipal environments to achieve various legitimate government goals, but they also have the effect of making it illegal to build affordable housing in many cities and towns.
- Laws in some states require local zoning laws to make room for the construction of affordable housing, see *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975).
- Both the Equal Protection Clause and the Fair Housing Act prevent private exclusionary practices by prohibiting the enforcement of racially restrictive covenants,

Shelley v. Kraemer, 334 U.S. 1 (1948), and even writing such restrictions in leases or deeds, Fair Housing Act, 42 U.S.C. § 3604(c).

- Because the Fair Housing Act prohibits unjustified acts that have a disparate impact on protected groups by denying them access to housing, and because those laws apply to local zoning and land use permitting decisions, a useful topic to cover is the extent to which local zoning laws that exclude multi-family housing (and hence affordable housing) have a disparate impact on groups that are relatively poor and disproportionately in need of lower cost housing. Those groups include African Americans, Latinos, and American Indians, women of all races, children, and persons with disabilities.

Marital Property

- It is helpful for students to learn the history of increasing rights granted to married women and fact that they were denied legal autonomy until the second half of the nineteenth century.
- It is also helpful to understand the power imbalance that came from women working in the home without any salary and how both community property and equitable distribution statutes were passed over time to ensure that married women earn a fair share of the marital assets.
- Those laws have not erased inequalities in access to property because of sex. Women still take more time than men away from paid employment to take care of children and the elderly; disparities in wages still hamper the ability of women to accumulate property; and both discrimination and sexual harassment remain serious social problems.

Tribal Property and the History of Conquest

- Many property casebooks describe first possession as the origin of title, and then note the fact that conquest of Indian nations means that much of the land in the U.S. is based on dispossession or denial of first possession rather than protection for first possession.
- On the other hand, most of the land was acquired through treaties that were coercive but in which tribes did reserve some lands and bargained for certain rights that they retain to this day, including inherent sovereignty and property.
- Indian nations are not just historical relics, but flourish today and their property rights are a unique estate in land not usually covered in first year property classes. It is important to understand accurately what tribal property rights are and how they continue to exist.

- Case law both protects tribal property rights and justifies taking it without tribal consent and sometimes without compensation. Examples include:
 - *Johnson v. M'Intosh*, 21 U.S. 543 (1823) (land owned by Indian nations cannot be transferred in fee simple without the consent of the United States).⁴
 - *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (treaties can be unilaterally abrogated by the United States, and tribal property rights can be abrogated without the consent of the tribe even when the treaty provided otherwise).
 - *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955) (property owned by Indian nations can be taken by the United States without compensation if that title is not recognized by a federal treaty or statute).
 - *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980) (tribal property recognized by the U.S. cannot be taken without compensation but the U.S. is only required to show a “good faith effort” to provide compensation rather than obligated to pay fair market value as is the case with other property rights).

In conclusion, given the topics traditionally covered in the property law course and the very nature of property itself, the property law course may be one of the easiest first year courses to use to promote inclusion and equity in the first year curriculum. Antifeudal background principles like rules limiting restraints on alienation are based on an historical process designed to combat and contain the inegalitarian aspects of feudalism. For this reason, then, these modern topics of discrimination and inequality fit neatly with core principles in the field, and can be incorporated into the basic property course in ways that illuminate the basic principles and rules of property law.

4. In my view, this case is often misunderstood. For my take on how it should be understood and taught by property professors, see Joseph William Singer, *Indian Title: Unraveling the Racial Context of Property Rights, or How to Stop Engaging in Conquest*, 10 ALBANY GOV'T L. REV. 1 (2017).