

At the Lectern

Real + Imaginary = Complex: Toward a Better Property Course

James Grimmelmann

The first-year course in property has a dreadful reputation. When the *St. Louis University Law Review* invited four students to contribute to a symposium on teaching property, three of the four used the occasion to bash the course. One “began with the hypothesis” that it shouldn’t be a required course.¹ Another wrote, “I must admit my disappointment to find Property on the class schedule for my first semester of law school.”² And a third recalled “long hours desperately trying to understand the destructibility of contingent remainders, the rule in Shelley’s case, the doctrine of worthier title and the rule against perpetuities” only to admit that her “memory quickly faded as to the importance of these rules.”³ The bar of student expectations is set so low that every time I teach property, without fail, I have students who later tell me they were surprised they didn’t hate the course.

Professors are hardly more complimentary. Even those who relish teaching property describe a constant struggle against intricacy, incoherence, and irrelevance. Property is a “montage of ill-fitting subjects, jarringly connected by arcane language and obfuscatory rules”;⁴ “the word [‘property’] is used to describe a range of problems that have little or no logical connection with each other”;⁵ there is no “apparent coherence of the principles addressed in

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1. Jay Zych, *Theory and Praxis: Advice to Those Learning Property and a Request to Those Who Teach It*, 46 ST. LOUIS U. L.J. 807, 807 (2002).
2. Kelly M. Plummer, *Who Owns America?*, 46 ST. LOUIS U. L.J. 829, 829 (2002).
3. Amanda G. Altman, *Everything I Needed to Know About Being a Lawyer I Learned in Property*, 46 ST. LOUIS U. L.J. 821, 821 (2002).
4. Steven Friedland, *Teaching Property Law: Some Lessons Learned*, 46 ST. LOUIS U. L.J. 581, 581 (2002).
5. A. Dan Tarlock, Book Review, 21 STAN. L. REV. 1266, 1276 (1967) (reviewing CURTIS J. BERGER, *LAND OWNERSHIP AND USE: CASES, STATUTES, AND OTHER MATERIALS* (1968)).

the course.”⁶ Students “approach the property law course with a great deal of trepidation” because “[t]hey have heard horror stories.”⁷ “[T]he elements of the traditional Property course most often taught, estates in land and future interests, are those probably least used in practice.”⁸ Property is “perhaps the least obvious of the first-year courses that deserves retention in the core curriculum.”⁹ “Our colleagues, it seems, are not convinced of the central importance of the topic we teach, perhaps because we have not succeeded in making clear to them, or to ourselves, just what it is.”¹⁰ This isn’t a new problem, either. In 1976, “the authors (or co-authors) of the widely used first-year property casebooks seemed unable to articulate any generally agreed purpose or underlying philosophy for the teaching of first-year property.”¹¹ And these are some of property’s *friends*.

I come not to praise the property course but to bury it. The critics are right. The course as taught today is a mess, an anachronism, an embarrassment. It does belong in the first-year curriculum, but not in anything close to its present form. It is time to bar the entail, destroy the contingent remainders, commit a few acts of ameliorative waste, and put Blackacre up for sale.

I. For Real, Property?

The heart of the problem is the heart of the course: real property. At Stanford, property “deals with possession and ownership of land and with the incidents thereof”;¹² at Yale, “[t]he principal focus will be on entitlements in land.”¹³ Personal property is a very distant second. John Humbach’s 1976 survey of property teachers reported, “Over one-fourth of the respondents omit Personal Property topics almost entirely and another one-fourth spend less than 5 hours on Personal Property.”¹⁴ When Roberta Kwall and Jerome

6. Friedland, *supra* note 4, at 590.

7. Peter W. Salsich, Jr., *Property Law Serves Human Society: A First-Year Course Agenda*, 46 ST. LOUIS U. L.J. 617, 618 (2002).

8. Louise A. Halper, Q: *Why Is This Course Different from All Other Courses? A: Maybe It's Not*, 22 SEATTLE U. L. REV. 965, 966 (1999) (book review).

9. William L. Reynolds, *Back to the Future in Law Schools*, 70 MD. L. REV. 451, 455 (2011).

10. Halper, *supra* note 8, at 965.

11. John A. Humbach, *What Is Taught in the First Year Property Course? A Report of a Survey of Instructors Teaching the Basic Property Course*, 29 J. LEGAL EDUC. 459 (1978).

12. *Property*, STANFORD LAW SCHOOL COURSE CATALOG, <https://law.stanford.edu/courses/property/> (last visited May 10, 2017).

13. *Yale Law School 2016-2017: Course Offerings*, BULLETIN OF YALE UNIVERSITY, <http://bulletin.printeryale.edu/htmlfiles/law/course-offerings.html> (last visited May 10, 2017).

14. Humbach, *supra* note 11, at 466. By way of reference, ABA Standard 310 currently requires 700 minutes of “classroom direct faculty instruction” per credit: one fifty-minute “hour” per week for fifteen weeks, minus one week for a final examination. A four-credit course thus comprises fifty-six “hours” of instruction, and a six-credit course comprises eighty-four. Thus, half of property teachers surveyed spent ninety percent or more of their class time on real property.

Organ did a similar survey in 1997, their instrument included seven headings devoted to real property and “a miscellaneous category that included personal property, economic and ownership theory, body parts, intellectual property, and other nontraditional topics.”¹⁵ And when Peter Wendel and Robert Popovich repeated the exercise in 2004, they concluded that “Property professors consider [personal property] topics to be among the least important in the course.”¹⁶ The Multistate Bar Exam is even starker: It tests exclusively on real property.¹⁷

This obsessive focus on real property, I believe, is the source of all our ills. For one thing, it contributes to the subject’s legendary dryness. Real property is the Augean stable of the common law: 700-year-old statutes are still good law.¹⁸ Most of the complaints about the property course dwell on the topics with the oldest lineages. Everyone gripes about shifting and springing executory interests, about the Rule in Shelley’s Case and the Doctrine of Worthier Title, about the baroque classification of easements and the Byzantine complexity of covenants, and especially about the Rule Against Perpetuities. The inner animating logic of these antique survivals¹⁹ is gone; they no longer constitute a coherent system. Students can tell these are just abstract rules to be memorized, and casebooks have largely given up on trying to pretend they’re anything else.

All of this might be forgivable if real estate were central to modern legal practice. But it is not. Most lawyers are not real estate lawyers; easements by necessity and covenants that touch and concern the land are not concepts they will ever wield in practice. Even for land lawyers, arcane distinctions like the one between a fee simple determinable and a fee simple subject to a condition subsequent rarely rear their heads. Students are rightly skeptical that any of this material will be relevant in their professional lives. And yet the dead hand of the Rule Against Perpetuities rules them still.

The property course has apologists, not defenders. They take its collage of topics—the joint product of history, inertia, and chance—and construct *ad hoc post hoc* rationalizations for why teaching this particular grab bag is nonetheless worthwhile. The reasons are many, but they are all unpersuasive.

15. Roberta Rosenthal Kwall & Jerome M. Organ, *The Contemporary Property Law Course: A Study of Syllabi*, 47 J. LEGAL EDUC. 205, 206 (1997).
16. Peter Wendel & Robert Popovich, *The State of the Property Course: A Statistical Analysis*, 56 J. LEGAL EDUC. 216, 222 (2006).
17. NATIONAL CONFERENCE OF BAR EXAMINERS, MBE SUBJECT MATTER OUTLINE 2017, at 6 (2017), <http://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F201>.
18. *See, e.g.*, Chianese v. Culley, 397 F. Supp. 1344, 1345 (S.D. Fla. 1975) (“This right to convey hearkens back to the Statute of Quia Emptores in the year 1290, and the right to alienate one’s property has been accepted as an incident of an estate in fee simple ever since.”). This is not to say that everything in the stable is a turd; alienability has survived for good reason and is one of the key conceptual pillars of modern property law. *See infra* Part II.B.
19. Where they even survive, that is. No American court has destroyed a contingent remainder in decades.

First, there is the simple inertia of tradition. Property was a first-year course when today's professors' professors' professors were in law school, in something not unlike its current form. Holmes compellingly refuted the argument from tradition in 1897, and I cannot improve on his formula.

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.²⁰

Holmes was talking of doctrine, but he might as well have been talking of pedagogy. The modern property course is a historical survival, not the product of reasoned design. It bears strong traces of John Chipman Gray's six-volume casebook,²¹ and of the First Restatement. The former defined the metes and bounds of the subject; the latter codified black-letter rules. The combination was deadly for pedagogical innovation, because it created a canon that was at once too authoritative to ignore and too sprawling to clarify and challenge. Topics have come (zoning), gone (copyhold tenures), and been spun off (wills and trusts) over the years, but as long as the course is built around real property, incoherence and anachronism will be baked into its very definition. The law of land is the true law of the horse.

Another buck-passing defense is that property is a bar exam subject, and the bar tests real property and real property only. The list of top-level topics on the MBE is revealing: ownership, rights in land, contracts, mortgages, and titles.²² At least the National Conference of Bar Examiners has the honesty to admit that this is an examination in "real property," though not the gall to explain why every lawyer in the country needs to be able to classify remainders as vested or contingent.²³ Teaching real property law because it is on the bar exam accepts as given the wisdom of the bar examiners—something that law faculty do almost nowhere else. To be sure, professors cannot stray too far from the test every student must pass. But that does not mean that what the test tests is right. If the anachronistic content of the property course is dictated back by the bar exam, the better solution is to *change the bar exam*.

Next is the argument from history. Property law is historically grounded; some concepts make better sense if one knows where they came from.²⁴ But the point of teaching history in law school is to make better lawyers for today, and that means choosing the right history to teach. The only reason to choose

20. *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

21. JOHN CHIPMAN GRAY, SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF PROPERTY (1888 - 1892).

22. See NATIONAL CONFERENCE OF BAR EXAMINERS, *supra* note 17.

23. *Id.* at 6.

24. A good example is the origin of the law of covenants in the law of landlord and tenant, which explains both its peculiar notions of privity and something about when a promise touches and concerns land.

the history of real property as opposed to some other topic in legal history is that there is more of it. Fundamental features of the modern adversarial jury system were laid down in the same century as the Statute of Uses: Which of these two would you rather have all law students learn? I'm guessing it isn't the one they currently do.

Other apologies are frankly more cynical. They accept that property's obsession with real property does not provide a coherent body of doctrine that a substantial fraction of students will ever apply as such. But they find in the course something that will nevertheless benefit students. The truffle hunt was a bust, but we had a lovely walk in the woods and learned something about pigs.

For example, it is said that property leads students to confront deep questions about society, such as the relationship between the individual and the community, or designing legal institutions to serve democratic values, or optimal rules for economic efficiency in a world of limited resources. There is something to these claims. Property *does* raise fundamental issues, especially in the hands of a skilled teacher. And it *does* brain-build. But the question that any such explanation must confront is, why property? Might some other course, or even some other selection of property-related topics, serve the same purpose as well or better? If you were designing a course from scratch to teach some of these sweeping themes, why not cut loose estates in land and much of conveyancing? Or at the very least, why not bring in other forms of property that also raise similar issues?

The argument from difficulty is even worse. Few property teachers today would match A. James Casner's imperious proclamation:

The law is supposed to be a learned profession. Would not that supposition have to be revised if lawyers could no longer talk intelligently about fee tails after possibility of issue extinct, or distinguish a destructible contingent remainder from an executory interest in the nature of a shifting use? There may be legal problems that have more social significance, but none that similarly stretch the mind to its maximum capacity.²⁵

And yet I hear something similar from other property professors when I raise the question with them: Yes, the doctrine itself is pointless, but it's hard work, and hard work is good for you. At heart, this argument rests on a faulty syllogism:

Students should learn something difficult.

This is difficult.

Therefore, students should learn this.

25. James Vorenberg, *In Memoriam: A. James Casner*, 104 HARV. L. REV. 983, 984 (1991) (quoting *Third Academic Symposium: The Challenge to Legal Education*, in THE PATH OF THE LAW FROM 1967, 139, 158 (A. Sutherland ed. 1968) (remarks of Associate Dean A.J. Casner)).

The same reasoning could be used to “prove” that students should learn the ERISA regulations in the first year, or almost anything else. If the goal is to master a complex formal system, then any equally complex formal system would serve just as well; so why not choose one whose relevance is more readily apparent to students, one that will serve them well in their later studies and in practice? And while learning Gray’s codification of the Rule Against Perpetuities²⁶ is often a rite of passage for students, so are binge drinking and fraternity hazing.

The common theme in these apologies is that they are all fit and no justification. They are explanations of the property course as it is currently constituted, not statements of how the course ought to be constituted, if it should be constituted at all. But there is no strong reason that a good theory of the property course would match the accidental coverage of most syllabi. A better theory should be prescriptive: It would tell us what to change and what, if anything, to keep.

II. Diversity and Unity

Despite its flaws, the property course does have something worth salvaging. Even if Property with a capital “P” is a curricular anachronism, property with a small “p” is pervasive in law school and in the law. On the conventional curricular account of property, real property is the theme and the other forms—personal, intangible, and intellectual property²⁷—are variations. The conventional account is backward. Sometimes lawyers deal with land, but more often they are concerned with bank accounts, industrial equipment, customer lists, stocks and bonds, franchise agreements, retirement accounts, Facebook accounts, and other modern forms of unreal property. Property cases and concepts show up in upper-level courses in family law, wills and trusts, real estate transactions, landlord-tenant, land use, local government, environmental law, energy law, natural resources, payment systems, secured transactions, debtor-creditor, bankruptcy, corporations, intellectual property, and taxation. Real property doesn’t even feed into a majority of these courses.

It is *property* that matters, not real property. Treating the two as synonymous is actively harmful. In Julie Cohen’s words, “The idea of property in land as the paradigm case of property exercises despotic dominion over property thinking, with clear consequences for theory and doctrine alike.”²⁸ She and others have capably detailed the ways that slighting these other forms

26. JOHN CHIPMAN GRAY, *THE RULE AGAINST PERPETUITIES* 174 (3d ed. 1915), <https://archive.org/details/ruleagainstperpoograygoog>.

27. I will use “personal” property to refer to property in movable physical objects, “intangible” property to refer to property in objects that lack physical substance but by social convention are capable of exclusive possession and control, and “intellectual” property to refer to property in information as such. This is not quite the traditional classification—but unlike the traditional classification, it makes sense.

28. Julie E. Cohen, *Property as Institutions for Resources: Lessons from and for IP*, 94 *TEX. L. REV.* 1, 2 (2015).

of property distorts doctrine and stultifies scholarship. But it also has ugly consequences for pedagogy.

First, students are subconsciously taught not even to perceive other forms of property as fit objects of study: they avoid classes in intellectual property because they think that “intellectual property” is synonymous with “patents,” or steer clear of courses in commercial law because they don’t know what payment systems or secured transactions even are. The property course as currently taught goes out of its way to deemphasize its own relevance to the rest of a law school education.

Second, students who see only real property examples do not realize that property concepts generalize to other forms. Personal property can be adversely possessed.²⁹ Intellectual property can be jointly owned.³⁰ All the intuition and doctrinal knowledge students develop about real property is left to wither on the vine after the exam—even though it applies perfectly well to other forms of property.

Third and conversely, treating real property as the paradigm leads students to make inappropriate extrapolations from what they have learned about real property. The default state of real property is owned; the default state of information is free for common use. Real property transactions tend to be complicated, expensive, formal, and either bespoke or at least made to measure. Transactions in personal property are often the opposite: No one calls a lawyer to draft the deal documents for a pack of chewing gum. The endless doctrinal insistence that real property is unique and requires unique remedial protections should be a warning against building the course around it.

The other forms of property are not “[real] property’s unruly stepchildren”;³¹ they are full-fledged members of the property family. If there is a black sheep here, it is Blackacre. The key to teaching a course that captures the essence of this extended family is to combine a *diversity of subjects* with a *unity of concepts*.

On the one hand, the range of fields that property feeds into is a sign of strength. A well-designed first-year property course could support the upper-level curriculum by teaching material that makes other courses make sense. Just as copyright needs torts and employment law needs contracts, many courses need property. Of course, secured transactions deals with different kinds of property than pension and employee benefit law does. The property course should embrace this diversity: It serves the whole curriculum, not just the real estate courses.

On the other hand is the persistent anxiety that there is no “there” there in property. But this is partly an artifact of building a course around land and partly a reflection of the fact that property concepts are broadly applicable.

29. *E.g.*, *O’Keeffe v. Snyder*, 416 A.2d 862 (N.J. 1980).

30. *E.g.*, 17 U.S.C. § 201(a) (2012).

31. Cohen, *supra* note 28, at 7.

It does not show that there are no such concepts. Quite the opposite. The mechanics of sorting out priority among conflicting transfers of a copyright look very much like the mechanics of sorting out priority among conflicting transfers of a tractor. Something general is at work here, something that is not specific to any field of practice, and something that does not have a home elsewhere in the required curriculum. The property course should bring out these unifying concepts.

A. Diversity of Subjects

Start with the diversity. Property comes in many shapes and sizes; they should all be given the same serious treatment as real property. Personal, intellectual, and intangible property deserve their day in the sun.

i. Personal Property

Personal property is typically treated as a one-hit wonder: First possession is the opening act before real property takes the stage, perhaps with finders as an encore. But that is typically it for main cases. Beyond these topics, personal property usually shows up only in casebook notes. A few books deal with bailments, gifts, and involuntary transfers through good-faith purchase or the running of the statute of limitations, although these are often isolated topics. I am aware of only one modern casebook that has a soup-to-nuts section on personal property.³² This abbreviated treatment contributes to the common student sentiment that the cases are frivolities, with no doctrinal connection to the rest of the course.

This is a shame, for two reasons. First, personal property is omnipresent. Most law students have more personal property than real, and much more familiarity with personal property than real, especially in this post-crisis age when homeownership is a distant dream for many of the young. It is omnipresent in the curriculum, and omnipresent in law practice: from the assets divided on divorce to the property in property crimes to the tangible assets on a typical corporate balance sheet. Real-property deals are occasional moments of high drama for the in-house or small-business lawyer; personal-property deals arise every time someone executes a purchase order.

And second, personal property is a beautiful, coherent body of law. It has about a dozen moving parts; for the most part, they fit with one another. The legal differences among different types of tangible personal property are far less salient than their similarities. The real-property system, if something so ramshackle can even be called a “system,” is more complicated, less logical, and far less intuitive. It is possible to teach all of the important personal property topics in about one credit’s worth of class time, at the end of which students can look at a complicated set of facts about a thing and make a confident

32. See BARLOW BURKE, ANN M. BURKHART & R.H. HELMHOLTZ, *FUNDAMENTALS OF PROPERTY LAW* 1-103 (3d ed. 2010).

statement about who owns it. At the end of that unit, students know what property is and how it works, more or less.

Here, then, is what students should know about personal property to be well-educated lawyers:

Initial acquisition. This traditional jumping-off point for the course is a crucial topic for personal property. The two great heads here are first possession (previously unowned things) and accession (derivation from previously owned things); together they permit a wide range of kinds of things to be brought into play: wild animals, to be sure, but also natural resources like oil and water.

Voluntary transfers. This subject is frequently treated only under abandonment and gifts in property courses, but sales and wills are equally valid modes of transfer.³³ The details of sales are well-covered in contracts, but wills (and intestacy) receive at most glancing coverage in any first-year course. This, even though many property cases are unintelligible without some implicit knowledge of estates law. Abandonment, of course, provides a great link back to initial acquisition for personal property, one explored in classics of the canon like *Haslem v. Lockwood*³⁴ and *Eads v. Brazelton*.³⁵

Involuntary transfers. Some casebooks mention adverse possession of personal property, usually with a classic like *O’Keeffe v. Snyder*.³⁶ Good-faith purchase, however, is usually relegated to the notes. Talking about them two together brings out that they both cut off the true owner’s title, but for arguably different reasons. Other important forms of real-world transfers by operation of law—e.g., the execution of judgments and bankruptcy—escape attention entirely. The former is a “civil procedure” topic, the latter an “elective” topic: why?

Personal property crimes, torts, and remedies. The history of detinue and trover may not grab students’ attention. But the question of what you or the prosecutor can do to the louse who stole your car may be more interesting. I like to give my students a criminal statute on receiving stolen property, which puts the traditional material on finders in a rather different light.³⁷ Remedies here are also worth talking about, because students who have taken only the

33. Perhaps these teaching burdens should really be borne by the first-year contracts course, which is of course the first-year course devoted to voluntary exchanges. A less exclusive focus on promises might do some good for the subject. But for today I confine myself to reforming one course at a time.
34. *Haslem v. Lockwood*, 37 Conn. 500 (1871). See, e.g., JOSEPH WILLIAM SINGER ET AL., PROPERTY LAW: RULES, POLICIES, AND PRACTICES 329 (6th ed. 2014).
35. *Eads v. Brazelton*, 22 Ark. 499 (1861).
36. *O’Keeffe v. Snyder*, 416 A.2d 862 (N.J. 1980).
37. E.g., MD. CODE. ANN. CRIM. LAW § 7-104(c) (LEXIS through 2017 legislation).

introductory torts course might be excused for thinking that a car thief owes damages but can keep the car³⁸

Possessors' rights. Chimney sweeps, airplane mechanics, and loyal British soldiers have earned their place in the canon, for good reason; *Armory v. Delamirie*³⁹ alone is good for an hour of class discussion, bringing out all of the logical consequences of the decision to protect a finder's possession and all of the roads not taken. But there are other forms of possession by a nonowner, and these relations are so common in real life ("Can I borrow your casebook?" "Want to get a Zipcar for the afternoon?" "They gave \$100 for one just like this on *Pawn Stars!*") that students deserve to understand the legal architecture on which they operate. Bailments, leases, and pledges are important, personally and commercially. What happens if the UPS truck carrying your new computer catches fire? How could a business get the use of a shrinkwrapping machine without the full expense of buying one? The UCC has useful answers to these and many other questions.

Security interests. Car loans are a thing. In some ways more complicated than real-property mortgages (land doesn't drive off to another state), in some ways much simpler (with an order of magnitude less money at stake, lenders can be a little less paranoid), they are just as suitable for teaching. UCC Article 9⁴⁰ is not exactly light reading, but the details of priorities and perfection matter to many lawyers. Students deserve at least to know that there are some rules on this. What happens in case of default? What happens when multiple creditors fight over the same assets? Is *Repo Man*⁴¹ true to life?

The golden thread running through all of these topics is possession, that most malleable of legal concepts. It provides a unifying pedagogical theme, as well as a powerfully concrete set of teaching examples. Indeed, it is probably the unifying theoretical issue that drives all of personal property law; everywhere else possession is less crucial (real property), necessarily constructive (intangible property), or purely metaphorical (intellectual property). Students who come out of a property course understanding the back-and-forth between possession and ownership are in a position to make excellent educated guesses on almost any personal-property issue.

2. Intellectual Property

Intellectual property, too, has made inroads into the course. But the typical property casebook's treatment of intellectual property is problematic. It is hard to imagine a case better-calculated to give students the wrong impression

38. The regrettable desuetude of the course in remedies bears some of the blame here. But if most students don't study remedies, the property course needs to fill its share of the resulting gap.
39. *Armory v. Delamirie* (1722) 93 Eng. Rep. 664; 1 Strange 505 (K.B.).
40. U.C.C. art. 9 (AM. LAW INST. & UNIF. LAW COMM'N 2014).
41. *REPO MAN* (Universal Studios 1984).

of intellectual property than the most common anchor for an intellectual-property chapter, *International News Service v. Associated Press*.⁴² Students who meet intellectual property through *INS v. AP* might be forgiven for thinking that it is a common-law field (with a heavy dash of equity) that has been developed primarily by judges with an open-ended warrant to create new causes of action through analogical reasoning supported by policy arguments, and that its principal concern is to deter free riding. None of this is the case. The policy debate among the Justices is illuminating, but the case is deeply unrepresentative. (Another property chestnut, *Moore v. Regents of the University of California*, is also misleading, because the intellectual property whose value dominates the case—the patent derived from Moore’s cell line—is not squarely before the court.⁴³)

Intellectual property lacks the structural unity of real or personal property; the different branches have different bases of protections, different tests for similarity, and strikingly different defenses. To be sure, there are important commonalities among them—including some all-important transactional features that clearly mark out intellectual property assets as property—but the best thing that the first-year property course can do when covering intellectual property is to give students an appreciation of its diverse varieties. The three major federal regimes—patent, copyright, and trademark—are naturally the core of that coverage. State rights of publicity are worth mentioning, and one might include a casebook note or some classroom discussion of trade secrets and common-law idea protection. Moral rights, because of their specificity to particular objects in the American system, form an interesting case. Beyond that, discretion is the better part of valor: Design patents, the state law of trademarks, false advertising, and the various *sui generis* regimes (boat hulls!) add complexity without corresponding payoff. One thing that today’s property books sometimes get right is that intellectual property’s “negative spaces” are as important as its positive coverage. *Cheney Brothers v. Doris Silk* is an excellent prompt for an engaging discussion about how the fashion industry functions even in the absence of copyright protection.⁴⁴ To understand an idea, it helps to study near misses.

What should the course say about the different fields of intellectual property? The two topics that deserve substantial class time are subject matter and infringement:

In *patent*, subject matter could easily be covered with one of the Supreme Court’s recent (and surprisingly readable) cases on patentable subject matter, particularly *Association for Molecular Pathology v. Myriad Genetics*⁴⁵ (human DNA)

42. *Int’l News Serv. v. Associated Press*, 248 U.S. 215 (1918).

43. *Moore v. Regents of Univ. of Cal.*, 793 P. 2d 479 (Cal. 1990).

44. *Cheney Bros. v. Doris Silk Corp.*, 35 F.2d 279 (2d Cir. 1929).

45. *Association for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107 (2013).

or *Alice Corp. v. CLS Bank*⁴⁶ (computer software). Infringement requires some attention to an actual patent's claims: either with a simple claim-construction case or with a simple patent. The important idea here is that patent rights are defined peripherally and explicitly: Claims attempt to draw the 'metes and bounds' of the patent.⁴⁷

In *copyright*, it is hard to beat the canonical phone book case, *Feist Publications v. Rural Telephone Service Co.*, for a clear explication of what copyright protects and what it doesn't.⁴⁸ Many other good cases engage with originality, and many engage with the idea-expression dichotomy, but *Feist* has a vivid simplicity that makes the essence of copyright immediately graspable. Infringement can, and probably should, be literally illustrated: Students can argue over the similarities and differences between two images. Copyright is centrally claimed by example; the contrast with patent's textually defined test for infringement could not be starker. In what sense is property with no explicit boundaries really "property"? Debate.

Trademark has a slightly recursive character. Consumer understandings are both the basis for protection and the test for infringement. It is probably not necessary to get into the full multifactor tests for likelihood of confusion. Instead, a case that raises the question of why distinctive marks are protectable but generic ones are not gets at the heart of the field. I have had success with one of the many cases brought over the years by the Coca-Cola Company: COKE is a valid trademark but COLA is not.⁴⁹ It is important to say a bit about priority, which recalls first possession principles, but this can probably be done in the context of an ordinary infringement case.

Right of publicity requires some delicacy. The *Midler v. Ford Motor Co.* case is wonderful, but risks confusing students unless the professor and casebook are crystal-clear on why Midler had no basis in copyright to stop Ford's use of a sound-alike.⁵⁰ A case on the contested line between the right of publicity and the First Amendment might be better.

The procedural and formal issues in intellectual property—term, formalities, registration procedures, etc.—are interesting but are properly the subject of a note, not major discussion. Defenses, on the other hand, require classroom attention. Copyright is not fully explicable without fair use, and the degree to which the First Amendment puts independent limits on intellectual property rights is a major cross-cutting theme. A parody case, a news reporting case, or both, would be illuminating on the qualified nature of these property rights. (Compare the cases on access to real property for speech purposes, such as

46. *Alice Corp. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014).

47. See Jeanne C. Fromer, *Claiming Intellectual Property*, 76 U. CHI. L. REV. 719, 731-43 (2009).

48. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

49. *E.g., Dixi-Cola Labs v. Coca-Cola Co.*, 117 F. 2d 352 (4th Cir. 1941).

50. *Midler v. Ford Motor Co.*, 849 F. 2d 460 (9th Cir. 1988).

PruneYard Shopping Center et al. v. Robins,⁵¹ and the cases on access to the media, such as *Miami Herald Publishing Co. v. Tornillo*⁵²).

The other major conceptual issue to bring out is the difference between the type and the token. Intellectual property rights are distinct from, overlap with, and in some ways restrict personal property rights. A given tangible item may be owned as personal property by one person but subject to the intellectual property rights of others. Patent exhaustion or copyright first sale is the most vivid illustration of this idea, but others would serve, including the overlapping ownership of personal letters (the recipient owns the paper but the sender owns the copyright), restrictive licensing, the problem of orphan works, and rebranded reconditioned goods.

This may seem like a lot of material, but it needs to be. Most property courses and casebooks treat intellectual property as the Other, an odd variation on traditional (and implicitly normal) real property. As long as it receives short shrift, the impression will endure. Only with the long shrift can it be properly covered as a coequal form of property in its own right.

3. Intangible Property

Then there is intangible property, which is almost completely absent from the property canon, even though it is central to the modern American legal system. The traditional subjects in which it was taught—Bills of Exchange and Promissory Notes, Corporations, Partnership, and Trusts⁵³—were part of the law school curriculum at a time when (real) property was its own equal pillar with them. But as the course has receded into its first-year foundational role, it has never systematically asked whether that foundation should support financial and entity forms of property.

Intangible property is important. Tens of trillions of dollars are held as financial assets, and artificial-property-owning entities are the dominant form of business today. Lawyers play major roles in creating and transferring these assets; essentially the entire business law curriculum is concerned with them. That education could start in the first year, not the second. In some respects, these intangibles look very much like real and personal property; in others, they are radically different. The details can wait, but students deserve the general picture early and clearly.

Unlike real and personal property, but as with intellectual property, intangible property is not one thing. Good coverage would embrace that diversity and show students a healthy variety of different forms, showing both where they come from and how they are managed. Because the salient features of different types vary so much, it is probably not worth imposing too

51. *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).

52. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974).

53. HARVARD UNIVERSITY, LAW SCHOOL OF HARVARD UNIVERSITY: ANNOUNCEMENTS, 1900-01, at 8-10 (1900), [https://iif.lib.harvard.edu/manifests/view/drs:427284368\\$3i](https://iif.lib.harvard.edu/manifests/view/drs:427284368$3i) (Harvard Law School course catalog for 1900-1901).

much common structure on them. Instead, an agenda for teaching intangible property might cover the rudiments of the following:

The law of co-ownership naturally extends to *partnerships*. The problems of coordination among co-owners are the same whether their arrangement is called a tenancy in common or a partnership (although the law's solutions differ). A little bit—not too much!—on partners' fiduciary duties completes the picture.

Corporations are more interesting and more complicated. The basic idea that corporate shares are a distinct form of property from corporate assets is conceptually crucial. Sorting out the relationship among them is a task for an hour of class time or more. It doesn't necessarily need extensive case coverage (the chestnut of *Walkovszky v. Carlton*⁵⁴ or another simple veil-piercing case would suffice), but many subtly distinct points deserve attention. The ideas of limited liability (shareholders' personal assets are not available to satisfy corporate debts) and asset partitioning (corporate assets are not available to satisfy shareholders' personal debts) are fundamental in property terms, once one accepts that the ambit of "property law" includes creditors' rights. So are the basic separation of ownership and control, which together with a few minutes on agency principles (the corporation acts through its employees, can be bound by them, and is liable for their torts) enable students to see how the corporation functions as a property-owning entity.

Trusts form the immediate and obvious contrast. The medieval origins of trust law could make for a few minutes of background lecture, but otherwise the less said about uses the better. Instead, the core here is trustees' powers and duties, as captured in the terminological distinction between "legal" and "equitable" ownership, in the trustees' subjection to settlors' orders as defined by the trust, and in the much more rigorous fiduciary obligations of trustees. It is highly informative to say something about the rights of third parties who deal with trustees—a wonderful illustration of good-faith purchaser and notice principles—and it doesn't hurt to say a bit about tracing remedies and disgorgement.

Payment systems are not a traditional property topic, but they have much to offer. UCC Article 3⁵⁵ can be too terminologically dense for its own good, but the basic ideas behind notes and drafts are deep. They take a promise to pay—a contract right—and use transferability to synthesize property from it. Add in negotiability, and the instrument becomes even more of a property right once personal defenses are cut off. This basic model works for an enormous range of financial instruments: Debtors' obligations are property in creditors' hands. With this insight, further connections open up: Shady debt

54. *Walkovszky v. Carlton*, 223 N.E.2d 6 (N.Y. 1966).

55. U.C.C. art. 3 (Am. Law Inst. & Nat'l Conf. of Comm'r on Unif. St. Laws 2014).

collection practices, for example, are tied to the lack of safeguards on transfers of consumer debt.⁵⁶

Students who own cars have firsthand experience with *title documents*. Look at the title certificate: What formalities are necessary to change ownership? Delivery? Signature? What if the signature is forged? Who owns the car if the seller delivers a title certificate to a buyer, but not the car itself? What if the seller delivers the car but not the title certificate? Now generalize to a case where there is no car—where the underlying asset itself is intangible. What happens if someone steals a check? A signed check? A blank checkbook? The legal principles that answer these questions are also at play with many other kinds of financial property.

The rest of this material can be a bit of a *miscellany*, but it can lead to excellent fundamental questions about what can (and cannot) be property, particularly at the contested line where “natural” meets “artificial.” What is a corporate franchise? Why are taxi medallions valuable assets? Electromagnetic spectrum is a great example because it requires answering the first-order question of what the property consists of, the second-order question of what rules govern its acquisition and use, and the third-order question of what institutions make and enforce those rules. And thoroughly modern examples like domain names and Bitcoins allow for excellent discussions on exclusivity, possession, and protecting innocent owners and buyers against fraud, mistake, and duress.

Covering intangible property well would have payoffs for the rest of the course. The importance of possession for personal property is highlighted by considering assets for which possession is harder to establish—or even define. Complex real-property transactions are synergistic with complex corporate transactions. And many of the important policy issues are synthetic. It is impossible, for example, to give a good account of the mortgage crisis that disrupted millions of Americans’ lives without foregrounding not just the traditional real-property mortgage loan but also the negotiation, bundling, and securitization of those mortgage loans into complex financial assets.

4. Real Property

This is a tall order. To fit these topics in a four-credit survey, others will need to go. That’s fine. There is plenty of fat in the real-property canon. Few topics can be dropped entirely, but many can be trimmed back substantially.

Most obviously, the freehold *estates in land* have long outlived their pedagogical usefulness. Corporations and trusts have taken over much of the work that they formerly performed. A practicing lawyer who uses a legal life estate—let alone a fee simple defeasible—is flirting with malpractice. Many states have

56. Moreover, the double-collection problem—in which multiple parties pursue a consumer for satisfaction of the same underlying debt—raises important issues about formalities (proof of payment) and the nonexcludability issues lurking in the wings when the “property” being sold to collection agencies consists purely of information about consumers.

modified or abolished the more exotic animals in the traditional menagerie for new instruments, or crafted laws to gradually remove some of them from the books. As a result, the general property course can make do with far less. Life estates are useful for introducing successive ownership interests, but the defeasible fees are a mess of unilluminating complexity. Joint tenancies and tenancies in common are better candidates for inclusion—indeed, simultaneous ownership should be taught *first*, before successive ownership, since it is both more relevant and easier to understand. On the other hand, the doctrinal machinery needed to set up the Rule Against Perpetuities—e.g., classification of future interests, vesting, lives in being—is out of all proportion to the payoff, especially since the Rule itself is on life support in many states.⁵⁷ And of the other traditional doctrines, the less said the better.

Leases are more familiar to students and more relevant to modern practice, but again, their generality is open to question. The traditional fourfold classification of tenancies is not worth extensive time. The implied warranty of habitability is characteristic and important; it brings with it both some historical background and some modern consequences. Landlords' and tenants' remedies on breach are also illuminating. Although the distinction between "property" and "contract" remedies is somewhat overblown, the story of the rise of landlords' duty to mitigate and the decline of landlords' self-help are both relevant to the world today and illustrative of broader issues in property. Rent-control laws are another common tenant protection; assignment and sublease are worth knowing about. Beyond that, it is probably best to move out.

Treating **trespass** and **nuisance** as torts makes clear that the main justification for including them in a property course is to show what makes "property" torts distinctive, if anything. Remedies can fall into that category, but should not be overdone. *Boomer v. Atlantic Cement Co.*⁵⁸ should, to be honest, be covered in torts. *Spur Industries v. Del E. Webb Development Co.*⁵⁹ was an experiment, not since repeated, and should have been pensioned off long since. The teacher who is inclined to do more with rights in land might more profitably look to cases that try to draw actual boundaries around land—not always as easy as it sounds. Lateral and subjacent support, overflights and caves, and boundary-survey mistakes all call into question the idea that property in land is as crisp and precise as one might think.

Servitudes are a topic on which the authority of tradition makes mountains out of hills. Not every form of easement in the Restatement needs to be covered in a first-year course. Students can certainly stand to know what an easement is, but the effort required to sort out easements by necessity and easements by implication is far disproportionate to any general understanding gained

57. See Lynn Foster, *Fifty-One Flowers: Post-Perpetuities War Law and Arkansas's Adoption of USRAP*, 29 U. ARK. LITTLE ROCK L. REV. 411, 471–86 (2007) (state-by-state survey).
58. *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870 (N.Y. 1970).
59. *Spur Indus. v. Del E. Webb Dev. Co.*, 494 P.2d 700 (Ariz. 1972).

thereby. Similarly, students could stand to know that there is a doctrinal and policy problem in making covenants run with the land. The ins and outs of two hundred years of jury-rigged solutions, much less so. A few judicious examples of servitudes will do.

Zoning, on the other hand is important—indeed, the low drama of zoning disputes is far more important on a day-to-day basis than the high drama of takings. *Euclid v. Ambler Realty Co.*⁶⁰ is usually taught for the major constitutional issues, but it is surprisingly good at covering many of the basic mechanics of zoning laws. Students also need to see something of the role that aggrieved neighbors play in zoning fights. As for takings, *Kelo v. New London*⁶¹ and *Penn Central Transportation Co. v. New York City*⁶² are enough for the first year: They more than adequately set out the boundaries within which takings disputes play out.

Finally, real-property **financing** and **transactions** are of great interest. But that is just to say that *property* financing and transactions are of great interest, and the coverage of issues unique to real property can be largely subsumed under the coverage of financing and transactions in general. Equitable conversion, for example, is an interesting special case of the risk of loss in a sale of property. Warranties of title to real property are an interesting special case of warranties of title for the sale of property. In each case, zooming out to consider other kinds of property allows for the elision of time-consuming details in the real-property case.

* * *

If the property course had room for only one coherent system of property law, it ought to be personal property rather than real: The doctrines are fewer and their connection tighter. But even personal property has no special claim to be the paradigm case for property. There is no paradigm case. Property is defined by a harmony among voices, not variations on a theme. Intellectual, intangible, personal, and real property all add distinctive and important perspectives. They all deserve coverage.

B. Unity of Concepts

These reforms of the coverage of the property course may seem to exacerbate the problem. It has gone from a topical grab bag to a grab bag filled with grab bags. But considering all the forms of property together allows for a much simpler way of presenting them; it invites us to emphasize the shared conceptual structure.

By a “concept,” I mean something more specific than an overarching theme or policy problem: The tension between dead hand control and modern

60. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

61. *Kelo v. City of New London*, 545 U.S. 469 (2005).

62. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

needs, for example, while interesting, doesn't decide cases. At the same time, a concept generalizes from specific statutes and doctrines. UCC § 2-403⁶³ is not the same as a typical notice recording act; doctrinally they're different, in scope and in application. But if you understand the general concept of a *good-faith purchaser*, you have a decent idea of what to expect from both. A good concept makes useful predictive claims about how property doctrines typically decide a class of cases.

The following is a tentative list of the doctrinal concepts that should be second nature to students finishing a course in property, just as "offer and acceptance" is second nature after contracts and "duty" is second nature after torts (or should be). This is not to say that the course should be explicitly structured around them, just that they provide a manageable intellectual framework to collect and organize the topics gathered together in a property course.

1. Things

Property is organized around identifiable things. Unless you can point to the thing (metaphorically, if not always physically), it isn't property. The thing need not already exist; property law may well summon it into being and give it a social identity by giving it a legal one. This is the reason for the broad survey of subjects of property above: to acquaint students with the range of things that can be property. A debt is property in the hands of a creditor; students for whom this idea is intuitive are far better-prepared for commercial law. Traditional corner cases in the penumbras of property—body parts, professional degrees—are relevant because other fields of law (divorce settlements, wills, bankruptcy) need to know whether something is a thing capable of being property.

2. Owners

Things have owners, whose rights as against others are mediated through the things, in their role as owners.⁶⁴ This is the essence of the idea that property rights are rights *in rem*: both in the sense that they are tied to a *res* and in the sense that they have the formal structure of rights good against the world. Defining owners' rights through impersonal duties to respect a thing's boundaries is a distinctively proprietarian way of slicing up the world. Conceptually, it also means that property can be subject to *in rem* jurisdiction: Courts can issue decisions about property rights in things without individually joining every person in the world who will be bound to respect the results.

3. Boundaries

These things also have boundaries, and one who owns the thing is protected against invasion of those boundaries by others. This is the place for

63. U.C.C. § 2-403 (AM. LAW INST. & UNIF. LAW COMM'N 2014).

64. To be more precise, interests in things have owners, as discussed below.

consideration of the various property torts, crimes, and self-help options, along with their associated remedial options. *Intel Corp. v. Hamidi*⁶⁵ is on point here, but even more so is its contemporary *Kremen v. Cohen*,⁶⁶ because the question of how one converts an intangible is central to understanding what the owner of one really owns. The point here is again to acquaint students with the rights that their clients care about defending. These concepts draw on tort law, but they show how “property” rights give tort law a distinctive inflection.

4. Interests

The interests that one can own in a thing are distinct from the thing itself. This is why the estates in land will not completely vanish from the course: The idea of a nonpossessory interest that is nevertheless “property” is profound and pervasive. Indeed, it is so central to intellectual and intangible property that it deserves extended, repeated emphasis. A lien is a property right in a specific thing, but an unsecured debt is a mere personal claim. Trusts, corporations, leases, cotenancies, and especially patents and copyrights give rise to overlapping rights in the same things. Interestingly, so to speak, some forms of property are more divisible than others: land and intellectual property are typically more amenable to simultaneous use than personal and intangible property.⁶⁷

5. Specific Forms

Permissible property interests come only in specific forms. You can order *à la carte*, but you have to order from the menu set before you. The *numerus clausus*, though not always named as such, casts a long shadow over property transactions. The problem of categorizing ambiguous conveyances is a classic example. The underlying assumption is that the answer must be one or the other: life estate or lease, not some novel *tertium quid*. But the same effect extends far beyond real property. Has a patent owner sold a patented item or licensed the patent? The courts must choose. Can you structure the corporate deal you want with the tools available to you, or will you have to live with the unwanted consequences of the characterization the courts choose?

6. Initial Acquisition

Ownership is initially established only through a handful of mechanisms. First possession is the most famous, but of much less importance today. Accession principles (landowners’ rights, physical transformation) do a good deal of work, but they are parasitic on already existing property claims. Creation works for intellectual and intangible property precisely because

65. *Intel Corp. v. Hamidi*, 71 P.3d 296 (Cal. 2003).

66. *Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. 2003).

67. Cf. Christopher M. Newman, *A License Is Not a “Contract Not To Sue”*: *Disentangling Property and Contract in the Law of Copyright Licenses*, 98 IOWA L. REV. 1101 (2013) (exploring consequences of divided interests in real and intellectual property).

of their nonphysical character. Finally there is raw power, or at least the legitimated form of power we call conquest: A government's unchallenged claim of sovereign authority enables it to hand out property rights that will be recognized *de facto* and *de jure* within its jurisdiction.

7. Chain of Title

One making a property claim must be prepared to trace a chain of title. Sometimes this involves rooting the chain in an act of initial ownership. But more often it involves tracing one's rights back in time to someone whose ownership is undisputed, or at least superior to the other party's. This is why attention to transactional mechanisms in general belongs in a property course: They are the links in a chain. And this is why an essential link connects finders, adverse possession, and title protection: Each topic requires students to think through the derivation of property rights. These topics draw on contract law, to be sure, but they generalize from contracts to other mechanisms such as gifts and wills and supplement it with deep ideas like the rejection of the *jus tertii*. Lawyers in all branches of the law must worry about competing claims to the same thing, and sorting them out means working with chain-of-title reasoning.

8. Possession

The relationship of possession and ownership is subtle but important. Possession can lead to ownership; possession can be evidence of ownership; the law often protects possession independently of ownership; possession can be a tort and a crime; confusion and trouble often follow when possession and ownership are split, as often they must be. Grasping the ins and outs of possession is the crucial task of an education in personal property; here, it is real property that is parasitic on an understanding gained elsewhere. Possession is also a malleable concept; it changes depending on the question being asked. The "possession" that would suffice to make you an owner of an abandoned suitcase doesn't suffice to give you "possession" of the drugs inside. Much of the conceptual challenge of intangible property consists in working out good tests for what should count as possession. The act of broadcasting during certain hours in a certain place using a transmitter tuned to a certain frequency at a certain power? A database entry on a particular server mapping a particular string of characters to a particular set of numbers?

9. Binding Third Parties

Property generically worries about making third parties participants in property rights. In some respects, this is a matter for contract law's doctrines of assignment, delegation, and third-party beneficiaries—or would be, if most contracts courses had not abdicated this part of the subject. But in other ways, the attempt to synthesize rights and restrictions that will be usable by and binding on successors is a central preoccupation of property law. It is visible in

subleases and assignments, security interests, trusts, servitudes, negotiability, intellectual property licensing, and elsewhere.

10. Notice

Conversely, property systematically protects third parties who take without notice of conflicting claims. The obvious—and woefully undertaught—example is the good-faith purchaser of goods under UCC § 2-403. Other examples include priorities among conflicting transferees of real property, priorities among lienors, the various privity and notice requirements in servitudes, the open and notorious prong of adverse possession, various tolling rules under statutes of limitations, and notice formalities in intellectual property. Again, there is a unity to these provisions that is lost when “property” is thought of as “real property.”

11. Transactions

Property deal-makers must consistently worry about distinctively proprietarian concerns: quality of goods, title assurance, cross-cutting property rights, financing, and the tension of substance and form. The beautifully general machinery of “contract” law slights these property-specific issues, and yet they are crucial to anyone doing a patent licensing deal, a corporate asset purchase, or a real estate sale. Students need to be alert to warranties of title and noninfringement; the timing and privity of warranties; the concerns that arise in any extended transaction with a gap between agreement and closing; contingency terms and due diligence; courts’ annoying tendency to recharacterize transactions; multilateral deals; and the not always perfect correspondence between transactions on paper and facts on the ground.

12. Recordation

The entire problem of recordation reflects concerns unique to property. Here, real-property law does have something profound to teach: The basic concepts of record title, constructive notice, races to record, title searches, and nonrecord risks are all excellently on display in the real-property recording systems. But again, one can do much, much more to show the essential unity across forms of property. Intellectual property recording can be the stuff of high drama;⁶⁸ the badly defective private recording system of MERS played a substantial role in the mortgage crisis. Personal property recording systems raise remarkable issues about mobility and jurisdiction; the domain-name system and Bitcoin are modern twists on very old ideas.

13. Government as a Source of Property

Government is a constitutive source of property rights. The real-property canon illustrates these themes quite well, from *Johnson v. M’Intosh*⁶⁹ to zoning.

68. No kidding. See PAUL GOLDSTEIN, *ERRORS AND OMISSIONS* (2006).

69. *Johnson v. M’Intosh*, 21 U.S. 543 (1823).

But again, other branches of property have much to teach. Government can synthesize property literally from nothing; what else is a patent? It can coordinate human activity in ways that establish potential subjects of property, from spectrum to airport landing slots to dollar bills and trillion-dollar platinum coins. On this theme, a topic that belongs in the course, even if briefly, is conflict of laws. Jurisdiction, choice of law, and recognition of judgments are all inflected differently when property is concerned, and thus the question of where a thing is has particular importance. Land is fixed, personal property is frustratingly mobile, and intellectual and intangible property raise deep conceptual problems for any attempt to localize them.

14. Government Limited by Property

Government is correspondingly limited by property rights. Real-property takings hold pride of place here, but should they? For one thing, other property can be taken all the time, and is: *Ruckelshaus v. Monsanto Co.*⁷⁰ shows even that disclosure of information can be a taking. For another, other constitutional and subconstitutional provisions have much to say here. Any realistic survey would need to consider not just the Public Use clause and regulatory takings, but the mechanics of eminent domain and just compensation, the public trust doctrine, the Contracts Clause, traditional limits on the police power, the Fourth Amendment's link to trespass law, the Ex Post Facto Clause, the canon against retroactivity, the rule against reopening judgments, the First and Second Amendments (and possibly the Third), the Progress Clause, the Equal Protection Clause, and of course the Commerce Clause—all of which have hooks that can depend on the presence or absence of property. I am not saying that one needs to teach cases on all of these, just that a modern treatment of the subject would emphasize that takings are just one thread of a much larger constitutional fabric.

15. Access

Individuals have access rights to property as nonowners as well as property rights as owners. Here, too, casebook authors have done a fine job using real property to make the point: *State v. Shack*⁷¹ is a common inclusion, and some casebooks work beautifully with the theme. Yet again, the same story repeats throughout property, and the narrow focus on real estate and physical places conceals more than it illuminates. The defense of necessity works for personal property as well as real. First Amendment-inflected rights of fair use and parody in copyright and trademark are access rights; so is the (nearly extinct) experimental-use defense in patent and the use of unlicensed spectrum bands.

70. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

71. *State v. Shack*, 277 A.2d 369 (1971).

16. Fairness

Property rights across the board incorporate (if not always fully) concerns about fairness for all. In real property, public accommodations and fair housing law, of course, are about justice for the individual who is turned away because of her race, but they are also about a broader commitment to a just society. I will say it once again: *This is not unique to real property, and discussing these issues only with real property obscures them elsewhere.* Many limits on what can be owned derive directly from a general principle that certain resources—air, drinking water, ideas—*must* be available in common to everyone, at least to some degree. The policy questions here are especially rich when we move beyond real property. Does copyright restrict the supply of books in minority languages? Do wage garnishment orders disproportionately hurt the poor, and asset protection trusts disproportionately benefit the rich? How does the corporate form of property-holding promote (or inhibit) social responsibility? And so on. These questions are just as rich when we look beyond land.

* * *

These concepts are not a complete account of property. I make no claim that they are the only possible list, the most reasonable list, or even a particularly good list.⁷² But they are *a* list of core property concepts, and they refute the claim that there is nothing distinctive about property as a subject or a course. A student who leaves the property course with a strong intuitive sense of how these concepts work will be able to make sense of property questions, wherever they arise in the law. The particular answers will vary; they will require further study in law school and extensive research in practice. But a lawyer who understands these concepts can get over the all-important first hurdle: framing a precise enough question that she knows where to start looking for the answer.

III. Getting There from Here

The past generation has seen a remarkable outpouring of inventive scholarship on the essence of property. Some of the work is conceptual: Property is analytically defined by exclusion, or property is a law of things. Other work is normative. Property should secure individual liberty against state coercion; property should support a broadly democratic anti-feudal society; property should enable human flourishing; property should promote community self-governance; property should maximize social welfare; property is a pluralist institution that touches on all of the above. The debates

72. Another version of the course might focus on property institutions as ways of mediating human relationships among neighbors, communities, business partners, families, buyers and sellers in impersonal markets, and so on. A third would look at property historically, showing the continual adaptation of older doctrines to new problems in new domains. A fourth would come at property in collective-action terms: holdouts, spillovers, tragedies and comedies of the commons, information costs, government and public choice, and so on. I hold up my version not as the ideal, but as a constructive proof that there is a viable alternative to the traditional land-law ideal. *There are other ways.*

among these camps have brought passion, insight, and depth to property scholarship.

But these grand visions all too frequently run aground on the shoals of the traditional property curriculum. It takes hard work to extract these themes from the details of equitable conversion or possibilities of reverter: they are thematically dead. A few casebooks try; it is no accident, I think, that they tend to be among the wordiest books on the market. The sheer burden of topics that “must” be covered is a check on the ambitions of any property teacher, no matter how high-minded. Or low-minded, for that matter. The property teacher who cares only about teaching students material that will be useful to them all in practice has an equally hard row to hoe.

Some casebook authors have tried to go beyond real property. A chapter on intellectual property is now nearly *de rigueur*, and a few books have genuinely serious coverage of personal property.⁷³ The most thoroughgoing attempt in this direction is probably Thomas Merrill and Henry Smith’s *Property: Principles and Policies*, which freely mixes real- and personal-property cases, covers public employment rights and spectrum and other important forms of property rarely spotted between the covers of casebooks, and (gasp!) even has intellectual property cases outside of the section specifically devoted to intellectual property.⁷⁴ But even this innovative book is held back by the genre of the property casebook. It dutifully ticks every box on the real-property checklist, from the Doctrine of Worthier Title to the Restatement (Third) of Property: Servitudes.⁷⁵ By my count, it devotes eighty-nine out of one hundred and thirty-seven cases to real property.⁷⁶ How much more innovative might it be if it gave not one-third of its coverage to other forms of property, but two-thirds?

Teaching beyond real property does not entail a commitment to teaching topics in any particular order. Professors who prefer to start with initial acquisition still can; those who would rather begin with exclusion, or with transactions, can do that instead. A substantial choice must be made between grouping topics or grouping types of property. One could imagine teaching personal property, then real, then intellectual, then intangible, in each case touching on the different topics. Or one could teach initial acquisition, then exclusion, then shared ownership, and so on, in each case touching on all the types of property. Both approaches are viable, as are any number of hybrids,

73. See BURKE, ET AL., *supra* note 32. This is partly the simple survival of traditional personal-property topics: first possession, finders, bailments, liens, etc. It also partly reflects the modern vogue for a few dramatic cases on controversial forms of property, particularly body parts.

74. See THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* (2d ed. 2012).

75. *Id.* at 593-94, 1001.

76. My counts were eighty-nine real-property cases, thirty-four personal-property cases, eight intangible-property cases, and six intellectual-property cases. Even combined, the intangible- and intellectual-property cases add up fourteen, a shade over ten percent.

e.g., teaching personal property in the first third of the semester, and then going over the same territory again topic by topic for the other types of property combined. Any approach that recognizes the equal dignity of other forms of property besides land would be an improvement over the present quagmire.

Moreover, the Big Ideas in a property course should, and will, vary with professors' interests and expertise. A professor who embraces property's diversity of subjects and unity of concepts can still teach with other cross-cutting themes firmly in mind. Nothing about a historical approach requires teaching only the history of land law: American law has gone through other important transformations as it moved from preindustrial to industrial to postindustrial property. Environmental and ecological concerns arise far beyond real property; what are tradable emissions permits or fisheries quotas but new kinds of property, intangible but with important connections to the physical world? Economic considerations are just as relevant for modern forms of property—indeed, more so, as more and more wealth flows through these other forms. And property's role in a democratic society, or an egalitarian one, is not just a matter of giving everyone a little land.

I recognize that this is a dramatic departure in the content of the property course. Surprisingly few upper-level courses will be discomfited thereby. Teachers of trusts and estates will need to say somewhat more about future interests—but they may make up the time elsewhere as students will already know what a trust is. Courses in real estate transactions will need to cover more ground—but then again, students who have thought about the general problems of property conveyancing may be better-prepared than students who have spent their time beating their heads against the maddening classification of easements. Law schools might even, heaven forbid, need to offer an elective course specifically in land law. But that is pretty much it: The teachers of other upper-level courses are unlikely to notice the substitution.

Longtime property teachers might also reasonably object that a substantial redefinition of the course will require a great deal of work on their part. I do not believe this constitutes sufficient reason to continue teaching a course that wastes students' time. Nor have professors traditionally shied away from learning new things: It is part of the great attraction of the profession. But at any rate, there are ways to lessen the burden of the switch. New casebooks will help, just as today's casebooks help new professors learn the course the first time.⁷⁷ Expanding property's ambit will help, too, by showing that other

77. For example, I and four other property professors have assembled *Open Source Property*, a free downloadable casebook. Stephen Clowney, James Grimmelmann, Michael Grynberg, Jeremy Sheff & Rebecca Tushnet, OPEN SOURCE PROPERTY: A FREE CASEBOOK, <https://opensourceproperty.org> (last visited May 10th, 2017). It is provided as a set of remixable modules, which professors are encouraged to edit and assemble to build a custom casebook that meets their own pedagogical needs. Different professors have used the materials to teach very different courses; my own spring 2016 "build" of the casebook (available on the book's website) comes closest to the principles described in this essay. The materials are all made available for free reuse under a Creative Commons Attribution-NonCommercial license, and we also offer teachers' manuals and slides for most of the modules.

members of the faculty are qualified to cover the course. This is not a change that needs to happen all at once, either: A professor who cuts ten percent from her real-property coverage each year does students a substantial service each time she does, and will arrive at a perfectly healthy, modern property course within a few years. And finally, at some point, professors simply need to bear down and do the work. Good teaching is hard, and there is no honorable way around that fact.

The bar exam is a bigger obstacle. Whatever else it does, the first-year property course does at least introduce students to the terms and doctrines they will desperately try to memorize in the summer after graduation. Giving up on that mission, even if it makes for better law students and better lawyers, does make the bar exam into a higher hurdle. Some schools, relying on their students' general cognitive capabilities and their overall program, have already largely decided not to teach to the test. At these schools, excising real property would be no great loss. Other law schools do not have the same luxury. They must cover what the MBE covers, or their students' ability to find jobs as lawyers will suffer. That is why this essay is also ultimately a plea to bar examiners. Stop testing on "real property." Test on "property," in all its forms.⁷⁸

Conclusion

Property beyond real property deserves more than a foot in the door of the property course; it deserves an equal footing. The present focus on real property is not just myopic, but astigmatic. It holds us back in *everything* we want to do with the course. Whatever good you think we can do for students, we can do it better if we teach about other kinds of property. Property today is a jumble of ill-fitting pieces, and here I am proposing to add more. But trying to solve a jigsaw puzzle with only a quarter of the pieces is an exercise in masochism. Only when we find the rest of the box will we stand a chance of reassembling the whole picture.

78. Many state bar examinations go well beyond real property, even if they don't realize it. Their "property" questions are embedded in sections on commercial law, corporations, wills, family law, etc. In these states, a better property course could *help* students study for the bar exam.