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# A Novel Tool for Teaching Property: Starting With The Questions

*Tim Iglesias**

*Gertrude Stein asked, "What is the answer?" . . . and when no answer came she laughed and said: "Then, what is the question?"*[1]

## INTRODUCTION

Generally, property law is taught, along with torts and contracts, as a first-year foundational course introducing students to the common law.[2] While "property law" consists of legal doctrines, rules, policy justifications, and theoretical perspectives, this essay focuses on common law property rules and doctrine.[3] Professors vary on how much doctrine to include in their courses and most are eager to delve into policy and deeper issues. Students often find property law doctrine confusing which hinders their capacity (and appetite) for digging into policy and theory. This essay argues that both professors and students would benefit from an approach that explicitly recognizes the *questions* courts are regularly called upon to address in property cases. It proposes a set of organizing questions as a coherent framework for teaching students property doctrine, while simultaneously opening them up to the profound and fascinating policy and theoretical debates in the field. This framework can be used with any casebook or teaching method.

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1 Quoted in Judith D. Fischer, *Got Issues? An Empirical Study About Framing Them*, 6 J. ASS'N LEGAL WRITING DIRECTORS 1, 2 (2009).

2 To my knowledge, while many law schools have reduced the number of units dedicated to teaching property law, only Yale Law School has made Property Law an elective.

3 I recognize that an important dimension of contemporary property law includes statutes that codify, modify, and supersede the common law, as well as novel legislative enactments creating or revising the property system and property rights. The approach presented in this essay also applies to statutes. *See infra* note 37 and accompanying text.

While many have written on how to teach particular doctrines[4] or which doctrines should be included in a property course,[5] few have addressed the problem of teaching a course in which the fundamental concepts are contested and which presents numerous other pedagogical challenges (e.g., a broad array of topics that appear unrelated, still-surviving ancient doctrines, and the need to translate from a dead language—Norman French).[6] Recent research on teaching property primarily surveys which topics professors choose to teach with fewer units available.[7]

Despite all of the debates surrounding property law, there is an inherent and consistent structure, which can be used to teach the course in combination with the traditional topic organization or other formats. The structure is found in the *questions* that courts are called upon to answer. The questions are:

1. Is there a "property interest" at issue?
2. If it is property, what type of property interest is it?
3. How is this type of property interest created or acquired?
4. Who "owns" the property interest? How are competing ownership claims decided?
5. What "property rights" does ownership in this property entail, and with what limits/scope and duties?
6. What is required to make a valid transfer of this property interest?

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4 *See, e.g.*, John Martinez, *A Cognitive Science Approach to Teaching Property Rights in Body Parts*, 42 J. LEGAL EDUC. 290 (1992).

5 *See, e.g.*, M.C. Mirow, *Globalizing Property: Incorporating Comparative and International Law into First-Year Property Classes*, 54 J. LEGAL EDUC. 183 (2004); Roberta Rosenthal Kwall, *Why Intellectual Property Belongs in the First-Year Property Course*, 54 J. LEGAL EDUC. 504 (2004).

6 The primary exceptions are: Peter S. Menell & John P. Dwyer, *Reunifying Property*, 46 ST. LOUIS U. L.J. 599 (2002) (introducing their new casebook); Steven Friedland, *Teaching Property Law: Some Lessons Learned*, 46 ST. LOUIS U. L.J. 581 (2002) (offering alternative ways to teach Property). These articles were part of a special symposium issue on teaching Property. *See also* Laura S. Underkuffler, *Teaching Property Stories*, 44 J. LEGAL EDUC. 152 (2005).

7 *See, e.g.*, Joanne Martin, *The Nature of the Property Curriculum in ABA-Approved Schools and its Place in Real Estate Practice,* 44 REAL PROP. TR. & EST. L.J. 385, 393–94 (2009); Roger Bernhardt & Joanne Martin, *Teaching the Basic Property Course in U.S. Law Schools*, PROB. & PROP., Sept.–Oct. 2007, at 36, 37–38; Peter Wendel & Robert Popovich, *The State of the Property Course: A Statistical Analysis*, 56 J. LEGAL EDUC. 216, 220 (2006); Roberta Rosenthal Kwall & Jerome M. Organ, *The Contemporary Property Law Course: A Study of Syllabi*, 47 J. LEGAL EDUC. 205, 208, 210 (1997). An exception is Keith Sealing, *Dear Landlord: Please Don't Put a Price on My Soul: Teaching Property Law Students That "Property Rights Serve Human Values,"* 5 N.Y. CITY L. REV. 35, 106 (2002) (promoting teaching property law while integrating a social justice dimension).

7. How long does the property interest last? How can the property interest be terminated?
8. How are property rights in this kind of property enforced?

Courts are consistently presented with these same legal questions under the rubric of a "Property Law claim." The varied *answers* courts give to these questions create the evident pluralism in the substance of property doctrine and fuel theoretical disputes. The framework that I propose helps students identify the important issues and questions at the outset of their study of property law so they are prepared to explore, discuss, advocate for, and develop an understanding of the varied answers that courts give and their normative bases.

The questions listed above are consistently posed and answered in property cases. At the same time, the questions do not presuppose any particular answers; so articulating the set of questions in no way forecloses the rich policy debate that informs the questions' answers.

The idea that a question does not require a particular answer may seem strange. Certainly, in simple mathematics each question has one correct answer. However, legal questions may have several plausible and appropriate answers because they can be answered from different perspectives. Consider the story of the Three Stonecutters:

> A traveler came across three stonecutters and asked each one in turn: "What are you doing?" The first replied, "Isn't it obvious? I am cutting this stone so that it fits with that one to make a wall." The second said, "This is my job. I am making a living to support my family." The third looked up with a visionary gleam in his eye and said, "I am building a cathedral."[8]

In this story, the same question elicits three distinct answers because each stonecutter heard and answered the question from his own perspective. In the same way, when a case raises a particular property question,[9] courts interpret and answer the questions from diverse policy perspectives, leading to distinct rules and doctrines associated with the same question. Each

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8 There are many versions of this story. *See, e.g.*, *Three Stonecutters: On the Future of Business Education,* HARVARD MAGAZINE (Oct. 15, 2008), http://harvardmagazine.com/breaking-news/three-stonecutters-the-future-business-education [http://perma.cc/CB7E-NRJB]; *see also* PETER F. DRUCKER WITH JOSEPH A. MACIARIELLO, MANAGEMENT 258 (Rev. ed. 2005) (making the *Parable of the Three Stonecutters* famous). While context usually helps limit and make questions more determinative of the answers that suffice, what counts as "context" is not a given or obvious.

9 Of course, the parties before the court will try to persuade the court as to which property question the case raises if they believe that this strategy will give them an advantage.

answer that a court provides to any of these questions could reasonably provoke the follow-up query of: "Why?" The courts' justifications for the answers they provide to the primary questions inevitably reveal their conceptual and normative commitments.

Thus, property law questions are not determinative of the answers because courts' consideration of the questions is itself shaped and framed by diverse property perspectives or schools of thought described *infra*. Therefore, there is a range of answers that coherently respond to each question.[10] This fact is most easily seen in Question #1 (Is this a property interest?). Courts' acceptance or rejection of a proposed extension of what counts as a legally recognized "property" interest inherently relies on (more or less clear) normative visions of property law and can vary widely. Answers to this question operate as an important gatekeeper.[11]

Questions frame and drive inquiry, particularly legal inquiry.[12] Once western tradition recognized "property" as a *legal* category—not a mere social norm—and, in particular, a legal category distinct from tort or contract law, certain questions evolved which *must* be decided by courts.[13] The questions express property's *traditional* core legal doctrinal issues. They will seem familiar to property law professors because we have been using and teaching these questions without necessarily articulating all of them at the same time in a list. The primary contributions of this essay are to call the questions out in their entirety, articulate how they correlate to casebooks' organization of topics, and demonstrate the usefulness of using the framework of questions in teaching. Finally, the framework advances the goal of contemporary legal education to help students integrate legal

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10 What has been called the "canon" of Progressive Property scholars incorporates judicial answers to the traditional questions in ways that shape doctrine and favor particular normative property views. *See, e.g.*, Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CAL. L. REV. 107, 114 (2013) (expressing some skepticism about the "creative use of outlier cases" such as *State v. Shack* and *Matthews v. Bay Head Improvement Association*). Whether these cases are "outliers" or a part of the core of property law is a normative question well worth pursing in the classroom.

11 *See, e.g.*, Moore v. Regents of the University of California, 51 Cal. 3d 120 (1990) (considering whether a person can have a sufficient legal interest in his own bodily tissues amounting to personal property).

12 *See* ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 83 (2008) (stating the question presented "may well be the most important part of your brief"). *See generally* BERNARD J. F. LONERGAN, S.J., INSIGHT: A STUDY OF HUMAN UNDERSTANDING (1978) (presenting an epistemology founded on humans' capacity for questioning).

13 *See, e.g.*, Christopher Serkin, *From Social Recognition of Property to Political Recognition by the State: Peter Gerhart's Property Law and Social Morality and the Evolution of Positive Rights*, 2 TEX. A&M J. REAL PROP. L. 287, 288 (2015) (reviewing book that offers an evolutionary account of how legal property rights emerged from "social recognitions" among potential claimants).

analysis and legal practice[14] because starting with the questions—rather than the answers—is how lawyers actually operate to serve their clients.

This essay's argument is subtle and could be easily misconstrued. It is *not* proposing a Grand Theory of Property, nor is it taking a position on whether such a theory should be pursued. It neither seeks to resolve any of the many important conceptual and normative debates about property law nor to *appear* to resolve them. Rather, it presents the value of an anchoring framework that can be superimposed upon property law doctrine as it is currently structured to facilitate students' learning in the context of profound pluralism and uncertainty in the field. It offers the structure based upon (primarily) *descriptive claims* regarding what questions courts regularly address in the common law tradition of property.[15] It does not endorse these questions as normatively appropriate or complete.[16] It merely contends that students will be better able to explore the radical pluralism of property law if they have a stable framework from which to start.

Professors can introduce students to the questions early in the course and use the questions as reference points to help students recognize the connectedness of the topics. Casebook editors could articulate the questions and explain their relationship to the course topics in a preliminary way in an introduction section. If desired, they could refer to the questions

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14 *See*, *e.g.*, WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 12–13 (Jossey-Bass 2007).

15 Since dissolution of the "is-ought" distinction and increasing sophistication regarding epistemology, it is impossible to claim that any statement is "purely descriptive" since some acts of interpretation are involved in every assertion. This essay's claim to be descriptive is limited to the identification of the legal questions that courts ask and answer in cases that are identified as "Property Law" cases. *See infra* Part III B (The Relationships Among the Questions Can Be Complex) where I explain that while parties can disagree about which question is raised by the facts, the only questions that a court will recognize as Property Law questions are the ones I have identified. The author would appreciate any citations to Property Law cases in which a court appears to ask and answer different or additional legal questions than those identified in this essay.

16 One might think that the claim that courts are always asking the same set of questions in Property Law cases inherently (or implicitly) commits the courts (or this essay's author) to a particular theory of "Property" (in particular, a "thing" or an "ownership" view). *See*, *e.g.*, Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309, 316–17 (2006) (describing the "castle model" of property which focuses on the protections of the rights of owners). The ownership view considers property questions solely from the point of view of the owner, neglecting the perspectives of non-owners and the consequences on non-owners of legal recognition of owners' rights. Superficially, the questions identified in this essay appear to validate this view because they seem to beg a specific answer or type of answer. However, in practice, they do not because courts answer the questions from varied policy perspectives as explained *infra* notes 29–32 and accompanying text.

within their coverage of a particular topic or case in order to demonstrate that the courts are indeed asking a limited set of legal questions despite the particular phrasing of a legal issue in any particular case.

This essay proceeds in the following four steps: first, it explicates the problem; second, it articulates the proposed solution—the framework of questions; third, it demonstrates how the framework of questions comprehensively maps onto property law doctrine; and fourth, it explains why the framework is useful and suggests how to use this framework in property law courses.

## I. THE PROBLEM: WIDELY-RECOGNIZED CHALLENGES IN TEACHING AND LEARNING PROPERTY LAW

> The contents of property law emerged as a montage of ill-fitting subjects, jarringly connected by arcane language and obfuscatory rules. . . . The lack of topical relevance was only outweighed by its apparent lack of unity. The result was cognitive dissonance—a disjointed grouping of unrelated topics.[17]

This essay evolved from my own struggles to teach property and to make sense of the cases and relationships among topics, doctrines, rules, policies, and theories.[18] I soon found that I was not alone. Property professors acknowledge this problem openly.[19] Many practicing attorneys bemoan the apparent incoherence of property law as a field and particular property law doctrines (usually giving special mention to future interests, the requirements for the creation of real covenants, and, of course, the reviled Rule Against Perpetuities).[20] Even the U.S. Supreme Court has opined in this vein: "[T]he body of property law . . . more than almost any other branch of law, has been shaped by

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17 Friedland, *supra* note 6, at 581 (describing his experience of his property class in law school).

18 I began teaching Property Law in the fall of 2002.

19 Menell & Dwyer, *supra* note 6, at 599 ("The property course has become a bundle of topics that professors can liberally mix and match . . . but students suffer when their property course lacks a cohesive framework upon which they can layer other concepts and subjects in advanced courses. Few students . . . are able to retain much from a course that comes across as disconnected bodies of doctrine whose only common element may be that they involve land . . . . Property has devolved into a disparate set of doctrinal areas . . . . Each Property professor has his or her potpourri of coverage, and most modern property [case] books largely reflect and cater to that eclecticism."); *see also* Michael Weir, *Ways to Make the Teaching of Property/Land Law More Interesting*, 11 J. S. PAC. L. 107, 107 (2007) (another property professor who writes: "For many students the study of property law can be problematic. That means it is sometimes a problem for the lecturer. Property lawyers revel in the medieval; the arcane, the convoluted but fundamental concepts that abound in property law.").

20 *See generally* Peter A. Appel, *The Embarrassing Rule Against Perpetuities*, 54 J. LEGAL EDUC. 264 (2004).

distinctions whose validity is largely historical."[21] And, so, it is no surprise that bright and hardworking students often have more difficulty synthesizing their Property Law course than other first year foundational courses.[22]

Teaching Property Law presents at least two distinct challenges: (1) lack of coherence at the doctrinal level: there are disparate rules and doctrines across many distinct topics that engender the perception among students that neither the topics nor the doctrines "fit together";[23] and (2) lack of unity/coherence at the policy and theory level: diverse policy and theory perspectives for addressing property questions that are not resolved and may be irresolvable.

Regarding the perceived lack of coherence at the doctrinal level, most casebooks structure the course according to the traditional topics.[24] All casebooks give students a sense of the

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21 Jones v. U.S., 362 U.S. 257, 266 (1960).

22 JAY M. FEINMAN, LAW 101: EVERYTHING YOU NEED TO KNOW ABOUT THE AMERICAN LEGAL SYSTEM 205 (Oxford Univ. Press 2000) ("Property law may be the basic subject that most irritates law students. The fundamental principle of property law seems obvious: If you own something it's yours, and you can do what you want with it. But more than any other subject, property law is burdened with a thousand years of legal history and a plethora of technical distinctions."). "Students have lamented the truth that property, as traditionally taught, has been merely a sectional presentation of interests relating to land, the relevance and the interconnectedness of which was never clarified, much less emphasized. In short, property was accessible to only a few who 'got it.' The remainder, and majority of students, surrendered to the view that property was a monumental memorization task." Comments on draft of this essay, Richard T. Sakai, Assistant Professor, Co-Director, Academic Support Program, University of San Francisco, School of Law (copy on file with author). And, it is possible that this problem helps account for why so few law students publish notes about Property law. *See* Steve Clowney, *Property, Student Notes, and Elite Law Schools*, PROPERTYPROF BLOG (Feb. 14, 2011), http://lawprofessors.typepad.com/property/2011/02/property-student-notes-and-elite-law-schools.html (citing Andrew Yaphe, *Taking Note of Notes: Student Legal Scholarship in Theory and Practice*, 62 J. LEGAL EDUC. 259, 282 (2012) (finding student Notes dedicated to property account for only 7% of the total at non-elite schools and only 2% at elite schools)) [http://perma.cc/2CUP-A5MT].

23 This perception is particularly likely when students compare Property doctrine with Contracts and Torts, the other common law foundational courses. For example, while the ins and outs of negligent torts may baffle some students, they can all easily grasp the primary elements that structure legal analysis of all negligent torts: duty, breach, causation, and damages. This essay provides a similar structure for the whole range of Property Law issues in the form of a framework of questions.

24 In researching this essay, the author reviewed the following twenty-one Property Law casebooks: JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER & MICHAEL H. SCHILL, PROPERTY, (7th ed. 2010); RICHARD H. CHUSED, CASES, MATERIALS AND PROBLEMS IN PROPERTY, (3d ed. 2010); JOSEPH WILLIAM SINGER, PROPERTY LAW RULES, POLICIES, AND PRACTICES, (5th ed. 2010); EDWARD E. CHASE & JULIA PATTERSON FORRESTER, PROPERTY LAW CASES, MATERIALS, AND QUESTIONS (2d ed. 2010); DAVID CRUMP, DAVID S. CAUDILL & DAVID CHARLES HRICIK, PROPERTY: CASES, DOCUMENTS, AND LAWYERING STRATEGIES, (2d ed. 2008); BARLOW BURKE, ANN M. BURKHART & R.H. HELMHOLZ, FUNDAMENTALS OF PROPERTY LAW, (3d ed. 2010); ROGER BERNHARDT, JOYCE PALOMAR & PATRICK RANDOLPH JR., PROPERTY CASES AND STUDIES (2d ed. 2009); THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES (2d ed. 2012);

profound pluralism of Property Law, along with a few limited navigation tools.[25] Casebook editors have struggled valiantly and attempted creative solutions to offer a coherent framework to understand the rules and the roles that courts play across the various topics and doctrines.[26] But their efforts may still leave students swimming in a sea of apparently unrelated rules which are grouped around a dozen distinct topics.[27] The framework of questions reduces the swirling mass of information and issues on at least one dimension. The framework of questions does not "solve" this problem by oversimplifying a complex world, but rather by providing analytical clarity that makes managing the uncertainty easier.

Regarding the perceived lack of unity/coherence at the policy and theory level, there is no currently dominant "theory" of Property Law. Rather, from an intellectual and academic standpoint, at least since Thomas Grey's famous chapter announcing the "disintegration" of Property,[28] scholars have struggled to make sense out of the institution of private property

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GRANT S. NELSON, WILLIAM B. STOEBUCK & DALE A. WHITMAN, CONTEMPORARY PROPERTY (3d ed. 2008); JOHN G. SPRANKLING & RAYMOND R. COLETTA, PROPERTY, A CONTEMPORARY APPROACH (2009); R. WILSON FREYERMUTH, JEROME M. ORGAN & ALICE M. NOBLE-ALLGIRE, PROPERTY AND LAWYERING (3d ed. 2011); JOHN P. DWYER & PETER S. MENELL, PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE (2001); JAMES CHARLES SMITH, EDWARD J. LARSON, JOHN COPELAND NAGLE & JOHN A. KIDWELL, PROPERTY CASES AND MATERIALS (2d ed. 2008); CALVIN MASSEY, PROPERTY LAW: PRINCIPLES, PROBLEMS, AND CASES (2012); SHELDON F. KURTZ, HERBERT HOVENKAMP & CAROL NECOLE BROWN, CASES AND MATERIALS ON AMERICAN PROPERTY LAW (6th ed. 2012); ERIC T. FREYFOGLE & BRADLEY C. KARKKAINEN, PROPERTY LAW: POWER, GOVERNANCE, AND THE COMMON GOOD (2012); DAVID L. CALLIES, J. GORDON HYLTON, JOHN MARTINEZ & DANIEL R. MANDELKER, CONCISE INTRODUCTION TO PROPERTY LAW (2011) (this casebook replaces J. GORDON HYLTON, DAVID L. CALLIES, DANIEL R. MANDELKER & PAULA A. FRANZESE, PROPERTY LAW AND THE PUBLIC INTEREST: CASES AND MATERIALS (3d ed. 2007)); EDWARD RABIN, ROBERTA ROSENTHAL KWALL, JEFFREY KWALL & CRAIG ANTHONY ARNOLD, FUNDAMENTALS OF MODERN PROPERTY LAW (6th ed. 2011); JON BRUCE & JAMES ELY, JR., CASES AND MATERIALS ON MODERN PROPERTY LAW (6th ed. 2007); JOHN E. CRIBBET, ROGER W. FINDLEY, ERNEST E. SMITH & JOHN S. DZIENKOWSKI, PROPERTY: CASES AND MATERIALS (9th ed. 2008); D. BENJAMIN BARROS & ANNA P. HEMINGWAY, PROPERTY LAW (2105). For lists of which casebooks organize property doctrine in the traditional way and which do not, see *infra* note 103.

25 Many casebooks use some of the questions, e.g., Questions #3 and #4, to organize some topics and doctrines.

26 *See, e.g.*, DWYER & MENELL, *supra* note 24 (this casebook "conceptualizes the course through the comparative analysis of the major institutions—legal, social, market, and political—governing resources"); Peter S. Menell & John P. Dwyer, *Reunifying Property*, 46 ST. LOUIS U. L.J. 599, 601–02 (2002) (introducing the casebook).

27 Note: I am *not* suggesting that casebooks should organize the course according to these questions instead of by topics. See Section IV of this essay for my suggestions on how to use this framework.

28 Thomas C. Grey, *The Disintegration of Property, in* PROPERTY 69, 69 (J. Roland Pennock & John W. Chapman eds., 1980) ("By contrast, the theory of property rights held by the modern specialist tends both to dissolve the notion of ownership and to eliminate any necessary connection between property rights and things.").

and understand courts' roles in it. The scholarly literature is rife with descriptive, conceptual, and normative conflicts.[29] One treatise lists the following leading schools of thought: "Justice, Liberty, or Rights-Based Approaches; Utilitarian or Consequentialist Approaches; Social Relations Approaches; Libertarian and Progressive Approaches."[30] More recently, a Virtue Ethics approach to Property Law has joined the conversation.[31] Others have distinguished between essentialist schools and positivists.[32] Even the ubiquitous "bundle of sticks" metaphor is disputed and understood in numerous ways.[33]

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29 *See, e.g.*, Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 744 (2009) (property decisions involve "plural values" and "cannot be adequately understood or analyzed through a single metric"); Steven J. Eagle, *The Really New Property: A Skeptical Appraisal*, 43 IND. L. REV. 1229, 1229 (2010); J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 723–24 (1996) ("'[P]roperty is a bundle of rights' asserts the claim that property is a concept without a definable 'essence'; different combinations of the bundle in different circumstances may all count as 'property' and no particular right or set of rights in the bundle is determinative."); HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS (2011); Eric R. Claeys, *Property 101: Is Property a Thing or a Bundle?*, 32 SEATTLE UNIV. L. REV. 617, 617–18 (2009) (reviewing Thomas W. Merrill & Henry E. Smith, eds. PROPERTY: PRINCIPLES AND POLICIES (2007)); Jane B. Baron, *The Contested Commitments of Property*, 61 HASTINGS L.J. 917, 917 (2012) (proposing "property as a machine" and "property as a conversation" as illuminating metaphors); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 958 (1982); Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 531 (2005); Craig Anthony (Tony) Arnold, *The Reconstitution of Property: Property As A Web of Interests*, 26 HARV. ENVTL. L. REV. 281, 281–84 (2002); Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 372 (2003); Jeanne L. Schroeder, *Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property*, 93 MICH. L. REV. 239, 239 (1994); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L REV. 561, 569 (1983) ("As the property concept was generalized and decorporealized, it faded into the generic concept of right, which in turn proved to be systematically ambiguous (e.g., Hohfeld) if not entirely indeterminate.").

30 JOSEPH WILLIAM SINGER, PROPERTY (3d ed. 2010); *see* SUSAN BRIGHT & SARAH BLANDY, SURVEY OF PROPERTY LAW ACADEMICS RELATING TO RESEARCH APPROACHES 2013: SUMMARY OF FINDINGS (2013), https://www.shef.ac.uk/polopoly_fs/1.302966!/file/PR-Survey-Report.pdf (reporting areas of research in the following categories: Property Doctrine/Black Letter for academic audience, Property Doctrine/Black Letter for practitioner audience, Property Theory, Socio-legal, Comparative property law, Empirical, Critical Legal Studies, and noting other approaches such as legal history, law and geography, law and development, and critical race studies) [http://perma.cc/PSM7-8FGH]. This study included academics who consider themselves working in the field of property law from the United States and England.

31 *See, e.g.*, Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 864–74 (2009).

32 *See, e.g.*, THOMAS W. MERRILL & HENRY C. SMITH, PROPERTY: PRINCIPLES AND POLICIES 15–16 (2007); Tony Honore, *Ownership*, *in* MAKING LAW BIND, 161, 165–76 (1987) (identifying eleven elements of "full ownership"). *See generally* Hanoch Dagan, *Pluralism and Perfectionism in Private Law* (Tel Aviv Univ. Legal Working Paper Series, Tel Aviv Univ. Law Faculty Papers, Working Paper No. 128, 2011) http://law.bepress.com/taulwps/art128/.

33 *See* Symposium, *Property: A Bundle of Rights?*, ECON JOURNAL WATCH, Vol. 8, No. 3, (Sept. 2011), http://econjwatch.org/issues/volume-8-issue-3-september-2011 [http://perma.cc/9L37-ZLVS].

While many scholars have proposed solutions to "unify Property" based upon one or another substantive view, none have attracted consensual support or agreement.[34] Recent studies of Property courses document how professors mix and match doctrinal topics to fit the number of units available; these studies are further evidence of the lack of unity in Property Law.[35] A professor's personal interests and preferences or what topics are tested on a state's bar exam appear as likely to determine topic selection as any general theory.

There is very little Property Law literature or commentary that directly or comprehensively addresses these teaching challenges.[36] This essay offers a solution to the first challenge. And, while it does not "solve" the second challenge, it offers useful assistance in meeting it.

## II. THE FRAMEWORK OF QUESTIONS

The following questions constitute a framework that provides analytical clarity and "grips" to help students cope with the multiplicity and apparent disunity of common law doctrines of Property generally taught in law schools.[37]

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34 At present, property law is not a unified field. Whether it ever was, ever could be, or should be are the focus of a large amount of property law scholarship. *See, e.g.,* publications listed *supra* notes 28–32; *see also* Laura S. Underkuffler, Book Review, Stuart Banner, AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN (2011), 61 J. LEGAL EDUC. 504, 507–08 (2012) (arguing that property has no "true nature"; "[i]f by property's 'true nature,' we mean that there is an enduring idea of content or configuration of rights that property represents, then property largely (if not completely) fails this test"). This essay addresses a different issue: how to teach property law doctrine in the context of such radical pluralism. In the author's personal view, property law will never be "unified" in the sense that one theory will encompass all doctrines and rules in a manner that receives consensus. This is because the concept of "property" and its multifaceted and complex roles in our individual and social lives can never be adequately reduced to one meaning. "Property" is an essentially contested concept. Each of the approaches noted above will have something distinct, relevant, and justifiable to say about property law questions, including how they are unnecessarily limiting and biasing. This pluralism makes the subject endlessly fascinating, but it also makes it harder for students to learn.

35 *See supra* note 7.

36 For some exceptions, see publications cited *supra* note 6.

37 This essay focuses on common law property rules and doctrines because they are the core of most property law courses. The framework also applies to statutory property rules and doctrines and constitutional property law. The framework applies to property doctrines created by legislation because these laws address the *same* legal questions as the common law. If we ask *how* any particular regulation of property aims to achieve the regulation's purpose, we are directed to one or more of the questions. For example, the Recording Acts address Question #4 (ownership) by deciding which title is superior. The federal Fair Housing Act aims to enforce an anti-discrimination principle by primarily addressing Question #5 (property rights entailed by ownership). Constitutional property issues, e.g., concerning whether governmental regulation of property is constitutionally valid as an exercise of either the police power or the power of eminent domain are, of course, distinct. They can be understood as covered by Questions #1 (is it a property interest for constitutional purposes), Question #5 (what are the property rights entailed

1. Is There a "Property Interest" at Issue?[38]

First, the threshold question: Is the thing (or relationship) of value at issue a legally recognized and protected "property" interest, some other kind of legal right (e.g., a personal right), or merely an expectancy interest?[39] Any answer a court provides in such a dispute presumes some at least implied notion of what is "property." This well-recognized question[40] reflects an ongoing tension within Property Law regarding continuity and change; and the history of Property Law evinces substantial adjustments to the definition of private property.

More fundamentally, this question asks: What *should* be propertized? Historically, an obvious example is the horrific institution of chattel slavery in which U.S. courts treated some Africans as a recognized type of "property" from the nation's founding until the adoption of the Thirteenth and Fourteenth Amendments.[41] Another historical example is servitudes. Conflicts regarding courts' recognition of these interests as *property* interests versus contractual rights extended over a long period.[42] More recently, *Goldberg v. Kelly* and related cases conceptualized government benefits as a species of property.[43] Developing technology often raises this issue. Contemporary examples include *Moore v. Regents of the University of California*.[44] And while planets and

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by ownership), and Question #8 (how are property rights enforced), but it is important to recognize them as constitutional issues not matters of common law property. The degree to which the framework's questions would assist the teaching of the bulk of the intellectual property material (patent, copyright, and trademark) is beyond the scope of this essay. Clearly, many of the same questions seem initially applicable. However, intellectual property law includes a much more substantive notion of "public domain" as an implied limit on the scope of intellectual property rights. And the tests for infringement of intellectual property rights (e.g., "fair use") are phrased and operate very differently from other types of property.

38 This essay focuses mostly on privately-owned property.

39 When someone is named as a devisee in a will of a living person, she has only an expectancy interest and has no standing to sue if the person wants to change the terms of the will. *See also* Local 1330, United Steel Workers v. U.S. Steel Corp., 631 F.2d 1264, 1280 (6th Cir. 1980) (rejecting claims that steel workers possessed a property interest in the plants where they had worked).

40 *See, e.g.*, SINGER, *supra* note 30, at 185–278; Sealing, *supra* note 7, at 59; Laura S. Underkuffler, Book Review, 61 J. LEGAL EDUC. 504, 504 (2012) (reviewing STUART BANNER, AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN (2011)) (identifying the question "What is property?" as a primary theme in the book).

41 *See, e.g.*, Commonwealth v. Aves, 18 Mass. (1 Pick.) 193 (1836) (distinguishing Massachusetts laws, which did not consider a child a slave, from Louisiana laws).

42 See discussion of this historical development in DUKEMINIER, KRIER, ALEXANDER & SCHILL, *supra* note 24, at 847–59.

43 *See generally* Goldberg v. Kelly, 397 U.S. 254 (1970); Charles Reich, *The Liberty Impact of the New Property*, 31 WM. & MARY L. REV. 295 (1980). *See also* Charles A. Reich, *The New Property After 25 Years*, 24 U.S.F. L. REV. 223 (1990). *But see* Charland v. Norge Division, Borg-Warner Corp., 407 F.2d 1062 (6th Cir. 1969) (finding no legally recognizable property right in a job).

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

asteroids are not currently subject to ownership claims by states pursuant to international treaties, evolving technology may revise this position.[45] Environmental conditions may also raise this issue.[46] Animal rights cases pose this question in a complex way because the proponents are split on the issue of whether or not propertizing animals will best serve advocates' goals.[47] This issue is critical to a regulatory takings claim because a plaintiff must demonstrate that she owns a recognized property interest in order to bring her claim.[48]

For some things of value, the question is answered absolutely (e.g., a vote is never a property interest), while for others the answer is qualified by purposes and context. Courts sometimes employ a concept of "quasi-property" in situations where something exhibits only limited indicia of property or is considered property only for a limited purpose.[49] The human body presents an interesting example. In the United States, organs are not "property," but many body products, such as hair, blood, semen, and ova are treated as property.[50] And some courts recognize

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45 *See, e.g.*, Kenneth Chang, *A Business Plan for Space*, N.Y. TIMES (Feb. 9, 2015), http://www.nytimes.com/2015/02/10/science/a-business-plan-for-space.html.

46 *See, e.g.*, Shelley Ross Saxer, *Managing Water Rights Using Fishing Rights As a Model*, 95 MARQ. L. REV. 91, 93 (2011) (arguing that water rights ought not to be considered as property rights).

47 *See generally* collection of articles in 60 J. LEGAL EDUC. (2010).

48 A claim under the Fifth Amendment takings clause requires a court to consider a two-part test. First, the court must determine whether there is a "cognizable Fifth Amendment property interest" that is the subject of the purported taking and, second, whether there was an actual taking. Hearts Bluff Game Ranch, Inc. v. U.S., 669 F.3d 1326, 1329 (Fed. Cir. 2012). *Compare id.* at 1333 (holding an opportunity to operate a mitigation bank is not a property interest under the Takings Clause), *with* Cty. of San Diego v. Miller, 532 P.2d 139, 143 (Cal. 1975) (applying a "fairness and public policy" test to find that an unexercised option to purchase land is a property interest for purposes of eminent domain, even though it is not an estate under traditional common law concepts of property). *See also* Maureen E. Brady, *Property's Ceiling: State Courts and the Expansion of Takings Clause Property* (Va. L. Rev., Working Paper, 2015), http://ssrn.com/abstract=2673783 (documenting judicial restrictions on regulatory takings by determining what constitutes "property" and state courts' expansion of the definition of private property).

49 *See, e.g.*, Leno v. St. Joseph Hospital, 302 N.E.3d 58, 59–60 (Ill. 1973) ("The principle is firmly established that while in the ordinary sense, there is no property right in a dead body, a right of possession of a decedent's remains devolves upon the next of kin in order to make appropriate disposition thereof, whether by burial or otherwise."). Courts must also determine if something is property for the purposes of a particular law, e.g., Cal. Farm Bureau Fed'n v. State Water Res. Control Bd., 247 P.3d 112, 117 (Cal. 2011) (addressing whether a water right is a "property right" for purposes of Proposition 218 regarding the two-thirds voting requirement for a tax).

50 *See, e.g.*, Lisa Milot, *What Are We—Laborers, Factories, or Spare Parts?: The Tax Treatment of Transfers of Human Body Materials*, 67 WASH. & LEE L. REV. 1053, 1086, 1092, 1104 (2010); Brian Morris, *You've Got to Be Kidneying Me!: The Fatal Problem of Severing Rights and Remedies from the Body of Organ Donation Law*, 74 BROOK. L. REV. 543, 553 (2009); Erin Colleran, Comment, *My Body, His Property?: Prescribing A Framework to Determine Ownership Interests in Directly Donated Human Organs*, 80 TEMP. L. REV. 1203, 1204 (2007); *see also* Moore v. Regents of the Univ. of Cal., 793 P.2d 479 (Cal. 1990).

educational degrees as property in the context of divorce, but not for other purposes.[51]

2. If It Is Property, What Type of Property Interest Is It?[52]

Courts distinguish between different types of property interests, e.g., real and personal property, tangible and intangible property, and public and private property. Courts identify which particular "property interest" has been created by a document, an agreement between individuals, or some other human action.

Scholarship documenting the Doctrine of Numerus Clausus suggests that courts persist in recognizing a limited number of specific types of property interests. If a court has answered Question #1 affirmatively, it must fit the claim into one of several pre-existing categories.[53] This is part of what we teach in the classification of estates and future interests section of the course. Courts are regularly asked to decide what property interests are created by a grantor's ambiguous language, e.g., a fee simple determinable or a fee simple subject to condition subsequent?[54] When state legislatures abolished the fee tail estate, they directed courts to reinterpret what property interest was created by a document purporting to create a fee tail. When California abolished the possibility of reverter, it directed courts to treat interests that would have been so classified as right of entry/power of termination. Courts decide whether a document referring to itself as a "lease" actually creates a "leasehold estate" or some other kind of property interest (e.g., a license, an easement, or a profit).[55]

Defining a particular property interest will also often define, in turn, a particular "property relationship" between the parties. In our property law tradition, there is not one singular owner—non-owner relationship, but rather a myriad of distinct property relationships, e.g., bailor-bailee, donor-donee, grantor-grantee, concurrent interest

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51 *Compare* O'Brien v. O'Brien, 489 N.E.2d 712, 716 (N.Y. 1985) (interpreting state statute to include an interest in a profession or professional career to be a marital property asset divisible at divorce), *with In re* Marriage of Graham, 574 P.2d 75, 77 (Colo. 1978) (holding that an MBA degree was not subject to division). *See In re* Marriage of Spengler, 6 Cal. Rptr. 2d 764, 771–72 (Cal. Ct. App. 1992) (holding that a right to renew a term life insurance policy could be a property interest divisible at divorce for purposes of California's Community Property law); *see also* Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 612 n.418 (2005).

52 Note: This question is often answered in conjunction with Question #3 (how is that type of property interest created or initially acquired?), but it is conceptually distinct.

53 For a proposal to reform our estates and future interests, see D. Benjamin Barros, *Toward a Model Law of Estates and Future Interests*, 66 WASH. & LEE L. REV. 3, 6 (2009).

54 *See, e.g.*, Mahrenholz v. Cty. Bd. of Sch. Trs., 544 N.E.2d 128 (Ill. App. Ct. 1981).

55 *See, e.g.*, Cook v. Univ. Plaza, 427 N.E.2d 405, 408 (Ill. App. Ct. 1981) (finding "Residence Hall Contract Agreement" regulating use of university dorms was not a lease). Landlord-tenant relationships are particularly complex because they involve an unresolved mix of property law, contract law, and tort law.

holders, mortgagor-mortgagee, present interest holders-future interest holders, and dominant estate owner-servient estate owner. What specific property rights are entailed by ownership of a particular type of property and a particular property relationship is a distinct question (Question #5, *infra*.) Sometimes the property relationship is tightly linked to the answers to Question #5 (e.g., in most states defining a leasehold interest specifies certain rights and duties between the landlord and the tenant); other times, it is not, functioning only as a label without much pre-set content (e.g., the content of a real covenant will be defined by the text of the covenant).

3. How Is That Type of Property Interest Created or Initially Acquired?[56]

This question is often explicitly covered in casebooks. There are numerous ways that property interests can be created or initially acquired. Property interests are generally created by deliberate human action and agreements, and expressed in documents. But some property interests, e.g., a successful adverse possessor's estate,[57] certain easements,[58] and an implied equitable servitude,[59] can be created by operation of law.

Disputes about creation or initial acquisition of property interests include the test for what constitutes "occupation" of a wild animal and the issue of whether a deed can create an easement in a third party?[60] Once property is initially owned, subsequent ownership is determined by answers to Questions #4–8.

4. Who "Owns" the Property Interest? How Are Competing Ownership Claims Decided?

Some Property Law casebooks articulate this question explicitly and use it to organize part of the course.[61] Under the rubric of these questions, we teach doctrines such as the Rule of Capture, the Law of Finding, and Adverse Possession and

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56 This question is distinct from the fundamental property theory issue of how can a private property system be normatively justified which is often an issue raised early in Property Law courses. *See, e.g.*, Emily Sherwin, *Three Reasons Why Even Good Property Rights Cause Moral Anxiety*, 48 WM. & MARY L. REV. 1927, 1927 (2007). American courts assume a private property system and ask this question within that system.

57 *See, e.g.*, Mullis v. Winchester, 118 S.E.2d 61 (S.C. 1961) (adverse possession). The title acquired by adverse possession is understood to be a new title, not a transfer of a property interest from the previous owner.

58 *See, e.g.*, Strollo v. Iannantuoni, 734 A.2d 144 (Conn. App. Ct. 1999) (implied easement by necessity); Bubis v. Kassin, 733 A.2d 1232 (N.J. Super. Ct. App. Div. 1999) (implied easement by prior existing use); Melendez v. Hintz, 724 P.2d 137 (Idaho 1986) (prescriptive easement); Holbrook v. Taylor, 532 S.W.2d 763 (Ky. 1976) (easement by estoppel).

59 *See, e.g.*, Sanborn v. McLean, 206 N.W. 496 (Mich. 1925) (implied equitable servitude).

60 At old common law, the answer was an unequivocal "no." *But see generally* Willard v. First Church of Christ, Scientist, 498 P.2d 987 (Cal. 1972).

61 *See, e.g.*, SINGER, *supra* note 30, at 97–183.

relativity of title.[62] The common law did not presume a single owner, but included numerous multi-owner forms, such as concurrent interests.

The rules are informed by purpose and context. The elements and rules for adverse possession of an entire lot differ from those pertaining to border disputes,[63] and differ again as between a claimant with a defective deed and one without any document purporting to ground an ownership claim.[64]

5. What "Property Rights" Does Ownership in This Property Entail, and with What Limits/Scope and Duties?

While neither courts nor commentators regularly employ Wesley Hohfeld's categories and terminology,[65] courts do regularly analyze an ownership interest to identify specific rights it includes.[66] This may be the most contested area.[67]

Ownership of many types of property entails a familiar group of rights (*viz.* the right to possess/use/control, the right to exclude, and the right to transfer),[68] but a wide variety of other familiar property interests do not.[69] An owner of stocks (an intangible property interest) has obvious rights to control,

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62 *Id.* at 797–98 (capture); *id.* at 800–01 (finding and relativity of title); *id.* at 140–43 (adverse possession); *id.* at 541 (recording acts often reverse the result of a common law analysis of priority of title).

63 *Compare* Manillo v. Gorski, 255 A.2d 258, 262 (N.J. 1969) (articulating and revising elements for adverse possession in a boundary dispute), *with* Mullis v. Winchester, 118 S.E.2d 61, 63 (S.C. 1961) (articulating elements for adverse possession of a parcel).

64 *Compare* Norman v. Allison, 775 S.W.2d 568 (Mo. 1989) (claim of title), *with Mullis*, 118 S.E.2d at 66 (color of title).

65 A comprehensive formal analysis of jural relations (opposites and correlatives) was articulated in Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28–33 (1913).

66 *See, e.g.*, U.S. v. Craft, 535 U.S. 274, 278 (2002) ("A common idiom describes property as a 'bundle of sticks'—a collection of individual rights which, in certain combinations, constitute property."); Henneford v. Silas Mason Co., 300 U.S. 577, 582 (1936) ("The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership. A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots [sticks] and lay the charge distributively."). Professor Merrill articulates this distinction as between a "discrete asset" (legally recognized property form) and an "incident of property" (power or privilege that belongs to someone who owns the property, but is not a legally recognized form of property itself). Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 974 (2000).

67 Commenting on an earlier version of this draft, Professor Peggy Radin remarked that Question #5 is "the big kahuna." (Email on file with author).

68 Examples include ownership of a paperback book or a car. Others have investigated additional "property rights." *See, e.g.*, Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781 (2005); Lior Jacob Strahilevitz, *The Right to Abandon*, 158 U. PA. L. REV. 355 (2010); Eduardo M. Peñalver, *The Illusory Right to Abandon*, 109 MICH. L. REV. 191 (2010).

69 *See, e.g.*, Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 509–10 (1990) (Mosk, J., dissenting) (discussing the typical bundle of rights and exceptions to it).

exclude, and transfer, but she has no meaningful "right to possess."[70] Water rights are usually considered to be merely usufruct rights, i.e. rights of use.[71]

Property interests with traditionally clear rights may be subject to reexamination in a new context. Usually a spouse owning property held in the tenancy by the entirety form does not have a unilateral right to transfer.[72] But in *U.S. v. Craft*, the U.S. Supreme Court considered "whether a tenant by the entirety possesses 'property' or 'rights to property' to which a federal tax lien may attach."[73] And, the meaning and scope of the Public Trust doctrine, through which a state reserves certain property rights to the state and its people, has recently been broadly explored.[74]

Practically speaking, because we live in an interdependent world, all property rights cannot be absolute.[75] Having a specific right (e.g., the right to exclude) is different from knowing the "scope" or limits of that right. The plaintiffs in right to exclude cases may frame their cases in absolutist terms—as if the issue was having a right to exclude or not—but often courts resolve such disputes by declaring the scope of a recognized right by a recognized owner.[76]

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70 JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY 369 (Aspen Law & Business, 2001) ("The traditional view of the corporation is that it is owned by the shareholders."). WILLIAM ALLEN ET AL., CASES AND COMMENTARIES ON THE LAW OF BUSINESS ORGANIZATION 58 (3d ed. 2008) ("Thus, a functional two-level ownership structure characterizes partnerships and all business entities: The contributors of equity capital do not 'own' the assets themselves but rather own the rights to the net financial returns that these assets generate, as well as certain governance or management rights.").

71 *See, e.g.*, Shelley Ross Saxer, *Managing Water Rights Using Fishing Rights As a Model*, 95 MARQ. L. REV. 91, 92 n.5 (2011) (citing authorities). Singer's explication of three common law rules on surface water ("natural flow," "common enemy," and "reasonable use") demonstrate the range of limited scope of rights and correlative duties the neighboring landowners can enjoy. SINGER, *supra* note 70, at 121–23.

72 *See, e.g.*, Long v. Earle, 269 N.W. 577, 581 (1936) ("It is well-settled under the law of this State that one tenant by the entirety has no interest separable from that of the other.").

73 U.S. v. Craft, 535 U.S. 274, 276 (2002). The Court's phrasing of the issue could be interpreted as asking Question #1 (is this "property") or Question #5 (what rights are entailed in ownership). This opinion partly depended upon the justices' interpretation of the relationship between federal law and state law. State courts' interpretation of their state's version of the Married Women's Separate Property Act resulted in a variety of possible understandings of the tenancy by the entirety.

74 *See, e.g.*, Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 WAKE FOREST J.L. & POL'Y 281, 283 (2014).

75 *See* Kenneth J. Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 329 (1981).

76 *See, e.g.*, Jacque v. Steenberg Homes, Inc., 563 N.W. 2d. 154, 159 (Wis. 1997) (construing the right to exclude with a broad scope); State v. Shack, 277 A.2d 369, 372 (N.J. 1971) (construing the right to exclude more narrowly); Campbell v. Westdahl, 715 P.2d 288, 292 (Ariz. Ct. App. 1985) (considering the scope of a tenant's right to transfer her leasehold estate, this court opines: "The modern trend is to impose a standard of reasonableness on the landlord in withholding consent to a sublease unless the lease expressly states otherwise.").

Property Law recognizes limits on the property rights of property owners vis-à-vis non-owners as well as vis-à-vis other property owners.[77] Generally, there are three sources of limits: the common law, grantors, and government regulation. Nuisance law is the paramount example of common law limits between property owners. The legal rules of nuisance are explicitly (and notoriously) contextual. Courts also identify property owners' duties, e.g., the duty to not commit waste[78] and landowners' duties to those who enter their property.[79]

In practice, the answers to the question, *what "property rights" does ownership in this property entail, and with what limits/scope and duties?*, are determined by courts' answers to four interrelated sub-questions: (a) What specific rights are recognized in this property in this context?;[80] (b) How are these rights related to each other?;[81] (c) What is the "scope" (limits) of

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77 *See, e.g.*, Union Oil Co. v. State Bd of Equal., 386 P.2d. 496, 550 (Cal. 1963) ("Ownership is not a single concrete entity but a bundle of rights and privileges as well as of obligations."). *See generally* Eduardo M. Penalver, *The Illusory Right to Abandon*, 109 MICH. L. REV. 191 (2010) (uncovering the common law limits on the right to abandon property). KURTZ, HOVENKAMP & BROWN, *supra* note 24, at 178–95, includes a subsection on the obligations associated with bailment. MERRILL & SMITH, *supra* note 24, at 361–499, includes a chapter entitled "Owner Sovereignty and Its Limits," discussing exceptions to (or limitations on) the right to exclude.

78 *See, e.g.*, DUKEMINIER, KRIER, ALEXANDER & SCHILL, *supra* note 24, at 217–18 (discussion of duty to avoid waste).

79 Traditionally, landowners owed different duties to different classes of non-owners depending upon the status of the entrant as trespasser, licensee, or invitee. Carter v. Kinney, 896 S.W.2d 926, 928 (Mo. 1995). In the modern time, many courts have combined these into a single "reasonableness" duty. *See* Heins v. Webster County, 552 N.W.2d 51, 52 (Neb. 1996).

80 In the concurrent ownership interests context, this question asks: what are the *relative* rights of the co-owners of the same property?

81 For example, concurrent interests present formidable challenges to courts in this sub-question. To illustrate, the inherent ambiguity (or arguable incoherence) of the relationship between cotenants' equal rights to use a concurrent interest estate has challenged courts, leading to different jurisdictional default rules (out of possession cotenant's right to rent from cotenant in possession). More generally, current variant answers to this question include: (1) a near-infinitely variable "bundle of rights" (J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 712–13 (1996) (describing the "bundle of rights" as the "currently prevailing understanding of property in what might be called mainstream Anglo-American legal philosophy" and attributing this view to Lawrence C. Becker, Stephen R. Munzer, and Jeremy Waldron); *see also* JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES 43 (1st ed. 1888) ("The dullest individual among the people knows and understands that his property in anything is a bundle of rights.")); (2) a fundamental/basic right of exclusive possession upon which other rights are derived (Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998) ("[T]he right to exclude others is more than just 'one of the most essential' constituents of property--it is the sine qua non.")); (3) a web of interests (Craig Anthony (Tony) Arnold, *The Reconstitution of Property: Property As A Web of Interests*, 26 HARV. ENVTL. L. REV. 281, 281–84 (2002)); and (4) the bucket of water metaphor—that all the rights are thoroughly interconnected and interdependent (Lee Anne Fennell, *Property and Half-Torts*, 116 YALE L.J. 1400, 1441–43 (2007) (citing Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1760 (2004) (quoting WILLIAM MARKBY, ELEMENTS OF LAW 158 (6th ed. 1905) (asserting that

each property right?; and (d) What affirmative obligations (or duties) come with ownership?[82]

Not every case requires consideration of all of these sub-issues. Unfortunately, when cases do present these sub-issues, courts have neither been self-conscious, consistent, nor transparent about how they reach and answer these sub-issues. Courts neither necessarily answer all of these questions directly, nor in any particular order. And sometimes, courts do not address these sub-issues at all, but merely announce a holding.[83]

6. What Is Required to Make a Valid Transfer of This Property Interest?

Property Law provides numerous rules defining what is required to make a valid transfer.[84] Property Law is conventionally distinguished from contract law by the fact that no consideration is required for a valid transfer of a property interest. The rules differ for real property, personal property, and some intangible property.[85] Rules concerning valid transfer by gift[86] or by deed[87] fit under this question.[88] The Principle of Derivative Title (one cannot transfer greater rights than

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ownership "is no more conceived as an aggregate of distinct rights than a bucket of water is conceived as an aggregate of separate drops")).

82 Examples of affirmative obligations include the duties of an owner of a present interest to the owner(s) of a future interest, e.g., duty to not commit "waste." For one view on affirmative duties, see Robert C. Ellickson, The Affirmative Duties of Property Owners Yale Law & Economics Research Paper No. 499 (July 10, 2014), http://ssrn.com/abstract=2464545 (last visited Jan. 15, 2016) [http://perma.cc/WY3E-L8VF].

83 *See, e.g.*, J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 715 (1996) (criticizing the "bundle of rights" metaphor and using cases to demonstrate "the absence of a concern [by some courts] to elaborate the legal concept of property in more than a superficial way" and to "indicate how a court may avoid facing difficult questions about the nature of property, in order to move quickly to consider broader policy issues concerning the legal treatment of things of value"). *Cf.* U.S. v. Craft, 535 U.S. 274 (2002) (offering an unsatisfying explanation why state law understandings of the rights entailed in a tenancy by the entirety are not respected by the federal government) *with* Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306 (1984) (explicating carefully the relative rights of the owner and the public under the public trust doctrine).

84 *See, e.g.*, NELSON, STOEBUCK & WHITMAN, *supra* note 24, at 230–44.

85 Students are often surprised that a transfer of a real property interest does not have to be recorded in the public records in order to be a valid transfer.

86 *See, e.g.*, Westleigh v. Conger, 755 A.2d 518, 519 (Me. 2000) (requiring present donative intent, delivery, and acceptance).

87 Transfers of real property generally require execution of a valid deed, delivery of the deed, and acceptance.

88 Rules for transfer by devise and intestate transfer are provided by statute. Importantly, neither adverse possession nor abandonment is a form of "transfer" of property interests. Adverse possession primarily concerns Question #4 (who owns the property interest) as is shown by the contexts in which the doctrine is raised. If an erstwhile adverse possessor is successful, a new title is created by operation of law, not by transfer. Abandonment doctrine addresses how a property interest can be terminated (Question #7), and then become available for someone else to acquire (Question #3).

she possesses) seems clear enough but has common law exceptions derived from equitable estoppel.[89]

Given the contemporary dominance of doctrines favoring alienability, most types of property are transferrable. Whether some property interests should be "market inalienable" or not is a well-established debate.[90]

It seems obvious that someone designated as "an owner" may transfer an interest validly, but a woman who owns property with her husband as a tenant by the entirety could not transfer it alone. It seems equally obvious that *only* an owner may transfer an interest validly, but the common law estate *jure uxoris* (which gave a husband an estate in all of the land owned by his wife at marriage) allowed the husband to sell land titled in his wife's name to a third party subject to certain limitations.

Most transfers of property interests are deliberate and intentional. But sometimes they can occur by operation of law, e.g., when title passes to the holder of a possibility of reverter when the defeasing condition is violated.

7. How Long Does the Property Interest Last? How Can the Property Interest Be Terminated?

Because property interests may or may not last indefinitely, courts need rules to determine how long an interest lasts and how an interest can be terminated. For example, if a grantor has correctly created a fee simple determinable, then the violation of the condition terminates the present interest and the holder of the possibility of reverter now owns the property. A cotenant in the common law joint tenancy can destroy the "right of survivorship" with ease. In contrast, a cotenant in a tenancy by the entireties cannot unilaterally do the same; the right of survivorship in a tenancy by the entireties can only be terminated by the spouses' joint action or divorce.

When grantors do not provide expressly how or when a property interest lasts, the modern presumption is that it lasts as long as the interest conveyed can last. Courts have developed various other rules to decide this question, from the doctrine of

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89 *See* FREYERMUTH, ORGAN & NOBLE-ALLGIRE, *supra* note 24, at 146–48.

90 Most property interests can be bought and sold in the market; they are "market alienable." However, some property interests (e.g., one's organs) are treated as "market inalienable"—they may be transferrable as gifts but not for economic consideration. *See e.g.*, Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931 (1985); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1849–50 (1987); Walter Block, *Market-Inalienabilty Once Again: Reply to Radin*, 22 T. JEFFERSON L. REV. 37, 37 (1999); Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403, 1406 (2009).

abandonment[91] to the Doctrine of Changed Conditions.[92] This area is not free of dispute. The *Pocanos* case can be read as a tragicomic story of how difficult it can be for an owner to abandon a real property interest under the law.[93]

8. How Are Property Rights in This Kind of Property Enforced?

Questions concerning enforcement of property rights are both important and complex. The critical sub-questions are: Has a property right been violated? Against whom can the owner(s) enforce the property right? What defenses can be raised against enforcement? And, what remedies are available if a violation is proven?[94]

There are a wide variety of rules determining if a property right has been violated and what defenses are available (e.g., whether any defense to unauthorized use is available). Liability rules range from bright line rules, to various standards, to elements tests and factor tests. Rules defining which party bears the burden of proof can be outcome-determinative.[95] Common law jurisprudence is a primary source for these rules, but the terms of an inter-vivos grant or a will may also determine how a particular property right may be enforced.

Regarding the sub-question "against whom can the owner(s) enforce the property right," many property rights are "in rem"—enforceable against all non-owners. However, some

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91 Abandonment concerns how a true owner can terminate her ownership interest unilaterally without transfer to another person or entity. It is therefore not an answer to Question #6 because while it is a relinquishment (ending of a property ownership in Question #7), it is not a transfer of this interest to another owner. The consequence of successful abandonment raises Question #3—how the (possibly) valuable property can be acquired by someone else, e.g., a finder.

92 For example, the Doctrine of Changed Conditions is applied in the context of interests that run with the land, e.g., easements, real covenants, and equitable servitudes. *See, e.g.*, Western Land Co. v. Truskolaski, 495 P.2d 624 (Nev. 1972) (recognizing the doctrine but refusing to apply it to a single-family subdivision). The RESTATEMENT (THIRD) OF PROPERTY, SERVITUDES § 7.10(1) (2000) would apply the doctrine of changed conditions to all "servitudes." The Marketable Title acts provide a statutory basis for terminating property interests. *See* FREYERMUTH, ORGAN & NOBLE-ALLGIRE, *supra* note 24, at 756–57.

93 *See* Pocono Springs Civic Ass'n v. MacKenzie, 667 A.2d 233 (Pa. 1995). In this case, the owners of a tract of undeveloped real property in a common interest community found out it was undevelopable, but were still required to continue to pay homeowner association fees. They attempted to rid themselves of the property in numerous ways unsuccessfully. *Id.*

94 For example, in Alby v. Banc One Financial, 128 P.3d 81, 83 (Wash. 2006), the court must decide whether a condition included in the deed was enforceable, whether the condition was violated, and, if so, what is the remedy.

95 See discussion of *Melendez v. Hintz*, 111 Idaho 401 (1986) in Note 2 in FREYERMUTH, ORGAN & NOBLE-ALLGIRE, *supra* note 24, at 548–49.

commonly recognized property rights—cotenants in concurrent interest, easements, and real covenants/equitable servitudes—only bind some specified others with whom one is in a particular property relationship.[96]

Regarding remedies, the famous Calabresi and Melamed article distinguishing "property rules" from "liability rules" addressed what remedies courts should make available to wronged property owners from an economic perspective.[97] Courts' answers to these questions vary by the type of property and the context.[98] And, the answers have changed over time. At common law, property was reflexively protected by "property rules," but in modern times, courts have brought a more flexible approach to this issue, sometimes employing property rules and sometimes liability rules to protect property rights. This flexibility is demonstrated in some nuisance cases[99] and in some minor encroachment cases.[100] There is also a modern trend to deny property owners "self-help" remedies that were traditionally available to them under common law to enforce their property rights.[101]

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96 Cotenants in concurrent interests have certain rights and duties toward each other. The *Swartzbaugh v. Sampson*, 54 P.2d 73, 74 (Cal. Ct. App. 1936) case formally raises Question 8 (can a cotenant sue to cancel a lease in a joint tenancy which she has not joined), but its answer exemplifies the difficulty courts have had in answering Question #5 regarding the scope of rights created in concurrent interests. *See also* DUKEMINIER, KRIER, ALEXANDER & SCHILL, *supra* note 24, at 847–51, 857 (discussing legal requirements for enforceability of Real Covenants and Equitable Servitudes).

97 Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules and Alienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1097 (1972). "An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller . . . . Whenever someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it, an entitlement is protected by a liability rule." *Id*. at 1092. Thus, if a property interest is protected by a "property rule" and someone is found to interfere with it, a court will typically issue injunctive relief to protect the owner's interest, but if the property interest is protected by a "liability rule" and someone is found to interfere with it, a court will typically issue an award for money damages.

98 *Id*. at 1093 ("Taney's house may be protected by a property rule in situations where Marshall wishes to purchase it, by a liability rule where the government decides to take it by eminent domain . . . ."). In contrast, "[t]he bailee has an absolute duty to redeliver the object of the bailment to the bailor." DUKEMINIER, KRIER, ALEXANDER & SCHILL, *supra* note 24, at 144; *see* Laura S. Underkuffler-Freund, *Property: A Special Right*, 71 NOTRE DAME L. REV. 1033, 1034 (1996) (arguing that while property is a special right, the special characteristics of property "demand that property protection be give a far more complex—and contingent—interpretation than other constitutionally protected rights").

99 *See, e.g.*, Boomer v. Atlantic Cement Co., 257 N.E.2d 870, 872 (N.Y. 1970).

100 *See, e.g.*, Mannillo v. Gorski, 54 N.J. 378, 382, 389 (1969) ("[I]f the innocent trespasser of a small portion of land adjoining a boundary line cannot without great expense remove or eliminate the encroachment, or such removal or elimination is impractical or could be accomplished only with great hardship, the true owner may be forced to convey the land so occupied upon payment of the fair value thereof . . . .").

101 *See, e.g.*, Berg v. Wiley, 264 N.W.2d 145, 149–50 (Minn. 1978).

## III. MAPPING THE QUESTIONS ONTO THE PROPERTY COURSE

### A. The Framework of Questions Encompasses Property Law

The framework captures the material covered by the Property Law course because there is a tight congruence between the framework of questions and the doctrines and topics presented in Property Law casebooks. Quite simply, these questions are what courts in common law Property cases ask and then answer in their opinions.[102] This section maps the questions onto the traditional topics and cases.

Most casebooks are organized according to a traditional ordering of topics and doctrines.[103] The cases included in this traditional array of topics present, *albeit* implicitly, all of the questions. This brief overview will demonstrate the congruence

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102 I derived these questions from my own extensive study of the cases and teaching experience. While conducting research for this essay, I found that this articulation of questions also finds some support in in Property Law scholarship, including by authors who do not share the same philosophical or theoretical perspectives on Property Law. *See, e.g.*, Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 531 (2005). In this article, the authors present their theory of Property based upon "the value inherent in stable ownership." "This Article begins by demonstrating that any coherent and comprehensive property theory must address four legal questions: (1) [w]hat things are protected by property law; (2) vis-à-vis whom; (3) with what rights; and (4) by what enforcement mechanism?" *Id*. Here these authors identify issues that I have labeled as Questions #1, 4, 5, and 8. In my view, they did not articulate all of the relevant questions "that any coherent and comprehensive property theory must address." However, they recognized the value of identifying Property Law's critical questions in their project of search for a substantive theory of Property Law. *See also* Daniel Klein & John Robinson, *Property: A Bundle of Rights? Prologue to the Property Symposium*, ECON JOURNAL WATCH, Vol. 8, No. 3, 193, 195 (Sept. 2011), https://econjwatch.org/articles/property-a-bundle-of-rights-prologue-to-the-property-symposium [http://perma.cc/VDC2-A2ZZ]. Professors Daniel Klein and John Robinson wrote:

> In waving an exclusion banner, we mean . . . that exclusion or dominion is central, even though it is not all that "property" signifies. The exclusion idea does not itself provide the justification of property; nor speak to how unowned things become property; nor clearly imply which things are amenable to ownership (or propertization); nor clearly imply specific delimitations of "exclusion," "dominion," or "messing with."

In this quote, the authors acknowledge that the concept of exclusion does not address all of the important questions of Property Law. And, they specify four additional issues. The first question (the justification of a private property system) is not part of the framework because it is a *normative* foundational issue which is assumed in the common law. The other issues they identify correspond to Questions #1, 3, and 5 in the framework I have articulated.

103 I analyzed twenty-one Property casebooks to identify patterns in the structures they use to organize the course. The following casebooks present topics completely or substantially in the traditional order described: DUKEMINIER ET AL., CHASE & FORRESTER, BURKE ET AL., BERNHARDT ET AL., NELSON ET AL., SPRANKLING ET AL., FREYERMUTH ET AL., SMITH ET AL., MASSEY, KURTZ ET AL., BRUCE & ELY, CRIBBET ET AL., BARROS & HEMINGWAY, *supra* note 24.

The following casebooks organize the course in a non-traditional order: CHUSED, DWYER & MENELL, MERILL & SMITH, SINGER, CALLIES ET AL., CRUMP ET AL., FREYFOGLE & KARKKAINEN, RABIN ET AL., *supra* note 24.

between the questions in the framework and the topics included in traditional Property Law casebook coverage.

Many casebooks begin with a section on "first acquisition," usually covering doctrines such as the Rule of Discovery, the Right of Capture, and Acquisition by Creation. They then present the Law of Finding, Adverse Possession, and the Law of Gift as examples of "subsequent acquisition." These topics and the section headings more or less explicitly raise Questions #2 (types of property interests), Question #3 (how acquired), and Question #4 (who owns property) because the cases included in these sections present conflicting claims of ownership in which that issue is resolved by courts' decisions about what constitutes the required acts for acquisition of that type of property.[104] The Acquisition by Creation cases can also raise Question #1 (is it a "property interest").[105] The Law of Gift also concerns Question #6 (how to transfer property), and some casebooks headings make this explicit.[106] At this point, the traditional casebook arrangement of topics presents Estates and Future Interests, which address Questions #2 (types of property interests), Question #3 (how acquired), Question #5 (property rights entailed by ownership), Question #7 (termination of property rights), and Question #8 (enforcement of property rights).[107] Traditional coverage then moves

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104 For capture, see *Pierson v. Post*, 3 Cai. R. 175, 175 (N.Y. 1805); for acquisition by creation, see *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479 (Cal. 1990); for rule of finding, see *Armory v. Delamirie*, (1722) 93 Eng. Rep. 664 (holding finder's possession grounds an ownership claim against subsequent possessors); for adverse possession, see *Mullis v. Winchester*, 118 S.E.2d 61 (S.C. 1961); for gift, see *Newman v. Bost*, 29 S.E. 848 (N.C. 1898) (articulating and applying the rule that a gift *causa mortis* requires an intention to make a gift and delivery). As discussed *infra* in notes 117–121 and accompanying text, the *M'Intosh* case in the Rule of Discovery section covers additional questions. Johnson v. M'Intosh, 21 U.S. 543, 572 (1823).

105 *See Moore*, 793 P.2d 479 (considering whether a person can have "a sufficient legal interest in his own bodily tissues amounting to personal property").

106 *See e.g.*, FREYERMUTH, ORGAN & NOBLE-ALLGIRE, *supra* note 24 ("Chapter 4. Transferring Property by Gift").

107 For Question #2, see *Mahrenholz v. Cty. Bd. of Sch. Tr. of Lawrence Cty.*, 417 N.E.2d 138 (Ill. App. Ct. 1981); for Question #5, see *Baker v. Weedon*, 262 So.2d 641 (Miss. 1972), characterized in FREYERMUTH, ORGAN & NOBLE-ALLGIRE, *supra* note 24, at 254 ("Rights and Duties of a Life Tenant (The Law of Waste)"); for Question #7, see DUKEMINIER, KRIER, ALEXANDER & SCHILL, *supra* note 24, at 191 ("A fee simple may endure forever; a life estate, for the life of a person; a term of years, for some period of time measured by the calendar. . . . The estate system is designed to make clear who is transferring what to whom—not just what physical parcel of land or item of personal property, but also what sort of ownership, measured in duration of the transferee's interest."); for Question #8, *Woodrick v. Wood*, 1994 WL 236287, at *2 (Oh. Ct. App. 1994) (finding that the destruction of a barn on a life tenant's estate does not constitute waste and therefore does not violate the rights of future interest holders); *see* DUKEMINIER, KRIER, ALEXANDER & SCHILL, *supra* note 24, at 223 (if the condition subsequent incorporated into a fee simple determinable or fee simple subject to executory limitation is violated, the holder of the future interest has an immediate right to possession); in contrast, if the condition subsequent incorporated into a fee simple subject to condition subsequent is violated, the holder of the future interest has a right to possess, but must

to Concurrent Interests which raise Questions #2, 3, 5, 6, 7, and 8.[108] The law of Landlord and Tenant, another complex set of doctrines engaging Questions #2–8 generally follows.[109] Next comes the law of Servitudes, which implicates all of the questions.[110] After Servitudes,

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take affirmative action to gain possession. DUKEMINIER, KRIER, ALEXANDER & SCHILL, *supra* note 24, at 224–25.

108 For Question #3, see DUKEMINIER, KRIER, ALEXANDER & SCHILL, *supra* note 24, at 319–21 (explicating creation requirements of tenancy in common, joint tenancy and tenancy by the entirety); for Question #5, see DUKEMINIER, KRIER, ALEXANDER & SCHILL, *supra* note 24, at 338 (stating rule that cotenants of tenancies in common and joint tenancies have a unilateral right to partition, but cotenants in a tenancy by the entirety do not); *Spiller v. Mackereth*, 334 So.2d 859 (Ala. 1976) (recognizing cotenant in possession has a duty to not commit "ouster" against cotenant); for Question #6, see *Riddle v. Harmon*, 162 Cal. Rptr. 530 (Cal. Ct. App. 1980) (holding, *inter alia*, that traditionally one could not validly convey a property interest to oneself); for Question #7, see *Riddle*, 162 Cal. Rptr. at 530 (holding, *inter alia*, that a joint tenant can terminate a joint tenancy and destroy the right of survivorship unilaterally by conveying to herself as a tenant in common); for Question #8, see *Delfino v. Vealencis*, 436 A.2d 27 (Conn. 1980) (enforcing traditional common law rule favoring partition in kind over partition by sale); *Swartzbaugh v. Sampson*, 54 P.2d 73, 79 (Cal. Ct. App. 1936) (holding cancelation of leases is not a remedy available to cotenant when other joint tenant entered into the leases unilaterally and without her consent).

109 For Questions #2 and 7, see DUKEMINIER, KRIER, ALEXANDER & SCHILL, *supra* note 24, at 421–23 (presenting three types of leasehold estates term of years, periodic tenancy and tenancy at will) and requirements for notice to terminate; *Garner v. Gerrish*, 473 N.E.2d 229 (N.Y. 1984) (deciding "whether a lease . . . creates a determinable life tenancy on behalf of the tenant or merely establishes a tenancy at will"); *Ernst v. Conditt*, 390 S.W.2d 703, 706 (Tenn. Ct. App. 1964) (determining whether language in a lease created an assignment or a sublease interest); for Question #5, see *Hannan v. Dusch*, 153 S.E. 824, 825 (Va. 1930) (considering "whether [in a lease] without an express covenant there is nevertheless an implied covenant to deliver possession); *Hilder v. St. Peter*, 478 A.2d 202 (Vt. 1984) (holding that an implied warranty of habitability exists in every residential lease); for Question #6, see DUKEMINIER, KRIER, ALEXANDER & SCHILL, *supra* note 24, at 430 (stating rule that a lease creating an leasehold interest that will last longer than a year must be in writing); for Question #8, see DUKEMINIER, KRIER, ALEXANDER & SCHILL, *supra* note 24, at 465–81 (cases and discussion of landlord remedies for defaulting tenants); *Berg v. Wiley*, 264 N.W.2d 145, 150–51 (Minn. 1978) (holding "self-help" not available to landlords as remedy); *Reste Realty Corp. v. Cooper*, 251 A.2d 268, 275 (N.J. 1969) (finding landlord breached covenant of quiet enjoyment substantially and that tenant merited "constructive eviction" remedy).

110 For Questions #1 and 2, see DUKEMINIER, KRIER, ALEXANDER & SCHILL, *supra* note 24, at 764 ("The law of servitudes is a study of how the tides of urbanization and the demands of the market for efficient control of externalities swept around the artificial barriers limiting one form of servitude and forced courts to recognize and develop other forms."); *Tulk v. Moxhay*, 2 Phillips 774, 41 Eng. Rep. 1143 (recognizing an equitable servitude as a property interest); for Question #3, see *Holbrook v. Taylor*, 532 S.W.2d 763, 764 (1976) ("As to the issue of estoppel, we have long recognized that a right to use of a roadway over the lands of another may be established by estoppel"). In the servitude context, Question #4 (who owns the property interest) is generally determined by an answer to Question #3 (was a servitude created); for Question #5, see *Raleigh Avenue Beach Ass'n v. Atlantis Beach Club*, 879 A.2d 112, 123–24 (2005) (defining the scope of public rights under the public trust doctrine). *See generally* Preseault v. U.S., 100 F.3d 1525 (1996) (considering scope of easements). For Question #6, see *Willard v. First Church of Christ, Scientist*, 498 P.2d 987, 991 (1972) (holding that a grant may reserve an interest in an easement in a third party); *Miller v. Lutheran Conference & Camp Ass'n*, 200 A.646, 652 (1938) (holding that easements in gross can be assigned by a grant). For Question #7, see *Preseault*, 100 F.3d at 1556 (finding that certain easements have terminated by abandonment). For Question #8, *Preseault*, 100 F.3d at 1556 (finding that the U.S. government is subject to a takings claim); *Brown v. Voss*, 715 P.2d 514, 518 (1986)

most casebooks cover land transactions, zoning, eminent domain, and regulatory takings, topics that primarily involve statutory and constitutional law except for the doctrine of nuisance.

The framework includes all of the various topics, but not every question applies to every topic.[111] The Law of Capture focuses on Questions #2 (types of property interests), Question #3 (how acquired), and Question #4 (who owns the property).[112] Coverage of Estates and Future Interests primarily addresses Question #2 (types of property interests), Question #3 (how created/acquired), Question #4 (property rights entailed by ownership), Question #6 (termination of property rights), and Question #7 (enforcement of property rights).[113] As explained in note 110 *supra*, the Law of Servitudes requires consideration of all of the questions, except Question #4 (who owns the property).

### B. The Relationships Among the Questions Can Be Complex

The questions have their own complexity. They are conceptually distinct, but in practice are often interrelated. The questions are all interdependent and are not serial. Often courts will answer one question which is the primary legal issue presented in a case by answering one or more other questions. There is not a one-to-one relationship between a question and a property doctrine. Some doctrines (e.g., adverse possession and servitudes) involve several questions; others (e.g., finding) only involve a few. The answer to

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(denying injunction despite misuse of easement). Note that *Appendix A* demonstrates that all of the doctrinal material covered in the servitudes section of PROPERTY comfortably fits into the proposed framework of questions.

111 For example, the requirements for a valid transfer of a property interest (Question #6) are not usually covered in the Law of Finding because they do not arise in that context.

112 For example, while the procedural posture of *Pierson v. Post* is an appeal from a nonsuit, the property law question is "whether Lodowick Post, by the pursuit with his hounds in the manner alleged in his declaration, acquired . . . a right to, or property in, the fox . . . ."). Pierson v. Post, 3 Cai. 175, 177 (N.Y. Sup. Ct. 1805). Similarly, the property issue in *Ghen v. Rich* is whether Ghen "claims title to the whale" by virtue of the prevailing whaling customs. Ghen v. Rich, 8 F. 159, 160 (D.C. Mass. 1881). *Popov v. Hayashi* concerns contested claims between attendees for a baseball in a stadium. Popov v. Hayashi, 2002 WL 31833731, at *1–3 (Cal. Sup. Ct. 2002).

113 *See, e.g.*, White v. Brown 559 S.W.2d 938, 941 (1977) (finding will created a fee simple absolute rather than a life estate); Baker v. Weedon, 262 So. 2d 641, 644 (1972) (finding life estate holder can force future interest holders to sell, i.e. terminate their property rights in land); Mahrenholz v. Cty. Bd. of Sch. Tr. of Lawrence Cty., 417 N.E.2d 138, 145 (1981) (holding that a deed created a fee simple determinable followed by a possibility of reverter); Alby v. Banc One Fin., 128 P.3d 81, 84 (2006) (holding that deed conveyed a fee simple determinable with an enforceable restraint on alienation); Kost v. Foster, 94 N.E.2d 302, 304 (1950) ("The principal question involved is whether or not the interest of Oscar Durant Kost was a vested remainder at the time of the purported sale by the trustee in bankruptcy."). Estates are largely defined by how they are created (Question #3) and how long they last/how they can be terminated (Question #7).

one question may tend to provide a particular answer to another question, but they are not determinative.[114]

Property Law includes a wide variety of doctrines and rules. These doctrines and rules are all answers to the property questions, but there are several distinct ways that doctrines and rules function as answers. Some doctrines or rules respond *directly* to one of the primary questions for a particular type of property, e.g., the elements for a valid inter-vivos transfer of real property addresses Question #6 (requirements for valid transfer). Other rules are *elemental* in the sense that they provide part of an answer to a question, e.g., horizontal privity rules provide part of what is required to create a Real Covenant (Question #3). Yet other doctrines are *instrumental*; they assist the court in answering certain other questions. For example, courts apply the Rules Against Unreasonable Restraints on Alienation and the Rule Against Perpetuities to decide whether to enforce a grantor's intended conditions in order to determine what property interests have been created by a grant, ultimately addressing Questions #2 and 3 (types of property interests and how acquired).

Of course, not every case addresses all of the questions. Some cases straightforwardly concern one question. For example, the narrow holding in *Pierson v. Post* technically only decides that "mere pursuit" is insufficient to constitute "occupancy" of a wild animal in a wasteland, and therefore does not give acquisition. This holding creates a rule responding to Question #3 (how acquired) which decides the underlying conflict in the case, Question #4 (who owns the property).[115] Others are primarily about one question, but the consequence of resolving it may answer other questions.[116] For example, adverse possession is ultimately about Question #4 (who owns the property), but the application of the doctrine to any given set of facts in a case gives an answer to Question #2 (types of property interests), to Question #3 (how acquired), and to Question #7 (termination).

Some particularly complex cases, e.g., *Johnson v. M'Intosh*, engage numerous questions. While the stated issue in that case

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114 Some libertarians consider the identification of a property interest in Question #2 to essentially determine the answers to Questions #5 and 8, thus conflating these three questions, but courts have held them to be distinct.

115 *Post,* 3 Cai. at 175. The broader holding offers a complete rule for "occupancy."

116 For example, in the *Mahrenholz* case, the issue before the court is Question #4, but to answer that question it needs to answer Questions #3 and #6. *See generally Mahrenholz*, 417 N.E.2d.

sounded in Question #5[117] (the scope of the Native American's right to transfer property), the ultimate issue in this action for ejectment was Question #4: who owned the land as between the plaintiffs (who traced their title to two grants from Native American tribes) and the defendants (who traced their title to a government patent). The Court's path to answering that question began by justifying the "Rule of Discovery" as a rule for acquiring property interests (Question #3),[118] then elaborating the specific property rights entailed by title/ownership by discovery (Question #5),[119] then tracing the chain of title of the disputed lands from Cabot's discovery of the continent of North America to the defendants (Question #6).[120] Finally, comparing defendants' title to plaintiffs' title, the Court held that "the plaintiffs do not exhibit a title which can be sustained in the Courts of the United States" (Question #6) because the property interest owned by the Native Americans did not include a broad right of transfer, so their purported transfer of a fee interest was invalid.[121] Therefore the Court recognized defendants as the owners of the disputed land (Question #4).

This framework of questions articulates the primary *legal* issues which courts address in Property Law cases. All of the common law cases, doctrines, and rules in Property Law casebooks fit into this framework of questions. Therefore, this framework of questions provides a relatively simple but comprehensive structure within which all property doctrines can be encompassed. Admittedly, this is a strong claim. I am not suggesting that there are no interpretative issues. There could be debates over which questions are (or should be) raised in any particular case. And there could be debates about how the questions are interrelated. (To be clear, I am not arguing that the ordering of the questions presented in this essay has any significance.) However, I contend that these debates would not

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117 "The inquiry, therefore, is, in a great measure, confined to the power of Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country." Johnson v. M'Intosh, 21 U.S. 543, 572 (1823). The Court first states that "the question is, whether this title can be recognized in the Courts of the United States?" *Id*. at 572. The underlying issue of the authority of U.S. Courts to recognize a title by Native Americans that would be inconsistent with that claimed by the U.S. government is not a "property law" issue, but rather a constitutional and, at the time, a practical issue.

118 *Id*. at 572–80.

119 Discoverers gained an exclusive right to appropriate the land occupied by Native Americans either by purchase or by conquest as well as the right to convey its title subject only to the Native American right of occupancy. The Native Americans only had a right of occupancy, and, impliedly, a right to transfer their title in that interest only to the U.S. government or its authorized representative. *Id*. at 587.

120 *Id*. at 576.

121 *Id*. at 604–05.

identify *different or additional primary doctrinal questions* that the courts actually answer.

For example, Professor Singer argues (and I agree) that "systemic and distributive norms" are inherent in our property system.[122] Issues related to these norms are raised and resolved by courts through answering one or more of the questions in the framework. For example, antidiscrimination norms typically find their expression in courts' decisions about what rights are entailed in ownership, Question #5. When courts address distribution of property assets or wealth issues, they do so via answers to the questions in the framework. Allocation and distribution of property interests or property rights is often a *result* of application of the rule but usually not directly the object of the rule.[123] In contrast, the marital property doctrines *jure uxoris* estate, curtesy, and dower are the most prominent common law rules dealing *directly* with distribution of assets. In this context of the special relationship of marriage, the courts distribute property assets by answering Question #2 and #5.[124]

Similarly, when courts decide cases in which property rights conflict with other kinds of rights (e.g., the First Amendment right to freedom of speech), courts construe and resolve this conflict through deciding one or more of the questions in the framework. For example, in *PruneYard Shopping Center v. Robins*,[125] the California Supreme Court interpreted its state constitution to require that the shopping center owner allow individuals to enter its property to collect signatures for a political petition. The court resolved this conflict by

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122 JOSEPH SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 140–78 (2000) ("Some of the most important sets of rules in property law serve to ensure that the property system as a whole operates well.").

123 *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 254 (1970) (finding that government benefits were "property" (answering Question #1) effected a significant redistribution of property rights); United Steel Workers v. U.S. Steel Corp., 631 F.2d 1264, 1264 (6th Cir. 1980) (finding that workers' longstanding relationship with U.S. Steel did not create a recognizable property right (answering Question #1) and prevented a redistribution of property rights).

124 One could argue that Property law courts *should* address issues of allocation and distribution of property assets *directly*, for example by inquiring: "Is this distribution of property fair/efficient/etc. . . ?" perhaps as an element in a rule deciding Question #4, (Does one claimant already have enough property or does the other claimant lack some essential property?) Currently, there are few, if any, cases denominated as 1L "Property law" cases which ask these questions. The closest perhaps are nuisance cases in which Law and Economic scholars would urge courts to assign entitlements to parties based upon economic efficiency. Questions like these appear in property-related courses, such as Antitrust Law which concern systemic issues. Of course, other non-Property laws (e.g., marriage) also determine access to property assets. *See, e.g.,* U.S. v. Windsor, 570 U.S. 12 (2013) (holding that the limitation of "marriage" and "spouse" in federal law to heterosexual unions by Section 3 of the Defense of Marriage Act ("DOMA") is unconstitutional under the Due Process Clause of the Fifth Amendment).

125 Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 80–81 (1980).

finding that state-protected rights of free expression and petition limited the shopping center's right to exclude, a response to Question #5.[126]

## IV. HOW TO USE THE FRAMEWORK IN THE CLASSROOM

### A. One Professor's Experience

I want to teach Property Law in a manner that offers its diversity and complexity so that students can enjoy the variety and intellectual stimulation without becoming unnecessarily confused or overwhelmed. A few years ago, I started offering this framework to my students as a consistent structure that students can then apply to differing doctrinal areas, as an overlay to the topic structure the casebook offered. Many students appreciated it. Since then I have used this framework as a regular reference point during the course to help my students orient the topics, doctrines, and cases, and to offer a structure which they can use to get their arms around the course.

As part of the first assignment in my Property course, I require the students to write brief answers to a version of the questions in the framework *before* they do any reading.[127] I reassure them that this is not a "test" but rather a means to help them recognize what they already know about Property Law. Pedagogically, I am also attempting to "implant" these questions for their consideration during the course. Year after year, students' answers demonstrate that these questions are familiar as "Property Law" questions even to non-lawyers because even without any particular context they regularly mention the same property law doctrines and rules as answers to the same questions.[128]

During the course, when we begin to consider a case I often ask: What property question(s) does this case address? I hope to train the students to perform this exercise themselves. The questions and this practice help the students orient themselves to a case, anchor a case in the framework, and relate the cases (doctrines and rules) across topics.

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126 Robins v. Pruneyard Shopping Ctr., 23 Cal. 3d 899, 908–11 (1979) *aff'd sub nom.* Pruneyard Shopping Ctr., 447 U.S. 74. On appeal, the United States Supreme Court held that the California Supreme Court's holding did not constitute a regulatory taking under the federal constitution. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 79 (1980).

127 Following are the questions students are required to answer: (1) What is "property"?; (2) What is *not* "property"?; (3) What does it mean to "own" property?; (4) How do we know who is the "owner" of property?; (5) What is a "property right"?; (6) Do property owners have any "duties" or obligations by virtue of their property ownership? If so, what duties and to whom?; (7) Why do we (society and courts) recognize and enforce "property rights"?

128 For example, many students will identify "people" as an answer to "what is not property?" noting that chattel slavery was outlawed; or they will mention air or planets.

Periodically during the course, I provide students with a handout that tracks which questions we have studied for each topic or doctrine.[129] At the end of the course, I invite students to revisit their first essays to take stock of what they have learned. And, I offer the framework of questions as a supplement to the traditional exam outline organized by the topics.

B. Why Use This Framework in Your Course?

Most casebooks use *some* of these questions to organize part of the course, and use other means (primarily doctrines or topics) to organize the remainder. The framework of questions is an additional organizing tool that professors can use. This framework solves the first teaching problem (perceived lack of connection between property doctrines and rules) and provides substantial assistance for the second one (perceived lack of unity in Property policy and theory). It also contributes to helping students integrate legal analysis with legal practice.

Laying out the questions all together in a list offers a conceptual container for Property doctrine. It demonstrates that there are not an unlimited number of issues (just as there are not an unlimited number of property interests). The framework of questions demonstrates that property law is not disparate by demonstrating its connectedness via the questions courts ask and answer. It provides useful grips.[130] This reduces unnecessary anxiety, confusion, and distraction among students.

When students use the questions, they can read and understand cases more efficiently since the questions provide analytical clarity, allowing them to follow the court's reasoning because they understand what question the court is answering.[131]

In addition, the framework provides an easy entry into policy and theory questions and encourages a critical perspective. Knowing the questions suggests points of comparison and contrast instead of seeing rules and doctrines in isolation as unconnected. When students see that several rules are only different answers to the same questions in different contexts/topics, they instinctively inquire:

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129 *See* Appendix B: *Where Are We Now?*

130 The best-selling Property Law casebook, PROPERTY, by Dukeminier, Krier, Alexander & Schill (8th ed. 2010) covers servitudes in Part V of the book called "Land Use Controls" in a section entitled "Private Land Use Controls: The Law of Servitudes." This is perfectly reasonable and makes sense in terms of grouping the topics and doctrines. Yet, it would be helpful to students, and would not compromise any pedagogical objectives, to also point out that these doctrines are responsive to the same set of questions as the Law of Finding or Estates and Future Interests. *Appendix A* tracks the doctrinal material covered in the servitudes section of PROPERTY and demonstrates that it comfortably fits into the proposed framework of questions.

131 *See, e.g.*, Johnson v. M'Intosh, 21 U.S. 543, 572 (1823).

why use rule A to answer Question #2 in that topic but rule B to answer the same question in another topic? Seeing the troubles courts have in answering questions raises policy and theory questions, e.g., the relationship of property rights to each other (Question #5). Students see that the different rules are informed by different policies/theories/purposes and contexts, e.g., efficiency or fairness. And they see how they can change over time, so they appreciate the dynamism of property. The framework helps students integrate legal analysis with legal practice because starting with the questions that Property Law addresses places students in the place where their future clients will be—asking questions about how to accomplish a task or solve a problem. For example, what do I need to do to transfer my house to my daughter? Does my neighbor have a right to let her tree grow over my property?

This framework is pedagogically useful because it is *comprehensive*, *coherent*, *neutral*, *educationally fertile*, and *versatile*.

It is *comprehensive* because it organizes all of the common law doctrines and can be applied to every case. Some cases address only one or two questions; others address several questions. While there can be legitimate debates about which questions in the framework a particular case addresses, no case addresses a different or additional question that is not included in the framework.

The questions provide students with a *coherent*, stable framework in which to discuss and debate the full range of competing policy perspectives. Students can appreciate how each policy perspective leads to a different set of answers to the same basic Property Law questions.[132] When a professor provides several policy perspectives, or regularly references policy arguments without an intervening framework to relate the policy perspectives, students might find it difficult, like comparing apples to oranges. The questions provide a structure within which students can compare and contrast answers to the questions, and see which questions are ignored or de-emphasized by one policy perspective compared to another.

This framework of questions is *neutral*; it does not take a position on any of the critical issues in Property theory, e.g., whether property rights are natural rights or positivist or what scope of individual protection ownership of property confers. The framework only surfaces and makes explicit the legal questions that courts are regularly called upon to answer—and must

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132 *See* Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 531 (2005) (arguing that coherent policy perspectives have a general answer to all of the questions or at least offer principles and values by which to answer them).

answer—in Property Law.[133] The mere articulation of this framework suggests that several positions can be taken on each issue. The questions, in effect, mediate between theoretical conflicts and doctrine.

The approach is *educationally fertile*. Given that Property is a first year fundamental course, Property professors may want to both teach the students to "think like a lawyer," and teach doctrine and policy. Using the framework of questions, we can do both because the framework links obscure property doctrines to the fundamental structure of *legal* issues which courts address. In service to a common pedagogical goal in first year courses, the framework increases students' tolerance for ambiguity and offers opportunities to teach advocacy skills. Moreover, it teaches students to think in terms of overarching structure, rather than merely content—a push toward abstract thinking that is critical to higher, more theoretical applications of the law.

The framework of questions sets the stage in which important interpretative issues can be raised and engaged. Further, the framework of questions together with policy arguments and policy perspectives provides opportunities for students to advocate for certain rules over others as well as to explore the policy reasons for the development of the rules. Two advocates (or students) working from the same set of facts can argue that they raise different questions demonstrating the strategic importance of framing issues.[134] This approach helps students make sense of Property in the context of first year "foundational" courses focused on teaching the common law—learning law as it emerges from lawsuits—because it can demonstrate how effective lawyering includes successful framing of an issue to the court, and how courts exercise discretion in framing disputes by selecting which question(s) they will decide.

This approach is also *versatile*. It can be employed with any casebook and any teaching style or approach to Property Law—any

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133 This argument is consistent with the view that property law is an ongoing social conversation. *See* Myrl L. Duncan, *Property as a Public Conversation, Not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis*, 26 ENVTL. L. 1095 (1996); Steven J. Eagle, *The Really New Property: A Skeptical Appraisal*, 43 IND. L. REV. 1229 (2010) (contrasting "imposed top-down social change with Burkean and Oakeshottian gradual change derived from conversation with our legal and cultural tradition"). On this metaphor, this essay specifies the subject matter of that conversation when it is conducted in the courts. In particular, it articulates the *questions* that courts are regularly asked to *answer* in this legal conversation.

134 For example, in *State v. Shack*, 58 N.J. 297 (N.J. 1971), the issue is usually discussed as a dispute about the "scope" of the right to exclude. However, Mr. Tedesco (the plaintiff) could be understood to be arguing like the plaintiff in *Jacque v. Steenberg Homes, Inc.*, 563 N.W. 2d.154 (Wis. 1997), that anything less than an unlimited right to exclude is no right to exclude at all.

variation on the Socratic method, problem-based course, practical lawyering based courses as well as more conceptual or theoretical approaches. It allows professors to continue to select which topics they will teach in the time available without sacrificing coherence.

There are an abundance of difficult problems, doctrines, and rules in Property Law that students must struggle to understand and apply to novel fact situations. While the framework avoids some unnecessary confusion, it does not simplify or wring the difficulty out of Property Law. In fact, the framework actually makes this complexity and uncertainty manifest. It merely provides a useful structure upon which to hang the difficulties.

## CONCLUSION

This essay argues that even though Property theory is thoroughly contested, law professors can offer students a coherent structure for learning the doctrines and rules of Property Law. For purposes of teaching, the questions provide a structure for understanding the issues Property Law addresses. Without a framework students can get lost in the thicket of topics, doctrines, and rules.

Using the framework of questions presented in this essay, Property professors can orient students to the course, particular doctrines, and rules. Then they can use the questions as a regular point of reference for students to link doctrines and topics together. Further, they can demonstrate how different policy perspectives would approach and answer a particular question in a given case, and explore deeper theoretical issues.

Students can use these sets of questions to organize the issues, doctrines, and rules while keeping open to—indeed *revealing* in pedagogically helpful ways—the arenas of contemporary conflict in Property Law. The framework of questions creates a conceptual "tree" upon which students can hang doctrines and rules and explore controversies.

# Appendix A: Comparing Coverage of Servitudes in Dukeminier, Krier, Alexander, and Shill, PROPERTY (7th ed.) with the Framework of Questions

| Dukeminier et al., PROPERTY | Questions |
|---|---|
| **Easements** | |
| Historical Background and Some Terminology | Q #1 & 2 |
| Creation of Easements<br>• *Willard*<br>• *Holbrook*<br>• *Van Sandt*<br>• *Othen*<br>• *Raleigh Avenue* | Q #3 |
| Assignability of Easements<br>• *Miller* | Q #5 |
| Scope of Easements<br>• *Brown* | Q #5 & 8 |
| Termination of Easements<br>• *Preseault* | Q #7 |
| Negative Easements | Q #1 |
| Conservation and Other Novel Easements | Q #1, 2 & 3 |
| **Covenants Running with the Land** | |
| Historical Background (RC and EE)<br>• *Tulk* | Q #1 & 2 |
| Creation of Covenants<br>• *Sanborn* | Q #3 |
| Validity and Enforcement of Covenants<br>• *Neponsit* | Q #8 |
| Discriminatory Covenants<br>• *Shelley* | Q #5 |
| Termination of Covenants<br>• *Western Land*<br>• *Rick*<br>• *Pocono* | Q #7 |
| Common Interest Communities<br>• *Nahrstedt*<br>• *40 West 67th Street Corp.* | Q #5 & 8 |

# Appendix B: Where Are We Now? Handout

PROPERTY LAW
PROFESSOR IGLESIAS

Where Are We Now?

In our first class, we discussed the eight sets of questions that courts regularly answer in property law cases. This handout categorizes the property doctrines we are learning by reference to the primary questions we will cover when we learn that doctrine.

1. Is there a "property interest" at issue?
   - Servitudes

2. If it is property, what "type of property interest" is it?
   - Rule of Discovery
   - Doctrine of Adverse Possession
   - Estates & Future Interests
   - Concurrent Interests
   - Landlord-Tenant
   - Servitudes

3. How is this type of property interest created or acquired?
   - Rule of Discovery
   - Doctrine of Adverse Possession
   - Estates & Future Interests
   - Concurrent Interests
   - Landlord-Tenant
   - Servitudes

4. Who "owns" the property interest? How are competing ownership claims decided?
   - Rule of Discovery
   - Law of Capture
   - Law of Finding
   - Doctrine of Adverse Possession
   - Recording Acts

5. What "property rights" does ownership in this property entail, and with what limits/scope and duties?

- Rule of Discovery
- Estates & Future Interests
- Concurrent Interests
- Landlord-Tenant
- Servitudes
- Regulatory Takings

6. What is required to make a valid transfer of this property interest?

- Law of Gift
- Deeds

7. How long does the property interest last? How can the property interest be terminated?

- Doctrine of Adverse Possession
- Estates & Future Interests
- Concurrent Interests
- Landlord-Tenant
- Servitudes
- Power of Eminent Domain
- Regulatory Takings

8. How are property rights in this kind of property enforced?

- Estates & Future Interests
- Concurrent Interests
- Landlord-Tenant
- Servitudes
- Power of Eminent Domain
- Regulatory Takings