

Review: The Essence of Property Law

FUNDAMENTALS OF MODERN REAL PROPERTY LAW, 3d Edition.
By Edward H. Rabin and Roberta Rosenthal Kwall. New York,
New York: Foundation Press, 1992. Pp. xvi, 1092.

*Reviewed by Vada Waters Lindsey**

I. INTRODUCTION

I have taught property law for four years and, after considering other casebooks, I have always used Rabin and Kwall's *Fundamentals of Modern Real Property Law*.¹ My initial reason for selecting this casebook had much to do with my comfort level in contacting Professor Kwall to discuss her use of the casebook and course content. She graciously supplied me with several syllabi she had used throughout the years and helped alleviate the anxiety that accompanies new class preparation. In addition, I found Rabin and Kwall's Teacher's Manual to be a useful tool because of its level of detail, including a reference list to scholarly articles analyzing every subject covered in the casebook.

When my former Academic Dean asked me to consider teaching Property Law, I agreed to teach the course without hesitation. I was extremely excited to teach a course in property law—not because I would gain a strong understanding of the archaic rule against perpetuities, but because of my desire to help the students establish a strong foundation in transactional law. I taught Wills and Estates during my first semester of law school teaching, which was when the dean approached me regarding teaching Property. I was more than a little frustrated that students lacked a basic understanding of some fundamental property law concepts, such as the difference between joint tenancy and tenancy in common. I have since come to understand the

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1. EDWARD H. RABIN & ROBERTA ROSENTHAL KWALL, *FUNDAMENTALS OF MODERN REAL PROPERTY LAW* (3d ed. 1992).

difficulty of covering all fundamental property law concepts in a four-credit course. In teaching property, however, I attempt to provide a strong foundation so that students are as prepared as possible for upper-level courses in Wills and Estates, Real Estate Transactions, Real Estate Finance, Family Law, and Land Use Planning.

My early trepidation of teaching property has long since abated, but I continue using the Rabin & Kwall casebook because it closely matches my pedagogical method. This essay will explain why I use the Rabin & Kwall casebook and how it conforms to my teaching methodology. As will be explained in this essay, Professors Rabin and Kwall's use of the problem method in conjunction with the reading and analysis of case law, as well as their ordering and selection of the material, is consistent with my approach to teaching Property Law. My use of the casebook also enables me to teach Property Law from a historical perspective by exploring the evolution of American property law, its derivation from early English common law, its modern reforms, and its future.²

Part II of this essay will outline my overall approach to teaching Property and the inherent challenges of the subject. Part III sets out the topics covered in my property classes and the relevance of the "bundle of rights" concept. Part IV describes my use of the problem method in teaching Property and counters the purported disadvantages of applying that method. That part also demonstrates the practical use of the problem approach. Part V examines the evolutionary nature of property law and looks at three areas of law: landlord and tenant relationships, the law of servitudes, and future interests.

II. THE STUDY OF PROPERTY LAW

Most lay people believe the term "property" means a tangible or intangible thing. The term, however, really denotes the various rights appurtenant to the thing.³ My primary objective in teaching the first session of my property course is to dispel any possible misinterpreta-

2. In the Teacher's Manual, Professors Rabin and Kwall state: "[t]he processes of doctrinal genesis, evolution and development, and decay and fossilization are continuing even today. The law, like most living organisms, carries within it vestigial structures that can best be understood with the help of history." EDWARD H. RABIN & ROBERTA ROSENTHAL K WALL, *TEACHER'S MANUAL TO FUNDAMENTALS OF MODERN REAL PROPERTY LAW* 9-1 (3d ed. 1992) [hereinafter *TEACHER'S MANUAL*].

3. Black's Law Dictionary defines "property" as "the unrestricted and exclusive right to a thing; the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude every one else from interfering with it." BLACK'S LAW DICTIONARY 1216 (6th ed. 1990).

tion students are likely to have about the meaning of property.⁴ Professors Rabin and Kwall's casebook is consistent with my methodology.

The casebook's Introduction is entitled, "The Right to Exclude Others: The Essence of Ownership of Real Property."⁵ The first case in this chapter is *Loretto v. Teleprompter Manhattan CATV Corp.*⁶ The Supreme Court in *Loretto* addressed the right of an owner to exclude others from the owner's property in the context of a permanent physical taking. In reaching its conclusion that there was a taking that required just compensation, the Court characterized the right to exclude as part of the "bundle of property rights."⁷ The Rabin and Kwall casebook and its 1996 supplement also contain cases that do not rise to the level of a *per se* "permanent" taking because the taking is temporary.⁸ In such cases, courts use a balancing of interests approach. A comparison of the permanent physical takings cases with the temporary takings cases gives me an early opportunity to explain the theoretical differences between the *per se* rule and the balancing approach.

Property is a difficult first year course. First, many of the key cases in property law are early English common law cases and, consequently, may be difficult for students to read at this stage in their legal education. Second, in many areas there is the traditional approach, the majority approach, the modern trend, and the Restatement approach. The modern trends may or may not be the majority approach. From my perspective, the various approaches represent the continuing evolution of property law. From the students' perspective, it is often difficult to articulate the law because there is no uniform standard. Finally, unlike other first year courses, most property law concepts are foreign to the students. Students are unlikely to read about property law fundamental concepts such as easements, covenants,

4. I usually begin the class by borrowing a student's wristwatch to use during class on the pretense that mine is not working properly. I then explain that, at least during the class session, the student and I each have a property interest in the single item of property. My rights, of course, are limited to the right to use and possess the watch during class—the only rights bestowed upon me. Although I have physical possession of the watch, I do not have unrestricted rights to it.

5. RABIN & KWALL, *supra* note 1, at 1.

6. 458 U.S. 419 (1982), *reprinted in* RABIN & KWALL *supra* note 1, at 2.

7. RABIN & KWALL, *supra* note 1, at 6. *Loretto* is one of the seminal cases addressing permanent physical takings.

8. See *Yee v. City of Escondido, California*, 503 U.S. 519 (1992), *reprinted in* EDWARD H. RABIN & ROBERTA ROSENTHAL KWALL, *FUNDAMENTALS OF REAL PROPERTY LAW* (3d ed. Supp. 1996) [hereinafter *SUPPLEMENT*]; *State of New Jersey v. Shack*, 277 A.2d 369 (N.J. 1971), *reprinted in* RABIN & KWALL, *supra* note 1, at 9.

concurrent estates, springing executory interests, and restraints on alienation in their local newspapers.

The one area that students have an understanding of, and quite often direct experience with, is the law governing landlords and tenants—nonfreehold estates in property law vernacular. Most students are, in fact, tenants, and they have signed leases. The students may have even encountered legal issues pertaining to the demised property. As a result, the students can relate to the law of landlord and tenant unlike many other topics. Because most students already have had some experience in the landlord and tenant area, it is the first major substantive topic that I cover in my Property course. It is also the first major topic addressed in the Rabin & Kwall casebook.⁹

III. COVERAGE OF PROPERTY LAW CONCEPTS

There are 1088 pages of substantive material in the Rabin & Kwall casebook. In addition, the supplement contains another 108 pages. At Marquette University Law School, Property is a required first year, four-credit course. I am limited to covering approximately 500 pages. I prefer to cover fewer topics in critical detail rather than more topics with less attention to detail. In my course, I generally cover three broad topical subjects every semester: (1) nonfreehold estates (the law of landlord and tenant); (2) freehold estates (future interests and concurrent estates); and (3) servitudes (covenants and easements). I devote approximately two-and-one-half weeks to landlord and tenant relationships. With minor modifications, I usually

9. In the Rabin & Kwall casebook, the landlord-tenant materials begin on page 26. Although I usually alter the ordering of materials throughout the semester, I prefer to begin a course by reading the first chapter in the casebook. JON W. BRUCE & JAMES W. ELY, JR., *CASES AND MATERIALS ON MODERN PROPERTY LAW* (3d ed. 1994), is another casebook that begins the study of property law with landlord and tenant relationships. In other casebooks, landlord-tenant materials are found much later. For example, in CHARLES DONAHUE, JR. ET AL., *PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION* (3d ed. 1993), landlord and tenant materials begin on page 663; in JESSE DUKEMINIER & JAMES E. KRIER ET AL., *PROPERTY* (4th ed. 1998), on page 415; in JOHN P. DWYER & PETER S. MENELL, *PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE* (1998), on page 582; in J. GORDON HYLTON ET AL., *PROPERTY LAW AND THE PUBLIC INTEREST* (1998), on page 415; in SANDRA H. JOHNSON ET AL., *PROPERTY LAW: CASES, MATERIALS, AND PROBLEMS* (2d ed. 1998), on page 248; and in SHELDON F. KURTZ & HERBERT HOVENO KAMP, *CASES AND MATERIALS ON AMERICAN PROPERTY LAW* (2d ed. 1993), on page 423; in JOSEPH W. SINGER, *RULES, POLICIES, AND PRACTICES*, (2d ed. 1997), on page 761. There are bona fide reasons why the law of landlord and tenant is covered later in the readings in the other casebooks. A leasehold is an estate in land. By delaying the study of the law of landlord and tenant, students using the other casebooks will already be exposed to the meaning of an estate. However, I introduce the meaning of estates after my discussion of the "bundle of rights."

cover all of the landlord and tenant materials. However, I do not cover the chapter entitled "Landlord's Tort Liability for Personal Injuries"¹⁰ because the students are exposed to the liability issues in their substantive Torts class. I spend approximately four weeks on the nonconcurrent and concurrent estates, with the majority of the time spent on future interests. I cover most of the materials on concurrent estates. However, I only cover the introductory materials of the chapter entitled "Marital Property"¹¹ because Marquette University Law School has a separate Marital Property course. I devote approximately two-and-one-half weeks on the materials entitled "Covenants Running with the Land (Promissory Servitudes)"¹² and cover most of the material under that subtitle.

In order to provide even a rudimentary understanding of the future interest concepts, I must devote approximately three weeks to the materials. I cover all of the future interest material except the chapter entitled "Problems of Vesting."¹³ Although I did cover that material during my last Property class, I do not plan to cover it again because I believe it is more appropriately covered in the Wills and Estates class. Many property law professors no longer cover future interests and the Rule Against Perpetuities.¹⁴ Although modern reforms have essentially narrowed the significance of the Rule Against Perpetuities (RAP), I teach future interests and RAP because they establish the foundation for the law of trusts. My colleagues who teach Wills and Estates do not cover the classification of estates and future interests. Hence, if I choose not to cover future interests, it will not be covered in any other course at my law school. In covering the materials on future interests, I necessarily devote a lot of time to the technical rules; however, I attempt also to use the materials as an opportunity to expound on the "bundle of rights" concept. For example, one of the rights inherent in property is an owner's right to dispose of it. An individual who is not yet entitled to present possession of a physical object may still be able to exercise the right to dispose of it. On the other hand, the owner of certain present possessory interests in property may be unable to sell the property. To

10. RABIN & KWALL, *supra* note 1, at 78.

11. *Id.* at 324.

12. *Id.* at 447.

13. *Id.* at 245.

14. A recent survey addressing topical coverage concluded that thirty-five percent of the survey respondents (14 out of 40) did not cover future interests. Roberta Rosenthal Kwall and Jerome M. Organ, *The Contemporary Property Law Course: A Study of Syllabi*, 47 J. LEGAL EDUC. 205, 208-09 (1997).

provide a better understanding of this concept, I point out that in the landlord and tenant context, the tenant has a present possessory interest, but is not able to sell the property. The owner, however, is legally authorized to dispose of the property even though the owner does not have a present possessory interest in the property.

I also cover one other topic in detail, either real estate transactions or regulatory takings, alternating between the two topics because of time constraints. I like to cover real estate transactions primarily because I teach the upper level Real Estate Finance and Development course and I like my students to have some basic understanding of the law of mortgages and acquisition of real estate. Students should understand that a mortgagee owns a valuable property interest, although that interest will become possessory only upon default and initiation of a foreclosure proceeding. Whether or not I cover real estate transactions, I always cover the materials entitled "Recording Statutes."¹⁵ During the semester, the students learn that in order to bind a successor in interest to an easement or a covenant, the successor must have notice of the easement or covenant's existence. The editors briefly explain in the material addressing the succession of easements that a successor is considered to have notice where there exists actual, constructive, or inquiry notice.¹⁶ A much more expansive discussion of notice is provided in the "Recording Statutes" chapter, including case law addressing the notice issue.¹⁷ Given the importance of the notice requirement in the servitude area and other areas such as adverse possession, I find it useful to devote the additional class time to that material.

If I do not cover real estate transactions, I cover regulatory takings during the last week of class; hence, there is a certain amount of symmetry, as I begin the semester with physical takings and end with regulatory takings. As noted by the editors in the "Introduction to Regulatory Takings," there are many difficult issues that have not yet been completely resolved by the courts.¹⁸ The editors included the important Supreme Court decisions of *Lucas v. South Carolina Coastal*

15. RABIN & KWALL, *supra* note 1, at 953.

16. *Id.* at 401.

17. The editors included three cases emphasizing whether inquiry notice was present. See *Jefferson Cty. v. M.C. Mosley*, 226 So. 2d 652 (Ala. 1969), reprinted in RABIN & KWALL, *supra* note 1, at 966; *Martinique Realty Corp. v. Hull*, 166 A.2d 803 (N.J. Super. Ct. App. Div. 1960), reprinted in RABIN & KWALL, *supra* note 1, at 976; *Sabo v. Horvath*, 559 P.2d 1038 (Alaska 1976), reprinted in RABIN & KWALL, *supra* note 1, at 988.

18. SUPPLEMENT, *supra* note 8, at 41.

Council,¹⁹ *Pennsylvania Coal Co. v. Mahon*,²⁰ *Penn Central Transportation Co. v. City of New York*,²¹ and *Dolan v. City of Tigard*.²² The case that typically generates the most class discussion is the Supreme Court's controversial decision in *Lucas*. That holding limited a property owner's ability to recover just compensation because the Court concluded that compensation was required only when a property owner was deprived of "all economically productive or beneficial uses of the land."²³ In his dissenting opinion, Justice Stevens disagreed in part because of the "wholly arbitrary" aspect of the majority's opinion.²⁴ Specifically, Justice Stevens questioned the viability of a rule where "[a] landowner whose property [was] diminished in value 95% recover[ed] nothing, while an owner whose property [was] diminished 100% recover[ed] the land's full value."²⁵ As one of the fundamental rights inherent in property is the right to derive a profit therefrom, should a person be able to recover just compensation where profits are diminished by fifty percent, seventy-five percent, or even ten percent? The editors also raise interesting issues such as what the proper measure of damages would be.²⁶

I usually cover two or three additional, less time-consuming topics. Last semester I covered adverse possession and the law of nuisance. The class sessions devoted to adverse possession usually generate substantial class discussion. On the one hand, there is an owner who possesses the "bundle of rights" inherent in the physical property, including the right to use the land in any permissible manner and, for most practical purposes, the right not to use the property. On the other hand, there is another party who has exclusively possessed the property for a number of years and served the public policy objectives of productively using the land. The public policy concerns commonly used to justify adverse possession were stated in *ITT Rayonier, Inc. v. Bell*.²⁷ The adverse possession doctrine is applied to ensure "that title to land should not long be in doubt, that society will benefit from someone's making use of land the owner leaves idle, and that third persons who come to regard the occupant as owner may

19. 505 U.S. 1003 (1992), reprinted in SUPPLEMENT, *supra* note 8, at 44.

20. 260 U.S. 393 (1922), reprinted in RABIN & KWALL, *supra* note 1, at 583.

21. 438 U.S. 104 (1978), reprinted in RABIN & KWALL, *supra* note 1, at 588.

22. 512 U.S. 374 (1994), reprinted in SUPPLEMENT, *supra* note 8, at 66.

23. 505 U.S. 1003 (1992), reprinted in SUPPLEMENT, *supra* note 8, at 53.

24. *Id.* at 62.

25. *Id.*

26. SUPPLEMENT, *supra* note 8, at 41.

27. 112 Wash. 2d 754, 774 P.2d 6 (1989), reprinted in RABIN & KWALL, *supra* note 1, at

be protected."²⁸ The editors raise some good discussion questions regarding adverse possession. Why should a bona fide purchaser be deprived of the property in favor of a nonpaying party?²⁹ Should the adverse possessor's right be forfeited unless the adverse possessor pays the original owner the fair market value of the property?³⁰ Where the property is subject to a leasehold interest and an adverse possessor occupies the land, is that possession adverse during the term of the lease considering the landlord has relinquished possession to the tenant?³¹ Can a tenant acquire leased property through adverse possession?³² After much debate among the students, there is generally little consensus reached on the proper treatment of these issues.

In teaching the law of nuisance, I focus on the bundle of property rights and the boundaries of these rights. To what extent may the "bundle of rights" be limited to further a public or private interest? With society becoming increasingly environmentally conscious, the law of nuisance provides restrictions on a property owner's use of property. The casebook's material on nuisance is limited to the "private" nuisance, defined by the editors as "a wrongful interference with the use or enjoyment of land of another."³³ This definition is inclusive of far more than ecological concerns. For example, the definition encompasses neighbors who wrongfully interfere with other neighbors' use or enjoyment of land by playing their stereos too loud. The editors included two cases that raise pollution concerns.³⁴ The editors also included in the casebook *Prah v. Maretti*,³⁵ which generates substantial class discussion. In *Prah*, the plaintiff brought an action against a neighbor on a theory of private nuisance to enjoin the neighbor from obstructing the plaintiff's access to sunlight. The plaintiff owned a solar-heated residence, and the defendant's proposed construction would have interfered with plaintiff's access to sunlight.

28. *Id.* at 744 (citing William R. Stoebuck, *Adverse Possession in Washington*, 35 WASH. L. REV. 53 (1960)).

29. RABIN & KWALL, *supra* note 1, at 735.

30. *Id.* at 747.

31. *Id.* at 759.

32. *Id.*

33. RABIN & KWALL, *supra* note 1, at 517.

34. *Boomer v. Atlantic Cement Co., Inc.*, 257 N.E.2d 870 (N.Y. 1970), *reprinted in* RABIN & KWALL, *supra* note 1, at 522 (addressing whether dirt, smoke, and vibration from cement plant created a nuisance); *Spur Industries, Inc. v. Del E. Webb Development Co.*, 494 P.2d 700 (Ariz. 1972), *reprinted in* RABIN & KWALL, *supra* note 1, at 529 (addressing whether a cattle feedlot creates a nuisance).

35. 321 N.W.2d 182 (Wis. 1982), *reprinted in* RABIN & KWALL, *supra* note 1, at 537.

The defendant's proposed construction conformed to deed restrictions and local ordinances. The court noted that the case involved a conflict between one landowner who desired "unobstructed access to sunlight across adjoining property" and the adjoining landowner "interested in the development of his land."³⁶ Essentially, the question presented in *Prah*, as well as in many other nuisance cases, is whose "bundle of property rights" will take precedence. The court reversed the lower court's decision to grant summary judgment in favor of the defendant and remanded the case for determination of whether there was an unreasonable interference with the plaintiff's use of his property.³⁷

IV. A PROBLEM ANALYSIS APPROACH

In the preface, the editors state that "the law is not merely a body of general principles: rather, it consists of applications of general principles to specific facts."³⁸ Their objective is to "put these theories into practice by using a problem approach" in the casebook.³⁹ This approach mirrors my classroom methodology.⁴⁰ In a recently published article, Professor Cynthia G. Hawkins-León compared the Socratic method and problem method.⁴¹ She opined that three components must be present in order for the problem method to be an effective pedagogical tool: (1) the problem must be complex, include several issues, and involve at least one case; (2) the problem must be distributed prior to the class in which it is to be analyzed; and (3) the problem must be the focus of class discussion.⁴² She also outlined many of the disadvantages of using the problem method expressed by several legal scholars. These disadvantages are:

- (1) The professor must devote more time to course preparation in order to draft problems and their answers. . . .

36. *Id.*

37. Last year, we had an unexpected bonus in analyzing the *Prah* case. Because it was a local case, one ambitious student looked up the litigants in the telephone book and drove to the location to take an up-close look at the property (of course, from the public street). He learned that the defendant was able to construct the residence in the desired location and, although the neighbors' residences are very close in proximity, there continues to be social distance between the neighbors.

38. RABIN & KWALL, *supra* note 1, at v.

39. *Id.*

40. I generally apply the problem method approach in my Real Estate Finance & Development and Federal Income Taxation of Individuals classes. I genuinely believe that students learn better by applying the law to a set of facts.

41. Cynthia G. Hawkins-León, *The Socratic Method-Problem Method Dichotomy: The Debate Over Teaching Method Continues*, BYU EDUC. LAW J. 1 (1998).

42. Hawkins-León, *supra* note 41, at 9.

- (2) The Problem Method is more costly than the Socratic Method because its usage is most effective in smaller classes. . . .
- (3) Professors are not as much at liberty to teach via lecture when the Problem Method is utilized. . . .
- (4) Due to the in-depth discussion of individual problems, critics fear that less course material is covered when the Problem Method is utilized.⁴³

The Rabin and Kwall casebook satisfies the three key components espoused by Professor Hawkins-León, but counters the numerous disadvantages. I agree with other legal scholars that a professor must ordinarily devote a significant amount of time to the drafting of problems and their answers. However, this is not an issue when using the Rabin and Kwall casebook. Each major topic revolves around a "principal problem." In addition, the Teacher's Manual contains recommended analyses of the problems. Hence, there is no increased preparation time in using the problem method.

The second purported disadvantage is that the problem method is only useful in smaller classes. However, I believe the problem method is a valuable approach even in a large class such as Property. Many students have the misconception that the best way to learn is through memorization. Although this may be true in other disciplines, it is virtually impossible to memorize the law because of its sheer magnitude. Memorization of case law does not adequately prepare a student to analyze future fact patterns, whether presented during an examination or in the practice of law, because these fact patterns will not be an exact duplicate of the facts presented in a casebook. Students need to be able to understand and apply that law to different sets of facts. Whether there are 25 or 250 students in a class, every student needs to be able to analyze and apply the law to the facts presented in the problem.

The third purported disadvantage of the problem method, that professors are not any less at liberty to lecture when using the problem method than they would be when using the Socratic method, assumes that in-depth analysis of problems necessarily supplants, rather than supplements, lectures. The substantive black letter law must still be made known to students. Customarily, in my Property classes, I devote at least fifty percent of class time to lecturing on the substantive

43. Hawkins-León, *supra* note 41, at 9-10 (citing Myron Moskowitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 J. LEGAL EDUC. 241, 245 (1992); Gregory L. Ogden, *The Problem Method In Legal Education*, 34 J. LEGAL EDUC. 654, 664 (1984); and Suzanne Kurtz et al., *Problem-Based Learning: An Alternative Approach to Legal Education*, 13 DALHOUSIE L.J. 797, 802 (1990)).

law. Consequently, class lecture is complemented rather than replaced by the problem method.

As to the fourth purported disadvantage, my philosophy is to cover fewer topics in greater detail rather than to cover more topics in less detail. So, for my teaching style the concern about constricting topic coverage does not apply. If I ever decide to alter my decision to use the problem method, I do not believe I will cover any additional topics.

The principal problems presented in the casebook supplement the legal concepts raised in the cases and editors' notes. They provide the students with an opportunity to analyze complex legal issues in the context of practical problems. One of the first principal problems presented in the casebook deals with a first-year law student who arrives in town to begin her legal career only to find her apartment occupied by someone else.⁴⁴ Clearly, every law student is able to relate to the sheer panic a first-year student, already feeling insecure about law school, would experience upon arriving in town with no place to live! The editors also included other landlord and tenant problems in the casebook that raise challenging issues. What happens when a sublessee has made rental payments to the sublessor who "has left for parts unknown" without remitting any of the sublessee's payments to the lessor?⁴⁵ Can a landlord withhold consent to an assignment or sublease on the basis that, while the prospective assignee or sublessee has an excellent credit rating, he "has a long beard, long hair, and in general projects a somewhat unconventional image?"⁴⁶ Is a clause in a lease precluding assignments or subleases enforceable, or is that an unenforceable restraint on alienation?⁴⁷ These types of practical issues are presented throughout the casebook.

The principal problems also present weaknesses in the current law and raise the necessity for continued reform. For example, under present law there is no horizontal privity between neighbors; hence, the neighbor in the problem would be unable to recover damages because the action is one at law. In the "Running of the Burden" chapter, the editors included a problem where a successor sought to enforce two covenants against a neighbor—one which ran in equity and the other at law.⁴⁸ The problem shows the seeming ludicrousness of the horizontal privity requirement, as the neighbor would be successful at

44. RABIN & KWALL, *supra* note 1, at 35.

45. *Id.* at 136.

46. *Id.* at 146.

47. *Id.*

48. RABIN & KWALL, *supra* note 1, at 487.

obtaining injunctive relief but not damages. The neighbor could successfully pursue injunctive relief, but could not collect damages because the relationship of neighboring landowners did not satisfy the horizontal privity requirement.

V. THE PAST, PRESENT AND FUTURE OF PROPERTY LAW

The editors state in the preface that property law "oozes with tradition" for the traditionalist, "cries out for reform" for the reformer, and "embodies the often unexpressed assumptions on which our society rests."⁴⁹ Because these unexpressed assumptions change as society changes, the law of property is a work in progress. I do not believe that a law student can sufficiently understand the present law governing property interests without understanding the prior law. The metamorphic changes that have taken place in the law of property are just as significant as the black letter law of today. Without an understanding of why the law is evolving, the student is lost in the myriad of rules and left with the hopeless task of trying to memorize those rules. The rules governing landlord and tenant relationships, servitudes, and future interests have gone through a metamorphosis.⁵⁰ The Rabin & Kwall casebook contains traditional approaches, modern trends and glimpses of possible future reforms in each of these areas.

A. *The Law of Landlord and Tenant*

The doctrine of *caveat emptor* dictated the traditional approach to landlord and tenant relationships. The lease was considered a conveyance of an interest in land, and the landlord's only obligation was to deliver possession. Professors Rabin and Kwall use *Marini v. Ireland*⁵¹ to summarize the traditional approach and the justification for its erosion and to explain the standard used today in most residential leases: the implied warranty of habitability. The well-known reasons for the creation of the warranty include the unfair bargaining power between the landlord and tenant and the limited available housing for low income tenants.⁵² The editors raise a good discussion question about whether the warranty is actually beneficial

49. *Id.* at vi.

50. Other areas in property law continue to evolve as well. However, I limit my discussion to landlord and tenant relationships, future interests, and servitudes.

51. 265 A.2d 526 (N.J. 1970), reprinted in RABIN & KWALL, *supra* note 1, at 53.

52. The editors use *Knight v. Hallsthammar*, 623 P.2d 268 (Cal. 1981), reprinted in RABIN & KWALL, *supra* note 1, at 56, to provide a good discussion on the policy reasons for implying the warranty.

or harmful to the tenants it intends to protect.⁵³ This question usually generates considerable debate from the students.

The editors included *Davidow v. Inwood North Professional Group - Phase I*⁵⁴ in the materials to illustrate the implied warranty of habitability's use in the commercial setting, but the notes in the casebook correctly point out that the implied warranty of habitability has not yet been widely adopted in the commercial setting.⁵⁵ I generally like to ask the class whether there is any reason to distinguish the residential and commercial leases, especially where the commercial tenant is a small business—for example, a mom and pop neighborhood store—with limited business sophistication and limited resources.

My methodology in teaching landlord and tenant law is to expound on the “bundle of rights” principle and how its continuing changes affect the property owner's use of the property. A property owner has the right to derive profits from property, but can that owner decide to exercise discriminatory practices in renting property to tenants? Can a landlord decide to retaliate against a tenant who has complained about a housing code violation by evicting that tenant? The editors point out that under common law, landlords could be “bigoted or unreasonable” in selecting or rejecting tenants, and the landlords could refuse to renew a lease for arbitrary reasons.⁵⁶ After a brief introduction to the retaliatory eviction rules, the chapter is devoted to the Fair Housing Act's prohibition of discrimination in rental practices.⁵⁷ The case of *Kramarsky v. Stahl Management*⁵⁸ provides a good opportunity for me to explain the parameters of the Fair Housing Act. The court points out that it is acceptable to discriminate arbitrarily against a prospective tenant as long as the discrimination is not a violation of the Fair Housing Act. Interestingly, the discrimination in *Kramarsky* was based on the prospective tenant's status as an attorney.⁵⁹

The following chapter in the casebook focuses on the rights of a tenant to assign or to sublease. Once again, the material illustrates how the law regarding the landlord and tenant relationship continues

53. RABIN & KWALL, *supra* note 1, at 77.

54. 747 S.W.2d 373 (Tex. 1988), *reprinted in* RABIN & KWALL, *supra* note 1, at 68.

55. RABIN & KWALL, *supra* note 1, at 52. The editors provide some insight into the future use of the implied warranty of habitability in the commercial setting by stating: “[t]here is some movement in the direction of implying a similar warranty of fitness with respect to nonresidential leased premises, but this development is still tentative and uncertain.” *Id.*

56. RABIN & KWALL, *supra* note 1, at 115.

57. See 42 U.S.C. § 3604 (1994).

58. 401 N.Y.S.2d 943 (1977), *reprinted in* RABIN & KWALL, *supra* note 1, at 116.

59. *Id.*

to be a work in progress. The editors point out that traditionally a landlord could arbitrarily withhold consent to an assignment or sublease.⁶⁰ That approach in the majority of courts has been succeeded by a requirement that consent must *not* be arbitrarily withheld.⁶¹ In discussing this material, I remind the students of the "bundle of rights" inherent in property law. I usually ask the class whether they can reconcile the landlord's bundle of rights with the landlord's inability to withhold consent arbitrarily and his subjection to restrictions in selecting and removing tenants. The editors use *Newman v. Hinky Dinky Omaha-Lincoln, Inc.*⁶² to demonstrate a court's adoption of the rule prohibiting unreasonable withholding of consent. The *Hinky Dinky* case articulates factors to be analyzed in reaching the determination of whether the landlord had arbitrarily withheld consent.

B. *The Law of Servitudes: Covenants and Easements*

The editors have written well-developed introductory materials on the law of servitudes.⁶³ They provide a brief discussion of the proposed merger of servitudes under one body of rules.⁶⁴ They also point out that the law of easements has been relatively stable, whereas the law of covenants is governed by evolving rules.⁶⁵ The materials in the casebook, however, leave me some latitude in covering the law of easements as a work in progress. Traditionally, an owner of property was unable to reserve newly created easements in favor of a third party who was not a party to the conveyance. The editors included *Estate of Thomson*⁶⁶ in the casebook, which illustrates some courts' reluctance to abandon the long-standing traditional approach. The editors also included *Willard v. First Church of Christ, Scientist, Pacifica*,⁶⁷ where the court adopted the minority approach, the modern trend, because the traditional approach was "clearly an inapposite feudal shackle."⁶⁸ The contrasting approaches taken by the *Thomson* and *Willard* courts provide an interesting class discussion on the issue of whether there is any bona fide reason in modern times to

60. RABIN & KWALL, *supra* note 1, at 145.

61. *Id.*

62. 427 N.W.2d 50 (Neb. 1988), *reprinted in* RABIN & KWALL, *supra* note 1, at 146.

63. RABIN & KWALL, *supra* note 1, at 357-61.

64. *Id.* at 358.

65. *Id.*

66. 509 N.E.2d 309 (N.Y. 1987), *reprinted in* RABIN & KWALL, *supra* note 1, at 375.

67. 498 P.2d 987 (Cal. 1972), *reprinted in* RABIN & KWALL, *supra* note 1, at 372.

68. *Id.*

prevent a conveyor from creating an interest in a person who is not a party to the conveyance.

The casebook provides additional opportunities to explore the changing doctrine of the law of easements.⁶⁹ However, I only briefly discuss these matters in order to devote substantial time to the more challenging and evolving law of covenants. In my introduction to the law of covenants, I usually lecture on the requirements for the running of the benefits and burdens in law and equity because of the topic's complexity. In their introduction to the law of covenants, the editors explain that the law of covenants "is an unspeakable quagmire."⁷⁰ They also explain the difference between covenants that run at law and those that run at equity.⁷¹ The American Law Institute has proposed and adopted many revisions to the law governing covenants. The editors allude to many of these revisions and provide insight into the Restatement modifications and the future direction of the law of covenants.⁷²

There are several rules governing covenants that have purely historical significance. The disparate treatment in enforcing covenants at law and in equity was created at a time when the courts of law and equity were separate. The editors included in the casebook the early English case of *Tulk v. Moxhay*,⁷³ which allowed a covenant to be enforced in equity, even though it could not be enforced at law. The *Tulk* case is commonly considered to have created the equitable

69. For example, the editors point out that the traditional rule that easements in gross could not be transferred, but the modern trend is to allow for such transfer absent contrary intent of the grantor. RABIN & KWALL, *supra* note 1, at 378.

70. RABIN & KWALL, *supra* note 1, at 447. They also state:

The intrepid soul who ventures into this formidable wilderness never emerges unscarred. Some, the smarter ones, quickly turn back to take up something easier, like astrophysics. Others, having lost their way, plunge on and after weeks of effort emerge not far from where they began, clearly the worse for wear. On looking back they see the trail they thought they broke obscured with foul smelling waters and noxious weeds. Few willingly take up the challenge again.

Id.

71. RABIN & KWALL, *supra* note 1, at 449-50. In order for a party to successfully bring an action for damages (at law) against a successor in interest for violation of a covenant, there must exist intent, touch and concern, vertical privity, horizontal privity, and notice. In order for a party to obtain injunctive relief against a successor in interest, that party need only establish intent, notice, and touch and concern.

72. See for example, RABIN & KWALL, *supra* note 1, at 447, where the editors state that the Restatement sections are currently being rewritten, hopefully to "meet with a kinder, gentler reception than did their predecessors," and RABIN & KWALL, *supra* note 1, at 483, where they discuss the Restatement's abandonment of the touch and concern requirement.

73. 2 Phillips 774, 41 Eng. Rep. 1143 (Ch. 1848), *reprinted in* RABIN & KWALL, *supra* note 1, at 489.

servitude. As noted in the casebook, today the courts of law and equity have merged in most jurisdictions; consequently, the editors raise the question of whether there is any modern justification for disparate treatment.⁷⁴

The editors also raise the question of whether there is any modern justification for requiring horizontal privity for a covenant to run at law in light of its disapproval by legal scholars and its rejection by the Restatement.⁷⁵ The editors included *Moseley v. Bishop*⁷⁶ for its discussion of the horizontal privity requirement. In my lecture, I use the *Moseley* case to discuss the three types of relationships sufficient to establish horizontal privity, but also to question the worth of such a requirement in modern times. In a footnote, the court in *Moseley* discounts the "continuing vitality" of the horizontal privity requirement based on several policy reasons.⁷⁷

I usually conclude the discussion of servitudes by reminding the class of the bundle of rights inherent in the ownership of property and raising policy issues. For example, one of the rights inherent in property ownership is the right to control the use of the property. Why should this use be restricted by an agreement that the owner's predecessor in interest entered into with another party, especially if the current owner did not have actual notice of the agreement? Are the complex set of rules governing the law of covenants essential to balance the competing interests of protecting the property owner's rights to use and a party's benefits derived from a freely negotiated contract? Whose bundle of rights should take precedence—the owner of the underlying property or the owner of the benefits of a covenant?

C. *Future Interests and the Rule Against Perpetuities*

One of the most challenging areas in the study of property law is the rule against perpetuities. Traditionally, the common law rule against perpetuities provided: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."⁷⁸ In order to develop even a basic understanding of perpetuities issues, students must be able to classify an interest because the rule applies only to contingent remainders, vested

74. RABIN & KWALL, *supra* note 1, at 492.

75. *Id.* at 485.

76. 470 N.E.2d 773 (Ind. Ct. App. 1984), *reprinted in* RABIN & KWALL, *supra* note 1, at 492.

77. *Id.* at 495-96.

78. JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES § 201 (4th ed. 1942), *reprinted in* RABIN & KWALL, *supra* note 1, at 196.

remainders subject to open, and executory interests. The casebook devotes a separate chapter⁷⁹ to the terminology associated with future interests.⁸⁰ The terminology is explained by way of forty-three examples.⁸¹ These examples help the student establish a critical foundation to understanding future interests.

As with many concepts in property law, the Rule Against Perpetuities had its origins in English law. It is an area that has gone through evolutionary modifications. One fundamental question that I asked myself prior to teaching property law was whether it was pedagogically sound for me to teach the Rule Against Perpetuities given the time commitment required for covering the materials. Although I graduated from law school without a clear understanding of the rule and did not encounter a perpetuity question prior to entering academia, I answered my question in the affirmative. I thought it was worthwhile for students to explore the issue of whether a property owner's bundle of rights should include the ability to control the property in perpetuity even after the property owner's death. The traditional Rule Against Perpetuities was designed to promote the full utilization of land and the free exchange and control of property at the discretion of the present owner rather than a deceased transferor. In application, the Rule Against Perpetuities thwarts a testator or grantor's intent to dispose of assets in the way he or she sees fit. With these competing interests in mind, a valid question is whether there are any other approaches that might satisfy both interests.

The book references two well-known modern reforms that are applied to alleviate the harshness of the Rule Against Perpetuities: the doctrines of *cy pres* and "wait and see." The editors included *Fleet*

79. The chapter also includes a brief, informative discussion of the English historical origins of freehold estates. RABIN & KWALL, *supra* note 1, at 174-77. The brevity of the early English common law is also consistent with my teaching methodology. I believe that students should have some exposure to the early English law; however, as noted by the editors in the Teacher's Manual, "students do not appreciate being bogged down in a myriad of historical data." TEACHER'S MANUAL, *supra* note 2, at 9-1. The Teacher's Manual contains a detailed description of the English historical background relating to freehold estates and a chronological outline of important dates. TEACHER'S MANUAL, *supra* note 2, at 9-1 - 9-23. I incorporate some of these helpful historical facts into my lecture to give the students some foundation, but I prefer to focus on the historical development within this country.

80. RABIN & KWALL, *supra* note 1, at 174-91.

81. I believe the only way to learn to classify interests properly is through repetition. To supplement the casebook materials, I recommend that students read CHARLES I. NELSON & PETER T. WENDEL, A POSSESSORY ESTATES AND FUTURE INTERESTS PRIMER (1996). It contains problem sets and additional examples that students find useful.

*National Bank v. Colt*⁸² to illustrate the wait and see doctrine. The court in *Fleet National Bank* adopted an approach that allows for an examination of the "wait-and-see actualities," as opposed to the "orthodox possibilities."⁸³ I pose the question to the class whether the modern reform is superior to the traditional Rule Against Perpetuities, or whether the reform creates a new set of problems. The editors address many shortcomings of the wait and see doctrine at the end of the chapter.⁸⁴

The editors included *In re Estate of Chun Quan Yee Hop*⁸⁵ to illustrate a court's adoption of the *cy pres* doctrine. In the *Estate of Chun*, the court stated that "[t]he genius of the common law, upon which our jurisprudence is based, is its capacity for orderly growth."⁸⁶ This quotation, although applicable in other subjects, gives credence to my objective of presenting property law as a work in progress, constantly being reformed and fine-tuned to address the modern times.

Another area that continues to evolve is the relationship between the Rule Against Perpetuities and restraints on alienation. Included in the bundle of property rights is the owner's right freely to transfer the property. The editors explore this issue by examining preemptive rights—the rights of first refusal. Assuming a preemptive right does not result in an impermissible restraint on alienation, should the right still be subject to the Rule Against Perpetuities? Are the policy justifications of both concepts distinct enough to warrant independent application? The editors included the cases of *Shiver v. Benton*⁸⁷ and *Ferrero Construction Co. v. Dennis Rouke Corp.*⁸⁸ that directly deal with these issues.

VI. CONCLUSION

The Rabin and Kwall casebook allows me to adhere to my teaching methodology and meet my pedagogical objectives. The principal cases provide the students with a good snapshot of the law of property and its evolution. The use of the principal problems strongly complements my commitment to the problem analysis approach. One weakness of using this approach is that the first-year students still believe there is a "correct" answer. They usually feel unsure as to

82. 529 A.2d 122 (R.I. 1987), *reprinted in* RABIN & KWALL, *supra* note 1, at 213.

83. RABIN & KWALL, *supra* note 1, at 217.

84. *Id.* at 225-27.

85. 469 P.2d 183 (Haw. 1970), *reprinted in* RABIN & KWALL, *supra* note 1, at 220.

86. *Id.* at 221.

87. 304 S.E.2d 903 (Ga. 1983), *reprinted in* RABIN & KWALL, *supra* note 1, at 267.

88. 536 A.2d 1137 (Md. 1988), *reprinted in* RABIN & KWALL, *supra* note 1, at 270.

what is the correct answer because cases included in the casebook are indicative of the evolving nature of property law and do not represent a uniform standard.

The major disadvantage in using the casebook is that it was published in 1992 and has a 1996 supplement. Generally, I would prefer not to use casebook supplements, although I understand their necessity. Because I present Property as a work in progress, a more recent edition would better serve my objectives. All in all, I enjoy using the casebook. It provides the students not only with an opportunity to learn about significant issues in property law and the evolutionary nature of the subject, but also provides them with an opportunity to gain practical experience in applying legal theory to facts.