

Fall 2007

Teaching Property - A Conceptual Approach

Dale A. Whitman

Follow this and additional works at: <http://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Dale A. Whitman, *Teaching Property - A Conceptual Approach*, 72 Mo. L. REV. (2007)

Available at: <http://scholarship.law.missouri.edu/mlr/vol72/iss4/12>

This Conference is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized administrator of University of Missouri School of Law Scholarship Repository.

Teaching Property – A Conceptual Approach

Dale A. Whitman*

The property course has shrunk. This fact is well-documented, and is obvious to anyone who has taught the course over any appreciable length of time. For many decades, Property received six credits in most law schools – typically three in the Fall and three in the Winter semester of the first year.¹ Now, few schools give the course more than four or five credits, and some have cut it to three.² The change seems to have occurred mainly over the last two decades.

While it is doubtful that many Property teachers would have chosen this reduction, it is now an accomplished fact. Thus, teachers of the course are left with this question: how can we take best advantage, for our students, of this new poverty of credits? That is the question I propose to address in this short paper.

This question is typically answered by a discussion of which topics within the traditional course should be reduced in emphasis or omitted. I suggest that this is not the soundest approach, and to propose an alternative. Before doing so, I will suggest certain norms that I believe should guide our decisions.

The first of these norms is that our task is to prepare our students to *practice* law (though many of us do not always act as if this were so). We are, after all, training³ people to engage in a profession. Whatever pedagogical techniques and emphases contribute to this goal should attract our attention.

My second proposition is that it is the practice of *real* property that ought to occupy our attention in the first-year Property course. This is not to say that there is intellectual vacuity in other types of property, such as personal property or intellectual property. Indeed, a comparison of real property

* Professor of Law Emeritus, University of Missouri-Columbia.

1. I studied under this allocation at Duke University Law School in 1963-64, accompanied by a further three-credit course in personal property that was, at least ostensibly, taught as a “legal method” or “legal process” course.

2. See Roger Bernhardt & Joanne Martin, *Teaching the Basic Property Course in U.S. Law Schools*, *PROB. & PROP.*, Sept./Oct. 2007, at 36, 37.

3. In academic law, we tend to eschew the word “train.” This is odd, since in medicine and the sciences, people use it proudly, as in “I trained under Dr. Jones, the Nobel prize winner.” To legal academics, “train” seems to have acquired an unintellectual patina, as if we were “training” students to find the courthouse and pay the filing fees. I think there is nothing wrong with speaking of “training,” so long as we understand that we are training our students in the habits of mind and legal concepts that they must possess to be successful practitioners.

with alternative property regimes can be stimulating and sometimes enlightening.⁴ But far more lawyers must deal, day to day, with real property issues than with these other regimes. When we occupy significant time with these other topics in the Property course, we are cheating our students out of the knowledge of real property that many more of them will find more valuable.

Indeed, I have been increasingly dismayed by the diversity of material found in Property casebooks that has very little *real property* relevance. There is material on the sale of body parts, nuisance, zoning and land use planning, in addition to personal property and intellectual property. In one recently-published casebook containing 1375 pages of content, more than 600 pages are devoted to these issues that are outside the core of real property. The real property material is, in consequence, fairly superficial. Of course, no teacher is bound by the emphasis taken by the casebook, but I think it is difficult to justify this level of relative inattention to real property in a course of four or five credits.

I understand that these peripheral issues can make for enjoyable classroom discussion. At the same time, I suspect that some of my colleagues are drawn to them in part because they have relatively little knowledge of the way real property law is practiced, and prefer to avoid classroom situations that might display their ignorance. This is a particularly likely explanation for those who regard themselves as having primary commitments in other fields of law, and who have been dragooned by their deans into teaching Property despite their meager interest in it.

But if we decide that Property means Real Property, we are still left with a great deal of material from which to choose. How do we decide what to cover? As I have reflected on this question, I've concluded that we – and I include myself in this equation – have tended to become too rule-bound and insufficiently conceptual. Anyone can discover the rules in his or her jurisdiction with a little effort on Lexis or Westlaw . . . anyone, that is, who has a strong grasp of property concepts.

It is the *concepts* that count. Anglo-American property law embodies many fairly subtle concepts that are anything but obvious to law students. Most property concepts are based on history, and often they do not resemble what we might develop if we were starting from scratch today. Yet a conceptual understanding is absolutely essential to successful practice in the field. Hence, a strong Property course is one that focuses on concepts, not rules.

Let me illustrate. Not long ago I was in a meeting with a group of lawyers, most of whom were property specialists. I happened to mention that a joint tenancy might be severed by a conveyance by one of the joint tenants, even if the other joint tenant was unaware of the action and did not consent to

4. See, e.g., Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1 (2004).

it.⁵ One of the other lawyers, who has been out of law school 25 years and practices predominantly in the real property field, was struck. “You mean,” he said, “that if I hold property in joint tenancy with my wife, I can take away her right of survivorship without her even knowing about it?”

Every lawyer whose practice touches the real estate field needs to know the concept of severance of joint tenancies. It is not so important to know whether a severance would be accomplished by a particular type of conveyance – a mortgage, a lease, or a conveyance of a life estate. A little research will disclose what light can be shed on these details in any specific jurisdiction. But if a lawyer is oblivious to the idea of severance – the conversion of a joint tenancy into a tenancy in common by means of a conveyance from one joint tenant – then she or he will never do the research at all, and may engage in conduct that is highly detrimental to a client.

With this introduction, and with apologies to David Letterman, I present my top ten property concepts: the things that every student should understand upon completion of a property course.

10. *Severance of joint tenancies*, as I mentioned above, is number 10. A lawyer who fails to understand the concept can leave a client in a corner with no escape.⁶

9. *Adverse possession* is not a transfer of title from the former true owner, but rather creates a new original title in the adverse possessor,⁷ while terminating the former true owner’s title.⁸ Since it is based on the running of the statute of limitations for an action in ejectment, it will not run against owners of interests who could not sue in ejectment – in particular, against holders of nonpossessory rights, such as future interests⁹ and mortgages.¹⁰

5. See, e.g., *Crowther v. Mower*, 876 P.2d 876, 878-79 (Utah Ct. App.1994) (deed effectively severed joint tenancy, despite the fact that it was unrecorded and that other joint tenant was unaware of it); *Taylor v. Canterbury*, 92 P.3d 961, 967 (Colo. 2004) (recognizing severance by virtue of grantor’s deed to himself).

6. For example, a client entering into a second marriage, but with children by the first marriage, might place his or her property in joint tenancy with the new spouse. Later, the client might realize that this act, if left unchanged, would result in the children by the first marriage receiving nothing at the client’s death. If the client’s lawyer is unaware of the possibility of severance, the client’s desire to provide for the children might be entirely frustrated, while if a severance is employed, the children can at least be assured of receiving a one-half interest in the property.

7. See, e.g., *El Cerrito, Inc. v. Ryndak*, 376 P.2d 528, 532 (Wash. 1963) (“When real property has been held by adverse possession for ten years, such possession ripens into an original title.”).

8. “A successful adverse possession action results in a legal titleholder forfeiting ownership to an adverse holder without compensation.” *Grace v. Koch*, 692 N.E.2d 1009, 1012 (Ohio 1998).

9. *Schaeffer v. Maddox*, 794 So. 2d 1139, 1141 (Ala. Civ. App. 2000) (adverse possession commenced during term of life estate is not binding on holder of remainder following life estate; separate adverse possession against holder of remainder after it becomes possessory would be necessary); *Ebersol v. Mishler*, 775 N.E.2d 373 (Ind.

Hence, the title acquired by an adverse possessor may well be subject to such encumbrances.

8. A *future interest* is “future” only in the sense that possession under it is deferred until some later time.¹¹ Future interests exist in the present, as witnessed by the facts that they can be presently transferred,¹² that they are compensable in eminent domain,¹³ and that their holders are entitled to compensation or injunctions for waste¹⁴ and to notice of foreclosure of preexist-

Ct. App. 2002) (“As a general rule, the doctrines of laches, estoppel, and adverse possession can be asserted only against those who have a present right to possess the real estate in question.”); W.W. Allen, Annotation, *What Acts, Claims, Circumstances, Instruments, Color of Title, Judgment, or Thing of Record Will Ground Adverse Possession in a Life Tenant as Against Remaindermen or Reversioners*, 58 A.L.R.2d 299, 302-05 (1958); RESTATEMENT (FIRST) OF PROP. § 222 cmt. f (1936).

10. *Stat-o-matic Ret. Fund v. Assistance League of Yuma*, 941 P.2d 233, 236-37 (Ariz. Ct. App. 1997) (where adverse possessor takes possession after mortgage has been placed on land, adverse possessor acquires title subject to mortgage). The same principle probably applies to easements, in the sense that an adverse possessor who acquires title to the servient land, but who has done nothing during the prescriptive period to interfere with the use of the easement, must recognize the continued validity of the easement. See *Faulconer v. Williams*, 964 P.2d 246, 251 (Or. 1998); *Mueller v. Hoblyn*, 887 P.2d 500, 509 (Wyo. 1994) (acts of servient owners on their land, while extensive, did not sufficiently interfere with easement to terminate it).

11. “Future’ estates are presently existing, legally protected property interests. As applied to such interests, the adjective ‘future’ refers to only one of the components of property, the right to possession, and does not mean that the ‘future’ estate will come into existence only at some future time.” WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* § 3.1, at 79 (3d ed. 2000).

12. While some types of transfers were at one time impermissible for some kinds of future interests, the prevailing modern view is that all future interests can be transferred in the same manner as possessory interests. See, e.g., CAL. CIV. CODE § 699 (“Future interests pass by succession, will, and transfer, in the same manner as present interests.”); GA. CODE ANN. § 44-5-40 (“Future interests or estates are descendible, devisable, and alienable in the same manner as estates in possession.”); RESTATEMENT (FIRST) OF PROP. § 162(1) (“The owner of any remainder or executory interest in land has the power, by an otherwise effective conveyance inter vivos, to transfer his interest or any part thereof.”).

13. See, e.g., *Harris Propane, Inc. v. Miss. Transp. Comm’n*, 827 So. 2d 6, 11 (Miss. Ct. App. 2002) (Southwick, P.J., concurring) (any interest or estate, including a future interest, is compensable in eminent domain); *City of Palm Springs v. Living Desert Reserve*, 82 Cal. Rptr. 2d 859, 868 (Cal. Ct. App. 1999) (right of entry following fee on condition subsequent is compensable in eminent domain only if it is likely to become possessory within a reasonably short time).

14. *Brokaw v. Fairchild*, 177 N.E. 186, 186 (N.Y. 1931) (remainder holders entitled to injunction against waste); *Wood v. Griffin*, 46 N.H. 230, 237-38 (1865) (life tenant is entitled to recover damages from third party who has committed waste on the premises, if life tenant had paid damages to remainder holder); *Hood v. Freeman*, No. M2004-01889-COA-R3-CV, 2007 WL 27121, at *4-*5 (Tenn. Ct. App.

ing mortgages.¹⁵ However, waste damages are not necessarily easy to compute, or even envision, where the future interest in question is contingent in nature and as a practical matter might never become possessory.¹⁶ It's a thorny problem, but one worth making students think about.

7. *Restraints on alienation*, unlike restraints on use, are widely disfavored and often held unenforceable.¹⁷ The rationale for the disfavor lies in the concept of economic efficiency; restraints on alienation often prevent the land from being transferred to the person who values it highest and will make the most productive use of it. Students often have difficulty distinguishing restraints on alienation from restraints on use, but the latter are very widely enforced,¹⁸ once again because of economic efficiency.

Jan. 3, 2007) (reversioner may recover damages or obtain injunction against waste by leasehold tenant who allows building of flood retention pond on land).

15. *Williams v. Kimes*, 996 S.W.2d 43, 46 (Mo. 1999) (en banc) (contingent remainder holders are "owners" entitled to notice of foreclosure of deed of trust).

16. Typically, the court will refuse to grant a damages remedy in favor of a contingent future interest holder. *See, e.g.*, *Strickland v. Jackson*, 134 S.E.2d 661, 662 (N.C. 1964); *Sargent Lake Ass'n v. Dane*, 351 A.2d 54, 56 (N.H. 1976); *Sermon v. Sullivan*, 640 S.W.2d 486, 487 (Mo. App. W.D. 1982). *But see* *Pedro v. January*, 494 P.2d 868, 875-76 (Or. 1972) (contingent remainderman who sued alone obtained a damage award, which was impounded to await vesting). An alternative approach is to recognize the action for damages if the contingent future interest holder sues on behalf of all future interest holders. *See* *Watson v. Wolff-Goldman Realty Co.*, 128 S.W. 581, 583 (1910) (suit in equity). Another alternative is to regard the contingent future interest holder's right to bring an action in waste as suspended, and hence to refuse to entertain the suit, unless and until the contingency is removed and the interest becomes vested. *See* *Estate of Hemauer v. Remaindermen Under Last Will & Testament of Bloom (In re Estate of Hemauer)*, 401 N.W.2d 27 (Wis. Ct. App. 1986) (from table of unpublished opinions in North Western Reporter, text in Westlaw).

On the other hand, equitable relief in the form of an injunction is usually available to the contingent future interest holders, *see* *Peterson v. Ferrell*, 37 S.E. 189, 189-90 (N.C. 1900) (contingent remainder); *Kollock v. Webb*, 39 S.E. 339, 343-44 (Ga. 1901) (same), unless the future interest appears very unlikely ever to become possessory. *See* *Brown v. Brown*, 109 S.E. 815, 816-17 (W. Va. 1921) (same).

17. *See, e.g.*, *Grand Circus Dev. Corp. v. Beldon Const. Co.*, No. 219558, 2001 WL 1565214, at *3 (Mich. Ct. App. Dec. 7, 2001) (provision of option to sell land, prohibiting sale to persons affiliated with the Detroit Tigers baseball club, was unenforceable); *LaFond v. Rumler*, 574 N.W.2d 40, 44 (Mich. Ct. App. 1997) (contract of sale which provided that vendor would have the right to approve any future sale by purchaser, and would be entitled to a portion of the resale price, created a void restraint on alienation). *Cf.* *Alby v. Banc One Fin.*, 128 P.3d 81, 83-84 (Wash. 2006) (deed provision prohibiting the mortgaging of the property during the lifetime of the grantors was valid).

18. *See, e.g.*, *Jensen v. City of New Albany*, 868 N.E.2d 525 (Ind. Ct. App. 2007) (deed to city "so long as said real estate shall be used as a Municipal Park and Golf course" created a valid fee simple determinable, which was extinguished by a subsequent eminent domain action by the state). Even judges are not immune from

6. *Deeds, once delivered, are not ambulatory.* Delivery of a deed is like squeezing toothpaste out of the tube – the grantor can't put it back in again.¹⁹ Today, lawyers are faced with a wide variety of non-probate transfers as well: life insurance, "Transfer on Death" (TOD) deeds, TOD bank accounts, inter vivos trusts, and the like. Are they ambulatory or not? The answers vary, but the lawyer who is not sensitive to the issue, or who does not understand the formalities necessary to accomplish a revocation of an existing designation,²⁰ can roundly frustrate a client's intentions.

5. *A deed will transfer whatever interest the grantor holds,* even if it is a lesser interest than the deed describes, unless the deed contains language that is inconsistent with a more limited transfer. Thus, a deed that purports to transfer a fee simple will instead transfer a life estate if that is all the grantor has.²¹ This is often a surprise to students. A related concept is that this principle operates completely independent of whether the deed contains covenants of title. Hence, a quitclaim deed will transfer a fee simple absolute (or any lesser estate) just as readily as a full warranty deed.²² Students (and law-

confusion on this point, and will sometimes mix up restraints on alienation with restraints on use. *See, e.g.,* Niemann v. Vaughn Cmty. Church, 77 P.3d 1208 (Wash. Ct. App. 2003) (language in deed providing that property must be held "for the perpetual use of Protestant Evangelical Churches of the Community of Vaughn, Washington" was incorrectly characterized as a restraint on alienation).

19. For example, any modification made to a deed after it has been delivered is ineffective. *See* Julian v. Peterson, 966 P.2d 878, 880-81 (Utah Ct. App. 1998) (placing additional name on deed as grantee after delivery gave additional grantee no interest in the land); Hilterbrand v. Carter, 27 P.3d 1086, 1090 (Or. Ct. App. 2001) (correction deed recorded by grantor five years after original deed, changing the type of tenancy by which the grantees held title, was not binding on the grantees).

20. For example, TOD deeds (also termed "beneficiary deeds") are statutory creatures that typically can be revoked by recording a revocation by the grantor before his or her death, but in no other way. *See, e.g.,* KAN. STAT. ANN. § 59-3503(a), (c) (TOD deed may be revoked only by recording a revocation in the register of deeds' office, and may not be revoked by provisions of a later will); ARIZ. REV. STAT. ANN. § 33-405(E), (J) (same). *See also* McHatton v. Ribeiro (*In re* Estate of Moore), 97 P.3d 103 (Ariz. Ct. App. 2004), *depublished by* 107 P.3d 923 (Ariz. 2005) (decedent's creation of trust as to all of her property did not have the effect of revoking the POD designation of her bank account, since she did not comply with statutory formalities to revoke POD designation).

21. *See* Weber v. Eisentrager, 498 N.W.2d 460, 464 (Minn. 1993) (deed by life tenant can convey only life estate, even if it purports to convey fee simple); ITT Rayonier, Inc. v. Wadsworth, 346 So. 2d 1004, 1010 (Fla. 1977) (same). On the other hand, a deed will be presumed to intend conveyance of a fee simple absolute, and will in fact convey that form of estate, unless the grantor either has only a lesser estate or expressly restricts the deed to conveyance of a lesser estate. *See* Holland v. Hathaway, 438 So. 2d 456, 464 (Fla. Dist. Ct. App. 1983).

22. *See, e.g.,* Barrett v. Barrett, No. Civ.A. NC 2003-0340, 2004 WL 1067935, at *2-*3 (R.I. Super. Ct. Apr. 20, 2004) (quitclaim deed was sufficient to create remainder interests in grantees and reserve life estate in grantor). The difference between

yers) have a tendency to assume that the title transferred by a quitclaim deed is a sort of second-rate title, but nothing could be farther from the truth.

4. *Recording is not necessary to the effectiveness of a conveyance* as between the parties.²³ Yet if this is so, students often wonder why anyone bothers to record. The answer, of course, is that the recording acts provide a powerful incentive for grantees to record. If they fail to do so, they are at risk of losing their interests to subsequent purchasers – in most states, to subsequent bona fide purchasers (BFPs).²⁴ Over the years I have been asked by lawyers dozens of times, “Do you think I need to record this document?”²⁵ Lawyers need a framework for answering that question; it requires an understanding of the fundamental concepts of the recording acts.

3. *Possession is often treated as the equivalent of ownership* except as against someone with better title.²⁶ While this issue does not arise very frequently in practice, when it does, it can completely flummox a lawyer who is unaware of it. Even an adverse possessor is regarded as a having a sort of title as against a subsequent trespasser.²⁷ The principle arose in an era when

the two types of deeds lies entirely in the question of whether the grantee will have a remedy in damages against the grantor if the title transferred is not what it purported to be. With a quitclaim deed, the grantee has no remedy, while with a deed containing some covenants of title, the grantee may recover damages, provided other applicable tests are met. *See, e.g.,* *Brown v. Lober*, 389 N.E.2d 1188, 1193 (Ill. 1979) (grantee could not recover under covenant of seizin in warranty deed because statute of limitations had run, and could not recover under covenant of warranty because grantee had not been ousted by holder of paramount title).

23. *Jacobs v. Jacobs*, 73 N.E.2d 477, 477 (Mass. 1947); *City of Omaha v. Morello*, 602 N.W.2d 1, 6 (Neb. 1999); *Anson Corp. v. Corp. Comm’n of Okla.*, 839 P.2d 676, 679 (Okla. Civ. App. 1992).

24. Depending on the nature of the jurisdiction’s recording act, those who can avoid the unrecorded conveyance may be subsequent BFPs, subsequent BFPs who record first, or mere subsequent purchasers (BFP or not) who record first. *See* STOEBCUK & WHITMAN, *supra* note 11, § 11.9.

25. From the grantee’s viewpoint, the answer is nearly always “yes.” At least, grantees should always consider recording.

26. With respect to personal property, the classic statement of this “relative title” concept is the famous dictum in *Armory v. Delamire*, (1722) 93 Eng. Rep. 664 (K.B.), that “the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner.” *See also* *Branch v. Morrison*, 50 N.C. (5 Jones) 16 (1857) (a party in possession of land, though not the owner, who harvests turpentine, can maintain trover against one who wrongfully takes it from him); *Mitchell v. Ga. & Ala. Ry. Co.*, 36 S.E. 971, 973-74 (Ga. 1900) (a bailee may maintain trover against a thief who takes the property from the bailee).

27. For example, an adverse possessor of land may maintain an action for trespass against one who intrudes on his or her possession. *See* *Ridgely v. Bond*, 17 Md. 14 (1861); *Hoelmer v. Heiskell*, 221 S.W.2d 142, 144-45 (Mo. 1949). The cases are divided as to an adverse possessor’s standing to bring a trespass action. *Contra* *French v. Childers*, 133 S.W.2d 63, 64 (Ky. 1939) (only one who has record title or

paper titles were not common and proof of title was often difficult, but it is equally sound today.

2. *Servitudes run to successors*, on both the benefit and burden sides. Of course, there are technical requirements to be met,²⁸ but modern courts are often willing to overlook them.²⁹ This basic concept, as applied to burdens of covenants,³⁰ often seems perplexing to students: how can I, merely by buying or leasing a parcel of real estate, become bound by promises that I never made? Many of us use the Coase theorem to demonstrate to our students why this is a sound concept in terms of economic efficiency,³¹ but it still seems to run against the grain of contract law, because it operates without a literal “meeting of the minds.” This “automatic” binding effect of covenants can be especially troublesome to lawyers when the covenant appears to be an ordinary contract, rather than being styled a covenant running with land.³²

1. *Rights in land* can be created in a profusion of ways in our legal system.³³ We are the beneficiaries of enormous flexibility, if we only know how to use it. We conventionally divide real property rights (at least along one axis) into three categories: possessory estates,³⁴ nonpossessory interests (such

actual title derived from adverse possession can maintain trespass). Indeed, an adverse possessor may even be able to maintain an action to remove a cloud on title. See *Barnes v. Webster*, 154 A.2d 918, 920 (Md. 1959).

28. See STOEBUCK & WHITMAN, *supra* note 11, § 8.13.

29. For example, the Restatement (Third) of Property eliminates the horizontal privity requirement completely. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.4 (2000). The Restatement’s view is slowly gaining adherents. See, e.g., *Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.*, 84 P.3d 295, 302 (Wash. Ct. App. 2004) (“We conclude that ‘horizontal privity’ is not required, or that it is met by the original parties’ grantor-grantee relationship.”).

30. See, e.g., *328 Owners Corp. v. 330 West 86 Oaks Corp.*, 865 N.E.2d 1228 (N.Y. 2007) (covenant requiring correction of code violations was binding on successor grantees of building); *Montfort v. Trek Res., Inc.*, 198 S.W.3d 344 (Tex. App. 2006) (covenant by holder of mineral estate to furnish water to surface estate owner was binding on subsequent grantee of mineral estate).

31. See Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 711-19 (1973); Herbert Hovenkamp, *Bargaining in Coasian Markets: Servitudes and Alternative Land Use Controls*, 27 J. CORP. L. 519, 528-33 (2002). The theorem was introduced in the classic article, R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

32. See, e.g., *Bremmeyer Excavating, Inc. v. McKenna*, 721 P.2d 567 (Wash. Ct. App. 1986) (contract to employ a specific excavation company to fill land held not to touch and concern land, and hence not to run with land).

33. The division of types of rights is profuse but not infinite. See Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. 373 (2002). It is even arguable that these concepts should be applied to “virtual” property – that is, to rights created by computer games and simulations. See Joshua Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047 (2005).

34. See STOEBUCK & WHITMAN, *supra* note 11, § 1.8.

as easements and covenants),³⁵ and rights that are not regarded as interests in real property at all, such as licenses and the innkeeper-guest relationship.³⁶ We also divide land ownership temporally, with present interests and an almost bewilderingly complex system of future interests.³⁷ Along a different axis, we recognize “legal” as distinct from “equitable” rights, with the latter deriving mainly from trust relationships.³⁸ Along a still different axis, we have a variety of security devices – mortgages, deeds of trust, installment contracts, negative pledges, and so on.³⁹

Creative lawyers are always developing new combinations of these rights, adapting them to new circumstances. Time-share condominiums⁴⁰ and securitizations⁴¹ are two of many illustrations I could give. Another is the recent advent of large tenancy-in-common ownership enterprises, designed to satisfy the needs of investors for tax-free exchange opportunities.⁴² But to be creative requires the lawyer to understand both the strengths of property concepts and their limitations – limitations which often grow out of their historic origins.

Your list may be different than mine, but I suspect there will be a great deal of overlap. I think each of us who teaches Property must decide what is important to teach, and I think that decision is best made at a conceptual level. What people learn (or don't learn) in law school really does matter. Concepts that are missed or misunderstood in law school may haunt the lawyer for the remainder of her or his career – without the lawyer even being aware of carrying any misconceptions.⁴³

Moreover, it does little good merely to tell students about property concepts. Reading this paper would be an essentially worthless exercise for beginning law students. The concepts have to be experienced, worked with,

35. *See id.* § 8.1.

36. *See, e.g.*, *Six Flags Theme Parks, Inc. v. Dir. of Revenue*, 102 S.W.3d 526, 533 (Mo. 2003) (finding that a coin depositor's rights in a video arcade comprise a license rather than a leasehold estate).

37. *See* STOEBOCK & WHITMAN, *supra* note 11, §§ 2.1, 3.1.

38. *See id.* § 1.5.

39. *See generally* GRANT S. NELSON & DALE A. WHITMAN, *REAL ESTATE FINANCE LAW CH.3* (5th ed. 2007).

40. *See generally* Robert E. Dady & Robert S. Freedman, *To Deed or Not to Deed: That Is the Timeshare Question*, *PROB. & PROP.*, Mar./Apr. 2001, at 49.

41. *See generally* Patrick D. Dolan, *Lender's Guide to the Securitization of Commercial Mortgage Loans*, 115 *BANKING L.J.* 597 (1998).

42. *See, e.g.*, Terence Floyd Cuff, *Section 1031 Exchanges Involving Tenancies-in-Common*, 29 *REAL EST. TAX'N* 53 (2002); Nancy Leary Haggerty, Norman Arnell, & Todd LaSala, *Tenancy-in-Common Ownership for 1031 Exchanges: The Risks with TICs*, *PROB. & PROP.*, Jan./Feb. 2007, at 36.

43. *See, e.g.*, *Bank Midwest v. Lipetzky*, 674 N.W.2d 176 (Minn. 2004) (court enforced a disabling restraint on alienation without any apparent recognition by the lawyers or the court of the doctrine that holds such restraints unenforceable).

massaged, tried out, and argued about. That's what Property class is about. It's an unbelievable amount of fun to do this, but it also has enormous long-term consequences for the professional lives of our students. Can we do it in five, or four, or even three credits? Yes, but it becomes increasingly challenging as the time shrinks. If we rethink what we are doing along conceptual rather than topical lines, I believe each of us who is in the business of teaching can do a better job.