

**WHAT IS PROPERTY LAW IN AN AGE OF
STATUTES AND REGULATION?: A REVIEW
OF *PROPERTY: PRINCIPLES AND POLICIES*
BY THOMAS MERRILL, HENRY SMITH
AND MAUREEN BRADY**

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ABSTRACT

The Fourth Edition of Property: Principles and Policies by Thomas Merrill, Henry Smith and Maureen Brady lays out what the field's leading thinkers believe we all should know about property law. Unlike most casebooks, the book is an intellectual achievement, a powerful argument made through educational materials. But it is premised on a set of beliefs, common among property law scholars, about what is important about the field. Although it discusses many legal and policy issues, Property: Principles and Policies focuses on the common law of property and the structure of property rights, both in theory and in historical practice.

However, the property law it presents is often quite distant from how we actually regulate the uses and transfers of real property today. For better or for worse, we live in an age of statutes and administration. From mortgage regulation to zoning to property tax policy and administration, the most important means through which we regulate real property fall outside of the common law. The book, and indeed much of the work done by property law scholars, does not wrestle with the methods through which government institutions regulate real property.

While systems of real property regulation build on the structure of property rights established over time, most relevant legal and policy disputes about real property do not turn on interpretations or changes in the common law of property. Instead, they are instances where other types of law—administrative, local government, securities, and tax, among others—apply to real property.

Focusing on the traditional common law of property, rather than the effects other types of law have on real property, is not a mistake. It is a choice. But it is a choice that comes with costs for students and scholars alike. Most real property regulation is done through state and local governments. First-

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year students, whether they have requisite traditional property law courses, federal-law focused “Leg-Reg” courses, or both, are often not exposed to how state and local governments work. Similarly, focusing on the common law and the theoretical structure of property rights renders property law scholars less able to be useful to legal and policy disputes.

The rich insights of property law theory could contribute more to contemporary law and policy if scholars took seriously the institutions that regulate most property most of the time.

I.

WHAT IS AND WHAT IS NOT “PROPERTY LAW”?

Property: Principles and Policies, by Thomas Merrill, Henry Smith and Maureen Brady, is one of our favorite casebooks.¹ Unlike most casebooks, it presents a thorough-going argument, a clear set of claims about what is important about property law as a subject and how students and scholars alike should think about it. Merrill and Smith are giants in the field who have published their now-extremely influential views about property law in dozens of law review articles.² The first three editions of the casebook have been an essential part of their scholarly project because they discuss property law comprehensively. The theoretical sections of the book, particularly Chapter 1, are a notable success, establishing the book’s worldview while also attending to counterarguments and other ways of thinking about property law.

The Fourth Edition, released in the summer of 2022, is a delight. Maureen Brady is an excellent addition to the book. As one of the most exciting scholars in the country on any topic, her method-

1. THOMAS W. MERRILL, HENRY E. SMITH & MAUREEN E. BRADY, *PROPERTY: PRINCIPLES and POLICIES* (4th ed. 2022) [hereinafter MSB].

2. There are so many articles that it would be folly to try to cite all of them, but some of the most well-known include Yun-chien Chang & Henry E. Smith, *The Numerus Clausus Principle, Property Customs, and the Emergence of New Property Forms*, 100 IOWA L. REV. 2275 (2015); Thomas W. Merrill & Henry E. Smith, *Making Coasean Property More Coasean*, 54 J.L. & ECON. S77 (2011); Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965 (2004); Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719 (2004); Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. 453 (2002); Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357 (2001); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998). Notably, Smith is now the Reporter for the Restatement (Fourth) of Property, and Merrill and Brady are both Associate Reporters. MSB, *supra* note 1, at v-vi (Preface to the Fourth Edition).

ological approach to property law—historical and inductive, exploring puzzles and complications amid the rigid theoretical stories we tell about property law—rounds out the hard-edged abstractions the book presents.³ As the premier contemporary scholar of the “mud” of property law theory, Brady complements the book’s crystalline structure perfectly.⁴ Several new parts of the book—including a new section on the role of custom in property law and an increased discussion of the role of equity—are just terrific.⁵

The release of a new edition of such an intellectually rich casebook, however, provides an opportunity to ask big questions about the field of property law. This book’s content covers what the nation’s leading property law scholars think is important to know about the field.

Is their focus justified? Is this all there is to property law? Are the contents of this book . . . important?

This Review argues that the answer to these questions is no. Or rather, the contents of the book are not *as* important as the book’s authors implicitly maintain. The reason is that property law as presented in this book—and, to be fair, in the other excellent casebooks in the field and much of the legal scholarship about property law⁶—is often quite distant from how we, in the United States, in 2022, actually regulate the uses and transfers of real property.⁷

3. Some of our favorites include Maureen E. Brady, *Turning Neighbors into Nuisances*, 134 HARV. L. REV. 1609 (2021); Maureen E. Brady, *The Forgotten History of Metes and Bounds*, 128 YALE L.J. 872 (2019); Maureen E. Brady, *The Damagings Clauses*, 104 VA. L. REV. 341 (2018); Maureen E. Brady, *The Failure of America’s First City Plan*, 46 URB. LAW. 507 (2014).

4. Carol Rose famously distinguished between hard-edged, “crystal” property law rules and messy, “mud” standards. Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988). Here, we are using that distinction to separate clear, structural theories, like those advanced by Merrill and Smith, and more holistic, historically-informed approaches to property theory.

5. MSB, *supra* note 1, at 255–76 (Ch. III Section C: Community and Custom), 415–17 (Ch. IV Section C: Property and Equity).

6. The other leading casebook is also excellent. JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER, MICHAEL H. SCHILL, LIOR JACOB STRAHILEVITZ, *PROPERTY* (10th ed. 2022). It is, however, largely similar in its focus, at least with respect to the critique issued below.

7. Another critique one might make of the book, and the broader field, would be aimed at its parochialism. *Property: Principles and Policies* discusses property in theory, often making somewhat universal claims about the nature of property ownership. But it does not do much to explore how property law works in other countries. To be fair, the book does include a pretty substantial discussion of English law, particularly old common law decisions, and occasional forays into comparisons between American and foreign law. But there’s no sustained discus-

The central focus of *Property: Principles and Policies* is the history and present state of the common law governing real property, both its content and how it should be understood theoretically.⁸ That is, the bounds of what constitutes “property law” according to the book are mostly defined by the traditional common law of property, with statutes and regulations sometimes intervening in ways that modify but don’t radically alter the shape of the law.

We will argue that the common law is not where most law and policy about real property is made today. For better or for worse, we live in an age of statutes and administration, including at the state and local level where much (although not all) of regulation of real property is promulgated.⁹ Today, the uses, financing, and disposition of real property are comprehensively governed by legislation, tax and spending policies, and regulations issued by administrative bodies and other types of government entities.

That is not to say traditional property law doctrines do not matter at all: they obviously do. Nor is it to say that legislative and administrative policies do not build on and respond to problems in the architecture of the common law of property. But if one is trying to answer the question of what students should know and think about “property law,” the likely place to start should be on how law

sion of how property law works in other jurisdictions, or what comparative efforts can tell us about the broad theoretical arguments contained in the book. This argument is not the focus of this review, but it likely could be made powerfully. Thanks to Taisu Zhang for suggesting this point.

8. Although the main focus of *Property: Principles and Policies* is property in land, the book also discusses personal property and several other forms of intangible property. See *infra* Section II(d). For what it is worth, personal property—stuff, not land—is more reasonably discussed using a traditional focus on caselaw and property theory.

9. See WILLIAM N. ESKRIDGE JR. & JOHN A. FEREJON, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (Yale 2010) (arguing that the contemporary American Constitution is best understood as being comprised of not only the formal Constitution, but also a number of “superstatutes” that play a constitutive role in our law and politics); GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 1, 2 (1982) (arguing that we are in an “age of statutes” but that courts should respond to this by continuing to make law in a common law fashion, sometimes treating statutes, particularly obsolescent ones, “as if they were no more and no less than part of the common law”); Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107, 109 (2018) (“State administrative agencies have burgeoned in size and responsibility in recent decades, and today do a lion’s share of governance affecting people’s day-to-day lives.”); Maria Ponomarenko, *Substance and Procedure in Local Administrative Law*, 170 U. PA. L. REV. (forthcoming 2022) (manuscript at 4) (on file with authors) (“The lack of attention to local administrative agencies is striking given the sheer breadth of local administration.”).

regulates the use and acquisition of real property today and where there are active disputes.

This same rationale goes for scholars as well. As we have argued elsewhere, property law scholarship needs to make an “institutional turn,” focusing as much on the procedures through which property law and regulation are made in legislatures and administrative bodies at several levels of government as it does on the history and theory of the common law.¹⁰ Those bodies are designed in particular ways, use specific procedures, and interact with other governmental entities in ways that matter to the concerns of property law scholars. Moreover, their outputs can be assessed using the tools of property theory.

Property: Principles and Policies addresses regulation and legislation as a matter of secondary concern. The chapter on housing finance devotes only two paragraphs to federal interventions, both financial and regulatory, into the mortgage market after pages and pages about the common law of mortgages.¹¹ The book maintains this focus despite the dominant role played by federal regulators, tax law, and government-sponsored entities in shaping housing finance in this country. The section of *Property: Principles and Policies* on zoning and other land use controls follows two separate long sections on nuisance law, despite the fact that land use regulations, and not private nuisance litigation, are the most important method today for addressing conflicts among neighboring land uses.¹² There are pages upon pages about common law rules governing forms of ownership but very little about changes in trust, tax, and health care law that influence how people transfer property and that are continuing subjects of important policy disputes.¹³ While types of property ownership other than real and personal property are discussed (from intellectual property to government benefits and licenses), the institutional design of the entities that create these types of property and/or regulate their sale and use are largely ignored. The book mostly ignores common issues—from public choice to local fiscal concerns—that can be used to explain the development of policy about both real property and more newly created types of property. There is nary a word about property taxes or federal tax subsidies for homeownership, even though

10. Roderick M. Hills Jr. & David Schleicher, *Planning an Affordable City*, 101 IOWA L. REV. 91, 134 (2015).

11. See *infra* Section II(a).

12. See *infra* Section II(b).

13. See *infra* Section II(c).

taxes are central to the concerns people and businesses have when they buy property. And so on.

The law governing real property remains very important. Land use regulation has had (and continues to have) a huge effect on housing costs and economic growth by limiting the amount of housing built in economically successful regions.¹⁴ Returns on real property wealth explain a huge amount about levels and trends in economic inequality and the racial wealth gap.¹⁵ Many policies designed to address global warming—whether they involve the siting of clean energy sources or transmission lines, reducing emissions by allowing more environmentally friendly forms of land use, or adapting to the negative effects of warming—rely on changing property regulation.¹⁶

14. David Schleicher, *Exclusionary Zoning's Confused Defenders*, 2021 WISC. L. REV. 1315, 1326 n.62 (2021) (summarizing the literature); Kyle F. Herkenhoff, Lee E. Ohanian & Edward C. Prescott, *Tarnishing the Golden and Empire States: Land-Use Restrictions and the U.S. Economic Slowdown*, 93 J. MONETARY ECON. 89, 90 (2018) (“U.S. labor productivity would be 12.4% higher and consumption would be 11.9% higher if all U.S. states moved halfway from their current land-use regulation levels to the current Texas level.”); David Albouy & Gabriel Ehrlich, *Housing Productivity and the Social Cost of Land-Use Restrictions*, 107 J. URB. ECON. 101, 101 (2018) (“Observed land-use restrictions raise housing costs by 15 percentage points on average, reducing average welfare by 2.3% of income on net.”); Chang-Tai Hsieh & Enrico Moretti, *Housing Constraints and Spatial Misallocation*, 11 AM. ECON. J. 1, 25–27 (2019) (finding that perfect mobility would lead to an increase in growth rates of 87% and an 8.9% higher GDP and that simply reducing New York, San Francisco, and Silicon Valley’s zoning restrictiveness to the national median would lead to 3.7% higher GDP); Bryan Caplan, *Hsieh-Moretti on Housing Regulation: A Gracious Admission of Error*, ECONLIB (Apr. 5, 2021), <https://www.econlib.org/a-correction-on-housing-regulation/> [<https://perma.cc/6URZ-QPZX>] (showing that Hsieh and Moretti’s growth calculation should have led to an estimate of 36% higher annual GDP under full mobility and 14% higher in the three-city estimate); David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78 (2017) (discussing the effect of land use regulations and housing costs).

15. Matthew Rognlie, *Deciphering the Fall and Rise in the Net Capital Share: Accumulation or Scarcity?*, BROOKINGS PAPERS ON ECON. ACTIVITY (2015) (arguing that most of the increased return to capital relative to labor found by Thomas Piketty is a result of increased return to land capital); Meghan Kuebler, *Closing the Wealth Gap: A Review of Racial and Ethnic Inequalities in Homeownership*, 7 SOCIO. COMPASS 670 (2013) (discussing how differences in homeownership have contributed to the racial wealth gap).

16. See, e.g., Jim Motavalli, *The NIMBY Threat to Renewable Energy*, SIERRA (Sept. 20, 2021), <https://www.sierraclub.org/sierra/2021-4-fall/feature/nimby-threat-renewable-energy> [<https://perma.cc/28AS-P7HT>]; Noah Smith, *The Left's NIMBY War Against Renewable Energy*, BLOOMBERG (Sept. 12, 2021), <https://www.bloomberg.com/opinion/articles/2021-09-12/the-left-s-nimby-war-against-renewable-energy> [<https://perma.cc/FDQ7-KVT4>]; Maanvi Singh & Oliver Milman,

But property law as it is generally taught, and as it is generally talked about by property law scholars, often pushes to the side much of what is important today about real property regulation. This is not a mistake; it reflects a conscious decision that “property law” should not (mostly) be about the most salient issues in property regulation, but rather about the underlying structure of property rights defined by the development of the common law over time.

This design, conscious as it may be, has substantial costs. To start, relegating the public law of property to the background of a property law course does not teach students about the types of disputes about real property they are most likely to encounter as lawyers and citizens.¹⁷ While some students may take courses that build on property, like land use, trust and estates, secured transactions, and intellectual property, many do not. The structure of *Property: Principles and Policies* implicitly tells a story about the much greater relative importance of the common law of nuisance, mortgage and transfers to financial regulation, zoning, and trust and tax law. And that story is just not very convincing.

Further, integrating discussions of real property with discussions of other forms of property, from government licenses to intellectual property to securities, should entail discussing the often-similar institutions that govern them. There is real value in teaching 1Ls about common law reasoning and the aspects that make property law distinctive from torts and contracts. But it is also important

Denser Cities Could Help Curb Carbon Emissions, If the NIMBYs Allow It, MOTHER JONES (Aug. 25, 2021), <https://www.motherjones.com/politics/2021/08/denser-cities-carbon-emissions-climate-sprawl-nimby-yimby/> [https://perma.cc/QY5Y-9SU8]; Devin Buntun & Matthew E. Kahn, *Optimal Real Estate Capital Durability and Localized Climate Change Disaster Risk*, 36 J. HOUS. ECON. 1 (2017) (arguing that real estate investors and governments need to encourage the creation of types of buildings that can be moved in response to climate risk); Keith Gessen, *The Destroy-It-to-Save-It Plan for East River Park New York's First Climate Adaptation Battle Is Here*, N.Y. MAG.: CURBED (May 11, 2021), <https://www.curbed.com/2021/05/east-river-park-nyc.html> [https://perma.cc/73BQ-Z8FQ] (describing litigation over an effort to build a park to mitigate climate change related risks brought by nearby residents).

17. Schleicher's Yale colleagues have made a similar point about torts, renaming their course “Torts and Regulation.” John Fabian Witt, *A Torts Course for the Actually Existing World*, LPE PROJECT (Nov. 8, 2018), <https://lpeproject.org/blog/a-torts-course-for-the-actually-existing-world/> [https://perma.cc/US7P-AJ99] (describing renaming the course as part of a project “to invite . . . conversations about private versus public administrative mechanisms” to help “bring the torts class into the twenty-first-century and connect it to actually existing problems”). John Witt has produced an online casebook that makes this type of move. JOHN FABIAN WITT, *TORTS AND REGULATION: CASES, PRINCIPLES, AND INSTITUTIONS* (2d ed. 2020) (ebook).

to teach students early in law school about how lawmaking at each level of government works, how political influence and public choice shape legal outcomes, and the potential benefits of and the challenges created by inter-jurisdictional variation.

This critique extends beyond the classroom. *Property: Principles and Policies* captures leading scholars' beliefs about the domain of "property law." This view is extremely narrow, leaving out much of what is currently in dispute about how we acquire and use real property. This narrow concept about the domain of property law causes property scholars to trim their ambitions and make them less useful to ongoing policy debates than they might otherwise be. Many policy and legal debates could be informed by the theoretically rich work of property law scholars. But property theory will only influence these debates if property scholars break free from their beliefs about the proper domain for their insights by applying to the gears of state and local administration and legislation the tools they have developed for studying archaic, and often superannuated, common law doctrines.

For instance, if one is focused, as Merrill and Smith are, on information costs facing those who encounter property, many of the main sources of those costs are regulatory. Information costs derive from complex webs of land use regulations that vary in both their rules and terminology across local governments, regulatory encouragement of bespoke forms of mortgage securitization, and rules that allow ownership of property by limited liability companies. Varying processes for enacting property regulations, and differences in the substance of those regulations, lead to higher or lower levels of information costs. And the costs and benefits of different types of regulations and regulatory regimes are often very similar to tradeoffs between the benefits of customization and standardization they discuss in their work.

"Progressive property law" scholars argue that property law should seek to achieve a plurality of values, not merely wealth creation, and, in particular, should be judged by its contribution to citizens' "individual capabilities."¹⁸ But, for these scholars, issues like the availability and limitations on federal housing vouchers that allow access to wealthier and more diverse neighborhoods, or prop-

18. For examples of the ideas in "progressive property" law scholarship, see Gregory S. Alexander, Eduardo M. Peñalver, Joseph W. Singer & Laura S. Underkuffler, *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009); Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 864 (2009); Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237, 1264 (2005).

erty tax systems that keep revenue derived from increasing property values from being shared with poorer districts, are almost surely more important than traditional property law doctrines, however courts interpret them.¹⁹ One could make the same point about other types of property law scholars as well.

That a casebook omits relevant material is not news; it simply means it is a casebook, not an endless treatise. But the worldview of *Property: Principles and Policies* suffuses the field of property law, both in scholarship and in the classroom. The regulation of real property and the field of “property law” are increasingly distinct topics. Bringing them closer together would benefit students, the field of property law, and the development of law and regulation related to real property.

II. HOW WE REGULATE PROPERTY AND HOW IT IS DIFFERENT FROM “PROPERTY LAW”

To make the argument that *Property: Principles and Policies* fails to give proper recognition to legislation, regulation, and other forms of public law, we discuss below several chapters where the problem appears most prominently.

A. *The Law of Mortgages and Housing Finance Regulation*

The *Property: Principles and Policies* chapter on security interests, Chapter 7, begins by asserting the importance of property as a form of collateral.²⁰ It discusses the idea of secured credit at great length, including several cases about home mortgages. Notably, government sponsored entities (GSEs) such as Fannie Mae and Freddie Mac that play a dominant role in the housing securitization market are only mentioned in two paragraphs in a short section about the Financial Crisis of 2008.²¹ The book only mentions in passing important government entities that influence the mortgage market, like the Federal Housing Authority (FHA), which insures mortgages, and important historical practices, like “redlining.”²²

19. See *infra* note 103.

20. MSB, *supra* note 1, at 791–832.

21. *Id.* at 832.

22. *Id.* at 833–34. Notably, current scholarship suggests it was the FHA’s home insurance policy—not the Home Owners’ Loan Corporation that directly invested in mortgages and created the famous “redlining” maps—that was most responsible for racially-differential housing policy. Price Fishback, Jonathan Rose, Kenneth A. Snowden & Thomas Storrs, *New Evidence on Redlining by Federal Housing Programs in the 1930s*, J. URB. ECON. (2022). That said, the existence of any federal housing

This focus might lead the reader to believe that the law of mortgages is mostly an area defined by the common law. Perhaps a reader might be convinced by two stray paragraphs that some federal interventions mattered during the financial crisis. Otherwise, a reader of *Property: Principles and Policies* would not have much reason to think that the federal government, or spending and regulation generally, is particularly relevant to the mortgage market.

This perception would be in stark contrast to how people who study housing finance think about law and policy.²³ Christopher Odinet captures the basic view of the literature exploring the contemporary importance of the common law of mortgages: “It’s hard to overstate the significance of the modern mortgage transaction. It’s also hard to overstate the obsolescence of modern mortgage law.”²⁴ When people write about housing finance in America, the centerpiece of their story is how the federal government responded to the problems of the pre-Great Depression housing markets and spurred a flood of investment in housing after World War II.²⁵ Financial products that are uncommon in the rest of the world—particularly the “American Mortgage,” or the 20% down-payment, pre-payable, self-amortizing 30-year fixed rate mortgage—exist because of the interventions of a whole alphabet soup of federal agencies and GSEs that subsidize, insure, and securitize mortgages with particular terms, and federal banking regulators that influence the decisions of banks.²⁶ Federal banking regulators later allowed for the development of private-sector housing finance securitizations, and

policy that had racially-differential effects is only mentioned once in the casebook, in the context of critics in the 1990s making claims about bank practices that led to excessively aggressive lending. MSB, *supra* note 1, at 832.

23. See, e.g., William W. Bratton & Adam J. Levitin, *A Tale of Two Markets: Regulation and Innovation in Post-Crisis Mortgage and Structured Finance Markets*, 2020 U. ILL. L. REV. 47 (2020). See generally ADAM J. LEVITIN & SUSAN M. WACHTER, *THE GREAT AMERICAN HOUSING BUBBLE: WHAT WENT WRONG AND HOW WE CAN PROTECT OURSELVES IN THE FUTURE* (2020); Adam Gordon, *The Creation of Homeownership: How New Deal Changes in Banking Regulation Simultaneously Made Homeownership Accessible to Whites and Out of Reach for Blacks*, 115 YALE L.J. 186 (2005).

24. Christopher K. Odinet, *Modernizing Mortgage Law*, 100 N.C. L. REV. 89, 91 (2021) (emphasis omitted).

25. *Id.*

26. *Id.* at 92–95; David Reiss, *Underwriting Sustainable Homeownership: The Federal Housing Administration and the Low Down Payment Loan*, 50 GA. L. REV. 1019 (2016); Adam J. Levitin & Susan M. Wachter, *The Public Option in Housing Finance*, 46 U.C. DAVIS L. REV. 1111 (2013); Michael S. Barr, *Credit Where It Counts: The Community Reinvestment Act and Its Critics*, 80 N.Y.U. L. REV. 513 (2005).

a huge variety of different borrowing forms.²⁷ The Consumer Financial Protection Bureau (CFPB) is charged with regulating residential lending.²⁸ Federal tax policy subsidizes borrowing by including the home mortgage interest deduction and refusing to tax implicit rent earned by homeowners, as well as providing an income tax deduction for property taxes.²⁹ State and local governments get in on the action as well, doing things ranging from providing homestead property tax exemptions for owner-occupied housing to using private activity bonds to subsidize mortgages.³⁰

The price, availability, and terms of home mortgages in America are driven substantially by federal and state legislative and regulatory policy. The structure of these policies—which mortgages are subsidized, insured, and securitized, what banks are allowed and not allowed to do—is credited by scholars as playing an important role in the development of American suburbia and the creation of the “American Dream,” in building the racial wealth gap, and for causing urban sprawl.³¹ Federal home finance interventions also had a direct effect on the built form of housing in America, promoting everything from cul-de-sacs in the suburbs to increasing the minimum quality of housing construction.³²

27. Reiss, *supra* note 26, at 1069–71; Adam J. Levitin & Susan M. Wachter, *Explaining the Housing Bubble*, 100 *GEO. L.J.* 1177, 1177 (2012).

28. LaQuenta Rudison, *SOS: Saving the Secondary Mortgage Market from the Consumer Financial Protection Bureau’s Ability-To-Repay Rule*, 49 *J. MARSHALL L. REV.* 857, 861 (2016) (describing the CFPB’s regulatory role); 12 U.S.C. § 5511(b) (2010) (establishing the CFPB’s regulatory role).

29. *What Are the Tax Benefits of Homeownership?*, *TAX POL’Y CTR.* (2020), <https://www.taxpolicycenter.org/briefing-book/what-are-tax-benefits-homeownership> [<https://perma.cc/V3XE-CTCT>].

30. Jenny Schuetz, *Under US Housing Policies, Homeowners Mostly Win, While Renters Mostly Lose*, *BROOKINGS* (July 10, 2018), <https://www.brookings.edu/research/under-us-housing-policies-homeowners-mostly-win-while-renters-mostly-lose/> [<https://perma.cc/DKK3-NEQY>] (discussing tax and other subsidies for homeowners); GRANT A. DRIESSEN, *CONG. RSCH. SERV.*, RL31457, *PRIVATE ACTIVITY BONDS: AN INTRODUCTION* (2022), <https://sgp.fas.org/crs/misc/RL31457.pdf> [<https://perma.cc/Q7Z3-L7W5>] (describing uses of private activity bonds to subsidize mortgages).

31. *See generally* LEVITIN & WACHTER, *supra* note 23; Mechele Dickerson, *The Myth of Home Ownership and Why Home Ownership Is Not Always a Good Thing*, 84 *IND. L.J.* 189, 190–92 (2009); KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 190–218* (1985).

32. *See* Fred Wright, *The Effect of New Deal Real Estate Residential Finance and Foreclosure Policies Made in Response to the Real Estate Conditions of the Great Depression*, 57 *ALA. L. REV.* 231, 256–57 (2005). In comparison, the casebook talks about court-driven interventions into the minimum quality of housing—most notably, the implied warranty of habitability—but not those driven by federal mortgage regulation. *See* MSB, *supra* note 1, at 668–85.

Almost everything that is interesting, controversial, and unique about American housing finance is the result of federal and state regulation. And much of what is distinct about American housing has been substantially influenced by federal and state interventions in the mortgage market.

Further, disputes about how to regulate mortgage finance are not “just” a set of policy questions.³³ They are also a subject of a substantial amount of legal interpretation and development. Federal and state regulators and other entities like GSEs have specific legal powers and limits on which legal concepts can be brought to bear and that are indeed regularly written about by law professors. Statutes created these entities, administrative law doctrines structure and limit their outputs, and courts review their decisions and institutional structure.³⁴ All of this legal matter is grist for law professors’ and students’ legal analytic mill.

The rules these entities create, and the cases challenging their decisions, are not part of the common law of property or private law more broadly. These entities must comply with constitutional provisions and principles like the separation of powers, administrative law doctrines about the issuance and content of regulations, budgeting rules that govern the types of spending and promises the federal government can make, financial regulatory law, and tax law. But it is impossible to understand the contemporary mortgage market, or the contemporary housing market, without looking at federal and state laws and regulations.

33. Even if it were, the differential treatment of this and, say, rent control or the implied warranty of habitability suggest that it need not mean that federal housing policy be excluded. In those cases, *Property: Principles and Policies* has terrific sections covering policy arguments for and against and reviews of the literature. See MSB, *supra* note 1, at 682–86, 718–22. But when it comes to mortgage finance and tax subsidies for home ownership, it does not.

34. See, e.g., Odinet, *supra* note 24, at 119–48 (discussing how difficult it is to use traditional mortgage law in an era of financialized and regulated mortgages); Levitin & Wachter, *supra* note 26 (discussing the history of the development of different federal interventions); David Reiss, *The Federal Government’s Implied Guarantee of Fannie Mae and Freddie Mac’s Obligations: Uncle Sam Will Pick Up the Tab*, 42 GA. L. REV. 1019 (2008) (discussing implicit government guarantees for GSEs); *Collins v. Yellen*, 141 S. Ct. 1761, 1770–72, 1783–84 (2021) (permitting the Fair Housing Financing Authority (FHFA), which was created to control and bail out Fannie Mae and Freddie Mac, to make decisions as a conservator that replaced dividends for shareholders with a payment to the government for the entirety of their net worth, but also holding that, constitutionally, the president had to have removal power over the director of the FHFA); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020) (holding that the president had to have removal power over the director of the CFPB).

Moreover, scholars of housing finance often think in terms derived from property theory. For instance, arguments for why the federal government should subsidize mortgages and home ownership turn crucially on arguments for the positive externalities of home ownership and the investment in community it creates.³⁵ Critics point to the “dark side” of the social capital created by homeownership, i.e., “its capacity to effectuate local factions and to promote restraints and inegalitarianism that close off property.”³⁶ Other critics note the negative effect that homeownership has on mobility, or the risk for homeowners created by a house—an uninsured asset with a value that is correlated with incomes where the owner works—being the main source of wealth for most Americans.³⁷ Adam Levitin and Susan Wachter argue that the bespoke nature of private-sector mortgage-backed securities increased information costs, and that the government should try to structure the mortgage market to reduce these costs, directly invoking the idea of *numerus clausus* and Merrill and Smith’s take on that doctrine.³⁸

Notably, legislation and regulation to encourage lending have been central to American property law since before the United States was a country. As Claire Priest argues, legislative and regulatory innovations from the Debt Recovery Act of 1732, the abolishment of “fee tails,” and the creation of land registries were designed to make it possible for creditors to recover against landowners, encouraging lending and spurring investment in the American colonies.³⁹ These rules are considered part of the corpus of “property

35. See MARK KEIGHTLEY, CONG. RSCH. SERV., WHY SUBSIDIZE HOMEOWNERSHIP? A REVIEW OF THE RATIONALES (2019), <https://sgp.fas.org/crs/misc/IF11305.pdf> [<https://perma.cc/L8ZP-2FU9>].

36. Stephanie M. Stern, *The Dark Side of Town: The Social Capital Revolution in Residential Property Law*, 99 VA. L. REV. 811, 811 (2013); Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, *supra* note 14, at 127–29 (discussing how homeownership limits mobility); Stephanie M. Stern, *Reassessing the Citizen Virtues of Homeownership*, 111 COLUM. L. REV. 890, 891–93 (2011) (questioning the social benefits of homeownership).

37. Dickerson, *supra* note 31, at 207–12 (criticizing homeownership on the grounds that it leads to excessive investment in a single asset that is correlated with incomes).

38. Levitin & Wachter, *supra* note 27, at 1255–56.

39. CLAIRE PRIEST, CREDIT NATION: PROPERTY LAWS AND INSTITUTIONS IN EARLY AMERICA (2021). The casebook’s treatment of this makes it seem more like an evolution and less like an intentional policy program: “In eighteenth-century America the shift toward freer alienability also involved making property more available to the claims of creditors.” MSB, *supra* note 1, at 849. But Priest argues there were intentional interventions by legislatures—the Parliament, colonial and early state legislatures—to change the common law to make it easier for creditors

law,” but the last century’s worth of interventions designed to do roughly the same thing—increase lending and investment for buying and building houses—are not.

The law of mortgages, and housing finance more broadly, is a fascinating area of law. It has dramatic effects on how real property is acquired and on the lives of most Americans. But large swathes of it are considered outside of “property law” or at least outside the pages of *Property: Principles and Policies*.

B. Nuisance and Land Use

Property: Principles and Policies devotes two separate sections to nuisance law, a section in Chapter 1 on the intersection between nuisance and trespass, including a discussion of the work of Ronald Coase, and a long section in Chapter 8 on the Law of Neighbors.⁴⁰ After it completes the second section on nuisance, there is a section in Chapter 8 devoted to land use, including the classic cases of *Village of Euclid v. Ambler Realty Co.* and *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel (Mt. Laurel I)*.⁴¹

The order and focus seem odd given the first sentence of the section on zoning: “These days the main source of land-use control of a public character is zoning and related land-use regulation.”⁴² Even this underrates the relative importance of land use regulations

to recover against landowners, thus making them more willing to lend. PRIEST, *supra*, at 6–13.

40. MSB, *supra* note 1, at 25–43, 933–78. The latter of these sections, it should be said, quite wisely decided to drop the classic case, *Boomer v. Atlantic Cement Company, Inc.*, 257 N.E.2d 870 (N.Y. 1970), particularly because the type of conflict in that case has largely been addressed (and indeed addressed aggressively) by non-cumulative zoning for manufacturing. See Roderick M. Hills Jr. & David Schleicher, *The Steep Costs of Using Non-Cumulative Zoning to Preserve Land for Urban Manufacturing*, 77 U. CHI. L. REV. 249 (2010) (discussing how non-cumulative zoning largely displaced modifications in nuisance law as a protection for manufacturing firms against citizen lawsuits).

41. MSB, *supra* note 1, at 1065–105; *S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mount Laurel*, 336 A.2d 713 (N.J. 1975); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

42. MSB, *supra* note 1, at 1065. One might worry that focusing on public law, rather than traditional private law, would lead to too much inter-state and inter-local variation to be covered in a single survey course. While this may be a problem in some areas, there are plenty of fields in which it is not. While Restatements focus common law courts, model laws play an extremely important role in state and local property regulations. The Standard State Zoning Enabling Act, pushed by the Secretary of Commerce Herbert Hoover, is one of the most effective model laws ever, creating deep similarities in the methods of land use regulation around the country. Hills & Schleicher, *supra* note 10, at 97 n.15. There is variation, of course, but there is sufficient commonality for teaching purposes.

and private nuisance.⁴³ Moreover, it does not capture the interaction of property law theory and land use regulation.

To start, the content of private nuisance law is substantially influenced by land use regulations.⁴⁴ Suits for nuisance *per se*—i.e., land uses that constitute a nuisance regardless of the reasonableness of the activity—are often brought against a land owner who is violating zoning codes or other statutory regulations on land use.⁴⁵ That is, nuisance as a matter of law is substantially a private right of action against land owners who violate land use rules.⁴⁶ Private nuisance suits *per accidens*, or nuisances in fact, may be brought even when land uses are allowed under zoning codes and other ordinances. But reasonableness of any potential nuisance turns substantially on whether a use is permitted and how it fits with other land uses in the area, which, in a system of zone-based land use controls, is itself largely determined by land use regulations.⁴⁷ In contemporary property law, land use comes first and nuisance travels in its wake, rather than reciprocally.⁴⁸

Second, while the section on land use regulation includes useful and important material, it does not capture how central land use law is to understanding how property theory cashes out in real

43. We're using "land use" to cover not only zoning, but the full universe of land use and building regulations, including everything from building codes to historic preservation. Land use regulations other than zoning do not receive any substantial discussion in the book.

44. The chapters on nuisance mostly focus on private nuisance, not public nuisance claims. A claim that land uses violate a right owned by the public in general cannot be brought against land uses specifically permitted by zoning regulations written by the public. *See, e.g.*, *Town of Hull v. Mass. Port Auth.*, 806 N.E.2d 901 (Mass. 2004); *Maykut v. Plasko*, 365 A.2d 1114 (Conn. 1976).

45. *See* DAVID A. THOMAS, 8 THOMPSON ON REAL PROPERTY, THOMAS EDITIONS § 67.03(b) (2022).

46. *Id.* at § 67.03(c); MICHAEL ALLAN WOLF, 9 POWELL ON REAL PROPERTY § 64.05 (2023) ("Most courts hold that compliance with a zoning ordinance, while a factor in the defendant's favor, does not provide an absolute defense in a private nuisance action.").

47. WOLF, *supra* note 46.

48. And, indeed, as Brady has recently argued, the development of land use regulations was not only a response to the inability of nuisance to address landowners' desires to resist dense development, but also the failure of covenants (particularly "nuisance covenants") to address these desires. Brady, *Turning Neighbors into Nuisances*, *supra* note 3. There continues to be an interaction between covenants and zonings. As many have noted, homeowners use covenants to limit local land uses, partially, although not completely, substituting for zoning, but, as Nolan Gray argues, in places without zoning (or limited zoning controls), this takes away some of the political support for strict zoning rules. M. NOLAN GRAY, *ARBITRARY LINES: HOW ZONING BROKE THE AMERICAN CITY AND HOW TO FIX IT* 146–51 (2022).

disputes today. To start, the best economic argument in favor of zoning is that it shifts the right to build from an individual right held by the owner of a particular lot to the collective ownership of the property owners in a town.⁴⁹ William Fischel and Robert Nelson argue that, in the absence of transaction costs, it should not matter whether laws assign this right to individual owners or to residents of a town as a “collectively held entitlement,” as long as low-transaction cost negotiations are possible.⁵⁰ As a result, Fischel argues that assigning to a town the right to deny all building permits, and then asking those who want to build to “buy” the right from the town will lead to an “efficient balance between local environmental amenities and production of other goods and services.”⁵¹ That is, the best economic justification for zoning is explicitly Coasean. Indeed, negotiations between developers and local governments—using things like development impact fees or “affordable units” as the currency through which developers and towns make trades—are one of, if not the, most important practical applications of Coasean bargaining in property development.

The most important critiques of contemporary zoning also rely on traditional arguments in property theory. One of the big questions that runs through property law is whether strong property rights are a necessary element to encourage investment in a market economy or whether property ownership is a form of monopoly that stops the most efficient users of some assets from utilizing them (and how law should make tradeoffs between these benefits and costs).⁵² This is clear in debates about intellectual property, where the creation of property rights in ideas through the granting

49. See WILLIAM A. FISCHEL, *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS* 74–149 (1985); WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 39–71 (2001); ROBERT H. NELSON, *ZONING AND PROPERTY RIGHTS: AN ANALYSIS OF THE AMERICAN SYSTEM OF LAND-USE REGULATION* 22–51 (1977); Robert H. Nelson, *A Private Property Right Theory of Zoning*, 11 *URB. LAW.* 713 (1979).

50. FISCHEL, *THE ECONOMICS OF ZONING LAWS*, *supra* note 49, at 74–149; NELSON, *ZONING AND PROPERTY RIGHTS*, *supra* note 49, at 22–51.

51. FISCHEL, *THE ECONOMICS OF ZONING LAWS*, *supra* note 49, at 100.

52. The idea that property is a monopoly dates to Adam Smith, if not earlier. EDWARD HASTINGS CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* 266 (1933) (using rental income from urban property as an example of monopolistic competition); ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 180 (1776) (“The rent of land, therefore, considered as the price paid for the use of land, is naturally a monopoly price.”); C. Luke Watson & Oren Ziv, *Is the Rent Too High? Land Ownership and Monopoly Power* (CESifo, Working Paper No. 8864, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_

of patents or copyright is justified because it creates incentives to invent and invest, but is criticized for creating monopolies.⁵³ But it also is at the heart of classic cases like *Charles River Bridge v. Warren Bridge*.⁵⁴ Arguments about the monopolistic aspects of property ownership are at the heart of some recent important theoretical writing about property, most notably Glen Weyl and Eric Posner's *Radical Markets*.⁵⁵

From Bob Ellickson and Bernard Siegan in the 1970s through the two of us today, legal scholars have been making similar arguments that zoning excessively limits development.⁵⁶ Ellickson famously described groups of homeowners who use regulations to limit the supply of new housing as a “homeowner’s cartel,” limiting new supply in the name of increasing the value of their homes.⁵⁷ The consequences of considering zoning a “collective property right” of homeowners in town are felt by potential customers for development (and the broader economy). That is, they are very much about the downsides of monopoly and exclusion, of potential new production foregone due to limits imposed by existing residents.⁵⁸ Further, contemporary responses to these critiques turn

id=3774672 [https://perma.cc/XF4C-KZF5] (finding that concentrated land ownership leads to higher rents).

53. See Benjamin N. Roin, *Intellectual Property Versus Prizes: Reframing the Debate*, 81 U. CHI. L. REV. 999, 1001 (2014) (“[T]he benefits from promoting innovation through intellectual property rights are at least partially offset by the deadweight loss from allowing innovators to charge monopoly prices for their inventions.”).

54. 36 U.S. (11 Pet.) 420, 428 (1837) (determining that a grant of a charter to build a bridge between Boston and Cambridge did not foreclose the government from granting another such charter relatively nearby).

55. See, e.g., ERIC A. POSNER & E. GLEN WEYL, *RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY* (2018) (arguing property is best understood as a form of monopoly); E. Glen Weyl & Eric A. Posner, *Property Is Only Another Name for Monopoly*, 9 J. LEGAL ANALYSIS 51 (2017) (same).

56. See, e.g., Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 400 (1977) (“Antigrowth measures have one premier class of beneficiaries: those who already own residential structures in the municipality doing the excluding.”); BERNARD H. SIEGAN, *LAND USE WITHOUT ZONING* 85–140 (1972); David Schleicher, *City Unplanning*, 122 YALE L.J. 1670 (2013) (discussing homeowner control over land use); Roderick M. Hills Jr. & David Schleicher, *Balancing the “Zoning Budget,”* 62 CASE W. RESV. L. REV. 81 (2011); Hills & Schleicher, *supra* note 10; Vicki Been, *City NIMBYs*, 33 FLA. ST. J. LAND USE & ENV’T L. 217 (2018); Vicki Been, Josiah Madar, & Simon McDonnell, *Urban Land-Use Regulation: Are Homeowners Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEGAL STUD. 227, 229 (2014). This type of argument exists, of course, in other disciplines as well.

57. Ellickson, *supra* note 56, at 389.

58. See, e.g., Schleicher, *supra* note 56, at 1671–78; Hills & Schleicher, *supra* note 10, at 93.

on reliance interests and the need to encourage investment by providing insurance against neighborhood change.⁵⁹

Similarly, economists regularly argue that excessive zoning regulations lead to foregone agglomeration economies, or gains that arise when economic actors co-locate in cities.⁶⁰ Land use restrictions that limit housing growth at the regional level can limit the number of people who can access the best job markets, leading to lost wages and output on a scale that is hard to comprehend.⁶¹ Agglomeration economies are the positive externalities of co-location. When people and firms are physically proximate to one another, they benefit through reduced shipping costs; being able to participate in deep markets for labor and products and attendant gains from specialization, matching, and insurance; and knowledge spillovers or learning from one another.⁶² Property law is deeply concerned about negative externalities and how to limit them. But a number of property theorists have argued that traditional property law scholarship spends too little time discussing positive externalities and the extent to which property values are created by proximity and access, rather than exclusion.⁶³ Discussions of land use regulation naturally lend themselves to exploration of both positive and negative externalities. A failure to foreground debates over land use makes less and less sense in a world where the value of property is largely defined by its access to others, not its utility for farming or ranching.⁶⁴

59. See Schleicher, *Exclusionary Zoning's Confused Defenders*, *supra* note 14 (discussing arguments for modern zoning practice offered by Christopher Serkin and Richard Schragger).

60. ENRICO MORETTI, *THE NEW GEOGRAPHY OF JOBS* (2012); Schleicher, *Exclusionary Zoning's Confused Defenders*, *supra* note 14, at 1327.

61. Schleicher, *Exclusionary Zoning's Confused Defenders*, *supra* note 14, at 1327.

62. David Schleicher, *The City as a Law and Economic Subject*, 2010 U. ILL. L. REV. 1507, 1507 (2010) (summarizing the literature on agglomeration economies).

63. Lee Anne Fennell, *Property Beyond Exclusion*, 61 WM. & MARY L. REV. 521 (2019) (arguing that a property law built around exclusion has become more costly in a world where most of the value of property comes from access to others); Lee Anne Fennell, *Fee Simple Obsolete*, 91 N.Y.U. L. REV. 1457 (2016) (discussing how more of the value of real property in today's economy comes from proximity to others than from the intrinsic quality of land); Gideon Parchomovsky & Peter Siegelman, *Cities, Property, and Positive Externalities*, 54 WM. & MARY L. REV. 211, 214–15 (2012) (“[P]roperty and land use laws are largely concerned with the problem of negative externalities All the while, however, scholars have paid scant attention to the mirror-image phenomenon of positive externalities”).

64. See Fennell, *Fee Simple Obsolete*, *supra* note 63, at 1458–61. Perhaps a work-from-home world will make traditional property law rules more relevant, and land use regimes relatively less important, but we doubt it. Schleicher, *Exclusionary Zoning's Confused Defenders*, *supra* note 14, at 1365–72 (arguing that land use restric-

Third, the central concerns of the casebook are often felt through land use regulation.

Merrill and Smith are rightly well-known for developing their theory of property rights, in which the *in rem* nature of property rights is central.⁶⁵ Because property rights are vested in a thing—a *res*—and not merely against another specific person but are good against the world, they should not be fully customizable, Merrill and Smith argue, since making property rights too bespoke would create information costs for third parties who either want to buy or access those things. And giving owners full rights to decide how to use that property—including, importantly, the right to exclude—is a reasonable form of delegation to determine best uses in a world with high information costs for governments or courts regarding optimal uses or how to encourage investment.

Land use regulation, in Merrill and Smithian terminology, exists in the world of “governance,” not “exclusion,” because the government’s interest in delineating uses and reducing harms to third parties exceeds the need for simplicity and delegation to owners.⁶⁶ But the fact that land use is a “governance” regime does not mean that information costs are no longer of interest to legal scholars, judges, and law students.⁶⁷ Governance regimes can lead to potential purchasers of property and property rights facing higher or lower information costs. The statutes and administrative rules that constitute these governance regimes can influence whether these costs are higher or lower in ways that can be analyzed, predicted, and measured by lawyers.

If one wants to buy real property and then use it to erect a building of some sort, the need to decipher the vast web of local zoning and other land use regulations imposes substantial informa-

tions will continue to be important, and in some ways more important, in a work-from-home world).

65. See Merrill & Smith, *What Happened to Property in Law and Economics?*, *supra* note 2, at 359; Smith, *Exclusion Versus Governance*, *supra* note 2, at 453; Merrill & Smith, *Optimal Standardization in the Law of Property*, *supra* note 2, at 3.

66. Smith, *Exclusion Versus Governance*, *supra* note 2, at 453. Nuisance law, Smith argues, has elements of governance and exclusion; it “rests on a foundation of exclusion . . . but . . . also fine-tunes this hard-edged regime where the stakes are high enough and courts have some advantage in providing off-the-rack governance rules.” Smith, *Exclusion and Property Rules in the Law of Nuisance*, *supra* note 2, at 1024.

67. Hills & Schleicher, *supra* note 10, at 134–36 (arguing that information costs inside land use regimes are the most important source of information costs in modern real estate development).

tion costs.⁶⁸ Where cities maintain systems of discretionary review or when development requires a zoning amendment or variance, potential builders need to know not only the rules on the books, but also how local politics operates, to know if they will be allowed to build. For all but insiders (and often for them, too), it becomes genuinely hard to know what is and is not allowed. Where these rules differ substantially across dozens of local governments in a region, the information costs get so high that the market for potential developers who can learn all of these local rules and practices shrinks.⁶⁹

Smith and Merrill treat “governance” regimes outside of courts as kind of black box of unknowable, politically-derived rules, rather than court-enforced “exclusion” or simple “off-the-shelf” governance rules that are the proper domain of property law scholars.⁷⁰ But the differences between governance regimes are where many of the information costs that matter most to builders appear. Land use regimes that allocate authority exclusively to many small local governments give those governments the capacity to write rules with infinite variation, creating high information costs for potential buyers and builders. In contrast, regimes that allocate authority to larger governments and limit governmental discretion produce fewer information costs at the price of less customization to fit local preferences.

We can see this in reform efforts as well. For instance, state laws that pre-empt local regulations on accessory dwelling units (ADUs) have led to much more building in California and other places.⁷¹ This has happened not only because these rules are more liberal than local rules (which they are), but also because statewide

68. *Id.* at 116–22.

69. *Id.*

70. Smith, *Exclusion Versus Governance*, *supra* note 2, at 453; Merrill & Smith, *Optimal Standardization in the Law of Property*, *supra* note 2, at 8 (discussing relative competence of judges and legislatures for making property rules); Hills & Schleicher, *supra* note 10, at 134 (“Merrill and Smith themselves provide little such analysis beyond their hypothesis that customization should be left to legislatures rather than courts, because legislatures will somehow provide more comprehensive, stable, and clear determinations of property rights than the judiciary.”).

71. David Schleicher, *Constitutional Law for NIMBYs: A Review of ‘Principles of Home Rule for the 21st Century’ by the National League of Cities*, 81 OHIO ST. L.J. 883, 907–08 (2020) (discussing new laws governing accessory dwelling units in California and how they eventually led to housing growth); *A Look at U.S. Efforts to Encourage ADU Production*, PD&R EDGE (Feb. 23, 2022), <https://www.huduser.gov/portal/pdredge/pdr-edge-featd-article-022222.html> [https://perma.cc/S6LP-V9LL] (noting that 11% of all new housing permits in California were for accessory dwelling units).

pre-emption has reduced the need for local legal knowledge. Ordinary property owners and new commercial entrants have been able to get into the ADU market because there is less variation in local rules, reducing information costs.⁷²

In sum, for a book (and field) obsessed with information costs, it is extremely odd that there is very little discussion of one of the, if not the, biggest source of such costs in real estate development.

Finally, treating zoning as a recent intervention in the long-running common law debates over nuisance makes it hard to discuss how much zoning has changed over the years. Scholars have noted that pre-1970s and 80s, zoning had little effect on regional housing prices or population flows across the country.⁷³ But, after 1980, land use began to have huge effects on prices, population flows, and economic growth, at least in many regions.⁷⁴ The size of these effects can barely be overstated—they are *huge*.⁷⁵ Devoting only a few pages to land use policy leaves these massive changes out of the picture, despite their clear substantive importance.

This problem emerges in specific examples as well as generally. *Property: Principles and Policies* repeatedly discusses the way property law interferes with the development of solar energy collection on houses in a number of areas—the law of accession,⁷⁶ prior appro-

72. *Insights from the White House ADU Panel*, CASITA COALITION (Feb. 1, 2022), <https://www.casitacoalition.org/news-blog/insights-from-the-white-house-adu-panel-how-can-state-standards-and-coalition-building-help-america-encourage-more-adus> [<https://perma.cc/5FZM-KYV5>] (“Because the rules are the same across the state, companies are able to produce more ADU options and roll them out statewide—innovation is impossible where every city has separate and hard-to-achieve standards and the ability to say no.”).

73. William A. Fischel, *The Rise of the Homevoters: How the Growth Machine Was Subverted by OPEC and Earth Day*, in *EVIDENCE AND INNOVATION IN HOUSING LAW AND POLICY* 13, 13 (Lee Anne Fennell & Benjamin J. Keys eds., 2017) (discussing and seeking to explain a huge shift in strictness of zoning regimes starting in the 1970s and 80s); Peter Ganong & Daniel Shoag, *Why Has Regional Income Convergence in the U.S. Declined?*, 102 *J. URB. ECON.* 76, 78 (2017) (finding that convergence in per capita income between many rich and poor U.S. states slowed in the 1980s and then stopped as land use rules and the resulting lack of housing kept populations, and particularly poorer residents, from moving to high wage states); Edward Glaeser, Joseph Gyourko & Raven Saks, *Why Have Housing Prices Gone Up?*, 95 *AM. ECON. REV.* 329, 329 (2005) (“Changes in housing supply regulations may be the most important transformation that has happened in the American housing market since the development of the automobile . . .”).

74. See Ganong and Shoag, *supra* note 73 (discussing effect of zoning on population flows); see also notes 14 and 15.

75. See Ganong and Shoag, *supra* note 73 (discussing effect of zoning on population flows); see also notes 14 and 15.

76. MSB, *supra* note 1, at 128.

priation,⁷⁷ easements,⁷⁸ nuisance,⁷⁹ and real covenants.⁸⁰ From this, one would not know that residential rooftop solar only accounts for 10-20% of all solar energy production in the United States.⁸¹ Solar energy farms, which are responsible for most solar energy production, are involved in a variety of property law disputes, mostly concerning getting approval to build these farms in the face of local opposition. But their problems are largely of a public law variety—local land use restrictions and state-level environmental review laws—and thus are not addressed substantially in the casebook.⁸²

C. *Forms of Ownership, Trust Law, and Tax Law*

The “forms of ownership” are classic parts of traditional property law classes—fee simple, life estates, springing executory interests, and so on. Further, they are key to Merrill and Smith’s work on property law theory, with the *numerus clausus* principle that courts should not modify the forms of ownership being the key example of their broader claims about how the nature of an *in rem* right and information costs explain the structure of property law.⁸³ Most of Chapter 5 of *Property: Policies and Principles* is devoted to the forms of ownership.⁸⁴ The next Chapter has a section on trusts that discusses their relation to property law and estate planning, noting that they are where the most exotic future interests continue to reside.⁸⁵

Almost all real property is held in fee simple, leading one to wonder why property law courses spend so much time discussing

77. *Id.* at 1019.

78. *Id.* at 1018.

79. *Id.*

80. *Id.* at 1061.

81. *Comparing the Costs of Utility-Scale and Residential-Scale PV*, BRATTLE GROUP (Oct. 2017), https://www.brattle.com/wp-content/uploads/2017/10/7626_comparing_the_costs_of_utility-scale_and_residential-scale_pv_-_factsheet.pdf [<https://perma.cc/3HE4-L5WE>] (20% of solar energy is from rooftop solar); Laura Rodríguez, *Breaking Down Growth and Perspectives of Solar Energy: Utility, Commercial and Residential*, RATEDPOWER (Apr. 14, 2021), <https://ratedpower.com/blog/utility-commercial-residential-solar/> [<https://perma.cc/F6H9-FXPL>] (12% of solar comes from rooftop sources).

82. See Hannah J. Wiseman, *Localizing the Green Energy Revolution*, 70 EMORY L.J. ONLINE 59, 68–83 (2021) (discussing the legal and policy challenges facing industrial scale green energy and arguing for greater emphasis on distributed energy production as a result); Amy Morris, Jessica Owley & Emily Capello, *Green Siting for Green Energy*, 5 GEO. WASH. J. ENERGY & ENV’T L. 17, 20–22 (2014) (discussing challenges when siting utility-grade solar energy projects).

83. See generally Merrill & Smith, *Optimal Standardization in the Law of Property*, *supra* note 2.

84. MSB, *supra* note 1, at 503–97.

85. *Id.* at 760–85.

baroque forms of ownership, except as a history lesson and as a method for introducing the idea of information costs.⁸⁶ These forms of ownership are mostly relevant to bequests—what happens when people give property away or die. But if one is interested in the law of bequests, the forms of ownership and even the “property law” aspects of trust law are mostly sidelined these days. John Langbein has argued that as trust law developed and new statutes governing trusts were passed, “property became contract” in trust law, and thus best understood using a “contractarian” lens.⁸⁷ Trusts and non-trust contractual allocations have become the central way for property to be handed down upon death due to their greater flexibility, changes in the mix of assets owned by those leaving bequests, and changes in legal practice.⁸⁸

Tax law is also a clearly important driver of what people do with property when they die. Efforts to avoid estate taxes explain a great deal about how the rich structure their assets and bequests.⁸⁹ The tax rules governing “stepped up basis” for capital gains upon death or gift also influence what people do with their property and are subject to an important political fight.⁹⁰ Property tax rules, like the inheritability of less-than-market property value assessments, in California, can also influence bequests.⁹¹ Non-tax rules, like the test

86. Fennell, *Fee Simple Obsolete*, *supra* note 63, at 1458.

87. John H. Langbein, *Because Property Became Contract: Understanding the American Nonprobate Revolution* (Mar. 23, 2020) (unpublished manuscript) (on file with author) (describing the decline of probate); John H. Langbein, *Why Did Trust Law Become Statute Law in the United States?*, 58 ALA. L. REV. 1069 (2007) (describing statutory changes to trust law); John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625 (1995) (arguing that the real basis for trust law is “contractarian”).

88. Interestingly, Langbein argues that relative decline in the importance of real property wealth helped cause the decline of probate. Langbein, *Because Property Became Contract*, *supra* note 87, at 9; Langbein, *The Contractarian Basis of the Law of Trusts*, *supra* note 87, at 629.

89. For a particularly egregious example, see Jeff Ernsthansen, James Bandler, Justin Elliott & Patricia Callahan, *More Than Half of America’s 100 Richest People Exploit Special Trusts to Avoid Estate Taxes*, PROPUBLICA (Sept. 28, 2021, 10:45 AM), <https://www.propublica.org/article/more-than-half-of-americas-100-richest-people-exploit-special-trusts-to-avoid-estate-taxes> [<https://perma.cc/2M3E-TEUC>].

90. See Garrett Watson, *History of Attempted Changes to Step-Up in Basis Shows Perilous Road Ahead*, TAX FOUND. (Sept. 28, 2021), <https://taxfoundation.org/biden-estate-tax-unrealized-capital-gains-at-death/> [<https://perma.cc/Q88T-SEXT>] (discussing the long and ongoing history of efforts to reform stepped-up basis).

91. Under Proposition 58, passed in 1986, children were able to inherit acquisition-value based property tax assessments of residences from their parents and up to \$1M of other property. *California Prop. 13 Protections, Prop. 19 Strategies*, CUNNING-

for what constitutes an asset under Medicaid's rules governing eligibility for long-term care, have an effect on methods of bequest and the use of different forms of ownership.⁹²

Forms of ownership also matter to potential purchasers, creditors, and passersby, as complex ownership forms make it hard to figure out from whom a buyer must purchase rights, what is actually for sale, or whom to contact about concerns.⁹³ But secrecy about ownership and ownership of property through corporate forms with hard-to-locate owners—a subject of much modern popular and legal contestation—also imposes substantial information costs on people encountering property.⁹⁴ If we want to talk about how real property is regulated, laws governing the formation of, and property ownership by, limited liability companies are as much part of the regulation of real property as the forms of ownership.

Trust law, in its modern form, is on the edge of what is considered “property law,” while tax law is decidedly outside of it. The law of limited liability companies is even further outside of its scope. But these areas of law are extremely important to the regulation of real property.

HAM LEGAL (Feb. 17, 2021), <https://www.cunninghamlegal.com/california-legal-services/california-prop-13-protection-prop-19-strategy/> [https://perma.cc/ZF9A-QLH9]. But the passage of Proposition 19 in 2021 limited the ability of children to inherit tax basis to primary residences assessed at less than \$1M. *Id.*

92. As the exemption for estate taxes has been increased to “stratospheric levels,” there has been an increase in “taxpayers . . . transferring title of their homes to their children or other loved ones while at the same time retaining life estates,” as this makes it easier to be eligible for long-term care under Medicaid. Jay A. Soled & Letha Sgritta McDowell, *Life Estates Reconsidered*, 33 QUINNIPIAC PROB. L.J. 45, 45–47 (2019).

93. See generally Merrill & Smith, *Optimal Standardization in the Law of Property*, *supra* note 2.

94. Nearly 15% of all rental properties are owned through limited liability corporations. Emily Badger, *Anonymous Owner, L.L.C.: Why It Has Become So Easy to Hide in the Housing Market*, N.Y. TIMES (Apr. 30, 2018), <https://www.nytimes.com/2018/04/30/upshot/anonymous-owner-llc-why-it-has-become-so-easy-to-hide-in-the-housing-market.html> [https://perma.cc/B3SL-VVDY] (“L.L.C.s shield property owners from personal liability while obscuring their identities. In some cases, so much anonymity also enables money laundering, and it can mean that tenants struggle to hold landlords accountable, that cities fail to fix blight and that researchers can’t answer basic questions about the housing market.”). New York State recently passed a law requiring LLCs to reveal their partners whenever they make property transactions. See Michelle Breidenbach, *Even After New Law to Reveal Property Owners, NY Still Hides Their Names*, SYRACUSE (Jan. 6, 2020), <https://www.syracuse.com/news/2020/01/even-after-new-law-to-reveal-property-owners-ny-still-hides-their-names.html> [https://perma.cc/MG3Z-G9T3] (describing the effects of New York law that requires LLCs to identify their partners each time they buy or sell real property).

D. *Common Problems in Real Property and “New Property,” IP, Financial Assets, and Newfangled Things*

One of the challenges of a property law class or casebook is how to integrate types of property other than real and personal property, including government benefits and licenses, famously discussed by Charles Reich;⁹⁵ intellectual property and quasi-intellectual property rights (like “hot news” in *International News Service v. Associated Press*⁹⁶); rights in intangible assets, like spectrum; financial assets, like stocks, bonds, and other financial claims; and newer property-like claims, like ownership of “property” inside digital worlds, cryptocurrencies and non-fungible tokens, and whatever else evolves from societal innovation.

Property: Principles and Policies discusses these property forms, but largely as ways of exploring dimensions of property theory—things like the role Lockean theories of property play in defining the boundaries of property,⁹⁷ or what rights property holders have against the government.⁹⁸ These discussions are extremely useful, but they omit an essential topic, namely any discussion of the government entities that create and regulate these property rights and why.

To understand many of the big legal and policy questions surrounding these other forms of property requires not only addressing theoretical questions about “what is property” and what attributes “property” must have, but also how the entities that create and regulate them operate. It would be strange to think about intellectual property without thinking about the role played by entities like the Patent and Trademark Office or the Federal Circuit. Similarly, when thinking about government-created kinds of property like licenses, it is essential to think about the political and institutional reasons they were created. It is very hard to discuss, say, taxicab medallions without talking about their fiscal effects on local governments; lobbying by medallion holders and the taxi industry; Olsonian reasons why consumers harmed by the introduction of medallions were not as politically powerful as cab owners; and how the rise of powerful firms like Uber and Lyft that could channel consumer interests served to change the politics of taxi medallions.⁹⁹ Other forms of property, like financial instruments, are not

95. Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733, 772 (1964).

96. 248 U.S. 215, 240 (1918).

97. MSB, *supra* note 1, at 99–113.

98. *Id.* at 1128–36.

99. For discussion of the history, politics, policy and property law aspects of taxi medallions, see Katrina M. Wyman, *Taxi Regulation in the Age of Uber*, 20 *N.Y.U.*

pure creations of government in the same way that government licenses are, but they are nevertheless heavily regulated through legislation and regulation subject to the rules of administrative law. (The course is called “securities regulation” for a reason). And, while property theory provides a lens for thinking about how law will address new forms of property like digital property, so too do theories of regulation that focus on why regulators act, the effect of different levels of government doing the regulating (i.e., federalism, localism), or about separation of powers between the executive, legislative, and judicial branches.

None of this is to say that a property course, or casebook, can address all of these areas of law. But it is important to think about how to integrate the traditional topics of a property law class—i.e., the law governing real and personal property—into an economic world in which other types of property are of increasing financial importance.

Doing so suggests a greater focus on commonalities between old and new property. There are surely useful theoretical connections we can draw—Locke, Coase, and indeed Merrill and Smith are clearly important to understanding intellectual property or spectrum allocation.¹⁰⁰ But so too would a focus on commonalities between real and newer forms of property that focus on the institutional design of their creators and regulators. For instance, scholars regularly use similar analytical tools to understand the politics of occupational licensing and land use.¹⁰¹ The same local govern-

J. LEGIS. & PUB. POL'Y 1 (2017); Katrina M. Wyman, *The New Essentialism in Property*, 9 J. LEGAL ANALYSIS 183, 228–36 (2017); Katrina M. Wyman, *Problematic Private Property: The Case of New York Taxicab Medallions*, 30 YALE J. ON REG. 125 (2013).

100. Mala Chatterjee, *Lockean Copyright Versus Lockean Property*, 12 J. LEGAL ANALYSIS 136 (2020) (arguing John Locke's famous theory of property rights makes more sense when applied to copyright than it does to rights in real property); Ronald H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959) (Coase's famous argument for the creation of property rights in spectrum, a pre-cursor to the Coase Theorem); Henry E. Smith, *Intellectual Property and the New Private Law*, 30 HARV. J.L. & TECH. 1 (2017) (discussing articles applying private law theory to intellectual property).

101. Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, *supra* note 14, at 78 (discussing how the fact that land use and occupational licensing are the domain of sub-national and local governments leads to common effect on inter-state mobility and economic costs); BRINK LINDSEY & STEVEN M. TELES, *THE CAPTURED ECONOMY: HOW THE POWERFUL ENRICH THEMSELVES, SLOW DOWN GROWTH, AND INCREASE INEQUALITY* (2017) (using zoning and occupational licensing as two examples of how concentrated interests can use regulation to create upwards redistribution toward the rich and powerful at the cost of economic growth and economic equality).

ments that regulate land use often create taxi medallions and their administration and politics are both similar and interrelated.¹⁰² Regulations that govern real property are subject to some similar questions about legislative delegation to agencies as regulations that govern newer forms of property.

E. Other Areas

We don't want to gild the lily too dramatically. Focusing on property theory and the common law, as *Property: Principles and Policies* does, makes particular sense for some areas of law, like first possession or servitudes. In other areas, like the law governing leases or conflicts between anti-discrimination laws and the right to exclude, the book rightly puts a substantial amount of focus on aspects of legislation and regulation, like rent control or the Fair Housing Act.¹⁰³

But the book also excludes some of the most important property regulations; foremost among these is the property tax. Property taxes are “capitalized” into the value of homes, with higher taxes leading to lower prices,¹⁰⁴ and they limit how people use property by increasing the cost of making improvements or, sometimes, of changing uses.¹⁰⁵ That is, while people have exclusive rights to their

102. Wyman, *Problematic Private Property*, *supra* note 99, at 127, 138 (discussing how local governments, and particularly New York City, created taxi medallions); David Schleicher, *How Land Use Law Impedes Transportation Innovation*, in *EVIDENCE AND INNOVATION IN HOUSING LAW AND POLICY*, *supra* note 73, at 38, 48–50 (discussing how land use regimes can reduce the value of innovations in transportation, including taxi-like services like Uber and Lyft).

103. Even here, though, the focus is on regulatory interventions in common law regimes, such as mandatory contract terms like rent control and the implied warranty of habitability, or limits on private remedies like evictions. Largely ignored are spending or taxing policies that relate to real property or rental housing. There is almost nothing about the federal rental subsidies or public or social housing. Notably, this is a problem shared by law and economics-influenced scholars and progressive property law scholars alike. Zachary Bray argues that progressive property scholars should focus more on programs like Section 8, which provides housing vouchers, and less on rent control, as the program's effects more closely follow their ideas. Zachary Bray, *The New Progressive Property and the Low-Income Housing Conflict*, 2012 B.Y.U. L. REV. 1109, 1110 (2012) (“I argue that Section 8 is a better example than rent control of the new progressive-property approach, even though rent control has previously been identified as a practical example of the new progressive property and Section 8 has not.”).

104. FISCHER, *THE HOMEVOTER HYPOTHESIS*, *supra* note 49, at 11 (discussing capitalization).

105. Jerusalem Demsas, *Tax the Land: One Radical Idea to Solve America's Housing Crisis*, *VOX* (Mar. 4, 2022), <https://www.vox.com/policy-and-politics/22951092/land-tax-housing-crisis> [<https://perma.cc/FM3Y-JR5Y>] (discussing how

property, what they use it for is heavily influenced by property taxes. There are very complicated legal questions about methods of property tax valuation, from “dark store theory”¹⁰⁶ to the Ship of Theseus Problem for golf courses under California’s Proposition 13.¹⁰⁷ Fights over valuation are an extremely common form of administrative disputes and litigation.¹⁰⁸ Further, there are huge inequalities in how properties are assessed both on value (higher value properties are generally under-assessed and lower-value properties over-assessed) and by race.¹⁰⁹ And property taxes have been impor-

property taxes, by taxing both land value and the value of structures, reduce incentives to improve property); Wayne F. Foster, Annotation, *Validity, Construction, and Effect of State Statutes Affording Preferential Property Tax Treatment to Land Used for Agricultural Purposes*, 98 A.L.R.3d 916, § 2(a) (1980) (noting that many states have passed statutes requiring land used for agriculture to be assessed according to its value as agricultural land, and not at its true market value, as a way to disincentivize the conversion of farms to other, more highly valued uses).

106. Stephen W. Grant, Note, *Who’s Afraid of the Dark?: Shedding Light on the Practicality and Future of the Dark Store Theory in Big-Box Property Taxation*, 38 VA. TAX REV. 445, 461–62 (2019) (describing challenges by big box stores using income methods of valuation when there are numerous empty strip malls nearby).

107. Under California’s Prop. 13, assessed property values can only increase by a small amount unless ownership changes (i.e., when property is bought or sold). John A. Miller, *Rationalizing Injustice: The Supreme Court and the Property Tax*, 22 HOFSTRA L. REV. 79, 89–98 (1993) (describing Prop. 13). Golf clubs are owned by their members. Some have argued that there was a change in ownership when the membership of the club fully turned over, thus requiring a reassessment, but this was rejected by the State Board of Equalization. See Alexandra Zavis, *Some Golf Clubs May Be Reappraised for the First Time Since Prop. 13 Passed*, L.A. TIMES (Jan. 16, 2010), <https://www.latimes.com/archives/la-xpm-2010-jan-16-la-me-country-clubs16-2010jan16-story.html> [<https://perma.cc/2WR3-CF79>] (describing skepticism about tax treatment of golf clubs); Memorandum from Richard S. Moon, Tax Counsel IV, to Dean Kinnee, Chief, County-Assessed Properties Division (June 2, 2010), https://www.boe.ca.gov/proptaxes/pdf/220_0439.pdf [<https://perma.cc/XE9L-HC5K>] (affirming that it was proper not to reassess when membership of a club changed). Malcolm Gladwell noted this case was quite similar to the classic Ship of Theseus thought experiment about whether a ship that is constantly repaired to the point there are no original parts is still the same ship. Malcolm Gladwell, *A Good Walk Spoiled*, REVISIONIST HIST., at 30:35 (June 15, 2017), <https://podcasts.apple.com/us/podcast/a-good-walk-spoiled/id1119389968?i=1000386572090> [<https://perma.cc/6AAZ-CUBJ>].

108. See, e.g., William M. Doerner & Keith R. Ihlanfeldt, *An Empirical Analysis of the Property Tax Appeals Process*, 11 J. PROP. TAX ASSESSMENT & ADMIN. 5, 9 (2014) (stating that single-family homeowners alone filed almost 40,000 property tax appeals in Miami-Dade County from 2005–2009).

109. Christopher R. Berry, *Reassessing the Property Tax* (Mar. 1, 2021) (unpublished manuscript) (on file with author) (finding inequality in assessment based on the value of property); Carlos Avenancio-León & Troup Howard, *The Assessment Gap: Racial Inequalities in Property Taxation*, 137 Q.J. ECON. 1383 (2022) (finding racial differences in property assessment).

tant in certain areas of property theory, from Henry George through Posner and Weyl.¹¹⁰

Property taxes are usually left out of property law classes. They are not “property law” as understood by this book, other casebooks, and the field as a whole. But property taxes are one of the most important ways in which law and regulation influences the uses and acquisition of real property. As such, property taxes are the kind of thing students taking a course called “property” might want to know something about.

CONCLUSION

The Fourth Edition of *Property: Principles and Policies* is a major achievement. Although this review is mostly posed as criticism, we hope it is received as constructive—this is a great book and necessary for any scholar who thinks about property law.

But its existence should cause all of us who teach and write about property law to step back and think about what should be included in the field of “property law,” as law and policy changes over time. The traditional coverage of a property law course focuses substantially on common law doctrines, classic puzzles like coming to the nuisance or spite fences, and a variety of property law theory, from Harold Demsetz to Margaret Radin to Ronald Coase.

Property: Principles and Policies is one of the most sophisticated versions of the casebooks that focuses on the traditional scope of property law.

This is all well and good, but time has gone by, as time will do.¹¹¹ The significance of many of the types of legal disputes that are covered in a traditional property law course has waned over time, while other types of disputes—the processes and decisions of regulatory bodies and legislatures—have become relatively more important.

Property law classes and scholarship should evolve as well. Law schools are increasingly requiring legislation and regulation courses in the first-year curriculum; a modified version of property

110. POSNER & WEYL, *RADICAL MARKETS*, *supra* note 55, at 55 (calling for self-valued property taxes that also give others the right to “take” land at that price); HENRY GEORGE, *PROGRESS AND POVERTY: AN INQUIRY INTO THE CAUSE OF INDUSTRIAL DEPRESSIONS AND OF INCREASE OF WANT WITH INCREASE OF WEALTH: THE REMEDY*, Book IX (1879) (calling for a single tax on land value).

111. The line comes from the brilliant MARY ANN HOBERMAN, *THE SEVEN SILLY EATERS* (2000).

law could help address that need, while also addressing the excessive federal focus of many legislation courses.¹¹²

Property law theory is remarkably rich and of continuing importance. But it remains less useful than it might be if it is used to discuss hoary doctrines, rather than being applied to contemporary disputes. Further, the scope of its influence on public policy is limited by the focus of property law scholars on types of disputes that were more important in the past than they are in the present.

112. The rise of Legislation and Regulation courses in the 1L curriculum, sometimes at the expense of property law, reflects the relatively increasing importance of public law's regulatory entitlements and institutions over common law private law. Like Property, however, "Leg-Reg" often suffers from the failure to recognize how entitlements to land are essentially rooted in statutes and administrative agencies rather than common law doctrine. The reason for this failure is, however, different. "Leg-Reg" casebooks and classes often ignore state law, focusing on federal doctrine in statutory interpretation and administrative law. Such casebooks and classes also ignore the local political processes and institutions that play a large role in defining entitlements in land and other property. From zoning variances to taxi medallions to street vendors' licenses, much of property law is non-federal law created by institutions like lay commissions and unicameral legislatures—institutions about which many "Leg-Reg" casebooks are utterly silent. Instead, 1L students read leading cases from federal doctrine without addressing how different law and regulation can look at other levels of government.

Adding regulatory aspects to a property law course would help the 1L curriculum by adding state and local public law as well as federal public law. The curriculum could then address the cross-cutting political, economic, and philosophical problems that define and vex both federal and sub-national law—issues like the role of political parties, professional versus lay regulators, multi-tier federalist and localist systems, retroactivity and legal transitions, and so forth.