To: **Spring 2018 Property students**
From: **Professor Ford**
Re: **Final exam**

Congratulations on finishing the term and completing your first year of law school! It was a genuine pleasure to get to know all of you over the last semester and I hope to see many of you in other classes in the next few years.

This memo discusses the scoring and substance of the final exam. If you would like to discuss your exam, I am very happy to do so; please email me to set up a time to talk. Please note that I cannot and will not change grades at this point, except in the event of a mechanical error such as incorrect addition.

The exams were scored out of 80 possible points, with an average score of 45, a standard deviation of 8, and a high score of 61. Overall this exam proved to be more difficult than I expected, especially compared to the midterm. Still, I was really happy with the responses; you are all well on your way to being skilled and capable lawyers.

A few notes on the mechanics of grading: In grading a large number of exam, there will inevitably be some small discrepancies between different exams. To minimize this, I graded each question separately (for instance, I graded question 2 on every exam before I moved to question 3) and tried to create as detailed a rubric as possible, with rules for partial credit that I applied as consistently as I could. I also started grading each question at a different point in the stack to counteract any "drift" over the course of grading a question. Still, there will inevitably be small inconsistencies from exam to exam; the good news is that in nearly all cases, a one- or two-point change on the exam score wouldn't have affected your course grade either way.

What follows are some notes on each question. These were not the only ways to receive credit for each of the questions; rather, this is a guide to the key issues I was looking for and some of the trends I saw reading your responses.

Question 1

This question considered several ways an island community might use property law to deal with a flooding problem. The first three options contemplate three distinct ways of building and paying for a seawall around the island; the fourth and fifth options present somewhat wackier solutions.

Option (a): Resident-built seawall. This option would use zoning law to compel residents to build a patchwork seawall.

This option presents several legal and practical issues, starting with whether this a legitimate use of zoning in the first place. Zoning is generally okay as long as it's rationally related to the health, safety, and welfare of the community, which preventing flooding certainly is, so it seems constitutional under *Euclid*.

There is, however, a complication: Zoning typically limits the ways someone can use their property, rather than compelling them to make some specific use. Is this sort of "affirmative" zoning okay? This issue could be framed in various ways. Maybe requiring owners to make some specific use is a prohibited taking. Maybe it's a retroactive zoning change requiring some sort of amortization period. Zoning laws that seem to impose an affirmative obligation are relatively uncommon but do exist; consider Times Square, where buildings are required to have brightly lit signs. Such an affirmative obligation can be framed as a negative one: No owner may use their property for residential purposes *unless* they build a seawall. That starts to sound a lot like a nonconforming use requiring an amortization analysis. So the distinction between requiring and prohibiting specific uses may just be one of semantics, and then the question is whether the town would have to provide an amortization period. The easy answer is yes, under the majority approach described in the *PA Northwestern* concurrence. The slightly more nuanced answer is that the concerns driving the amortization requirement, like giving owners enough time to earn back their investment in property, may not apply here, so perhaps an amortization period isn't required.

This zoning approach has some practical advantages and disadvantages. On the positive side, it would use private actors and private control to solve the flooding problem, which might be more efficient than a centralized program and might reduce claims of government overreach. But the negatives are substantial. By requiring individual property owners to build their own segments of a single seawall, the plan creates the potential for inconsistencies, gaps, and quality issues in the seawall. It would also probably be more expensive, in the long run, than a single government- or association-funded seawall, since different architects and engineers and contractors will be involved; this sort of economy of scale is exactly why neighborhoods have homeowner associations in the first place. And there is a high likelihood of lawsuits, since the coastal owners may not want to spend money to build the seawall and since they would be effectively subsidizing the rest of the island.

Option (b): Town-built seawall. Under this option, the town would build the seawall instead of relying on the individual property owners to do it. This option would require the town to take title to a strip of land around the island,

which would represent a taking. Under *Kelo,* such a taking is valid so long as it is for a public purpose and so long as just compensation is paid. This is undoubtedly a legitimate public purpose—preventing the island from being inundated with flooding—so the taking would be legal so long as the town paid the owners. (Though it's possible the amount it would need to pay wouldn't be very large; if building the seawall increased property values, by making flooding less likely, then this might be the rare taking that pays for itself.)

The most significant issues with this plan are practical. It would be expensive and, like the zoning option, there is a high potential for litigation due to the number of potential plaintiffs. Unlike the zoning option, the potential upset parties include not just the coastal property owners but the inland ones as well, since they would be paying taxes that would go to the costs of taking the land and building the seawall. The plan has some advantages, though. It might be fairer, since the cost of the seawall would be distributed among all the people who would benefit from it. And it would provide a cheaper, more effective seawall, due to uniformity and economies of seawall scale.

Option (c): Association-built seawall. Under this option, the Community Association would conduct an assessment to raise funds to build a seawall. This sort of association, organized pursuant to an equitable servitude, is a method many communities and neighborhoods use to fund maintenance and impose rules on property owners. Though the assessment is large, such special assessments to raise money for capital improvements are fairly common. (Usually, an association will offer options for paying over time or borrowing the money, for owners who don't have the cash or don't want to pay all at once.)

Owners associations have broad powers to impose rules and raise money for improvements, so long as the action is authorized by the association's governing documents, is rationally related to the owners' use of their property, and isn't arbitrary, unduly burdensome, or against some fundamental public policy. This assessment, to prevent flooding, would be valid unless the amount is so large that it would be unduly burdensome. But flooding is a substantial problem that costs affected owners a lot of money, and $15,000 per property is probably a realistic (or low) estimate for the cost of building a seawall, so the assessment is likely valid. It's also worth asking if the association has the power to do work on owners' individual property, but the answer is likely yes so long as it's authorized by the association's documents and rules.

This option has similar practical advantages and disadvantages to the second option. It would be expensive; the prospects for litigation would be substantial, given the number of potential plaintiffs and the amount of money at stake; and there might be disputes about the plan's fairness, since inland

property owners would be contributing. But going through the private Association instead of the town itself might provide private-sector flexibility, and the plan would provide a single unified seawall.

Option (d): Startup investment. Under this option, the Association would invest in a startup developing a system that would gradually inflate balloons in the ground, lifting the island. Unlike the assessment in option (c), an assessment for this purpose would be vulnerable in court, since investing in a company is unlikely to be found to be rationally related to property use. (Note a distinction between investing in the company and buying a system from the company; the latter might be valid, if there was some reason to think the system would work.)

This option also has substantial practical problems. There's no reason to think the system will work; it's an unproven idea at this point. Even if it did lift the island, it might lead to unstable foundations or broken pipes or any number of other problems for property owners. And there is an obvious conflict of interest; we haven't studied the legal rules that would come into play, but the existence of the conflict might help persuade a court that the assessment is arbitrary or unduly burdensome.

Option (e): Sue the oil and car industries. This option would sue two giant global industries for causing climate change. It's not likely to be a very good solution to the island's flooding problem.

The first question is whether the nuisance claim would have any merit. This would require that the defendant intentionally and unreasonably interfered with the use of property. The Intentionality requirement doesn't mean the industries had to intend to cause harm; intending to do something while knowing it will cause harm is enough, so if the industries knew about climate change (which they would dispute), then this requirement would be satisfied. The bigger question is whether selling oil and cars is unreasonable; for that requirement, we discussed two approaches, one looking at whether the harm exceeds some threshold and another looking at whether the action causes more harm than good. The first approach is probably met here, since flooding causes a lot of damage, but the second is probably not, since these industries create goods and services that help a lot of people.

This approach also has a lot of practical problems. Suing two giant global industries would be expensive and would take a long time and would require taking on defendants with massive incentives to win. Proving that these industries' actions led to this flooding would be a big hurdle. It's not clear what remedy the court would order even if the residents did win. And it's not clear

how this would actually prevent flooding. In short, this option is pretty pie-in-the-sky.

Parts (a), (b), and (c) were worth 7 points each, while part (d) was worth 5 points and part (e) was worth 6.

Question 2

This was a relatively simple future-interest problem modeled on the casebook's Example 31 and footnote 22. It nevertheless proved to be fairly difficult for a lot of students, as future-interest problems basically always do.

(a) After this gift, A has a life estate. The state of title in O's grandchildren depends on whether they have been born—any grandchild who has already been born has a vested remainder subject to open, since nothing can prevent that grandchild from receiving a share of the property, while any unborn grandchild has a contingent remainder, contingent on being born. (Several exams said the grandchildren had a "contingent remainder subject to open," which is technically not a thing—the "contingent" part of a contingent remainder folds in all forms of uncertainty, including the fact that the class is still open. I didn't take off points for this, though.) And if O has not had any grandchildren yet, then O has a reversion; once one grandchild has been born, that interest is extinguished.

Note that A's death is not a contingency—nothing requires the grandchild to exist, or to still be alive, when A dies, since vested remainders are already vested and are, in most states, freely inheritable and devisable. If a grandchild of O dies before A dies, then that grandchild's heirs or devisees would receive her share. If one is born after A dies, they would take their share at that point. (The rule of convenience for class gifts might play a role in that scenario, but we didn't focus on that complication, and I didn't include it in the grading.)

(b) The gift is invalid under the common-law rule against perpetuities. For all contingencies to be resolved, the class of O's grandchildren must close, which means that all of O's children have to be dead. So potential lives in being include O's grandchildren and O's children. But neither is a validating life in being, since O is still alive and could have more children. The invalidating scenario, then, is that O conveys the property; O then has a kid (let's call her B); O and all of O's previously living children and grandchildren then die, as does A; and then more than 21 years later, B has a kid. That kid would be a grandchild of O who would be entitled to take under the conveyance, but only after the perpetuities period has expired.

(c) The gift is now valid. As before, the contingencies are resolved when the class of O's grandchildren closes, which is when all of O's children die. But because this gift is contained in O's will, the class of O's children is closed when the gift goes into effect. So the longest-living child of O is a validating life: within that child's life we will know all grandchildren of O who will ever exist.

Part (a) was worth 6 points, while parts (b) and (c) were each worth 3 points.

Question 3

This quote (which I made up for the exam) concerns an issue that came up several times in the course: when should property law respect the wishes of the dead at the expense of those who are alive today? Or, equivalently, when should it respect the wishes of people who are alive now, at the expense of those who will come later? We saw this issue, for instance, in the cases on first in time (why should being first lead to property rights?); in the estates in land, especially future interests; and in the materials on covenants and servitudes. The exam responses cited many other good examples.

The statement argues that in making this choice, the law should prioritize the living over the dead. For instance, the statement argues in favor of disregarding an instruction in a will to destroy a house, because the interests of the living are harmed by the destruction while the interests of the dead don't matter anymore.

It then makes a logical leap from caring about the *interests* of the living and the dead to caring about who *created* the rule. This is a problem for the statement. As several of you pointed out, the *numerus clausus* principle and rule against perpetuities are poor examples for the speaker's point: these are old doctrines, but they exist to solve some of the same problems the speaker is concerned with. The *numerus clausus* principle limits the number of estates that can be created because creating a new kind of estate has long-term costs even if it has short-term benefits. A new estate might better match the owner's wishes today, but it complicates things down the line for later generations after today's owner is dead. And the rule against perpetuities is intended precisely to limit one generation's influence: today's owner can create future interests that limit the behavior of future generations, but only for a limited time; after that the living have control instead of the now-dead previous owners.

In evaluating the rule, then, we can make several kinds of normative arguments. One kind might focus on whether the speaker is correct that favoring the living over the dead better serves human values. The law respects the wishes of the dead in part out of respect and in part out of a desire to create

useful incentives; if the law systematically disregarded wills, people might not want to work as hard to create wealth to pass on, or might waste effort trying to circumvent the law. On the other hand, the dead have no real stake in things once they die, so maybe there are no constraints preventing people, once they die, from settling scores or just creating chaos for the sake of chaos. If so, then doctrines that disregard the wishes of the dead might be a useful corrective.

A second kind of argument might focus on the specific human values the speaker is trying to further. The statement is vague on what those values are. We might imagine that the law should try to create more total wealth or happiness or some other measure of utility, or that the law should promote individual liberty and autonomy, or should promote equality or social cohesiveness or some other value. The statement is actually compatible with several of these goals; it just suggests respecting the wishes of the living to better further human values. But maybe respecting the wishes of the living better promotes certain values, while respecting the wishes of the dead promotes different human values.

A third class of argument might focus on the logical leap discussed above; even if the speaker is right about the living versus the dead, that doesn't suggest that the policy prescription makes any sense.

As with any policy question, many answers were possible and many different answers received credit. The best answers tended to recognize the logical fallacy in the quotation and tended to recognize that there are substantive policy reasons to respect the wishes of the dead, like maintaining incentives to create wealth and eliminating an incentive to circumvent the law. These arguments might not be dispositive, but they indicate that the issue is more complicated than the statement suggests.

Part (a) was worth 4 points, while part (b) was worth 8 points.

Question 4

This was a tricky question about co-ownership of property. This was one of those questions where the best way to tackle it is to go step by step through the sequence of events and figure out the state of the world after each step; exams that did so did much better than those that just tried to apply a rule all at once. The question also required a nuanced understanding of the differences between different kinds of co-ownership. This tripped up a lot of responses, since the fact pattern was similar to the facts in the joint-tenancy case *Harms v. Sprague,* while the legal analysis depended more on *Sawada v. Endo,* which, as in this question, dealt with a tenancy by the entirety.

(a) The tenancy by the entirety is a form of property ownership limited to married couples. In the majority of the states that recognize it, since the spouses own the tenancy as a single unit and have no separate interests in the property, no transaction relating to the property can happen without the consent of both spouses (or upon divorce or death). So the mortgage lien is invalid and the bank has no claim on the property. The loan creates a personal obligation in Dangerous, but not one backed by a lien in Blueacre.

The defamation judgment in favor of Cox likewise creates a personal obligation in Garritano, but one that has no connection to the property until Cox seeks to attach the property.

When Garritano and Dangerous convey the property to Dangerous, the tenancy by the entirety is dissolved and Dangerous owns the property in fee simple absolute. (This conveyance is potentially fraudulent, since it seems likely that the goal was to avoid paying the defamation judgment, but since it doesn't wind up harming either the bank or Cox—the bank because it didn't have a lien in the first place, and Cox because she can win anyway, as discussed below—it isn't likely to be found fraudulent, under the *Sawada* reasoning.) Then when Dangerous dies, the fee simple absolute is conveyed to Garritano by will.

When Cox and the bank sue, Garritano has Blueacre in fee simple absolute. Since there's no valid lien on the property and Garritano owes the bank nothing in her personal capacity, the bank loses. Since Garritano owes Cox $350,000, Cox can collect. This isn't because Cox has any sort of lien on Blueacre or because of anything involving a right of survivorship. Instead, it's because Garritano owes Cox the money, Garritano owns an asset—Blueacre in fee simple absolute—that is worth money, and Cox can choose to go after any of Garritano's assets in order to collect the outstanding judgment.

(As an aside, a lot of the exams made assumptions about the parties' genders. These are all named after real people, and all three are women.)

(b) If New Vermont is aligned with the listed states (the *Sawada* Group II states), then it changes the result for the bank. Because Dangerous is liable to the bank for her separate debts, the mortgage lien is valid but subject to Garritano's right of survivorship. If Dangerous had died while the property was still held in a tenancy by the entirety, then the lien would have been extinguished and the bank would have been out of luck. But when Garritano and Dangerous conveyed the property to Dangerous in fee simple absolute, the lien likely stayed in place, and when Dangerous died and left the property to Garritano, the same thing is true. So the attempt to avoid the defamation judgment wound up hurting Dangerous and Garritano with the bank debt.

Nothing changes for the defamation judgment, so both the bank and Cox have valid claims. But the property is worth $500,000, and the two debts add up to $600,000. So who doesn't get fully paid? Since the bank's debt is backed by a lien, while Cox's is unsecured, the bank would have priority and would get its full $250,000. Cox would be stuck with $250,000 of the $350,000 she is owed.

Part (a) was worth 8 points, while part (b) was worth 4 points.

Question 5

This policy question examined a court's decision in one context (*Pierson v. Post,* an ownership dispute between two hunters over a fox) and imagined how it might play out in a different context (*Spur Industries v. Del E. Webb Development Co.,* a dispute between a cattle feedlot and its residential neighbors). Answering it, then, required two steps: (1) laying out the goals, assumptions, and methods used by the *Pierson* court and (2) figuring out how those goals, assumptions, and methods would play out in *Spur.*

Way back in our first class, we talked about the different principles and methods of legal reasoning relied upon in *Pierson.* The decision was strikingly formalistic, looking to precedent and the teachings of various learned treatise authors first and foremost. But it also seemed to embrace some normative principles and policy goals, like a preference for easy-to-enforce bright-line rules and a desire to maintain a peaceful and orderly society. Both the historical authorities and these principles and goals led the court to adopt a rule requiring "certain control" over the pursued animal before property rights vest.

The dispute in *Spur* requires resolving two issues: (1) whether the feedlot represents an unlawful nuisance, and (2) if so, what remedy should be ordered. There are several ways one could apply the *Pierson* court's principles to these issues. One response would be to argue that precedent requires evaluating a purported nuisance solely according to its effects and enjoining it if it is found to be a nuisance. This approach, which was adopted by the court in *Morgan v. High Penn Oil Co.,* would embrace the formalism and respect for precedent of the *Pierson* decision. Another response would be to conclude that the feedlot had certain control because it was first in time, and so enforce a rule prohibiting a plaintiff who comes to the nuisance from winning a nuisance suit. This approach would create a bright-line rule and help maintain a peaceful and orderly society. Several approaches along these lines were possible.

For this question, 6 points were based on the response's assessment of the principles underlying *Pierson,* while 6 points were based on the application of those principles to *Spur.*