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1. Introduction to Property
   1. How – and Why – Does Property Originate?
      1. Sources of Property Law
         1. Common Law
            1. Most prominent
            2. Derived from British common law
         2. Statutory Additions
            1. Increase in rights for property owners

i.e. community common interest

makes property ownership more flexible

* + - * 1. Restrictions on property owners

Zoning

Building codes

Civil rights legislation

* + - 1. Constitutional Law
         1. 3rd, 4th, 5th Amendments
         2. 5th Amendment – Takings Clause
    1. Changing property rules Is very difficult because the system is very antiquated
    2. Oliver Wendell Holmes
       1. Kill the dragon or tame him to be a useful animal
       2. How do we assess old rules in the framework of modern economies and values?
       3. What values should the U.S. property system be advancing?
    3. Goffman Article
       1. Property for a sense of self/identity
       2. Territory formation
       3. Autonomy
          1. Sense of independence
          2. In order to establish some difference between us and other people
       4. Sociobiological explanation
          1. Animals claiming territory – we’re animals
          2. We learn to identify objects by who they belong to (i.e. “Dad’s ball”)
       5. Asylums taking everything from people and replacing it with non-descript stuff
          1. Eliminates connection
          2. Measure of control
          3. Strip people of private desires
       6. Property is important because the owner has control over it
          1. Whenever you own something, someone else doesn’t
       7. Blackstone: “Property is that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe”
       8. There are some outside constraints to discretion over thing that we own
          1. i.e. can’t use your gun to murder someone
    4. Tragedy of the Commons
       1. What’s the Tragedy?
          1. Free and open access to property – commons
          2. Using up resources before they can be sustained

Everyone loses

Can no longer support all people

* + - * 1. Individually rational, but collectively irrational and inefficient
        2. Each individual looks at what’s best for them to do – short term perspective

I bear a little of the harm of my behavior but all of my gain

* + - 1. Example: 10 Ranchers raising cattle
         1. At the beginning, each rancher produces 100 lbs of meat
         2. Price of the meat goes up, so they want to raise more cattle
         3. Eventually there are so many cattle, and the price goes down to a point where the net gain is declining
         4. Won’t they stop?

No because others will carry on increasing number of cattle

Larger take of a diminishing pie

* + - 1. But people can communicate, make agreements, and strategize
         1. Enforcement mechanisms
         2. Naming and shaming
         3. Inexpensive monitoring
      2. Open and limited access
         1. Limited – a group of people – not just anyone

ME lobster farmers were self-sustaining commons for a long time

Whaling was harder to monitor – open sea – decimated whale population

* + - 1. **What values are we trying to protect?**
         1. **Overall social well-being**
         2. **Larger pot**
      2. Tragedy of overusing a resource and denying society of the value of sustaining/growing the resource
      3. If everyone owns resources, they’ll have the incentive to make sure they don’t run out
         1. Make us bear the loss
      4. Property solutions to the tragedy
         1. Divide up property and give some to each
         2. Uber owner (i.e. government) which they can license out to individual
         3. Internalizing externalities
      5. Property Institutions can serve:
         1. Social values/utility
         2. Autonomy
    1. Soviet Farming – Bill Keller and Pipes NYT article
       1. Problem of laziness/lack of initiative
       2. Fear gets people to work
       3. Property as an incentivizer
       4. Problem: individuals not getting the benefits
          1. Working 🡪 value 🡪 someone else
       5. Collectivizing of farm sector diminishing effect on incentives
          1. But some (a lot) of people didn’t want to own their own land
          2. Don’t want to bear the losses
       6. Right of residuarity – when everyone else lives, the person left with the residual becomes the owner
    2. Positive and Negative Externalities
       1. Positive
          1. Under production problem 🡪 patents

Make hard work viable for inventors, etc.

Can property rules help internalize benefits?

* + - * 1. Utilitarian theory of property is dominant

Metaphors

**Tragedy of the Commons**

**Little Red Hen**

* + 1. Role of Custom
       1. Different from tradition
       2. Custom is informal resolutions of disputes
          1. E.g. ME lobster people developed a custom about how lobster buoys should be laid
       3. The biggest problem is when people are unfamiliar with the custom
       4. Whether people who create custom are taking into account all the considerations, consequences, and externalities
       5. Many judges will look to custom as party of their analysis
       6. Many customs operate as informal for a long time, some get uptake into common law, some are unclear if they’ll be enforced
    2. Felix Cohen
       1. Core of property: sign that reads “This is my property. Keep out unless I say you can. Signed Citizen, endorsed by government”
    3. Summary
       1. Property because…
          1. Autonomy/independence
          2. Security
          3. Externalities

Tragedy of the Commons and Little Red Hen

Property can ameliorate problems of actor creating more harm than benefit (e.g. pollution)

Person doing work has to get benefit from the positive externalities

Utilitarian view of property rules

Advance the opportunity for society to have the largest pie

* + - 1. Always a “compared to what” question in the background
         1. Tragedy of the Commons 🡪 breaking up commons into private property as compared to … self-regulation? (think: lobster harvesters)
         2. Are there better, alternative solutions (from the private property system)?
         3. People don’t always act in in accordance with what’s economically rational for them as an individual (i.e. altruism)
      2. It’s costly to create the property system
         1. It’s expensive to figure it out, police it, monitor it, enforce it
         2. Time and resources
    1. ***Johnson v. M’Intosh* (1823) [stealing from Natives case] (SCOTUS)**
       1. Origin of how real estate title is handled in the U.S.
       2. Both parties had title to the same tract of land
       3. M’Intosh get title from U.S.
          1. 🡪 U.S. got it from Britain via treaty (got treaty with proprietary interests because of war)

VA originally got the land and ceded it to the U.S.

* + - * 1. 🡪 Britain got land through discovery
        2. Before that 🡪 Native Americans had it
        3. Britain purchases the land from Natives (albeit one-sided)
      1. Johnson had claim by two grants from native chiefs
      2. **Discovery doctrine**
         1. Idea that being there first establishes ownership rights
         2. Nothing to do with relationship between English and natives
         3. Has everything to do with European nations

Designed to minimize the friction between European nations

* + - * 1. Idea that England “discovered” the territory
      1. England enacted a law that in the (then) colonies, no private citizen can purchase land from natives, only the U.S. as an entity can
      2. Positivism: it is because the sovereign says it is
      3. Conquest (in a just war): not an act of brute force
      4. U.S. did not conquer to acquire this property, they purchased it (but were the only possible buyers)
      5. Two chains of title, both have a common grantor (natives)
         1. In 1773 and 1775, natives grant to Johnson (for about $30K)
         2. In 1803(ish?) same natives sold it to the U.S.
      6. Trace back where property came from to a common grantor
         1. Normal principle: first come, first serve
         2. Whoever purchases first gets the land
         3. **Nemo dat** quod no habet: “one cannot give what they do not have”

You can only give it away once

There are some exceptions (TBC…)

Person with the earlier deed takes the property

* + - 1. But here, an act of the U.S. had stripped right of native tribes to transfer the property to anyone else but the U.S.
      2. The properties didn’t actually overlap
         1. Marshall wants to clarify what the nature is of title in this entire area
         2. Uncertainty about land ownership impairs development
         3. In actuality, it’s a short/easy case, but Marshall gives it space because of how important the issue was
         4. Marshall personally objected to the treatment of natives
  1. What is Property?
     1. Property: system whereby we allocate scarce resources
        1. Singer: the law of property is the law of relations with respect to a thing
        2. Smith: the law of property is the law of things
     2. Basic Framework: Sovereign makes the rules
     3. Property as a bundle of rights
        1. In rem rights = rights good against the world
        2. Roscoe Pound: enumeration of rights of ownership
           1. Right to exclude
           2. Right to use
           3. Right to generate income
           4. Right to the capital
           5. Right to security
           6. Right of transmissibility
           7. Right to destroy
        3. Tony Honoré’s indicia of ownership
           1. Right to manage
           2. Absence of term
           3. Duty to prevent harm
           4. Liability to execution
           5. Incident of residuarity
           6. Right of transmissibility
           7. + Pound’s list (minus the right to destroy)
        4. There could be more; no canonical list exists
        5. How many do you have to strip away before you take away ownership?
           1. No agreement on what’s absolutely essential
           2. But, some rights are foundational for some other rights

**Right to exclude\***

Right to security somewhat based on this

**Right to use**

**Right to transfer**

* + - 1. Subdivisions exist
         1. For example, right to transmissibility:

Right to sell

Right to give away

Right to devise

Right to create future interest

* + 1. Munzer’s Hofeldian Take on Honoré
       1. Claim rights
          1. To possess, use, manage and receive, income
       2. Powers
          1. To transfer, waive, exclude and abandon
       3. Liberties or privileges
          1. To consume or destroy
       4. Immunity
          1. From expropriation by the state
       5. Duty
          1. Not to use harmfully
       6. Liability
          1. For execution to satisfy a court judgment
    2. Hohfeld
       1. Wants to isolate concepts to see what’s distinct
       2. Thought the word “right” was overused. He broke it down into four
          1. Rights (claim right)
          2. Privileges
          3. Powers
          4. Immunity
       3. Relationships between correlatives and opposites
          1. Opposites: any person has one, cannot have the other
          2. Correlatives: if I have a right, someone else has got to have no right

|  |  |  |
| --- | --- | --- |
| Rights | Opposites | Correlatives |
| Right (claim right) | No-right | Duty |
| Privileges | Duty | No-right |
| Powers | Disability (no-power) | Liability |
| Immunities | Liability | Disability (no-power) |

* + 1. Ritchmond Cole v. Miller (1917) (SCOTUS)
       1. Decides in favor of employer
       2. Union labor or non-union labor
       3. Rights are enforced by state power, a privilege or liberty isn’t enforced
          1. i.e. privilege of starting a business
    2. Right to Exclude
       1. ***Jacques v. Steenberg Homes, Inc.* (1997) (WI SC) [mobile home delivery case]**
          1. Facts

Defendant sold a motor home to plaintiff’s neighbor

Defendant wanted to deliver it by crossing over plaintiff’s land, but the plaintiff’s refused

Defendant went over the land anyway

There was another route option – the private road – but there was a shit ton of snow and getting it around a turn would require rollers

Riskier and more expensive

* + - * 1. Opinion

Supports the right to exclude

* + - * 1. Damages

Court wanted to discourage violation of law, more than nominal damages owed 🡪 punitive damages appropriate

Nominal damages – no actual economic/physical harm

Court makes exception to the general rule

State that there’s not punitive recovery when only nominal damages are found

* + - * 1. What values are being advanced?

Channel people interests in using other land 🡪 negotiating with them (NOT SELF HELP!)

Social significance – if you don’t think law will be enforced or that your property will be protected, you might resort to self-help

* + - * 1. Does it matter what reason the plaintiffs have for wanting people off their land?

They lost money in a previous situation (adverse possession)

Not a great reason – takes 7-14 years to gain property via adverse possession

Reason has no bearing on the outcome – legally irrelevant

If we allow courts to weigh reasons – balancing exercise – then it significantly reduces security that comes with the right to exclude

* + - * 1. Every legal right is hollow without means of enforcement
        2. Deterrence
      1. ***State v. Shack* (1971) (NJ SC) [migrant worker rights case]**
         1. Facts

Plaintiff is a farmer who employed and housed migrant workers

Defendants wanted to give services to migrant workers

* + - * 1. Property rights are relational

Migrant workers have the right of access

Farmer has the right to exclude

* + - * 1. Opinion

Court seems to compare/balance the reasons

Judges the legitimacy of the arguments

Rules there is “no legitimate need” for the plaintiff to deny access to aid

* + - 1. Shack and Jacques – differences?
         1. Steenberg: right to make money?
         2. There’s a federal statute for assistance to migrant workers

They’re disadvantaged

Statute confers the right?

But EOA doesn’t establish a right

* + - * 1. Shack focuses on public policy

This is slippery though

* + - 1. Trespass
         1. The unprivileged and intentional intrusion on property possessed by another
         2. There are exceptions to the right to exclude
         3. Trespass privileges

Consent

Necessity

Pretty high burden

To avoid imminent risk to life/property

That privilege at common law

requires imminence of bodily harm or property loss.

Public policy

Broader than necessity, but hard to put a value on it

* + - * 1. **Ordinarily when you assert the right to exclude, you can do it for any or no reason and the court will support you**

But if the trespassing party puts up a sufficiently strong reason for access, court will evaluate your reasoning

Burden shifting (trespasser 🡪 owner)

* + 1. Eyerman dissent
       1. Property rights are there to vindicate values
       2. At some point, it becomes legally relevant to evaluate arguments to exclude
       3. To keep right secure, demand high threshold on trespasser to show that the right should be infringed
    2. Public Trust and Public Domain
       1. ***Matthew v. Bay Head Improvement Association* (1984) (NJ SC) [beach & common property case]**
          1. Public trust

Ancient idea (based on fact) that navigable waters are common property

Common ownership doesn’t end at the water’s edge 🡪 it extends to mean high watermark

Customary condition – incorporated into law

“ownership, dominion, and sovereignty over land, flowed by tidal waters, which extend to the mean high water mark, is vested in the state in trust for the people”

Fishing and navigation

* + - * 1. Facts:

Borough of Neptune City, NJ extends the public trust to recreation

This case deals with convenient access to a beach owned by the Association (not a municipality, but acts like it)

There’s no point in allowing them to use it if they a can’t access it

Right of access

* + - * 1. Issue: does the public trust right bring with it the ability to get there?
        2. Opinion

Court rejects the idea of making private parties provide access to the beach as long as there’s an alternative open to the public

Leaves out some issues and considerations

What if the entire area was private?

What if people don’t renew leases with the Association?

Kind of a kick the ball to a later date/work it out later decision

* + - * 1. Avon case

Public trust applied to municipality owners dry sand beach, immediately landward to the high water mark

* + - * 1. Same court as State v. Shack

Right to exclude loses in both cases

This case is different because it’s generally applicable

Not based really on individual interests

* + - * 1. Land-locked parcels & easements

Easement by necessity

Not applicable in the public trust context

* + 1. Right to Transfer
       1. ***Andrus v. Allard* (1979) (SCOTUS) [eagle feather case]**
          1. Facts

Appellees own/sell Native American artifacts that have feathers from protected birds

These items used the feathers before the birds were protected

Statute

Interest to protect eagles and migratory birds

The purpose isn’t to prohibit the sale of artifacts

Here, the eagles are already dead

But the statute clearly includes all feathers – of those eagles dead and alive; includes feathers previously acquired

Need universal prohibition of sale to prevent people from continuing to harm eagles and trying to sell new feathers as old artifacts

Hard to tell the old and the new feathers apart

* + - * 1. Court rules that the statute is constitutional because restrictions don’t amount to a taking
        2. Brennan: law strips right to sell, but that’s only one stick/twig in the bundle of rights that govern private property

Amount of loss is speculative

Other ways to use the property

* + - * 1. Government takes sticks out of the bundle via regulations

Personal property has always been subject to more regulation than real property/land

* + - * 1. Doesn’t take away the transfer right entirely

Can donate or loan to museum, etc.

But it does take away one the owner is most interested in

* + 1. Restraint on Alienation
       1. ***Davis v. Davis* (2016) (NC App.) [children try to screw over mom]**
          1. Lower court interprets deed in favor of plaintiff
          2. Life estate: someone lives there until they die, and then it’s fully transferred to remaindermen

Poor man’s will

Convey in a deed the remainder of the estate to kids, life estate until they die

* + - * 1. Here, defendant and her husband had deeded their beach property to 3 of their children, retaining a life estate
        2. They had a history of renting out to people from time-to time
        3. But language in the deed prevents them from renting it out (malpractice)
        4. Absolute restraints on alienation are void in NC

Mrs. Davis is okay despite the language in her deed

* + - * 1. Property you can’t transfer in the market is not available for its best/most efficient use

Restraint on alienation disincentivizes improvements

Prevents creditors from access

* + - * 1. Take-away: provision in deed is void, Mrs. Davis has flexibility she always had

The transfer right is an important stick in the bundle of rights

* + - 1. Does regulation severely reduce economic value?
         1. If so, strong chance it’s been “taken”
    1. Right to Destroy
       1. ***Eyerman v. Mercantile Trust Co.* (MO App.) (1975) [wants house destroyed after death]**
          1. Woman leaves instruction to destroy her house after her death
          2. Historical significance?

Dissent thinks it’s trumped up

Timing is suspect

The house/neighborhood isn’t designated as a landmark until after this lady dies

Testimony about dude helping these people out

House as a positive externality for the rest of the community

* + - * 1. Dissent also focuses on the fact that there’s already one vacant lot that’s well-maintained

No reason to believe that the home association wouldn’t maintain this new vacant lot

* + - * 1. Surrounding property values go down?

Her estate would be more economically well off if the house is not razed (destroyed)

Simple vacant lot is not a nuisance, maybe if it got unwieldy (trash, trespassers, etc.)

Could razing be a nuisance?

Probably not, will be over in a specified amount of time

* + - * 1. Positive externalities with the house would be lost with razing
        2. Think: comparison to refusal to be an organ donor?

How do you evaluate competing interests?

* + - * 1. My thoughts:

She’s dead; she can’t negotiate

We don’t know her motives

No reasonable person would take the loss on the property

* + - * 1. Majority paints decedent as capricious

But we don’t really know her motives

Also, none of her beneficiaries objected to tearing it down

* + - * 1. Case cites OH case in which decedent gave a reason

Didn’t want family home to be used as a boarding

Case ended differently; court let them destroy her house

* + - * 1. We don’t force people to productivity with their property
        2. Balancing merits of reasons with social value of your property

How would you do this?

But also, why should a dead person dictate what happens with property that still exists?

* + - * 1. **\*\*This is an outlier case. Normally, you don’t need a reason. The right to use = the right to destroy\*\***
        2. Distinguished from State v. Shack

Which is also an unusual case

The strength of the public policy arguments

Both make arguments on where courts should look for policy arguments against certain property rights

* + 1. Summary
       1. Law of property is concerned with the function of allocating material resources
       2. Much of property law is still common law
       3. Individuals and society as a whole are better off
          1. Individual autonomy and personality
          2. Locke’s labor dessert theory of property

When a person puts effort into creating something, they have a moral claim to that object

* + - * 1. Individual can keep a better management of their costs and benefits (commons)

Argument for value of private property

* 1. What Should be Property?
     1. ***INS v. AP* (1918) [news as property case]**
        1. INS is doing a little of this, but it’s inflated in the facts
        2. INS had been locked out of first access to news in Europe (run by Hearst who had been critical of European countries & leaders)
           1. So, they go to public bulletin board
        3. AP is interested in protecting their news, what writers have done
        4. Can’t have property rights over facts, but perhaps how they’ve been written up
        5. Court treats news as quasi-property
           1. Quasi-property because regular property rights are good against the world (in rem)
           2. What makes it property is that the AP is exerting the right to exclude
        6. Policy argument
           1. If other newspapers can bum off efforts of AP, then there’s no incentive for them to spend the resources to keep doing what they’re doing
           2. Little Red Hen problem
        7. INS & AP are direct market competitors
           1. Misappropriation and unfair competition
           2. Different than Rush Limbaugh on his talk show talking about their story – not competition
           3. Different from Little Red Hen in that multiple people can have the news. Little Red Hen is the only one who has her bread

There has to be a winner and loser under LRH, but that’s not necessarily true all the time

* + - 1. Opinion
         1. Goes back to investment. Court realizes how much investment AP is putting in
         2. Thinks INS taking news will prevent AP from recouping its investment
         3. AP has to have business model that makes it possible for them to recoup
         4. Competitor coming in and trying to grab AP’s production and compete with AP in the market 🡪 destroy the news gathering business
      2. Learned Hand distinguishes it Cheney Brothers v. Doris Silk Corp
         1. Neither case the property copyrighted or trademarked
      3. This decision did not generate an enormous amount of litigation because Congress updated copy right law that preempts these types of common law claims
      4. Misappropriation or Permissible Creativity?
         1. One cannot reap where one has not sown
         2. If man has any natural rights not the least must be a right to imitate his fellows, and thus to reap where he has not sown. Education, after all, proceeds from a kind of mimicry and “progress” if it’s not entirely an illusion depends on generous indulgence of copying
         3. Creation of information is paradoxical: free once it’s produced and protected so that it will be produced
      5. No evidence that AP will go out of business if INS continues doing what it’s doing
         1. Pitney is making the argument on an assumption of how the world works
    1. ***~~White v. Samsung Electronics America, Inc.~~* ~~(1992) [Vanna White commercial case]~~**
       1. ~~Samsung is running advertisements to emphasize the durability of their products~~
          1. ~~One features a robot dressed up as Vanna White with a Wheel of Fortune – reminiscent set~~
       2. ~~CA has statutory publicity right (§3344)~~
       3. ~~Similar to INS?~~
          1. ~~Both are an intangible asset (likeness in this case)~~
          2. ~~Someone trying to reap where they have not sown~~
          3. ~~After the same thing – right to exclude~~
          4. ~~By evoking White’s image, they are gaining a benefit~~
       4. ~~Different from INS?~~ 
          1. ~~Parties are not competitors~~

~~Samsung isn’t also trying to say that White endorses their products~~

* + - * 1. ~~Effort to exploit or appropriate Vanna White’s fame/likeness, which she has invested in~~

~~Maybe not the same incentive argument – would celebrities stop trying to be celebrities because of imitation?~~

* + - * 1. ~~Samsung had licensed the likeness of other celebrities in their ads~~
        2. ~~White invested in earlier labor that made her likeness valuable~~
      1. ~~Samsung asserts they aren’t appropriating her likeness~~
      2. ~~Court looks at §3344, which uses “name voice, signature, photograph, or likeness~~
         1. ~~White has no claim – not her face or her likeness~~
      3. ~~CA Common law is not necessarily an element test~~
         1. ~~White wins on this~~
         2. ~~Difference is that the common law claim is within the authority of the judges, court distinguishes it~~
         3. ~~The list is not exhaustive, just exemplary~~
         4. ~~The robot reminds the public/evokes the identity of Vanna White without using her face, figure, etc.~~
         5. ~~Common law is more malleable by court than the statute~~
      4. ~~Dissent~~
         1. ~~Court is expanding the right of publicity~~
         2. ~~It’s not her likeness that’s being protected, it’s the idea of her and what she does~~
         3. ~~The ruling is too broad and brings in 1~~~~st~~ ~~Amendment Issues~~
         4. ~~Think about the consequences of taking things out of the public domain~~

~~This isn’t just Vanna White, it’s all celebrities~~

~~Restricting ability of creator to use the public domain~~

* + - * 1. ~~Private property is not costless~~
        2. ~~Matter of institutional competence – legislature can handle this~~
      1. ~~Discussion~~
         1. ~~Vanna White will earn money for doing nothing~~

~~Just another way for celebrities to make money~~

~~Sets loose a set of unintended consequences~~

* + - * 1. ~~Problem: defining the scope of IP rights~~

~~For tangible property, the thing defines the boundaries~~

* + - * 1. ~~Parody is protected by fair use defense~~
        2. ~~CA publicity right is only for commercial/for-profit; non-profits, PSAs, etc. don’t count~~
    1. ***Moore v. Regents of University of California* (1990) [taking cells from patient without his knowledge]**
       1. Defendant takes cells from plaintiff during treatment and uses them in lucrative research without his knowledge or consent
       2. Court rules that plaintiff can’t prevail on conversion, but that there are other causes of action (torts)
          1. Breach of fiduciary duty
          2. Lack of informed consent
       3. Why is he pursuing property right/conversion? What do you need to prove for a tort claim?
          1. Has to show causal connection between defendants’ action and injury

What’s the injury? Loss of property?

Nothing bad happened to him/no injury

* + - * 1. Has to show a reasonable person would not consent
      1. He wants the money! But if he isn’t, why might you bring an action?
         1. Want control/injunction
         2. He might have had other plans for the cells
         3. Might just want control over his body/autonomy
      2. What’s Moore’s best argument for why we should recognize his cell line as property?
         1. **IP arguments: to encourage inventors/creators to invent/create**

Doesn’t work here

Underproduction of good things that create a great benefit for society

* + - * 1. Tragedy of the commons

Doesn’t work here here

* + - * 1. **Locke’s labor-dessert theory**

**Moore hasn’t don’t anything to make the cells valuable**

**But underlying this theory is the idea that we own ourselves**

* + - 1. A lot of people have a gut intuition that this case was not decided correctly
      2. Dissent (Mock)
         1. Court could have deemed this property without altering regulations
         2. He at least had the right to do with his own tissue whatever the defendants did with it
         3. Looks at it as exploitation of someone’s assets

Easiest way to protect against this is make it a property right

* + - 1. Why does court deny a property right here?
         1. Don’t want to disincentivize medical research
         2. So much research is going on using people’s cells
      2. Residuarity (“the buck stops here”)
         1. You can’t get rid of property easily
         2. Property brings with it responsibilities as well as rights
         3. Plaintiff would get some element of control over his cells (obligation of people who had taken them to give him money)
         4. Conversion (get the value of the item back)
         5. Replevin (get the actual item back)
      3. Would he get value of his cells (at the time of taking) or cell lines (much more money)
         1. Researchers put a lot of resources and labor into the cells
         2. Their work gives it the value
      4. **~~Law of accession~~**
         1. ~~Gives ultimate ownership to the person who’s given it the most value~~
         2. ~~As long as they do it under good faith~~
    1. Should Personal Data Be Property?
       1. Why would someone want to make the claim?
          1. Privacy: give the individual control

Right to use, exclude, transfer

* + - * 1. How do you do allocation?
        2. Don’t have to assign property rights/don’t need to incentivize people to create data
        3. Firms want more data

There’s no data pollution yet, maybe never

* + - 1. It’s more of a joint project
         1. You have to do something to create the data
         2. But maker of the device has to have made the device (typically, way more data)
      2. Claim that personal data feels like it should be property
         1. Intuition that it’s a representation of self
      3. Samuelson’s concern
         1. Markets

For it to work efficiently, the sellers need to be educated about it

People might sell it too easy/don’t understand the consequences

People are acquiring data for unknown/TBD reasons so they definitely can’t tell us what they’re going to do with it

\*information asymmetry\*

But this is already happening… without paying us. It’s better to get something rather than nothing

Privacy folks won’t like this

Structure of dealing with this would be necessarily complicated

* + - * 1. Alienability
        2. Doesn’t grab onto many of the normative arguments for property

Maybe Locke’s labor-dessert

* + - * 1. What are the costs of propertizing something?
  1. Introduction to Intellectual Property
     1. We protect this because we think it’s important to allow people to capture the value of their creation
        1. Some industries (e.g. high fashion) that don’t really need IP protections because the industry moves faster than copycats can
     2. ~~Except for trademarks, IP law has a temporal component~~
        1. ~~Corporations have fixed time periods (no death component)~~
     3. ~~Cases raise questions about what the boundary is~~
     4. ~~Patents~~
        1. ~~Basics:~~ 
           1. ~~Subject matter~~

~~Inventions – new and useful processes, machines, manufactured articles, compositions of matter~~

~~NOT abstract ideas or products of law/nature~~

* + - * 1. ~~Requirements for eligibility: useful, novel, and nonobvious to a person having ordinary skill in the art~~
        2. ~~Rights: exclude others from making, using, selling, or importing invention~~
        3. ~~Duration: 20 years~~
        4. ~~How to Acquire Rights: USPTO patent application~~
        5. ~~Limitations and Exceptions (examples)~~

~~Abstract knowledge in patent application freely disclosed~~

~~Subsequent inventors can “build on” patented invention…~~

* + - 1. ***~~Diamond v. Chakrabarty~~* ~~(1980) [human-made live organism]~~**
         1. ~~Is a human-made live organism patentable?~~

~~Court rules yes~~

~~35 USC § 101 uses broad language~~

~~Court looks to legislative intent~~

* + - * 1. ~~Brennan says it’s broad, but there’s an exception to it~~

~~No indication that Congress could have predicted that humans could manufacturer living organisms~~

~~But has no legislative evidence from the record that Congress felt that this was an exception~~

* + - * 1. ~~Recent statutes about patentability of plants~~

~~Congress wouldn’t have enacted them if they already had the power to patent living things~~

~~But there are reasons why maybe plants wouldn’t have been patentable & would need this legislation~~

* + - * 1. ~~Brennan also makes constitutional competence argument~~

~~Have the legislature take care of it~~

* + 1. ~~Copyright~~
       1. ***~~Feist Publications, Inc. v. Rural Telephone Service Co.~~* ~~(1991) [white pages case]~~**
          1. ~~Facts~~

~~Rural is a local telephone company collects directory information for a phonebook~~

~~Feist, is a regional phonebook that harvests data from phone companies for a larger directory~~

~~Feist asked for Rural’s permission, Rural says no, but Feist does it anyway and uses about 13K identical entries, Rural sues~~

~~This includes some fake names and numbers Rural included~~

* + - * 1. ~~Opinion~~

~~You can’t copyright facts, Rural’s arrangement of facts was not sufficient for copyright~~

~~Alphabetical organization is standard (almost necessary)~~

~~Creativity isn’t a very high standard~~

~~Can still take raw facts from creative organizations~~

~~The fake information is original, but probably not enough to make it copyrightable~~

~~Compilation of facts are not copyrightable even though compilation is time/resource consuming~~

~~Feist rejects idea that exertion of time and energy (“sweat of the brow”) alone makes something copyrightable~~

~~Not worried about disincentivizing people from compiling these directories~~

~~Not to buy into Locke’s labor theory~~

~~It’s to promote constitutional goal of promoting the arts and sciences~~

* + 1. ~~Trademark~~
       1. ~~Basics~~
          1. ~~Not trying to incentivize more trademarks~~
          2. ~~It runs forever~~
          3. ~~Relates to a segment of the market – not whole market~~

~~Delta faucets and Delta airlines~~

* + - * 1. ~~For identification purpose only~~

1. Acquiring Property
   1. Through Capture
      1. ***Pierson v. Post* (1805) [fox hunting case]**
         1. Facts
            1. Plaintiff is Post (rich hunter)
            2. Defendant is Pierson (farmer)
            3. Plaintiff is hunting a fox, defendant captures/kills fox before plaintiff can get it
            4. Defendant clearly has possession, but did plaintiff have possession first?

First possession/first in time

* + - 1. Question
         1. Whether pursuit of a wild animal creates property rights over the animal
         2. Whether either party has occupancy (possession)
         3. What do we have to figure out to determine possession?
      2. Majority and dissent disagree over what makes someone a first possessor
      3. Majority (Tompkins)
         1. If you mortally wound it
         2. Looks to history and authorities

Do we have a reason for differing from the authorities?

* + - * 1. Functional argument

Easier under this rule to determine – a bright line

Will lead to less litigation

How would you determine “reasonable prospect”?

How do you distinguish between a mere pursuit and a reasonable prospect?

A notice function

Encouraging/focused on keeping the peace and notice

* + - 1. Dissent (Livingston)
         1. Reasonable prospect of actually capturing the fox
         2. Why is discouraging fox hunting a bad thing?

Livingston hates foxes, they are a nuisance to farming

Wants to encourage hunting

* + - * 1. Wants jury of huntsmen (custom)
        2. Instrumental/functional justification

Best way to get rid of foxes

* + - * 1. Encouraging productivity
        2. Once a hunter has a reasonable prospect of success, he’s established possession

Temporal monopoly

He gets to finish his hunt

* + - * 1. Is he necessarily right that his rule would lead to more successful hunts of foxes?
        2. Appeal to custom

Serves Tompkins’ goal of peaceful resolution

Indication that sportsmen would give fox to Post

There would be no fixed rule

Not sure if it takes into account the farmer’s (or anyone else’s) value

Need to figure out a custom that takes into account everyone’s value

Want to conform to expectations

* + - 1. Rule of capture leads to aggressive acquisition
         1. Tompkins: if you don’t succeed, someone else will take it from you
         2. Incentive to be successful
         3. Leads to better technology
      2. This case is cited for Tompkins’ rule (majority persists)
      3. Important aspect is the ability of the fox to try and escape capture
      4. A lot of property rules are about giving effect to people’s well-settled expectations
      5. Don’t want rule to reward thieves, but yes to good faith capturers
    1. ~~Rules of Accession and Increase~~
       1. ~~Accession: someone puts labor into someone else’s property, they own the property if they greatly increase the value (good faith required)~~
          1. ~~Rewards legitimate investment~~
          2. ~~Must be in good faith~~
          3. ~~Have to transform it to a new value it wouldn’t have had without your labor, creativity, etc.~~
          4. ~~Compensate original owner for value of the object before it was transformed~~
       2. ~~Increase: when an animal is born, the owner of the mother owns the offspring~~
          1. ~~Fact of nature that females take care of their young~~

~~Notice~~

* + - * 1. ~~Certainty~~

~~It’s easier to prove maternity than paternity~~

~~Easy to administer~~

* + - * 1. ~~Human investment: mother’s owner takes care of the pregnant animal~~
    1. Constructive Possession
       1. A landowner is considered as being in possession of a resource that is on or in her land even if she doesn’t not have physical possession of it
       2. Don’t want to incentivize trespassing – definitely don’t want to reward it
          1. Security in one own’s land
       3. Ratione soli – for the reason of the land (just another name
    2. ***Keeble v. Hickeringill* (1707) [decoy ducks]**
       1. Plaintiff is the owner of a decoy pond (Samuel Keeble)
       2. Defendant shoots gun to scare ducks away (Edmond Hickeringill)
       3. Court finds for π
       4. What makes this case different?
          1. Maliciousness of defendant
          2. But Pierson might have been malicious too
       5. Here, there’s a net social loss, which isn’t true in Pierson
    3. ***Popov v. Hayashi* (2002) [baseball/homerun case]**
       1. Dispute over Barry Bonds recording breaking homerun ball
       2. Court is torn on what possession is in this case
          1. By definition, only one person can be the prior possessor

There is one winner and one loser in the vast, VAST majority of cases

* + - * 1. They order the sale of the ball and split the profits between the parties

Very unusual to split the proceeds

Some argue that equal division should be used more often as opposed to all or nothing

* + - * 1. Parties have equal claims
        2. Litigation diminished the value of the ball
        3. Popov’s lawyers took almost everything
      1. What would Pierson v. Post/Tompkins say about this
         1. Would rule for Hayashi
         2. Popov didn’t “mortally wound” the ball
      2. Court adopts Gray’s Rule (Gray = professor)
         1. Possession = in the glove, securely enough to sustain incidental contact
         2. Anyone who picks up the ball possesses it
      3. No one can demonstrate whether Popov had completed the first step of Gray’s Rule
      4. What would Livingston (dissent in Pierson) say?
         1. Major difference here – no need to incentivize catching of baseballs (unlike desire to incentivize fox hunting)
         2. Reasonable prospect of catching it

They each have as good of a chance as anyone

* + - * 1. Not so easy to apply Livingston’s rule to other facts
        2. Would defer to industry custom

We could apply baseball custom here

What is the custom of the bleachers?

First person who touches the ball should get it?

Schroeder says Hayashi would get it

* + - 1. Maliciousness of interference?
         1. None here (unlike Hickeringill)
         2. Hayashi is innocent
      2. Why isn’t it the MLB’s ball?
         1. Abandoned once it leaves the field
      3. Does Barry Bonds have claim to it via accession?
         1. He mixes his labor with the ball to give it ALL of it’s value
         2. Doesn’t work – he didn’t think in good faith that he had rights/license to the property
         3. Does this actually count as transformation (that’s usually a physical change to the article)
         4. **The doctrine is about more than just rewarding labor – it’s about ingenuity and creativity**
  1. By Finding It
     1. ***Armory v. DeLamerie* (1722) [chimney sweep case]**
        1. Facts
           1. Plaintiff is a chimneysweep/child
           2. Defendant is a goldsmith/shop owner
           3. Plaintiff finds a jewel while on the job, brings it to defendant’s shop and defendant’s master withholds the stones of the jewel
           4. Defendant doesn’t think he has possession, but assumes that plaintiff doesn’t own it
        2. Ruling: finder has a property right good against everyone but the owner
           1. Court says it doesn’t matter that plaintiff isn’t the original/true owner
        3. Why do we protect prior possession?
           1. Way of protecting ownership

Hard to prove how you acquired something

Easier to prove possession

* + - * 1. The legal relationship between the parties (once jewel is handed to master) is called a bailment
        2. Useful relationship to support/protect

Taking clothes to the dry cleaner, leaving your car with valet, etc.

* + - 1. Possession rules
         1. Make people secure
         2. Minimizes civil strife
         3. Assets put to productive use
    1. Lost vs. mislaid property (p. 130)
       1. Mislaid if the owner intentionally placed it in some location and then forgot to retrieve it
       2. Lost if the owner inadvertently loses possession of it
       3. Abandoned if the owner intentionally relinquishes all rights to it with no intention to confer rights on any particular person
    2. ***Hannah v. Peel* (1945) [broach case]**
       1. Facts
          1. Plaintiff finds broach in house owned by defendant
          2. Plaintiff is a soldier who’s at defendant’s house because it was requisitioned
          3. Peel isn’t asserting on basis of being true owner, not in the position of a bailee
          4. Plaintiff relies on Armory
       2. Question: As between owner of the house and finder – who has a superior claim?
       3. What should we be trying to do? What values, goals, etc.?
          1. Increasing efficiency/use of the item

Who’s going to use it most productively

Landowner had possession of it for a long time and isn’t using it

* + - * 1. Landowner hasn’t put in any labor into finding it

But also this is just luck for the plaintiff

* + - * 1. Security of one’s possession in their own home

Heavens and earth about and below property

Incentive to hide the find?

* + - * 1. Facilitating recovery of the item by the true owner?

If finder won’t turn it in because they know it’s going to the landowner

But landowner is better situated to get the goods back to the true owner

* + - 1. Summary
         1. Rules consistent with general expectations
         2. Rules that don’t create incentives to lie/conceal but do promote honesty
         3. Value of constructing a rule that facilitates true owner getting the property back
      2. What rule could accomplish these goals?
         1. Bridges v. Hawkesworth
         2. Turn it over to the police?
         3. Advertising
         4. Value minimum

Popov? Split the proceeds

* + - * 1. Differentiating between types of chattel
        2. Are shop owners different than homeowners?

A public place

* + - 1. What if we are pretty certain the owner is long gone?
         1. Courts are fixated on answering who prior possession is
         2. Drives common law decision
         3. Getting an answer with one winner (all or nothing)
      2. Court
         1. The brooch had been lost for a long time; plaintiff took advice of his commanding officer and handed it to the police. His conduct was commendable and meritorious. The defendant was never physically in possession of these premises at any time.
         2. Follows Bridges rule

A man possesses everything which is attached to or under his land. A man does not necessarily possess a thing which is lying unattached on the surface of his land even though the thing is not possessed by someone else.

* + - * 1. Rules for π
  1. Through Adverse Possession
     1. Basics
        1. Possession sometimes substitutes for ownership
           1. Helps solve disputes over title
           2. Easy to administer
           3. Contributes to productivity of the economy
        2. In some cases, someone can take away possession of others and become the rightful possessor
        3. Quiet title: declaratory judgment to determine owner
        4. Who is using the property most efficiently?
        5. Most common types of adverse possession claims
           1. Defective paper
           2. Boundary disputes
           3. Squatting
        6. All adverse possessors need some claim of right
        7. Color of title: you think you have a deed/conveyance that support the claim
        8. **The elements of adverse possession (pretty standard)**
           1. Actual

Without actual possession, no cause of action

* + - * 1. Exclusive

NOT sharing with the owner

* + - * 1. Open & notorious

To provide notice to the owner

Behave like the landowner would

* + - * 1. Continuous & uninterrupted

For years

* + - * 1. Hostile and adverse under claim of right

Possession was non-permissive

State of mind – different jurisdictions use different standards

Good faith “I thought I owned it”

Includes mistake

Objective

Court prefers this

Because with others, it’s easy to lie

State of mind is relevant

Subjective intent

Aggressive/trespasser/squatter

Mistake negates intent

“I knew I didn’t own it but I didn’t care”

* + - 1. A clear and convincing burden to show that the elements have been established for adverse possession
    1. ***Fulkerson v. Van Buren* (1998) (AR App.) [making improvements to church]**
       1. Adverse possession requires a state of mind for adverse possession
          1. But also, evidence in opinion of good faith standard
       2. Facts: Defendants occupied a church on plaintiff’s land for almost 13 years and had made many improvements to it. Plaintiff sent defendant a letter demanding that they vacate the land.
       3. Ruling: The church did not possess the land with the requisite intent for seven years and did not adversely possess the land.
       4. Defendants have been subservient to a title they recognized
          1. Non-permissiveness hasn’t been established
       5. Schroeder: have Van Buren been better represented, he probably would have won
       6. Courts aren’t’ thinking systematically about what’s required
       7. Dissent:
          1. Favors objective standard
          2. Emphasizes what they did
          3. They behaved like owners
    2. ***Hollander v. World Mission Church of DC* (1998) [strip of land]**
       1. Facts: Defendant and predecessors had used the disputed land mistakenly believing their property ran to a line of trees at the edge of woods on the church’s property. They had done all the upkeep for more than 15 years.
       2. Typical boundary dispute
       3. Holding: The defendant’s possession was accompanied by the requisite adverse or hostile intent
       4. Holding purports good faith standard
          1. Despite language that aggressive trespasser intent is required
       5. Not going to ask what her state of mind would have been had she known the actual boundary
       6. Minority (and Hollander): Maine doctrine: to prove adversity, the adverse possessor must have “an intention to claim title to all land within a certain boundary, whether it shall be found to be correct or not
          1. Pg. 144
          2. Mistake negates adverse intent (if good faith is not used)
          3. Majority rule – follow objective standard

A thinks they own X & accepts like

* + 1. ***Howard v. Kunto* (1970) [deed and plot mismatch]**
       1. Everyone has a house on a lot east of the one they actually own
       2. Moyer and Howard swap deeds so that Moyer’s land lines up with Moyer’s deed
       3. Two issues
          1. Summer residency

Court says this is okay for continuous possession

Used for the property’s usual purpose

Clearly a summer home and they used it the way it was meant to be used

* + - * 1. Tacking

Adverse possessors can tack on time from those with whom they are in privity with

If you’re in privity of estate, you can tack onto their time

In this case, the peculiarity of the tacking is:

Transaction that creates privity doesn’t actually involved the land that’s at issue in the adverse possession claim

* + - 1. Court treats privity as a proxy for good faith
         1. Distinction between trespassers
         2. Looking for good faith continuum
      2. Mistaken boundary & improvement
         1. Old approach: property owner can order removal
         2. Modern approach: look at competing equities
      3. Doctrine of undue hardship
         1. Where substantial redress can be afforded by the payment of money and issuance of an injunction would subject the defendant to a grossly disproportionate hardship, equitable relief may be denied although the nuisance is indisputable
         2. Fairness balance – irreparable harm vs. hardship
         3. When you have two innocent-looking parties on each side
    1. ***O’Keefe v. Snyder* (1980) [stolen paintings case]**
       1. Facts
          1. Plaintiff is Georgia O’Keefe
          2. She has paintings stolen, tells people about it, but doesn’t report it to the police or anyone until decades later
       2. Court wants more evidence and tries to rectify the law
       3. Trial court
          1. Uses conversion rule
          2. Statute of limitations began soon as property was stolen
          3. Even under best set of facts for plaintiff, she waited too long to sue, and possessor has the best title in the world
          4. Summary judgment for defendant
       4. Nemo dat – stolen title is not valid and is not transferrable
          1. This principle is overshadowed by time bar on only person with superior title
       5. Appellate court
          1. Claimants have to prove elements of adverse possession

Can’t do this really with open and notorious – notice problem

Have to behave like the true owner

* + - 1. NJ Supreme Curt
         1. Adopts discovery rule

It’s an equitable remedy

Helps to balance the equities

You would want to know what plaintiff has done

Has she engaged in due diligence?

Need more evidence, will be litigated on trial

Evidence we do have, it’s not looking good for her due diligence argument

It shows on the other hand that the paintings would have been very unlikely to be found

* + - * 1. Critical difference:

SC focuses entirely on what owner did (due diligence)

App court says adverse possession tends to rely on what possessor did

* + - 1. Unclear: are we interested in whether plaintiff did enough work? Or how well concealed were the paintings that if someone had them, no one would know even with due diligence?
      2. The case settled after this decision
         1. Trial court didn’t get to decide on a lot of this
      3. Void and voidable title
      4. Rules for SOL (just for chattel)
         1. Demand – owner demands return
         2. Discovery – owner discovers or reasonably could have
         3. Conversion – when it’s converted
  1. By Gift
     1. ***Newman v. Bost* (1898) [man gives girlfriend keys to bureau]**
        1. Facts
           1. Van Pelt is on his death be, he calls plaintiff into the room and gives her keys. He says everything in the house is hers, opens the door and points to furniture down the hall
           2. He gets too ill, stops talking and then dies
           3. Plaintiff brings action against administratrix of the estate (Van Pelt’s daughter)

Bureau – the key opens a draw that has a $3000 life insurance policy

Furniture in the house is sold ($200)

Piano

Furniture in the bedroom is sold ($45)

* + - * 1. I & ii are given by Van Pelt in anticipation of death (donation causa mortis)
        2. Iii & iv are given by Van Pelt (inter vivos)
      1. Court is skeptical about upholding gifts causa mortis
         1. They favor manual delivery
         2. There’s a better way to do this 🡪 write a will!
         3. Statutes of wills/frauds set up legal formalities
         4. Preparing wills & other conveyances of properties
         5. Downside to formalities – some people don’t get the memo, but still have intentions and desires for their property
      2. Court looks at intent and delivery
         1. Third element of acceptance: almost never plays a role in case law
      3. The problem with the life insurance policy?
         1. Court hones in on delivery – no manual delivery
         2. There’s constructive delivery – gives keys over

This is valid in many states

* + - * 1. Would it have made a difference with this court if Van Pelt made reference to the life insurance policy?

Court says if manual delivery is possible, it must be had

Harsh rule

* + - 1. Court says Newman only gets the items that the keys open
      2. The piano gets remanded – plaintiff has not shown that it was delivered to her
      3. Evidence that Van Pelt had wanted to give this stuff to her, but not enough evidence of delivery
      4. Wants to channel causa mortis gifts into the formality of will statutes
      5. Court was skeptical of plaintiff’s relationship with Van Pelt
    1. ***Gruen v. Gruen* (1986) [expensive painting case]**
       1. Facts
          1. Plaintiff’s father gives him an expensive painting, but retains a life state
          2. Defendant is stepmom who doesn’t want plaintiff to have the painting
          3. Father give plaintiff a letter to explain that he is giving the painting

Symbolic delivery

It doesn’t make sense to give the painting to plaintiff via manual delivery just so he could give it right back

There’s written evidence (great) – maybe delivery isn’t necessary

* + - 1. Court characterizes the gift differently
         1. The painting is not being given to the son presently
         2. Son got ownership rights right now (future interest) and dad retained possession rights
         3. Less need for delivery because ownership rights are intangible
      2. Remainder (🡪 third party) vs. reversion (🡪 grantor)
      3. Straightforward: present gift of a future interest
         1. States do recognize the ability to create future property interests in chattel
         2. Once there has been intent and delivery, the gift is irrevocable
         3. Engagement rings as conditional gifts

Conditional until the marriage occurs

* + - 1. Technicalities (checks)
         1. Some states have view that checks are commitments to pay, that are revocable until they are cashed
         2. Check is revoked by the death of the signer
    1. Schroeder likes intentionality – people contemplating what they’re doing
    2. Requirements
       1. Intent
       2. Delivery
          1. Manual – actual
          2. Symbolic – donor physically transfer an object that represents or symbolizes the subject

Writing

* + - * 1. Constructive – physically transfers to the done the means of access to or control of the gift object

Keys

* + - 1. Acceptance
         1. Never really a problem
         2. Assumed

1. The System of Estates in Land
   1. Basics
      1. Two big divisions
         1. Possessory estates (aka present interest) – you have a right, right now (\* = freehold)
            1. Fee simple (absolute)\*
            2. Fee tail (no one uses this anymore)\*

Bloodline patriarchal descension of land (no transfers)

* + - * 1. Life estate\*
        2. Tenancy/term of years

Alienable, inheritable and devisable

* + - 1. Future interest – certain or contingent possession of the property
    1. All possessory estates/present interest are vested
       1. Future interests in the grantor are vested even if the interest become vested only upon the happening of a contingency
       2. Contingent remainders are only relevant with regard to remainders and executory interests
    2. An estate is an ownership interest which is or may become possessory and is measure by some period of time (even if indefinitely)
       1. The owner of the right to possess the land now owns a possessory/present interest
       2. The owner of the right to possess (or possibly possess) the land in the future owner’s future interest. A future interest is a presently existing legal interest
    3. Transferring interest
       1. Interests can be transferred by sale, lease, will or trust
       2. Also, gift or intestacy
    4. Some terminology
       1. Heirs: take when the owner dies intestate (without a will)
          1. If there are no heirs, property will escheat to the state
          2. “and his heirs” – unnecessary but still used – doesn’t mean heirs have an interest
       2. Intestate: without a will
       3. Devisees: take pursuant to a will
       4. Testator or testatrix: a person who dies with a valid will
          1. Courts almost always use these terms correctly
       5. Issue/descendants: children, grandchildren, great-grandchildren, etc.
       6. Ancestors: parents, aunts & uncles, grandparents, etc.
       7. Collateral heirs: brothers & sisters, nephews & nieces, aunts, uncles, cousins who are related by blood
       8. Property is devisable if the owner can transfer ownership by a well
       9. Property is descendible or inheritable if the property can pass by the state’s intestacy statute to heirs
       10. Property is alienable, assignable, or transferable if the owner can sell or give it away during his lifetime
    5. Function of estates
       1. Estate laws provide a set of definite rules
          1. Reduce transaction costs in a society in which land is a commodity
          2. Numeris clausus: too many different kinds of property reduce certainty (“the category is closed”)
          3. Rule against creation of new estates: the formalized estates are the only permissible categories of estates

Caveat: figuring out how to classify the estates created by an instrument can cause significant difficulties

* + - 1. Divide up ownership over time
         1. Allows the present owner to decide who will own the property or how it will be used

For example: A conveys Blackacre to B so long as no liquor is ever served on the property

* + - * 1. Can transfer some ownership rights without losing complete control over what happens to your property
        2. Some estates allow “dead hand” control after the owner dies
    1. Interpreting Ambiguous Conveyances: The Presumption Against Forfeiture
       1. In interpreting ambiguous conveyances, courts rely on somewhat conflicting policies
          1. Seek to implement the intent of the grantor
          2. Employ a presumption against forfeiture
          3. Avoid partial intestacy
          4. Give effect to all language
  1. Fee Simple Absolute
     1. Breakdown
        1. Fee: interest in land
        2. Simple: ownership of unlimited duration
        3. Absolute: no future interests exist that could cut ownership short
     2. A full bundle of rights. The owner has the right to possess/use the property, to sell it, to give it away, to devise it by will or leave it to heirs
     3. “and his heirs” language means that estate last in perpetuity
     4. **This is the default conveyance, unless the language says otherwise**
        1. Rules of construction
           1. A testator intended to give away all his property through his will/partial intestacy is disfavored
           2. A grantor or testator conveys her full interest in the property unless the intent to pass a lesser estate is clearly expressed or necessarily implied by the terms of the dead or will
     5. Infinite duration of ownership of land
     6. Can be transferred/descended to anyone
     7. Defeasible estates (sub-type of fee simple)
        1. A present/possessory interest that will terminate prior to its natural endpoint, at the happening of a specified event other than the death of the current owner
        2. The person who gets the estate on the happening if that event holds a future interest
        3. Two features
           1. Whether the future interest is in the grantor or in a third party
           2. Whether the future interest becomes possessory automatically, or whether the holder of the future interest simply has an option
     8. When the future interest reverts automatically to the grantor at the happening of a specified event:
        1. The present interest is called the **fee simple determinable**
        2. The future interest is called a **possibility of reverter**
        3. Automatic transfer to grantor
           1. SOL for adverse possession begins on the day of the event
        4. Key words

So long as

While used as

Until

Unless

During the time that

* + - 1. Example: A gives Whiteacre to B so long as Whiteacre is used for residential purposes.
         1. What interest does B have?

Fee simple determinable

* + - * 1. What interest does A have?

Possibility of reverter

* + 1. Transfer only if grantor asserts property rights
       1. When the grantor must affirmatively assert his or her future interest, rather than it transferring back automatically upon the happening of a specified event:
          1. The present interest is called **a fee simple subject to a condition subsequent** (FSSCS)

Condition subsequent = an event whose occurrence or nonoccurrence will terminate the estate

* + - * 1. The future interest is called a **right of entry** or power of termination
        2. Law favors this
      1. Key words:
         1. Provided that
         2. On the condition
         3. But if
         4. Provided, however
         5. Right of entry
      2. Holder of fee simple continues to own the property until the grantor exercises his right of entry
         1. SOL for adverse possession doesn’t occur until the right of entry is recognized
      3. Examples
         1. A to B on the condition that Whiteacre is used for residential purposes

B has fee simple subject to condition subsequent; A has right of entry

* + - * 1. A gives Whiteacre to B so long as Whiteacres is used for residential purposes; in the event that it is not used, A shall have a right of entry

Same

* + 1. Distinguishing between FSD and FSSCS
       1. If language for both is used 🡪 look to intent
       2. When in doubt, judge will construe a FSSCS
       3. Or interpret it as a covenant 🡪 grantor may seek injunctive relief or damages for breach, but owner of fee simple will not forfeit ownership
       4. For BOTH, only original grantor or his heirs can hold the future interest
    2. Fee simple subject to an executory limitation
       1. Same granting language that would create a fee simple determinable or FSSCS, but future interest goes to a third party
       2. Also automatic
       3. Future interest = **executory interest**
       4. Executory interest divests or cut short
       5. As remainder waits patiently – for natural end
  1. Life Estate
     1. Possessory or future interest that are tied to the length of a particular person’s life
        1. Usually measured by the life tenant’s life, but can be measured by the grantor’s life or by the life of a third party
     2. Not devisable or descendible, but alienable
     3. Example: A gives Whiteacre to B for life
        1. B is free to transfer his life estate to a third party, C.
        2. In that case, C has what is known as a life estate pur autre vie – a life estate for someone else ‘s life
     4. Right to possess property for your lifetime
     5. Can transfer it in some conditions
     6. Freehold estates
        1. Fee simple
           1. Absolute
           2. Determinable
           3. Subject to conditions subsequent
           4. Subject to executory limitation
        2. Life estate
           1. Simple
           2. Determinable
           3. Subject to condition subsequent
           4. Pur autre vie
           5. Subject to executory limitation
     7. ***White v. Brown* (1977) [intestate ““have my home to live in and not to be sold”]** 
        1. Cardinal rule: discern intention of the testator
        2. Court then ignores her intention in favor of public policy
        3. Court relies on presumption against partial intestacy
        4. Lawyer writing a will includes a residuary clause 🡪 designate someone to receive residuals of the estate (whatever is left out)
        5. Discerning intent 🡪 what was she actually trying to accomplish?
        6. Interpretative presumption (in ambiguous conveyances):
           1. Seek to implement intent of the grantor
           2. Employ presumption against forfeiture
           3. Avoid partial intestacy
           4. Give effect to all language
        7. Δ trying to rely on the #4 🡪 court has to strike “my house shall not be sold” to get the result they want
        8. Banks won’t loan money on a life estate
           1. Difficult to maintain property as a life estate possessor (unless remaindermen agree)
        9. Ruling: Testatrix’s testamentary restraint on the alienation of the home devised to plaintiff does not evidence such a clear intent to pass only a life estate as sufficient to overcome the law’s strong presumption that a fee simple interest was conveyed. Mrs. Lide’s will passed a fee simple absolute in the home to plaintiff. Her attempted restraint on alienation must be declared void as inconsistent with the incidents and nature of the estate devised and contrary to public policy.
     8. ***Baker v. Weedon* (1972) [man left stuff to wife, not kids]**
        1. Instrument creates a life estate in Anna and a contingent remainder in her children, and an alternate contingent remainder in his grand kinds
        2. Anna wants to sell (due to insufficient income) 🡪 property is worth about $165K
        3. Remaindermen want to sell property at $336K in four years when value increases (when highway comes through)
        4. Discrepancy seems to motivate court to reach its decisions
        5. Puts life tenant in difficult position
        6. Common law used to only face a sale to prevent (if life tenant running down value of property)
           1. Could sue life estate holder for (sic) to force them to improve property
        7. This court liberalizes the doctrine, can force sale when it is in the parties’ best interest
           1. Ex. Of bifurcated ownership creating transferability problem 🡪 both owners need to agree to sell
           2. Same problem occurs with joint tenancy
     9. Conflicts between life estate holder and remainderman
        1. Life estate holder can exclude others from property, included holder of a future interest. Future interest holder can be a trespasser.
        2. Life tenant keeps all income, rents, profits from the land during the life estate
        3. Life tenant has all duties and obligations of owning a property (taxes, insurance, mortgage interest payments, etc.) – dispute between states about mortgage principal
        4. Life tenant not obligated to improve the property or repair extraordinary damages from nature/storms
           1. Constructing improvmenets on the land? Cannot seek partial payment from FI holders
  2. Leasehold Estates and Defeasible Estate
     1. ***Mahrenholz v. County Board of School Trustees* (1981) [property for school purposes]**
        1. Land:
           1. 38 ½ acres

H’s 🡪 Jacqmains with reversionary interest in the 1 ½ acres included

1959: Js 🡪 Mahrenholz’s with reversionary interest included

* + - * 1. 1 ½ acres

1941: H’s 🡪 School District, “this land is to be used for school purpose only; otherwise to revert to H’s”

Building used as school until 1973; as school storage after that

1951 & 1969 Huttons die intestate; Harry Hutton only heir

May, 1977 HH 🡪 Mahrenhoz’s all his interest in the 1 ½ acres

Sept. 6, 1977 HH disclaims all interest in 1 ½ acres in favor of School District

* + - 1. “this land is to be used for school purposes only – otherwise to revert to plaintiffs
      2. Land given to be used for school purposes only, otherwise revert to grantors
      3. Fee simple determinable or FSSCS?
         1. Doesn’t use obvious words of conditions or duration
         2. Consequences/outcome if fee simple determinable or FSSCS
      4. State of title in 1 ½ acres as of in January 1977?
         1. Depends upon whether the 1941 conveyance was a FSSCS or FSD
         2. If it is a FSD, depends upon whether the school district breached the condition in 1973
      5. When grantor has possibility of reverter 🡪 fee simple determinable 🡪 reverts automatically when condition triggered
      6. FSSCS 🡪 before grantor gets property back, he must exercise his right (right of re-entry, power of termination)
      7. Either reverter or right of re-entry 🡪 not transferrable per state law inter vivos 🡪 only through wills/intestacy
      8. Most states do not follow this policy
      9. HH the owner 🡪 heir (died intestate), HH has interest
      10. What interest is it?
          1. If Huttons created a FSSCS, HH has a right of re-entry, which he has not excersity

Cty continues to have FSSCS

* + - * 1. If Huttons created fee simple determinable, HH has reverter (or ownership/FSA in the 1 ½ acres)

Why didn’t court remand on the ownership issue? Isn’t HH unable to transfer rights to either M or school due to Illinois’ silly law?

If school breached, HH has fee simple absolute in the property

If school did not breach in 1973, they retain the property, HH still has the possibility of reverter

* + - * 1. If FSSCS, HH release to school district (by disclaimer) is valid because it is not an alienation

Harry still has right of entry; Harry’s May 1977 conveyance of his interest to Mahrenholz’s is void because of Illinois rule that right of entry is inalienable

Harry’s September 1977 release/disclaimer to School District is valid because not considered an alienation

* + - * 1. If fee simple determinable, if school did breach, HH acquired a fee simple absolute, conveyance to M is valid 🡪 okay to convey a fee simple absolute

If School District did breach condition in 1973, then Harry acquired a FSA in 1973 and the May 1977 conveyance of his interest to Mahrenholz’s is valid because OK to convey an FSA.

If School District did not breach condition in 1973, Harry’s September 1977 release/disclaimer is valid because it is not considered an alienation.

* + - 1. Any statute of limitations on right of re-entry?
         1. Laches can apply (undue delay)
         2. Not a SOL problem 🡪 HH has a right, not a cause of action
      2. No need for subtlety when drafting, use precision
      3. Court: they created a fee simple determinable in the Trustees followed by a possibility of reverter in the Huttons and their heirs
  1. Future Interests
     1. Sir Orlando Bridgeman, 1st Baronet of Great Lever
        1. Court created rule of perpetuities to stop him
     2. Aim 🡪 minimal competence
     3. Every life Estate has a future interest (no one lives forever)
        1. Future interest is a presently binding legal interest
        2. If FI is held by grantor, it’s:
           1. A **reversion**

Follows a life estate, fee tail, or term of years

Does not depend on the occurrence of a condition precedent

Assignable, devisable, and inheritable

* + - * 1. Possibility of reverter

Follows an FSD

Depends on the occurrence of a condition precedent

In most states, assignable inter vivos and devisable by will

* + - * 1. Right of entry/right of reentry/power of termination

Follows an FSSCD

Depends on the occurrence of a condition precedent

In most states, assignable inter vivos and devisable by will

* + - 1. If FI is held by a 3rd party, it’s called a **remainder**
         1. Must be created in the same instrument of transfer
         2. Must become possessory immediately following the natural termination of the prior estate

Otherwise, could be an executory interest

* + - * 1. Cannot divest or cut short the prior estate or follow an interest that has been cut short by a condition subsequent
        2. Most commonly follows a life estate, but also maybe a term of years
      1. Interest that grantor retains are not subject to rule against perpetuities
      2. A future interest in a third party that takes effect only when the preceding interest is divested or cut short by a condition subsequent is an **executory interest**
         1. An interest following a defeasible fee if the property passes to a third party instead of the grantor
         2. The present possessory interest being divested may be that of a third party transferee or of the original grantor

If the third party transferee’s interest is divested, the future interest is a **shifting** executory interest

More common

Follows an interest held by a third party that may be divested by a condition subsequent stipulated in the conveyance document

Divests the transferee (grantee)

If the grantor’s interest is divested, the future interest is a **springing** executory interest

Follows a gap in time

Divests the transferor

* + 1. Examples
       1. *A conveys Holly Farms to B for life. What interest does B have? A?*
          1. B has life estate; A has reversion*.*
       2. *A conveys Holly Farms to B for life, then to C and her heirs. C dies and then B dies. Who owns Holly Farms?*
          1. C’s heirs*.*
    2. Remainders:
       1. **Vested**: to an ascertained person (no doubt) and not subject to condition precedent
          1. Follows any life estate, fee tail, or term of years that ends natural
          2. Heirs are unascertained if the person is still alive
       2. **Contingent**: to an unascertained person or subject to a condition precedent
          1. Executory interests are always contingent interest (not necessarily remainders)
    3. Courts prefer vested remainders over contingent remainders
       1. Favor vesting remainders as soon as possible
    4. Vested remainders
       1. **Absolutely vested remainder**: is not subject to change, no prior conditions to be met to the ascertained person getting it
          1. Example: A conveys to B for life, then to C for life, then to D and his heirs
       2. **Subject to open** – remainder that may be divided among persons who will be born in the future (class – i.e. my kids)
          1. *A gives to B for life, then to B’s children. B has one child at the time of the devise, C.*
          2. *C has a vested remainder, but it is subject to open*
          3. Class closes when physiologically or naturally no one else can be born into the class
          4. Rule of convenience will close class when remainder becomes possessory or when a member of class can demand possession
       3. **Subject to divestment** 🡪 grant contains a condition subsequent that can result in divestment
          1. Example: *A gives to B for life, then to C, but if C marries then to D.*
          2. Whether the determinative condition is a condition precedent (remainder is contingent) or condition subsequent (the remainder is vested subject to divestment)
    5. Contingent remainders. Two ways:
       1. Remainder only takes effect upon happening of an event that is not certain to happen (condition precedent)
          1. *A to B for life, then to C if she reaches 21, otherwise to D*
       2. The remaindermen is currently unknown (unborn and/or unascertainable)
          1. *A to B for life, then to C’s children. C has no children at the time of the conveyance.*
          2. How can the non-living have a contingent remainder?

Lies in “the bosom of the law”

* + 1. Alternative contingent remainders: where one of two named persons (not grantor) takes to the exclusion of the other based on whether or not a condition precedent occurs
       1. If the condition happens, one party will own the property; if it doesn’t happen, the other party will own the property
    2. Examples
       1. *A gives to B for life, then to C’s children. C has no children at the time of the conveyance.*
          1. *What is the state of title?*
          2. *B has life estate, C’s children have a contingent remainder.*
       2. *A gives to B for life, then to C and her heirs if C survives B, otherwise to D and his heirs. State of title?*
          1. *B has life estate, C has contingent remainder in fee simple, D has alternative contingent remainder in fee simple. O has a reversion.*
       3. *A gives to B for life, then to C and her heirs if C attains the age of 21 before B dies. State of Title?*
          1. *B has life estate, C has contingent remainder. O has a reversion.*
       4. *O gives to A for life, then to B, but if B does not survive A, to C. What is state of title?*
          1. *A has life estate, B has vested remainder subject to divestment, C has executory interest*
       5. *O gives to A for life, then to B if B survives A, otherwise to C. What is state of title?*
          1. *A has life estate, B has contingent remainder, C has alternative contingent remainder, O has reversion.*
       6. *See examples 7 and 8, pp. 222 and 223.*
    3. How to read future interests
       1. How do you classify? By moving left to right, classifying interests as you go.
       2. “Whether a remainder is vested or contingent depends upon the language employed. If the conditional element is incorporated into the description of, or into the gift to, the remainderman, then the remainder is contingent; but if, after words giving a vested interest, a clause is added divesting it, the remainder is vested.” John Chipman Gray.
       3. **IT’S ALL GRAMMAR**.
    4. Transfer to a Third Party
       1. When a third party, rather than the grantor, acquires the estate upon the happening of the specified event:
          1. The present interest is called a fee simple subject to executory limitation.
          2. The future interest is called an executory interest.
       2. These behave exactly like fee simple determinable estates.
       3. Examples
          1. *O gives Holly Farms to A so long as Holly Farms remains used for farming, then to B.*

B has an executory interest; A has a fee simple subject to an executory limitation.

* + - * 1. *O to A for life, but if A ever farms the land, then to B and her heirs.*

A has a life estate subject to an executory limitation.

B has an executory interest.

Suppose A dies without ever farming the land?

[Unstated: O has a reversion].

# Estate and Future Interest Chart

|  |  |  |  |
| --- | --- | --- | --- |
| **Present Interest** | **Words Used to Create** | **Future Interest** | |
|  |  | **In Grantor** | **In Third Party** |
| **Fee simple absolute** | “to A,” “to A and her heirs” |  |  |
| **Fee simple determinable** | “as long as,” “while,” “during the time that” | Possibility of reverter |  |
| **Fee simple subject to a condition subsequent** | “provided that,” “on condition,” “but if” | Right of entry (for condition broken) or power of termination |  |
| **Fee simple subject to an executory limitation** | “until (or unless) . . . then to . . .”  “but if . . . then to . . . “ |  | Executory interest |
| **Life estate** | “for life” | Reversion | Remainder   * Vested * Contingent |

* + 1. Summary
       1. Retained by Grantor
          1. Reversion (after a life estate)
          2. Possibility of Reverter (after a fee simple determinable)
          3. Right of Entry (after a fee simple on condition subsequent)
       2. Conveyed to a Third Party
          1. Remainder

Contingent Remainder

Vested Remainder

Absolutely vested remainder

Vested remainder subject to divestment

Vested remainder subject to open

* + - * 1. Executory Interest

Shifting

Springing

* 1. Doctrines Furthering Marketability
     1. Contingent interest can make selling property difficult
        1. For alienability
        2. Difficult to place a value on that interest
        3. Contingencies often implicate two or more (groups of) people in the alternative
           1. Multiplying the number of people who must agree to any sale
        4. Contingent interest can be in persons who are not yet born. It’s impossible to negotiate with them
        5. Vested interests can clog the stream of commerce, too, but in general are more manageable – and can be more limited in duration. They were not considered the same threat to alienation that contingent future interests were
        6. Hence, common law property law evolved some rules that placed limits on some contingent future interests -- The Rule Against Perpetuities being the most significant
     2. ~~Rules that Further Alienability~~
        1. ~~Rules against restraints on alienation (Davis v. Davis)~~
        2. ~~Rules against creation of new estates~~
        3. ~~Rules of construction in interpreting deeds & wills~~
           1. ~~Fee simple over life estate~~
           2. ~~Vested remainders over contigent remainders or executory interests~~
           3. ~~Fee simple over defeasible fee~~
        4. ~~[Rule of destructibility of contingent remainders~~
           1. ~~A contingent remainder is destroyed if it has not vested at or before the termination of preceding life estates~~
           2. ~~Does not apply to personal property~~
           3. ~~Does not apply to interests held in trusts (equitable interests)~~
        5. ~~Merger rule~~ 
           1. ~~If a person holding a vested life estate acquires the next vested estate in the same property, the two vested estates merge into one~~
           2. ~~i.e. if a person with a vested life estate acquires a vested remainder in the property, she now owns a merged interest (fee simple absolute)~~
           3. ~~for the two vested interests to merge to destroy an intervening contingent remainder, the two vested estates must be acquired at different times – two vested interests acquired in the same document do not destroy intervening contingent remainders~~
           4. ~~Merges only vested estates, not contingent remainders~~
           5. ~~In the process, it might destroy a contingent remainder, but that is not its primary function; a remainder that does not intervene the two vested estates remains valid~~
        6. ~~Forfeiture]~~
        7. ~~Doctrine of worthier title~~
           1. ~~Applies to conveyances to the grantor’s heirs~~
           2. ~~When there is a conveyance or devise to a person, with the remainder or executory interest to the grantor’s heirs or next of kin, no future interest is created in the grantor’s heirs; rather, the grantor retains a reversion~~
           3. ~~Applies to all types of property~~
           4. ~~In effect, a prohibition against remainders in a transferor’s heirs~~
           5. ~~Widely applied only to inter vivos transaction (deeds and similar instruments of transfer)~~
           6. ~~Wills branch (applying it to devises) is not much used – being abolished by statute or judicial decision in about 30 states~~
           7. ~~Continues to apply to deeds in many states.~~

~~Rule of construction, to which the grantor’s intent is relevant and not as a rule of law~~

* + - * 1. ~~In order to avoid running afoul the rule, a drafter should specifically name the person to whom the transferor intends the property to go~~
        2. ~~Example:~~ *~~O to A for life, remainder in the heirs of O~~* ~~becomes~~ *~~O to A for life, reversion in O~~*~~.~~
      1. ~~The Rule in Shelley’s Case~~
         1. ~~When a devise or conveyance transfers a freehold estate to a person and in the same instrument also transfers a remainder to that same person’s heir or the heirs of his body, and either both estates are legal or both are equitable, both are considered to be held by the first-named freeholder, either for life, in fee simple absolute, or in fee tail; the person’s heirs get nothing under the grant~~
         2. ~~Requirements~~

~~Freehold estate (usually life estate) given to a first transferee~~

~~Remainder limited to the heirs of the first transferee in the SAME instrument~~

~~A freehold and a remainder of the same quality (both legal or both equitable)~~

* + - * 1. ~~Transferor’s intent makes no difference to the question of whether the rule in Shelley’s case applies~~
        2. ~~Applies to both vested and contingent remainders~~
        3. ~~Abolished by statute in over 40 sates~~
        4. ~~Example:~~

*~~O to A for life, remainder to A’s heirs~~* ~~becomes~~ *~~O to A for life, remainder in A~~*

*~~And then, the rule of merger combines these two interests in A, resulting in A having a fee simple.~~*

* + - 1. ~~Rule Against Perpetuities~~
    1. ~~Rule Against Perpetuities (common law)~~
       1. ~~No interest is good unless it must vest, if at all, no later than 21 years after the death of some life in being at the creation of the interest~~
       2. ~~Compromise between folks that want dead hand to rule and those that want the current population to control~~
       3. ~~Alternative statement~~
          1. ~~A future interest is void the moment it’s created if:~~

~~It is in a grantee~~

~~It is either contingent (given to an unascertained taker or subject to a condition precedent or both) or subject to open,~~ **~~AND~~**

~~It might still exist and be contingent or subject to open longer than 21 years after the death of the last person alive at the time the interest was created~~

* + - 1. ~~NOT subject to RAP~~ 
         1. ~~Interests retained in the grantor~~

~~Reversion~~

~~Possibility of reverter~~

~~Right of entry (AKA power of termination)~~

* + - * 1. ~~Vested remainder~~
        2. ~~Vested remainder subject to divestment~~
      1. ~~Five steps to any Rule Against Perpetuities Problem~~
         1. ~~Classify/identify all future interest and identify the ones subject to the rule~~

~~Vested subject to open~~

~~Contingent remainder~~

~~Executory interest~~

* + - * 1. ~~For contingent remainder~~

~~Either given to an unascertained taker or subject to a condition precedent or both OR~~

~~Vested subject to open, identify what must happen for it to become noncontingent and closed (i.e. fully vested) OR~~

~~For it to fail (cease to exist)~~

~~Fully vest for contingent remainders means~~

~~(1) all future interest holders are known (ascertained) (for class gifts, the class has closed), and~~

~~(2) any and all conditions precedent are removed.~~

* + - * 1. ~~For executory interest~~

~~Identify what has to happen to become possessory~~

~~For steps 2 AND 3: identify what has to happen for the interest to FULLY vest~~

~~For executory interest means that the interest becomes possessory.~~

* + - * 1. ~~Use lives in being to apply perpetuities (starting at the time the interest was created)~~

~~Look for validating life~~

~~Identify all lives in being at creation of the interest and “test” the interest~~

~~Creation of the interest means:~~

~~For sale—moment of conveyance~~

~~For will—moment of testator’s death~~

~~For trust—moment it becomes irrevocable~~

~~A life in being is any person who is:~~

~~Alive at the time the interest is created,~~ *~~and~~*

~~May have something to do with its vesting.~~

~~Try to imagine~~ *~~any way~~*~~, no matter how unlikely or wildly implausible, that the future interest (step 1) might fail to fully vest (step 2&3) more than 21 years after the death of all lives in being (step 4).~~

~~🡪Try to find fault, not to uphold!~~

**~~Executory interests~~** ~~vest when the contingency occurs.~~

~~EX:~~ *~~O to A so long as used for gambling purposes then to B.~~*

**~~Contingent remainders~~** ~~vest is when the condition that makes it a contingent remainder disappears.~~

~~EX:~~ *~~O to A for life, then to B provided that B finishes law school.~~*

~~For~~ **~~class gifts or vested remainder subject to open~~**~~, class must be closed.~~

~~Ex:~~ *~~O to A for life, then the children of A.~~*

~~Class~~ **~~closes~~** ~~on A’s death, so no RAP problem~~

~~Ex:~~ *~~O to A for life, then to the grandchildren of A~~*~~.~~

~~When will class close?~~

~~Upon the death of all off A’s children.~~

~~Is there a RAP problem?~~

~~YES. A could have a child after the interest is created, all the potential validating lives could die (i.e., A and any living children and grandchildren of A), and then the afterborn child could have a child (i.e., a grandchild of A) more than 21 years later.~~

~~However, the Rule of Convenience saves this gift – class closes when a member of it is able to take possession (upon the expiration of the prior estate). In this case, that occurs when A dies.~~

~~Ex:~~ *~~O to A for life, and on A’s death to A’s children for their lives, and upon the death of A and A’s children, to A’s grandchildren.” A has a child and a grandchild.~~*

~~State of Title: life estate in A followed by life estate in A’s children, followed by vested remainder subject to open in fee simple absolute in A’s grandchildren.~~

~~Now the gift to A’s grandchildren is void. A could have an afterborn child, all lives in being could die (O,A, A’s first child and A’s grandchild), and A’s afterborn child could have a child (i.e., a grandchild of A) more than 21 years after that.~~

~~Wait and see modification~~

~~The traditional approach~~

~~At the time of creation, if there is the~~ *~~possibility~~* ~~that an interest might not vest within the perpetuities period,~~ **~~the conveyance is void.~~**

~~The modern approach~~

~~Some courts will~~ *~~wait~~* ~~until the end of the perpetuities period~~ *~~and see~~* ~~whether the interest fails to vest.~~

* + - * 1. ~~If invalid, find a remedy~~

~~Basic rule: Strike the interest (the offending language)~~

~~Cy Pres doctrine: permits a court to modify a grant so as to validate it in keeping with grantor’s intent~~

~~Example:~~

*~~O to A for life, then to the first child of B to reach 25 years of age.~~*

~~Can become~~

*~~O to A for life, then to the first child of B to reach 21 years of age.~~*

* + - 1. ~~Fully vest~~
         1. ~~Sometimes the removal of the contingency is accompanied by possession~~

~~E.g., O to A so long as used for non-gambling purposes, then to B~~

~~When property is used for gambling purposes, the contingency on the executory interest is removed, the fee simple shifts from A to B and B takes a possessory interest. (this is called “vesting in possession.”)~~

* + - * 1. ~~Sometimes the removal of the contingency vests the future interest, but does not result in possession~~

~~E.g., O to A for life, then to B provided that B finishes law school~~

~~This contingent remainder becomes a vested remainder when B finishes law school, but if A is still alive, B still just has a future interest and does not yet have possession~~

* + - 1. ~~Warning Signs~~
         1. ~~There is an identified age or time period greater than 21 years.~~
         2. ~~The condition is not personal to someone specific person.~~
         3. ~~Interest given to a generation after next (grandchildren).~~
         4. ~~Conveyance that requires a holder survive someone who is merely described rather than specifically named.~~
         5. ~~An event that would normally happen within the time period, but is~~ **~~not logically compelled to happen.~~**
         6. ~~The holder won’t be identified until the death of someone who is merely described rather than identified.~~
      2. ~~More Examples~~
         1. *~~O to A for life, then to B, but if the land is ever used as a tavern, then to C.~~*

~~A has life estate, B has vested remainder, C has executory interest.~~

~~A,B and C can all die and more than 21 years can pass before land is used as a tavern.~~

~~C’s interest disappears, and B’s interest no longer subject to divestment.~~

* + - * 1. *~~O to A for life, then to B, but if A or B ever uses the land as a tavern then to C.~~*

~~Functionally, same interests created as in #3, but now OK, because condition has to occur or fail within B’s lifetime.~~

* + - * 1. *~~O to A for life, then to A’s children who survive to age 21. None of A’s children are currently 21.~~*

~~State of Title?~~

~~A has life estate; A’s children have contingent remainder. (VR subject to open if one is already 21).~~

~~To fully vest, Class must close and members reach 21.~~

~~Lives in Being – potential validating lives?~~

~~A, A’s children alive at time of conveyance.~~

~~Void or Valid?~~

~~Valid. Class closes at A’s death and none of A’s children can reach age of 21 more than 21 years after A dies.~~

* + - * 1. *~~O to A for life, and then to A’s first child to reach 25. A has no children who are 25.~~*

~~State of Title?~~

~~A has life estate; A’s first child has contingent remainder.~~

~~To fully vest, one of A’s children must reach 25.~~

~~Lives in being?~~

~~A, A’s children alive at time of conveyance.~~

~~Void or Valid?~~

~~Void.~~

~~A could have afterborn child; O, A and A’s first child could die, and A’s second child could take more than 21 years to reach 25.~~

* + - * 1. *~~O to A for life, then to A’s widow for life, then to A’s children then living~~*~~.~~ *~~A is married to B and they have child, C.~~*

~~A has life estate, A’s widow has contingent remainder in life estate, A’s children then living have a contingent remainder in FSA~~*~~.~~*

~~Is Widow’s CR OK? Yes. Now, how about the CR to children?~~

~~Nope. A might be married to someone other than B when he dies. X. X might not yet be born. X and A may have a child, Y. A,B and C may die. For Y’s remainder to vest, Y has to outlive X. That may take more than 21 years after all the relevant lives in being have died.~~

* + - * 1. *~~O to A for life, then to A’s widow for life, then to A’s children. A is married to B and they have child, C.~~*

~~Now gift to children is OK, because it must vest and close when A dies.~~

* + - * 1. *~~O to A for life, then to B’s children after A’s will is probated~~*~~. B has children X and Y.~~

~~What interest do B’s children, X and Y, have?~~

~~CR subject to open and subject to condition.~~

~~Is it good?~~

~~No. The will might never be probated!~~

* + - * 1. *~~O to A for life, then to A’s first child for life, then to whoever is President of the United States. A has no children.~~*

~~Gift to A’s first child is OK. It’s a contingent remainder in a life estate.~~

~~But … A could have his first child, B. Then O and A die. Then more than 21 years passes before B dies. We will not know who the president of the United States is until B dies – potentially outside the RAP period.~~

* + - 1. ~~Uniform Statutory Rule Against Perpetuities~~
         1. ~~Apply the common law RAP. If interest is OK under common law RAP, it is also OK under USRAP.~~
         2. ~~If invalid under common law RAP, take the~~ *~~wait and see~~* ~~approach for 90 years after the interest was created. If it vests within that 90-year period, it is valid.~~
         3. ~~If invalid even under the 90 year wait and see, a court can reform the disposition in a way that “most closely approximates the transferor’s manifest plan of distribution.”~~
      2. ~~Some states have abolished the rule entirely, created extremely long perpetuities period, or permitted dynasty trusts.~~
         1. *~~Lucas v. Hamm~~* ~~- 56 Cal. 2d 583 (1961).~~

~~Attorney not liable for malpractice for violating the rule against perpetuities in a will, because reasonable lawyers could make the same mistake.~~

~~“Few, if any, areas of the law have been fraught with more confusion or concealed more traps.”~~

1. Leases
   1. Leasehold Estates
      1. Categories of Tenancy
         1. Term of years
         2. Periodic tenancy
            1. No defined ending date
            2. i.e. week to week, month to month
            3. conforms to frequency of payments
            4. either party can terminate it by notice

Statutes may change notice requirement, but usually need a month to terminate a month lease

* + - 1. Tenancy at will
         1. Continues only by mutual agreement and ends when one of the parties wants to end it
         2. Rarely used in commercial interactions, usually between friends
         3. Implied or express
         4. Oral leases
      2. (sufferance)
         1. Wrongful occupancy – tenant holds over
         2. Landlord can evict person as trespasser or extend the lease for a new term
    1. Concepts have developed on the contracts side 🡪 historical ideas of tenancy
    2. ***Kajo Church Square, Inc. v. Walker* (2003) [people transferred land to church and leased it back to themselves]**
       1. Facts
          1. Plaintiffs had a “life estate use agreement” with Grace Covenant Fellowship Church
          2. Plaintiffs sue for declaratory judgment for life estate or a leasehold for life in property owner by Kajo (defendant)
          3. Defendant claims it’s not a life estate or a tenancy for life 🡪 it’s a tenancy at will
       2. Ruling
          1. Court sides with the defendants
          2. Tenancy at will – defendants can kick them off whenever
       3. Look at original transaction/intent of the parties
          1. Walkers wanted to give property to church and get right to remain on property until they die (sounds like a life estate)
          2. Difficulty in classifying it as a life estate

Nothing in the deed that would construe a life estate

* + - 1. “life estate use agreement”
         1. Court says there’s no such thing
      2. You can contract a tenancy at will, one only one side (tenants)
         1. When tenants die, the lease ends
         2. Court doesn’t discuss it

Invalid in TX

No one brought it up

* + - 1. Schroeder thinks they did it for tax purposes – didn’t really want a life estate (still responsible for property tax)
         1. The church is tax exempt
      2. Court worried about expanding categories of tenancy
      3. Takeaway: not always looking at intentions like they say they are
         1. Limited number of tenancy categories

each comes with standardized rights, responsibilities, and limitation

UNLESS you contract around them (lease)

* 1. Selection of Tenants
     1. **Mrs. Murphy Exception**
        1. Owner has to live in unit
        2. Four units or less
        3. provides that if a dwelling has four or fewer rental units and the owner lives in one of those units, that home is exempt from the FHA
     2. Civil Rights Act of 1866
        1. Designed to invalidate discrimination of state law (AA property ownership)
        2. Had almost no effect for 100 years because SCOTUS ruled it applied only to state actions
     3. Carve-outs
        1. Elderly communities can discriminate on age (55+) or family status
     4. Discriminatory advertisements?
        1. How would a reasonable consumer/renter see it?
     5. Limits to the right to exclude
        1. We make policy choices (racial discrimination not okay)
  2. Sublease and Assignment
     1. No default against this – alienability values, but you can contract specifically for consent/notification provisions
     2. ***Ernst v. Conditt (*1964) [sublease or assignment]**
        1. Facts
           1. Standard 1-year lease
           2. Ernst (landlord) leases to Rogers (lessee) who subleases to Conditt (sublessee)
           3. Rogers flies the coop
        2. Question: was this a sublet or assignment?
           1. If arrangement is a sublet then Conditt has obligations to Rogers, but not Ernst
        3. Conditt wants to call it a sublet, but Ernst wants to call it an assignment
           1. It’s called a sublet in the documents, but it’s also implied that Rogers has no inversion
        4. Court finds an assignment has been created, defendant is going to lose
           1. Conditt is liable to Ernst
     3. ***Kendall v. Pestana, Inc.* (1985) [change in control case]**
        1. Facts
           1. CA housing/real estate market is booming
           2. 25-year lease
           3. Tenant sells business and wants new tenant to be assignee
           4. Need consent to assign/sublet
           5. Landlord says no – won’t consent

But would say yes for increased rent

* + - 1. Arguments
         1. Property

Just exercising rights under the lease

Court retort: don’t want absolute restraints on alienability of tenancy

Restatement requires reasonability

* + - * 1. Contract

Good faith and fair dealing

Duty to mitigate damages

Court is not sure the clause gives unfettered discretion

Court says you bargained for this rate of rent – not unfair to have landlord bear upside risk of more valuable real estate

Bare naked consent/assignment clause would e read by most people that landlord has to give a reason

* + - 1. Public policy decision
         1. Contracts interpreted to require reasonable behavior from the parties
      2. Restatement of property
         1. People shouldn’t be able to exercise leave powers arbitrarily
         2. But landlord’s reasoning isn’t arbitrary 🡪 trying to get more money/protect his commercial interest
      3. Ruling
         1. Court says it must be for particular – not general economic protection
         2. Makes normative decision that it’s illegitimate
      4. Lots of jurisdictions have recognized landlord duty to mitigate damages
         1. If you don’t, defaulting tenant doesn’t have to pay damages
      5. What could they have negotiated better?
         1. Landlord could have negotiated for absolute right
         2. Tenant could have negotiated for merger/acquisition
      6. A law firm submitted an amicus brief in support of allowing landlords to negotiated clauses around this problem
  1. Landlord Duties
     1. Possession, Condition of the Premise, and Quiet Enjoyment
        1. Duty to deliver possession
           1. Majority (English) rule – places the duty on the lessor to oust he holdover tenant and any trespassers on the property at the beginning of the lease

Requires landlord to deliver legal AND actual possession

* + - * 1. Minority (American) rule – tenant must evict the holdover tenant and any trespassers

Requires landlord to deliver only legal possession – not actual possession

* + - * 1. These are defaults – parties can contract for or modify either
      1. Eviction – a landlord’s actually or constructively evicting a tenant absolved the tenant of his obligations under the lease, including the duty to pay rent
         1. Total actual: LL excludes or locks the tenant out of the premises
         2. Partial actual: LL renovates the property and makes some of the leased premises part of a common area of a multiunit property

LL takes over part of premises and denies tenant of a portion of the premises crucial to use of the whole

* + - * 1. Constructive: LL so substantially interferes with the tenant’s use and enjoyment or causes or allows inhospitable conditions to persist that it is tantamount to an actual eviction

Tenant is justified in vacating the premises

Affirmative defense

LL duty can be statutory, common law, or from the lease

A lot of times – failure to supply heat, utilities, water, etc.

Based on landlord’s breach of the covenant of quiet enjoyment

Necessary elements

Intentional (actual or inferred) acts or failures to act by the LL (who has notice or knowledge of the problem) that breach a duty owed to tenant

That substantially interfere with the tenant’s enjoyment of the premises, or render the premises unfit for the purpose for which it was lease; AND

The tenant vacates the premises within a reasonable time after the landlord’s actions

* + - * 1. Partial constructive eviction: constructive eviction from a portion of the premises

Must be documented clearly by tenant who remains in possession of the rest of the premises

Rarely used – dispossession is less clear (tenant still lives there)

* + - 1. The covenant of quiet enjoyment states that a tenant has the right to enjoy his or her rental unit without “substantial interference” from the landlord. ... The activity must also be caused by the landlord or by someone under the landlord's control, which may include another tenant
         1. Wrongful eviction breaches this
         2. Implied in all leases – commercial and residential – written and oral
         3. Express covenant (negotiated between parties)takes precedence over the implied covenant
         4. Tenant doesn’t have to continue to pay rent to enforce it
         5. Tenant can

Stay in the leased unit and sue for damages

Vacate the premises and treat it as a constructive eviction

But if court finds no constructive eviction, they have to pay owed rent

Can seek declaratory judgment before vacating

* + - 1. ***Village Commons LLC v. Marion Co. Prosecutor’s Office* (2008) [leak and evidence case]**
         1. COMMERCIAL lease
         2. No habitability statute on the books in Indiana
         3. 3 consecutive years of progressing damage and leakage that Landlord refuses to adequately fix because suggested repairs “too expensive”
         4. Damages destroys state’s evidence, uproot portions of the office space, from use and ultimately forced the MCPO to relocate and stop paying on lease
         5. Lease contains exclusionary remedy
         6. Court acknowledges the contractual nature of a lease, thus the exclusionary remedy embedded in said lease is enforceable, HOWEVER:

ACTUAL Eviction: when the tenant is deprived of the occupancy of some part of the demised premises

Breach of covenant of quiet enjoyment 🡪 no rent owed

CONSTRUCTIVE Eviction: when the lessor, without intending to oust the lessee, does an act by which the latter is deprived of the beneficial enjoyment of some part of the premises, in which case tenant has a of election to quit, and avoid the lease and rent, or abide the wrong and seek his remedy in action for the trespass. But in EVERY case of construction eviction the tenant must quit the premises if he would relieve himself from liability to pay rent and whether or not he is justifiable in so quitting is a question for the jury.

Breach of covenant of quiet enjoyment 🡪 still some rent owed

Only in some jurisdictions

* + - * 1. Cites public policy considerations (p. 5/10)
      1. Damages
         1. Landlord is deprived of all of the rent
         2. You get 0 % of enjoyment out of the land – you’ve left
    1. Implied Warranty of Habitability
       1. Warranty implied by law in all residential leases that the premises are fit and habitable for human habitation and that the premises will remain fit and habitable throughout the duration of the lease.
       2. Requires rental premises be offered and maintained in a physical condition that provides safe, habitable housing for tenants.
          1. Warranty: that residential premises are safe, clean , and fit for habitation at the time of the execution of the lease
          2. Covenant: that landlord will maintain and repair the premises so that they remain in that same condition throughout the term of the lease
          3. Implied and not waivable – applies to written and oral leases

FEW states extend it to commercial leases in implied warranty of suitability, but most who have considered extending it have declined to do so

* + - * 1. Applies only to physical conditions; luxury items not included
      1. Basis is often housing code in the jurisdiction
         1. Helps poor tenants who need help but can’t afford to vacate
         2. Requires an objectively reasonable standard of habitability
         3. Must be substantial to breach the warranty – de minimis effects will not do
      2. Three elements to success clam:
         1. Defect must be substantial, considering its violation of the applicable housing code, its effect on tenant’s health or safety, the length of time it has existed and its seriousness
         2. LL must have notice of the defective claim
         3. LL must be given a reasonable time to repair the defect and not have done so
      3. Tenant may:
         1. Withhold rent until repairs are made
         2. Sue LL to collect damages
         3. (in some jurisdictions) repair the condition himself and deduct reasonable cost of the repair in the next rent payment(s)
      4. ***Hilder v. St. Peter* (1984) [habitability case – apartment trashed]**
         1. RESIDENTIAL lease
         2. No habitability statute in Vermont at the time.
         3. Habitability concerns included garbage from former tenant not removed, broken kitchen windows with glass shards, no front door key (security issue), toilet clogged and inoperable, bathroom light and wall outlet not working, water leak and mold, plaster falling from the ceiling onto the baby crib, raw sewage odor from broken pipes, furnace attached to the breaker (likely high electric bills).
         4. Court acknowledges the shift in focus from Middle Ages focus on arable land to urban society’s objective of obtaining safe, sanitary, and comfortable housing.
         5. Court acknowledges that today’s tenants are not farmers with working knowledge of how to make repairs and that the landlord is better positioned to do that.
         6. Court adopts the standard that an implied warranty of habitability runs in ALL residential leases, covering defects in “essential facilities”- those vital to the use of the premises for residential purposes.
         7. Court sites the minimum housing code standards. Breach of this can be used as prima facia evidence of breach of implied warranty of habitability.
         8. Requirements: 1) Tenant notified LL of the defect not known by the Landlord; 2) allow a reasonable time for LL to repair.
         9. Tenant able to sue for annoyance and discomfort.
         10. Violation on landlord’s part is a breach, thus the proper damage calculation is:

Abatement= normal rent rate minus rent given the deficient condition.

* + - * 1. Court permits the ability of the Tenant to withhold rents if the Landlord had notice and a reasonable time to repair and the defect was existed during the time of withholding

NOT IN NORTH CAROLINA!!!

* + - 1. Does the implied warranty of habitability really do anything?
         1. For low income communities, there are several challenges:

Folks don’t often know their rights or the landlord’s duties within a lease

Folks don’t keep records of the repair requests they make (“If it ain’t tangible, it ain’t happen.”)

The only entity that can legally hold the landlord accountable is the Court system, which costs money that tenants don’t have.

Indigency Petition – waives court fees

* + - * 1. Most commonly, tenants rights are asserted via the filing of a Answer and Counterclaim in an action were there are already being sued for Summary Ejectment. Can also counterclaim for business and consumer protection related statutes (UDTP, Unfair Debt Collection)
      1. Almost all residential, landlord-tenant litigation comes under implied warranty of habitability
      2. Damages – options for breach
         1. Agreed rent MINUS fair market rental value (FMRV) of premises in defective condition

Can lead to 0 damages

* + - * 1. FMRV of premises in compliant conditions MINUS FMRV of premises in defective condition

Hilder court chooses this

Have to call in experts/appraisals (costly)

Stacking damages against tenant

* + - * 1. Agreed rent MINUS % of rent corresponding lease value lost as a consequence of the landlord’s breach

More lines up with what we think expectation of tenant is

Court doesn’t have to get experts to make this decision

* + - * 1. None of these remedies have been successful in incentivizing landlords to comply – not deterring landlords
      1. Can you negotiate around this?
         1. Larger safety concerns – may not want to allow parties to negotiate
         2. Especially if there is an inequality of bargaining power
         3. externalities
    1. Five key differences in tenant rights between the covenant of quiet enjoyment and the warranty of habitability
       1. Covenant of quiet enjoyment
          1. Applies to all land (even without a dwelling)
          2. Covers only actions of the landlord – or agent of landlord

Can breach covenant if you breach obligation in the lease – by omission

Can be commission – that’s not a breach of the lease

* + - * 1. Can only be actionable by tenant, if tenant leaves the premise
        2. Waivable
        3. Standard is higher

Landlord has to do more to breach

* + - * 1. Not limited to physical conditions

Playing loud noises, etc.

Nuisance-like actions

* + - * 1. Relieves tenant from paying rent
      1. Habitability
         1. Applies to omissions as well as commissions
         2. Tenant can stay on premises and habitability is actionable
         3. Can have exceptions

I.e. someone who is a new landlord, or if it’s an infrequent/one-off

No exceptions in NC

* + - * 1. Applies to only physical conditions
        2. Does not apply to commercial
        3. Have to pay rent unless in extreme (rate) cases of completely uninhabitable
  1. Defaulting Tenant
     1. Tenant in Possession
        1. ***Berg v. Wiley* (1978) [restaurant dispute]**
           1. Court rejects common law rule
           2. Says Wiley’s action is not peaceable
           3. Dangerous for us to resort to self-help
           4. Court has a bias against tenants 🡪 titled system
           5. Landlords passing on costs as increased rents
           6. Summary eviction

Potentially adverse consequence on tenant side of terminating self-help

Result in more evictions being filed

🡪 more evictions on people’s records

🡪 snowball effect on credit scores, etc.

Complaint becomes part of the public record

Self-help is an off-the-books-operation

* + - * 1. Ruling: There was no abandonment or surrender of the premises. Defendant’s means of reentry were not peaceable. The only lawful means to dispossess a tenant who has not abandoned nor voluntarily surrendered but who claims possession adversely to a landlord’s claim of breach of a written lease is by resort to the judicial process.
      1. Self-help
         1. Common law: LL entitled to possession could resort to self-help without fear of civil liability – so long as he used no more force than reasonably necessary

No necessary true of criminal liability

* + - * 1. Modern view (and majority view): Berg v. Wiley

Some courts continue to permit self-help in commercial settings

Where self-help is allowed, it must be accomplished without a breach of the peace

* + - 1. Summary eviction proceedings – shortcut/alternative to ejectment
    1. Tenant out of Possession (abandoning tenant)
       1. ***Sommer v. Kridel* (1977) [dude’s marriage plans fall through]**
          1. Companion case is Riverview Realty Co. v. Perosio
          2. Common law: landlord didn’t have a responsibility to do anything (or may HAVE to not do anything) if tenant leaves
          3. Can’t accelerate rent liability

Still becomes due month-to-month

* + - * 1. Tenant could surrender and landlord could accept or refuse the surrender
        2. Tenant here rents in anticipation of a marriage, this falls through and he asked to be released

He had never lived in the unit

Lower court finds for landlord

* + - * 1. Perosio

Defendant in tenancy for a period of time and then leaves

Lower court finds for the landlord

* + - * 1. Court imposes a standard: landlord must exert reasonable diligence in reletting the apartment

Duty to mitigate damages

No expecting the impossible or above and beyond efforts

Allocate burden of proof: landlord is way more likely to have relevant facts, documents, etc.

Effort options

Advertisements in paper

Make records of who came in to ask about/see unit

Phone calls

Landlords can do this much more simply and easily than a tenant who gets this via discovery

* + - * 1. Court finds for Kridel

Someone ready, willing and able explicitly offered to rent and landlord turned them down

This did not happen in Perosio

Tenant is not relieved completely from liability

What should the landlord be doing for reasonable diligence?

* + - * 1. Problem of last volume: buyer defaults, seller lost the sale, fact that they’re selling to someone else doesn’t make up their loss
        2. Court makes point that there are unique units
        3. Some jurisdictions follow one but not the other – Schroeder says it doesn’t make a whole lot of sense
      1. Traditionally, LL has 3 options when the tenant abandoned
         1. Terminate the lease/surrender
         2. Leave premises vacant; recover accrued rent/abandoned
         3. Mitigate damages; recover any difference in the rent
      2. The majority rule: duty to mitigate
      3. Vacant stock
         1. Who can bear the burden
         2. Tenant can help by finding someone else to cover
      4. Many statutory limits on security deposits (p. 322)

1. Co-ownership of Property
   1. Basics
      1. Before, we were dividing up the bundle of sticks
      2. With co-ownership, multiple people have the whole bundle
      3. Contemporary/concurrent interest
         1. Tenancy in common
         2. Joint tenancy
         3. Tenancy by the entirety
      4. When conveyance is made, sometimes there is confusion about which type of interest it is
         1. Default rule: it’s a tenancy in common
         2. Common law: goal of keeping land together
            1. Land as a source of feudal payments, debts, money owed
            2. More productive for the king to keep land in consolidated structure
   2. Tenancy in common
      1. Have separate undivided interest in the property
         1. Each interest is assignable/descendible
      2. No survivorship rights
      3. Unity of possession (see below) is essential
   3. Joint tenancy
      1. Two distinctive features
         1. Aspect of the right of survivorship
            1. They continue to own land that was previously jointly owned with deceased joint tenant

Not a transfer of interest

Dead joint tenant’s interest evaporates

* + - 1. What happens at creation
         1. Unity of title:

One instrument or by joint adverse possession

Can never arise by intestate succession or other act of law

* + - * 1. Unity of time:

interest has to arise (acquired or vests) at same time

* + - * 1. Unity of interest:

must have equal undivided shares and identical interests measured by duration

* + - * 1. Unity of possession

Each must have a right to possession of the whole

One can voluntarily give exclusive possession to the other joint tenant

* + 1. If any unity is destroyed, the joint tenancy is destroyed 🡪 tenancy in common
       1. One tenant can do so unilaterally by transferring interest to 3rd party
       2. And they can do so without giving notice to the other tenants
    2. If these four unities don’t exist at time of creation, a tenancy in common is created
       1. Some states have statutes that say intent is enough
    3. Disputes: judicial partition- physically partition or order the land sold and divide the proceeds
       1. Available for joint tenants or tenants in common, but not for tenants by entirety
       2. Compensation to make partition more fair: owelty
    4. Problematic for creditors – can’t recover after death
  1. Tenancies by entirety
     1. Some (about half) states have eliminated
     2. Limited to marriage (some exceptions for people not legally allowed to get married)
     3. Created an interest/right of survivorship was stronger here
        1. No e could unilaterally destroy
        2. Not separate interests 🡪 husband & wife are of one flesh
     4. Divorce terminates the tenancy
  2. Presumptions
     1. Common law favored joint tenancies of tenancies in common, but today situation is reversed
        1. Some states require express provisions for survivorship
     2. Common law presumed husband & wives meant to create a tenancy by entirety
  3. Avoidance of probate
     1. By joint tenancy, it operates as a will and probate is avoided
     2. Probate is the judicial supervision of the administration of the decedent’s property that passes to others at the decedent’s death
        1. Can be costly and time consuming
  4. ***Harms v. Sprague* (1984) [brothers joint tenancy case]**
     1. Facts
        1. Harms brothers have a joint tenancy
        2. Sprague wants John Harms to cosign a tenancy for him to buy property from Simmons
           1. Interest of John Harms = security in Simmons’ property
        3. John dies
           1. Sprague is executor and devisee of the estate
     2. Court thinks matter turns solely on whether mortgage disrupts the joint tenancy
        1. If it did, tenancy becomes a tenancy in common & Johns interest would become Sprague’s
           1. Encumbered by the mortgage
        2. If it didn’t destroy unities, the brothers remain joint tenants and when John dies, his interest just disappears
     3. Court has to decide if entering in security arrangement/co-signing destroyed one of the four unities
     4. Is Illinois a title-theory or lien-theory state in terms of mortgages?
     5. Whether encumbering a joint tenancy is a sufficient disruption
     6. Reasonable authority in case law if you transfer title 🡪 disrupt title/time unities
  5. What can we do?
     1. Make a right of survivorship indestructible?
        1. But a lot of joint tenancy have a fragile right of survivorship
     2. Is it fair, correct, and just to inflict damages on third parties?
     3. Could you have a bright lien rule that you can’t encumber a joint tenancy without consent of all tenants
        1. Courts haven’t often done this
        2. Some jurisdictions require notice
  6. Courts have differing rules on (p. 251)
     1. Whether leases sever joint tenancy
     2. Whether mortgage by one severs the tenancy
  7. Ouster and responsibilities of cotenants (pp. 265-66)
     1. Changing the lock is not okay, but using the property w/o payment is fine
     2. Rents and profits
     3. Taxes mortgages payments
     4. Repairs and improvemnet
     5. ~~Outside of trusts, joint tenancies arise in joint bank account scenarios a lot~~ 
        1. ~~Some jurisdictions say a joint bank account is a joint tenancy with a right of survivorship~~
        2. ~~Convenience account: so someone else can pay your bills~~
        3. ~~Payable on death (POD) accounts~~
           1. ~~Exception o the statute of wills~~
           2. ~~Have to be established by statute~~
  8. ***Delfino v. Vealencis* (1980) [garbage lady gets screwed]**
     1. Common law rule: any party in concurrent ownership can insist on dividing up the property
     2. Facts
        1. Delfinos (plaintiffs) own 99/144 of land
        2. Vealenci (defendant) owns 45/144 of land
        3. Defendant is running a garbage business on the land and living there, but the plaintiffs want to develop and sell the land and divide the profit
     3. Court prefers partition in kind over partition by sale
        1. But modern practice is to decree sales in partition actions in ta great majority of cases – because all parties wish it or because courts are convinced that sale is the fairest method of resolving the conflict
        2. Courts are split on whether they take in subjective value
     4. The land is easy enough to divide, but…
        1. Who wants to buy land next to a garbage operation?
        2. They probably wanted to become the buyers at auction (get the whole thing at partition sale)
        3. Impracticability is a reason not to physically partition
     5. Trial court not looking at defendant’s interests, really only looks at plaintiffs’
     6. Problem: plaintiffs don’t have proof their interests will be adversely affected by partition in kind
        1. Can you show that land divided up has a higher sales value than land as a whole?
     7. Case is a bit of an outlier: many courts lean to partition by sale rather than in kind
  9. ***Spiller v. Mackereth* (1976) [cotenant using joint space]**
     1. Facts: Parties owned a building as tenants in common. A lessee had been renting the building and vacated, Spiller entered and began using the structure as a warehouse. Spiller put some locks on the building. Mackereth wrote a letter demanding that Spiller either vacated or paid rent. Spiller did neither.
     2. Ruling: Before an occupying cotenant can be liable for rent in AL, he must have denied his cotenants the right to enter. Unable to find any evidence which supports a legal conclusion of ouster.

1. Buying and Selling Property
   1. The Basics
      1. Contracts that are written are almost always executory (time between singing and closing)
         1. Closing date is negotiated by parties
         2. Usually some sort of urgency by at least one party
      2. Ability of buyer to inspect the house (due diligence period)
         1. Between signing and closing
            1. Can be several months long
         2. Look over the goods before the transaction is finalized
         3. Buyer can inspect property
         4. Buyer has flexibility to back out
         5. Seller worries about buyer’s remorse
            1. Buyer has cold feet and sellers have ex post damage (remedies)
         6. Try to get provisions that keep things moving along
         7. Buyer
            1. Applies for financing
            2. Insurance
            3. Inspection
         8. What if something happens to house during this time (i.e. fire)
            1. Can contract for this
            2. Common law says you buy the land, house is separate

So, you would continue to be bound

* + - * 1. If seller has insurance, buyer can get proceeds (constructive trust)
        2. Equitable conversion (enforcement)

Buyer holds equitable title to say contract is entered

Buyer has responsibility of getting insurance

* + - * 1. Uniform Purchaser Vender Act

Buyer has choice:

Rescind on grounds of material change

Take insurance proceeds and continue with deal

* + 1. Doctrine of merger
       1. Once you sign the deed, all prior agreements get merged into the deal
          1. Understanding that all prior obligations have been performed
          2. This can be handled by contact

Add a provision in the deed

Or do a separate contract, outside the doctrine of merger

* + - 1. Now in disfavor and becoming riddled with exceptions when the buyer does not intend to discharge the seller’s contractual obligations by acceptance of the deed
    1. “as is” clause (TBC…)
       1. Typically upheld if the defects are reasonably discoverable and there is no fraud
    2. Marital property
       1. A spouse can have protectable interest in property that doesn’t necessarily have to be recorded
       2. Buyer should inquire about seller’s marital status
       3. Kind of like a joint tenancy
    3. Statute of frauds
       1. Elements
          1. Signature
          2. Description (of the land covered)
          3. Price
       2. Proof that contract existed
       3. Need a really good reason to allow people to work around the statute of frauds (e.g. detrimental reliance)
       4. Every state has adopted some version – by statute or judicial decision
       5. Security!
       6. Exceptions
          1. Part performance – allows the specific enforcement of oral agreements when particular acts have been performed by one of the parties to the agreement
          2. Estoppel – applied when unconscionable injury would result from denying enforcement of the oral contract after one party has been induced by the other to seriously change his position in **reliance** on the contract
    4. Title based on adverse possession is good and merchantable title
    5. Marketable title: an implied condition of a contract of sale of land is that the seller must convey this
       1. Title not subject to such reasonable doubt as would create a just apprehension of its validity in the mind of a reasonable, prudent, and intelligent person, one which such persons, guided by competent legal advice, would be willing to take and for which they would be willing to pay fair value
    6. Marketable title > merchantable title (same thing)
       1. Buyers down the line want marketable title
       2. Title is free from litigation risk (title = marketable)
          1. Litigation risk or expense
          2. Encumbrances that someone might want to enforce via litigation (i.e. easement/right of way)

Can waive this

* + - * 1. Find something in the chain of deeds that affects potential litigation risks
      1. Not in way of marketable title if buyer waives it
    1. Can insure even if not merchantable
    2. Encumbrances are very common
       1. Gas/electric companies and easements
       2. Homeowner association regulations
  1. Contract of Sale
     1. ***Hickey v. Green* (1982) [woman finds better deal and backs out of sale]**
        1. Defendant (Green) agreed to sell land to plaintiffs (Hickeys) via oral agreement and deposit
        2. Defendant found higher bidder and backed out, but plaintiffs had already relied on the agreement and sold their house
        3. Lower court granted specific performance and the appellate court affirmed
        4. Why was the agreement valid?
           1. Reliance
           2. Partial performance doctrine

Here, parties agree there’s an oral contract

But if no contract is admitted, there has to be “action taken by the purchaser must be unequivocally referable to the oral agreement”

Payment of money alone is usually not enough

High standard without agreement that a contract existed

* + - * 1. if the second agreement (the Hickeys selling their house) was not enforceable, then there isn’t detrimental reliance
        2. Hickey 🡪 Green check doesn’t satisfy statute of frauds

Green did not sign it

* + 1. ***Lohmeyer v. Bower* (1951) [sale of house with violations]**
       1. Facts
          1. Plaintiff entered into contract to buy a lot from defendant
          2. Plaintiff tried to rescind because of a zoning violation (city ordinance/three-foot sit back) and subdivision restriction (houses had to be two stories)
          3. The lot had one story house that violated zoning restriction
       2. Existence of restrictions doesn’t make it unmarketable
          1. But the violation of the restrictions make it unmarketable
          2. Private restrictions do = unmarketable

You can waive or restrict private restrictions

Subject to restrictions of record = marketable

This contract included such language

You can also explicitly name restrictions

* + - * 1. When they’re waived, perfectly good/marketable title

Encumbrance (two story house)

Requirement is “of record” – not a defect

* + - * 1. What’s problematic is that house is in violation

Risk of litigation = unmarketable title

* + - * 1. Public zoning ordinance gets treated differently

Existence does not equal effect on marketability

Doesn’t have to be waived

but if you’re in violation of this 🡪 unmarketability

* + - 1. Why treat private and public restrictions differently?
         1. Government regulations aren’t considered to be features of a part of real property’s title (formal understanding)
         2. When people do title searches, they know where to look – city zoning ordinance are not in the same location as title documents (in county clerk’s office) (functional understanding)
      2. Consequence: reluctance of courts to find public restrictions to affect marketability
      3. Here, not just a risk of litigation, but a risk of serious expense
         1. There are workarounds, exceptions, but no guarantee that it will work out
    1. Equitable conversion: if there is a specifically enforceable contract for the sale of land, equity regards as done that which ought to be done
       1. The buyer is viewed as the owner from the date of the contract
       2. The seller has a claim for money secured by a vendor’s lien on the land
       3. Burden on the purchaser for risk of loss
       4. Inheritance p. 370
  1. Disclosure
     1. At common law, there was no seller obligation to disclose, but fraudulent misrepresentation was prohibited
        1. Just keep your mouth shut
        2. Caveat emptor
     2. ***Johnson v. Davis* (1985) [water leak/misrepresentation case]**
        1. Contract for $310K, $31K deposit
        2. Water gushes into house 🡪 major leaks
        3. Defendant (Johnson) had affirmatively said no problems with the roof
           1. Treats leak as a minor problem
        4. Defendants had duty to pay for repairs for water damage in a contract provision
           1. Repairs would be thousands of dollars
        5. Plaintiffs (Davises) want out of the deal
           1. Defendants engaged in fraudulent misrepresentation, so plaintiffs have right to
        6. Plaintiffs paid $5K before fraudulent misrepresentation was made ($26K after)
           1. so, they have to rely on duty to disclose to get the first $5K back
     3. Caveat emptor
        1. sellers can’t commit fraud
        2. but silence is OK – they don’t HAVE to make a disclosure
        3. Benefits
           1. Bright line, easy to administer
           2. Incentivizes buyers to do a thorough inspection
        4. Why reject it?
           1. Increasing sophistication of what’s being bought and sold

Maybe not apparent to inspector/buyer

Efficiency argument – put burden on party better equipped to deal with it

* + - * 1. Out of touch with the times

Not consistent with good faith negotiations

* + - * 1. Unfair bargaining?
      1. Steadily being eroded by courts
    1. In every jurisdiction requiring disclosure, the defect must be “material” to be actionable. One of two tests of materiality is applied:
       1. Objective test of whether a reasonable person who attach important to it in deciding to buy
       2. Subjective test of whether the defect “affects the value or desirability of the property to the buyer”
    2. ***Stambovsky v. Ackley* (1991) [haunted house]**
       1. It has to be disclosed that the reputation of the house is that it’s haunted
       2. Not apparent to any reasonable inspector
       3. Affects the value of the house/resale ability
          1. But court doesn’t’ really offer proof of this
       4. (quiet enjoyment argument?)
       5. Doesn’t’ actually overturn caveat emptor, just a very narrow exception
       6. Under holding, plaintiffs don’t have to disclose haunting reputation because they didn’t create it
          1. Court has a focus on fact that the seller created the reputation
       7. Judge is trying to make as narrow of a judgment as possible
       8. How knowledgeable are owners about their houses?
       9. There is an “as is” clause in the contract
          1. Sometimes things are barred by as is clause, but fraud can still be brought
          2. Sometimes as is clause will allow someone to take back any representation they made
    3. Stigma statutes
       1. Several states have enacted statutes shielding sellers from failure to disclose psychological or prejudicial factors that might affect market value (murder, former occupant died of AIDS, etc.)
       2. Point out that once you start talking about conditions that are not part of the property itself, some disclosure may be required
       3. What duty to disclose attributes about the environment?
    4. Implied warranty of quality
       1. Common law
          1. Rule caveat emptor: a builder who constructed a home and then sold it to a buyer was protected from liability even if the house was negligently constructed

Caveat emptor in the sale of real estate by a vendor-builder is, if not yet dead, certainly moribund

* + - 1. Majority today
         1. Implied warranty of quality or skillful construction exists in contracts for the sale of homes by builders, developers, or other “merchants” of housing
         2. In most states, not strict liability
         3. Most courts, applies only to significant defects
         4. Most courts hold that the warranty covers only latent or hidden defects
  1. Remedies
     1. When contract of sale is breached, three types of remedies available to nondefaulting party (buyer or seller):
        1. Damages
           1. General rule: difference between K price and fair market value at the time of breach
           2. Some courts allow to calculate difference from time it’s resold
        2. Retention of the deposit (sellers) or restitution of the deposit (buyers)
           1. Majority view: when buyer breaches a K to purchase land, the seller may elect to retain the down payment because of “the difficulty of estimating actual damages and the general acceptance of the traditional 10% down payment as a reasonable amount” even if the sales contract has no liquidated damages provision
           2. Minority view: defaulting buyers are entitled to restitution of the deposit money in excess of damages incurred (Kutzin)
        3. Specific performance of the contract
           1. Some courts have begun to depart from this, but still broadly available
     2. Generally, winner can elect the remedy she prefers
     3. Seller’s breach due to title defect (if seller is unable to convey marketable title)
        1. Half jurisdictions follow English rule
           1. Limit the buyer’s recovery to his down payment plus interest and reasonable expenses incurred in investigating the title
           2. Only if seller has acted in bath faith or assumed the risk of a failure to secure title will he be liable for ordinary damages
        2. American rule is gradually becoming the dominant position
           1. Allows purchaser to recover expectation (benefit of the bargain) damages, plus any other reasonably foreseeable special damages
     4. ***Jones v. Lee* (1999)**
        1. Parties contract to sell a house for $610K, put $6K down
        2. Defendants are buyers; plaintiffs are sellers
        3. Defendants back out and plaintiffs rejected proposed termination agreement
        4. Plaintiffs put house back on market and sell it a month later for $70K less
        5. Sue for $70K plus other damages
        6. Fair market price at the time of break
     5. ***Kutzin v. Pirnie* (1991)**
        1. Deposit and damages – buyer defaults
        2. Normal common law rule: not to give defaulting buyer money back, allow seller to keep the money
        3. MINORITY view
  2. The Deed
     1. Three types:
        1. General warranty deed
           1. Provides the greatest degree of protection
           2. Warranting title against all defects, whether they arose before or after the grantor took title
        2. Special warranty deed
           1. Contains warranties only against the grantor’s own acts but not the acts of others (i.e. predecessors)
        3. Quitclaim deed
           1. Contains no warranties of any kind
           2. Merely conveys whatever title the grantor has and if the grantee of a quitclaim deed takes nothing by the deed, the grantee cannot sue the grantor
     2. Need (p. 390):
        1. Consideration
        2. Acknowledgment
        3. Description of tract
        4. Seal
     3. Advice to clients: always get title insurance!
     4. Warranties
        1. That seller makes to buyer
        2. Distinction: warranties in general warranty (present v. future)
           1. Present: grantor warrants that he is in possession of the property
           2. Right to convey
        3. Guaranty against encumbrances on the property (easements, mortgages, leases, liens)
           1. Typically, there are encumbrances buyer can waive are in specific warranties
        4. Covenants that grantor will defend/indemnify grantee if someone makes claims on the title, to dispossess buyer (quiet enjoyment)
        5. Covenant of further assurances
        6. Present warranties (in document) vs. future warranties (things going forward)
        7. List of covenants – page 391
           1. Covenant of seisin: grantor warrants that he owns the estate that he purports to convey
           2. Covenant of right to convey: grantor warrants that he has the right to convey the property
           3. A covenant against encumbrances: grantor warrants that there are no encumbrances on the property

Encumbrances =mortgages, liens, easements, and covenants

* + - * 1. Covenant of general warranty: grantor warrants that he will defend against lawful claims and will compensate the grantee for any loss that the grantee may sustain by assertion of superior title
        2. Covenant of quiet enjoyment: grantor warrants that the grantee will not be disturbed in possession and enjoyment of the property by assertion of superior title
        3. Covenant of further assurances: grantor promises that he will execute any other documents required to perfect the title conveyed
    1. ***Brown v. Lober* (1979) [mineral rights]**
       1. General warranty deed conveying 80 acres from Borls 🡪 Brown
       2. But they didn’t have the acres to Coney. They only had 1/3 of the mineral rights
       3. Browns try to sell mineral rights to coal company, but find out they only have 1/3
       4. Too much time has passed between sale and condition of mineral rights
          1. Time for covenant recovery has passed
          2. Covenant of quiet enjoyment is only candidate left
       5. Court says: it’s not enough to have knowledge that you don’t own all your though you acquired
          1. No one is actually interfering with your right
          2. No one had tried to mine minerals
       6. Tendency toward the proposition that certain visible public easements (highways, RR rights of way) in open and notorious use at the time of the conveyance do not breach a covenant against encumbrances.
          1. General rule: an easement which is a burden upon the estate granted and diminishes its value constitutes a breach of the covenant against encumbrances in the deed – whether the grantee had knowledge of its existence or that it was visible and notorious
    2. Delivery
       1. To be effective, a deed must be delivered with the intent that it be presently effective
       2. Delivery is rarely an issue in commercial transactions – largely confined to donative transactions.
       3. Deed as symbolic delivery
       4. ***Sweeney v. Sweeney* (1940) [deeds shit to brother to get around wife]**
          1. John & Maurice are brothers
          2. Maurice (?) buys a tavern, estranged wife
          3. First deed: Maurice 🡪 John (delivery is good)
          4. Second deed: John 🡪 Maurice
          5. What’s going on here?

Maurice doesn’t want his estranged wife

Could have divorced her?

Forced share of surviving spouse, even if he’s got a will

Could have only limited it some by writing a will

Doesn’t want John’s heirs to get it if he dies first

If Maurice dies first, he wants it in John’s hand

Alternative contingent remaindered

Make them join tenants

* + - * 1. Two-deed plan could have worked with an escrow agent
        2. What happens?

Maurice dies first

Deed is lost

Creates enormous proof problem, but it still exists

* + - * 1. Court oversimplifies Maurice’s intent
        2. First deed is recorded, second is not (just minutes between conveyances)
        3. They think not recording it will keep it secret/concealed from the wife
        4. The deed was, in effect, manually delivered. Since the purpose would have been defeated had there been no delivery with intent to pass title, this conclusively establishes the fact that there was a legal delivery.
        5. Prevailing few
      1. Other views
      2. Should have given to escrow agent to give to brother if condition occurred
      3. Don’t need a physical deed for it to be valid
  1. Recording and Title Assurance
     1. Trying to bring certainty to question of “who owns this property?”
        1. Knowing ownership facilitates transactions
        2. Possession is a good proxy for ownership (evidence)
     2. The starting point (for ownership of land)
        1. First in time, first in right
        2. O deeds to A, then later O deeds to B. O had no interest in land to convey to B. Between A and B, A wins.
        3. Application of nemo dat (having nothing means having nothing to give)
        4. Once you give it away, you can’t give it to another person
     3. All states have statutes that create exceptions (recording statutes)
        1. In 48 states & DC, there are statutes for some people who aren’t first in time
     4. Bona fide purchaser for value
        1. Will prevail over any prior unrecorded interest
        2. Bona fide/innocent
        3. Put down good money
        4. The people who move assets to higher/better uses
        5. Lacking notice
     5. Types of rules
        1. Notice state
           1. ½ of states
           2. Protect B only if she takes delivery of the deed without notice of the prior conveyance to A
           3. The subsequent bona fide purchaser has priority even though that person fails to record
           4. A subsequent purchaser for value who takes without notice of third-party interests in the land prevails, regardless of whether he records
        2. Race-notice
           1. ½ of states
           2. Protect B only if she takes delivery of the deed without notice of the prior conveyance to A and also records her deed first
           3. A subsequent purchaser for value who takes without notice of third-party interest in the land prevails only if he records before the prior instrument is recorded
        3. Race
           1. Only NC and LA
           2. You have superior claim as long as you get courthouse to record it

Bona fides don’t matter

* + - * 1. The first purchaser (meaning anyone who has paid consideration for an interest in land) for value who records first, prevails (notice is irrelevant)
    1. How do you have notice?
       1. Actual knowledge of prior conveyance
          1. Personal knowledge of the prior interest
       2. Inquiry notice
          1. Would a reasonable person have suspicion? And then subsequently find out about prior conveyance
          2. Notice based on a purchaser’s duty to investigate relevant circumstances
       3. Record notice
          1. What you would learn if you inspected the chain of title and record if you searched/inspected it
          2. There are a lot of records – start with indices
          3. Notice of prior interest that would be revealed by an appropriate title search
       4. General index: grantor-grantee
          1. Alphabetized index for each
       5. In England, government certifies who owns the property
          1. Better system
          2. But U.S. is too embedded in deed recording system
          3. A lot invested in this system: lawyers, title insurance companies
       6. Title Search
          1. Start with the most recent grantee and go back as far as you can

Trace grantee index to establish original owner – did grantors create any adverse interest?

Go down to time the deed granted was recorded

Even if the deed was executed before then

* + - * 1. Start with oldest grantee and move your way forward through grantors

To see if grantors deeded anything to someone else

* + - 1. No generic rules requiring instruments to be recorded
      2. Unrecorded instruments can be completely valid
      3. Subsequent purchasers don’t know they’re subsequent purchasers
         1. Recording system provides opportunity to protect themselves
         2. It’s all about what a search of the records will reveal to a subsequent purchaser
      4. Wild deeds: not connected to the chain of title at all
         1. Could find it under a tracked index

By specific piece of land, not by the parties

* + - * 1. But wouldn’t find it under a grantor’s name
        2. Recorded - but neither grantee or grantor will show up
        3. Problem in race-notice and notice states
      1. You can acquire equitable title before legal title
         1. Have it substantively before title
    1. ***Luthi v. Evans* (1978) [oil and gas leases]**
       1. Facts
          1. 2/1/71 Owens assigns Tours interest in 7 oil and gas leases. Assignment contains Mother Hubbard Clause

“I’m giving you the same interest as the other property I own in the county”

Anything I haven’t named still goes

* + - * 1. Tours records on 2/16/71
        2. 1/30/75 Owns assigns interest in Kufahl lease to Burris
      1. Court says Mother Hubbard clause is valid so as to convey Owens’ interest to Kufahl lease to Tours
         1. Tours has recorded
         2. In suit between Burris and Tours – who wins?

Burris wins. Tours recorded assignment does not provide constructive notice of interest in Kufahl

* + - * 1. If court held otherwise, people in Burris’ position would have to do any additional search – to cover any and all properties
      1. What general rule does the court want to establish?
         1. The additional burden on Tours is much smaller than what would have been put on Burris
         2. Keeps records cleaner/more complete for future searches
         3. Prior purchaser is the least cost avoider
         4. Guilette comes with a ruling that does include an expanded search (common scheme)

Usually though, courts are reluctant to require an expanded search

* + 1. ***Messersmith v. Smith* (1953) [deed not acknowledged properly]**
       1. Facts/Timeline
          1. Before 5/7/46: Caroline and Frederick were cotenants with equal shares
          2. 5/7/46: Caroline deeds to Frederick, who, does not record
          3. 4/23/51: Caroline deeds a mineral lease to Smith
          4. 5/7/51: Caroline deeds a mineral deed to Smith (her ½ interest)
          5. 5/7/51: Caroline and Smith reexecute mineral deed because Smith is concerned about the wording. Earlier deed may have been properly acknowledged, but this deed was not
          6. 5/9/51: Smith deeds mineral deed to Seale
          7. 5/14/51: The 4/23/51 mineral lease from Caroline to Smith is recorded
          8. 5/26/51: the Caroline 🡪 Smith mineral deed and Smith 🡪 Seale deed are recorded
          9. At this point, Seale is the owner of the mineral rights, Smith is the lessee
          10. 7/9/51: Frederick records the Caroline 🡪 Frederick deed
          11. Frederick sues to quiet title

Alleges deed obtained by fraud, deceit, misrepresentation

Alternatively, that the deed was not acknowledged properly, thus not entitled to be recorded and thus Seale is not a bona fide purchaser

* + - 1. Appellate court says bound by trial court findings as to fraud, but finds for Frederick on the second theory.
      2. So Seale, who is a BFP for value, looks like he can prevail over a prior claimant, Frederick. However,
      3. Court holds that defective deed in Seale’s chain of title (Caroline 🡪 Smith deed) was not entitled to be recorded and so Seale’s deed is first recorded
      4. In ND, need a valid acknowledgement/notarization to have a valid recorded
      5. Frederick recorded last, he’ll see defective deed if he searches title
         1. Doesn’t defeat his claim
  1. Chain of Title
     1. Problems
        1. Recording solves a whole lot of problems
        2. ***Board of Education of Minneapolis v. Hughes* (1912) [wild deed]**
           1. When does a deed become effective?
           2. Facts

5/17/06: Hoerger executes and delivers a blank deed to Hughes

4/27/09: Hoerger executes and delivers a quitclaim deed to D&W

11/19/09: D&W execute and delivery a warranty deed to Board of Education

1/27/10: Board of Education records deed from D&W

12/16/10: Hughes fills in his name in 1906 deed & records

12/21/10: Hoerger 🡪 D&W deed is recorded

1/27/10: Duryea & Wilson → Bd. Of Ed is recorded.

12/16/10: Hoerger → Hughes (after Hughes fills in his name as grantee) is recorded

12/21/10: Hoerger → Duryea & Wilson is recorded

* + - * 1. Board of Ed. Has at least constructive notice that D&W don’t have recorded interest

Deed is wild to chain of title

* + - * 1. Who has superior title?

Race-notice state

* + - 1. ***Guillette v. Daly Dry Wall, Inc.* (1975) [one deed did not mention restrictions]**
         1. Deeds conveyed by common grantor (Gilmore)
         2. There are restrictions applied to the land, but one deed did not mention the restrictions – do they still apply?
         3. Deed 1 (Guillette)
         4. Deed 2 (Daly Dry Wall)
         5. You wouldn’t find this deed in the typical search

It would be indexed to another piece of land in a normal title search, you’d skip it

* + - * 1. Expanding the typical title search

Why impose the additional burden?

Reliance interest from other people who have purchased land from common grantor (Gilmore) before

What if we want Gilmore to do it right the first time?

Strict oversight

Convey straw/fiduciary & straw/fiduciary conveys it back to you

One property would have to go to a stranger

(Don’t worry about this for exam)

* + - 1. Most courts hold that the servitude must be properly recorded in the chain of title of all persons against whom subsequent enforcement is sought
    1. Persons Protected by Recording Statutes
       1. By judicial construction, the recording statutes have been held, almost universally, not to protect donees and devisees, even in race jurisdictions
       2. ***Lewis v. Superior Court* (1994) [notice of lawsuit not available in title search]**
          1. Lewises contract to buy a house from Shipley at $2.3M
          2. Notice of lawsuit (lis pendens) against Shipley from Fontana Films

Lis pendens is recorded 2/24 but not indexed until 2/29 (a day after Lewises acquired title)

* + - * 1. Court holds they’re going to take it free and clear from the obligation

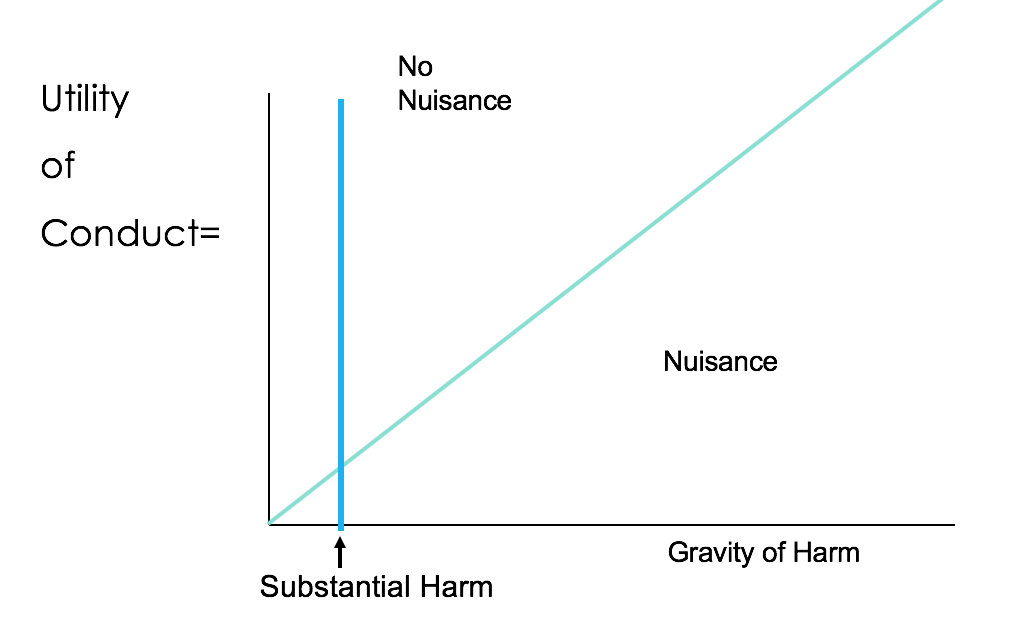
They put in enough value

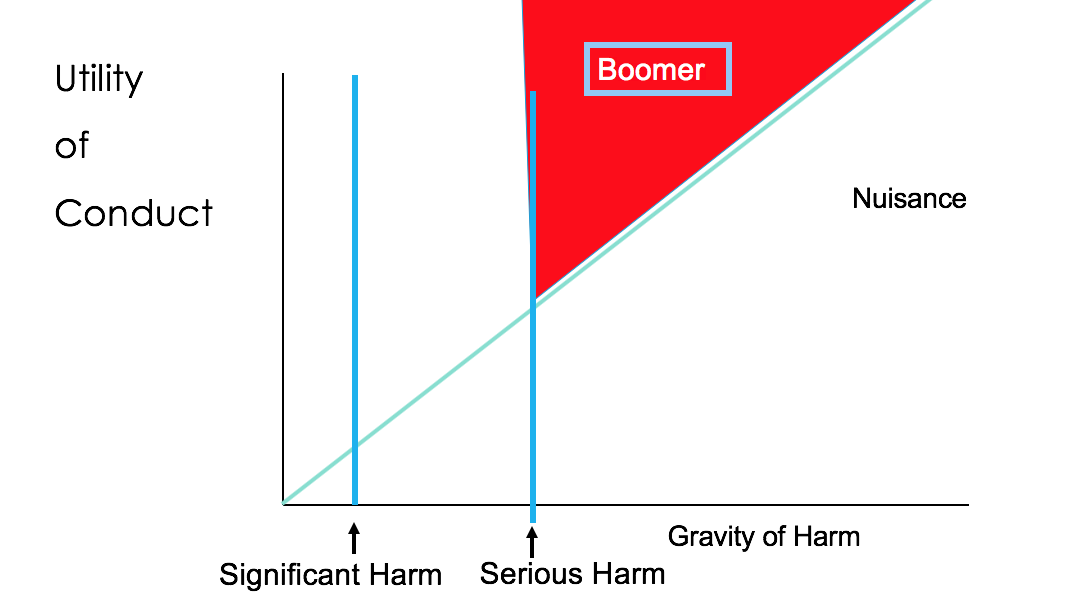
* + - * 1. Fontana wanted: Lewises liable until they make full payment

Court rejects this

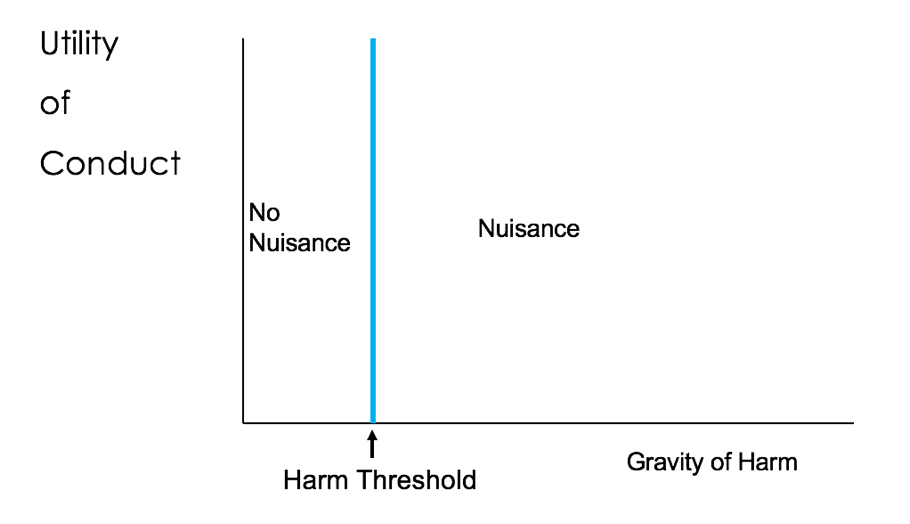
* + 1. Inquiry Notice
       1. ***Waldorf Insurance and Bonding, Inc. v. Eglin National Bank* (1984)**
          1. Inquiry notice: notice based on a purchaser’s duty to investigate relevant circumstances
          2. Case: building a condominium
    2. Title insurance
       1. The opinion of the insurer concerning the validity of title, backed by an agreement to make that opinion good if it should prove to be mistaken and loss results as a consequence
       2. Guarantees that insurance company has searched the public records and insures against any defects in the public records, unless such defects are specifically excepted from coverage in the policy
       3. Standard exclusions:
          1. Losses arising from government regulations affecting the use, occupancy, or enjoyment of land (zoning, building codes, etc.), unless a notice of enforcement or violation is recorded in the public record
          2. Claims of persons in possession not shown by the public records, as well as unrecorded easements & implied easements
          3. Easements arising by prescription
       4. ***Lick Mill Creek Apartments v. Chicago Title Insurance Co.* (1991)** 
          1. Title insurance insurers titles NOT value
          2. Inconsistent with Lomeyer decision?
          3. \_\_\_\_\_\_\_\_\_\_ doesn’t affect marketable title

1. Nuisance
   1. Overview
      1. Non-trespassory invasion/interference with your use/enjoyment of property
      2. Sic utere tuo ut alienum non laedus: one should use one’s own property in a way to not injure the property of others
      3. History
         1. Industrial revolution 🡪 pollution
         2. Typical/persistent nuisances
         3. RRs & sparks 🡪 fires of crops
      4. Plaintiffs in nuisance claims are typically residential occupants of land
      5. Environmental and pollution controls/regulations lower the number of nuisances created
      6. Liability arises only if the resulting interference is substantial and unreasonable
      7. Unintentional or intentional
   2. ***Morgan v. High Penn Oil Co.* (1953) [oil refinery gases]**
      1. Facts
         1. Plaintiffs owned land with a dwelling, restaurant, and trailers they rented out
         2. Defendants has oil refinery
         3. Nuisance claim that defendant’s refinery emits nauseating gases & owners that affect plaintiff’s property
      2. Court focuses on intentional nuisances
      3. Would it matter if defendant was really trying to mitigate the pollution nuisance?
         1. No – **due care is irrelevant in intentional nuisance**
         2. Can still commit a nuisance if you’re using maximum care
         3. Restatement of Torts: standard is that a nuisance must be unreasonable
            1. Whether the gravity of the harm outweighs the actor’s conduct
            2. Relatively few courts follow the Restatement explicitly
      4. Court doesn’t illuminate how it’s weighing the two factors
         1. They grant relief, so they must think harm > benefits
         2. How they’re analyzing the problem isn’t obvious
      5. Remedy? It’s abatable, an injunction to abate (or try to abate) the nuisance
      6. Morgan says it adopts/uses a balancing approach, but Schroeder finds it to be more of a threshold approach
   3. Measuring Nuisance
      1. Is it a balance or a threshold of harm?
      2. Restatement of Torts (2d) § 826(a) factors
         1. An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if
            1. The gravity of the harm outweighs the utility of the actor’s conduct
            2. The harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.
         2. Gravity of harm (827, 828):
            1. Extent and character of harm
            2. Social value of plaintiff use
            3. Suitability to the locality in question
            4. Burden of plaintiff avoiding harm
         3. Utility of defendant conduct
            1. Social value
            2. Suitability of location
            3. Practicability of preventing harm

A: 

A+B: 

* + 1. Goals of balancing approach?
       1. Achieving efficiency of land use
       2. Utilitarian
       3. Coase/competing uses
       4. Pro-Δ
    2. Goals of threshold?
       1. Stability
       2. Bright line
       3. Litigation avoidance
       4. Live and let live – to a certain extent
       5. Pro-π
    3. Restatement (First) Factors § 827, 828
       1. Extent/character of harm
          1. Dangerous vs. annoying
       2. Social value
          1. Residential is high up
          2. Running a hospital, etc.
       3. Suitability of locality
          1. Residential vs. industrial vs. commercial
          2. And surrounding neighborhood
       4. (4) + (7) can someone abate the nuisance?
    4. It DOES matter some who was there first (first in time)
    5. Pro-defendant orientation
    6. Threshold approach
       1. Doesn’t care how many people are harmed or social benefit really
       2. Suppresses a lot of socially useful activity



* + 1. Balancing approach
       1. It ignores harm/complaints because it’s too focused on social value
    2. Restatement (Second) of Torts § 826(b)
       1. “the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible” (second definition of reasonable)
    3. Doctrine of Undue Hardship, Relative Hardship, Balancing the Equities, Balancing the Hardships -- A doctrine applied at the remedy stage, after liability has been established.
       1. “where substantial redress can be afforded by the payment of money and issuance of an injunction would subject the defendant to grossly disproportionate hardship, equitable relief may be denied although the nuisance is indisputable”
       2. Elements of Undue Hardship/Balancing the Equities
          1. Defendant’s culpability
          2. Public interest (social value & utility of the activity)
          3. Defendant’s delay or acquiescence
          4. Hardship to plaintiff if only awarded damages
  1. Lateral and subjacent support
     1. Lateral support refers to that provided to one piece of land by the parcels of land surrounding it
     2. Subjacent support refers to support from underneath as opposed to the sides
        1. Issues arise when one person owns surface rights and another person owns some kind of subsurface rights, such as mineral interest
  2. ***Boomer v. Atlantic Cement Co.* (1970) [cement plant]**
     1. Conditional injunction
        1. Enjoined unless you pay the damages
     2. That’s too harsh of a rule, too many socially beneficial activities will be prevented
     3. Solution doesn’t make plaintiffs (or defendants really) happy
     4. Ruling: There is enough evidence to establish existence of an actionable nuisance, entitling plaintiff to recover temporary damages. There is enough evidence to establish existence of an abatable nuisance, entitling plaintiff to mandatory or prohibitory injunctive relief.
  3. Public nuisance: an unreasonable interference with a right common to the general public
     1. Unreasonableness measured by:
        1. Interferes with public health, safety, peace, comfort, or convenience
        2. Whether the conduct is proscribed by statute or ordinance
        3. Whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect
        4. Gravity and utility
     2. There must be substantial harm caused by intentional and unreasonable conduct or by conduct that is negligent, reckless or abnormally dangerous
  4. Nuisance vs. Trespass
     1. Market solutions – can the market solve issue of whether a trespass is warranted?
        1. Value of privacy v. amount trespasser is willing to pay
     2. Bargaining doesn’t work as well with nuisance
        1. Hold-out/people exploiting company
        2. Company could be locked in
        3. Too many people to negotiate with
        4. High transaction costs
     3. Damages remedy present in nuisance cases, not so much in trespass cases
        1. Injunction in trespass
           1. Market will fix it
        2. Right to exclude > quiet enjoyment?

1. Servitudes
   1. Overview
      1. Voluntary distinctions people make about control of property
         1. Contractual relationships
      2. Doctrines are entrenched in history
         1. Archaic distinction
      3. Usually two or more parcels of land to increase the total value of all the parcels involved
         1. Usually, burden one for the benefit of another
      4. Fundamental issue: do arrangements survive change(s) in ownership?
         1. No longer talking about people who contracted with each other
         2. Difficult arises when land changes hands
      5. Solutions
         1. One extreme: enforce everything
         2. Other extreme: enforce nothing between strangers
         3. Law rejects both extremes
   2. Different Types
      1. Easements
      2. Covenants
         1. Real covenants
         2. Equitable servitudes
         3. [Difference here is mostly in requirements and damages]
      3. Licenses
         1. Oral or written permission given by the occupant of land allowing the licensee to do some act that otherwise be a trespass
         2. A license is revocable, an easement is not
            1. License that cannot be revoked is treated as an easement
      4. ~~Profits~~
   3. Doctrinally & Functionally
      1. A right to do some act on another person’s land 🡪 easement
      2. A right to ender onto someone’s land and removed something attached to the land (i.e. minerals) 🡪 profit
      3. A right to restrict an owner from using her land in some way 🡪 negative easement or real covenant or equitable servitude
      4. A right to compel an owner to perform some act on her own land 🡪 real covenant or equitable servitude
      5. A right to compel an owner to pay money or maintain certain facilities 🡪 real covenant or equitable servitude
   4. Easements
      1. Types
         1. Explicit
            1. Affirmative (positive) or restrictive (negative)

Vast majority are affirmative – give the interest holder a right to do an affirmative act on someone else’s land

Negative easement – forbidding one landowner from doing something on his land that might harm a neighbor

Disfavored

* + - * 1. Appurtenant or in gross

Appurtenant – gives the right to whomever owns a parcel of land that the easement benefits

Landowner

If unclear, law construes in favor of this

In gross – gives the right to some person without regard to ownership of land

Personally

* + - 1. Explicit
         1. By necessity
         2. Estoppel (reliance)
         3. Implication
         4. Prescription
    1. By necessity
       1. Dominant and servient estates were formerly owned by a single owner
       2. The dominant estate became landlocked at the time of the severance.
       3. High bar
    2. Third party
       1. Restatement provides than an easement can be created in favor of a third party
       2. But many cases reaffirm the common law rule that a grantor cannot reserve an easement in favor of a third party
    3. Reservations and exceptions
       1. Reservation : provision in a deed creating some new servitude which did not exist before as an independent interest
       2. Exception: provision in a deed that excludes from the gran some preexisting servitude on the land
    4. ***Willard v. First Church of Christ, Scientist* (1972) [church parking]**
       1. Owner of property wants to sell property reserving an easement to a church for parking purposes
       2. In this case, such a reservation vests the interest in the third party. Grants are to be interpreted in the same way as other contracts and not according to rigid feudal standards. The balance falls in favor of the grantor’s intent, and the old common law rule may not be applied to defeat her intent.
    5. ***Kienzle v. Myers* (2006) [easement by estoppel]**
       1. Facts
          1. Neighbors who are friends set up a system where one’s sewage pipe is under the other’s property
          2. They both sell their property to different people
          3. New person doesn’t want other person’s sewage under their land
       2. Element of hardship needed in easement by estoppel
       3. When courts will find an easement without a writing (without regard to statute of frauds)
          1. How culpable does the party allowing use of their property need to be?

Mislead?

Just granting permission (Restatement)

* + - * 1. Detrimental reliance

Restatement and common law are squared on this

Remember Hickey v. Green

How hard it is to undo the action

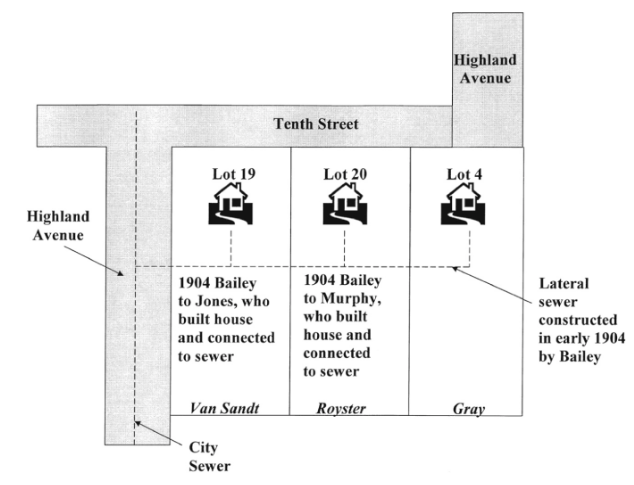
* + - 1. Permission that you could have revoked becomes irrevocable by allowing others to use the property, change their behavior to their detriment without saying anything
      2. Easement by estoppel: A property owner’s reasonable reliance on an adjacent owner’s permission for use ripened into an easement by estoppel. Trial court failed to distinguish. Equities favor not disturbing a 25-year-old arrangement which seems to have only recently concerned anyone.
         1. Aka irrevocable license
         2. Requirements:

Permission by the landowner of another’s use of the land

Good-faith reliance on the permission by the licensee, usually by making improvements and such

Landowner’s knowledge of such reliance (or reasonable knowledge)

* + 1. Look at notes case following this for differing view
    2. ***Van Sandt v. Royster (*1938) [sewage in basement]**

****

* + - 1. Facts
         1. Bailey owns all land, builds a house on lot 4, builds sewage pipe from lot 4 to street (via lots 20 & 19)
         2. Bailey sells lots and new owners put houses on lots 19 & 20
         3. Van Sandt (lot 19)’s basement is flooded with sewage and he sues

Their sewage can’t go through my property

* + - 1. Easement by implication?
      2. Circumvent statute of frauds
      3. Bailey could have reserved an easement in deeds for lots 19 & 20 for the benefit of lot 4
      4. Factors
         1. This would be costly to correct
         2. Is it reasonably necessary for enjoyment of property?
         3. Whether parties understood easement would probably continue
         4. Quasi easement: not an easement (can’t have easement on your own property), but something that could be an easement if property was separated
         5. Owner of servient state has to have notice of it
      5. Notice is a critical factor in this case
         1. Court finds there was notice
         2. Builder of house had notice
         3. Evidence that Van Sandt had notice

Plaintiffs must have known that house had modern plumbing that drained into a sewer

But court doesn’t clearly state how plaintiffs must have known about the easement

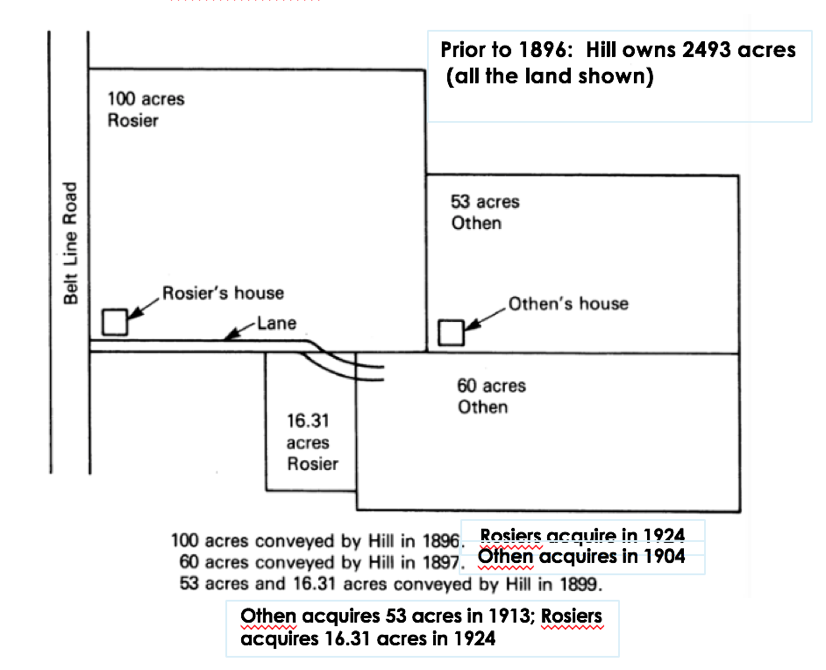
Court assumes something here

They tend to say purchaser is on notice

They are probably just putting a lot of weight on the first factor (expense)

Weak part of this case: how court handles notice

* + - 1. Trying to give effect to the intentions of the parties
    1. Easements implied from a prior existing use (or quasi- easement)
       1. Requirements:
          1. Initial unity of ownership, followed by severance of title
          2. An existing, apparent, and continuous use of the servient parcel for the benefit of the dominant parcel at the time of the severance
          3. Reasonable necessity to continue the prior use at the time of severance
       2. Weight of authority today holds that only reasonable necessity is required for an implied easement, regardless of whether the easements implied in favor of the grantor or grantee
    2. ***Othen v. Rosier* (1950) [muddy roadway]**

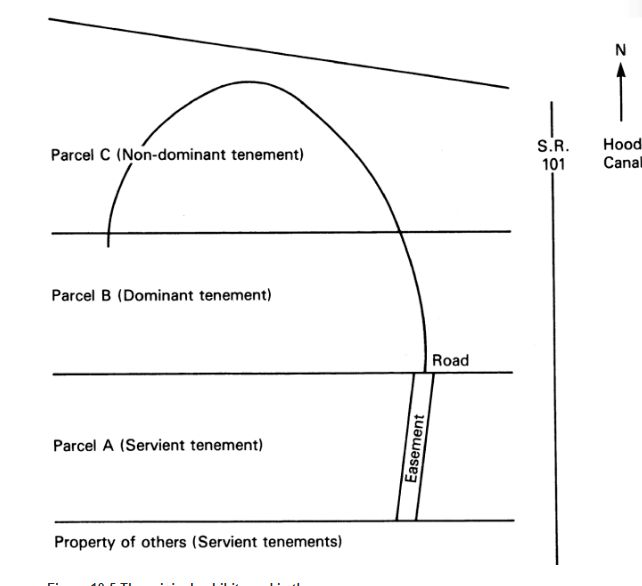
****

* + - 1. For easement by necessity to be possible, one owner has to sever land
         1. Some parcel of land has to become landlocked
      2. Critical transaction: 1896, when the land was broken up/when Hill sold the 100 acres
         1. Either landlocked when 100 acres were sold or it’s not landlocked for these purposes
      3. Was there other access to the road?
         1. Plaintiff has burden of proof (as person who wants the easement)

He can’t prove the land was landlocked as of 1896

Court thinks there’s another possibility/other ways he could have gotten to the road in 1896

* + - * 1. We don’t know who owns this land outside of the four parcels (two owned by plaintiff, 2 owned by defendant)
      1. Hill owns a lot more property in 1896, we don’t know the configuration
         1. But plaintiff and predecessors have been using the land on defendant’s property consistency
         2. Permissive use doesn’t count toward adverse possession/easement by prescription
      2. There’s a gate (evidence that defendant was trying to control the use of his land)
         1. Asserts control of it by maintaining it
      3. Plaintiff can’t specify where the right of way was
    1. Easements by necessity
       1. Requirements:
          1. Initial unity of ownership, followed by severance of title
          2. Strict necessity to continue the prior use at the time of severance
       2. Endures only so long as it is necessary
    2. Easements by prescription
       1. Like adverse possession
       2. In most states, the user can acquire a prescriptive easement even though the easement is also used by the servient owner
       3. Requirements
          1. Adverse and hostile use
          2. Open and notorious use
          3. Continuous use
          4. Use for the statutory period
       4. The uses made of a prescriptive easement must be consistent with the general kind of use by which the easement was created and with what the servient owner might reasonably expect to lose by failing to interrupt the adverse use
       5. There can be a public easement by prescription
    3. Scope and Abandonment
       1. Common law: can’t convey to a third party
          1. Schroeder and Restatement don’t like this
          2. Just creating extra steps
       2. Extension of use is misuse
       3. Methods for terminating easements (p. 532)
          1. Release (writing normally required)
          2. Expiration
          3. End of necessity
          4. Merger
          5. Estoppel
          6. Abandonment
          7. Condemnation
          8. Prescription
       4. ***Brown v. Voss* (1986) [easement only for benefit of one parcel]**

****

* + - * 1. Parcel B had an easement though Parcel A. Plaintiffs acquired parcels B & C and wanted to build a house that straddled both parcels – and use the easement of Parcel B
        2. Trial court finds for Browns
        3. Supreme Court – this is a misuse of easement, but you got the damages wrong
        4. How does Court justify not enjoining law violation?
        5. Does this remedy remind us of Boomer?
        6. Brown is violating legal limits of the easement

Doesn’t give an injunction, they give damages

* + - * 1. Plaintiffs acted reasonably, no damage to defendants, no increase in volume of travel, no increase in burden on servient estate

“[P]laintiffs have acted reasonably …there was no damage to the defendants … there are no increase in the volume … there as no increase in the burden on the servient estate … the defendants waited more than a year while plaintiffs expended more than $11,000 … the plaintiff would suffer considerable hardship in the injunction were granted whereas no appreciable hardship or damages would flow to the defendants from its denial.”

* + - * 1. Defendants waited a year to complain while plaintiffs spent a lot of money, plaintiffs would suffer considerable hardship if the injunction were granted – no hardship or damages would flow to defendants from its denial
        2. In Boomer, injunction would be a huge harm to defendant (& employees)
        3. Differences between the cases

More people affected negatively by pollution than by Brown’s easement

People affected but not party to litigation

More damages you don’t know about

Magnitude of harm: defeat idea that company should remain open

Here, self-contained scenario

Social value

Ability to bargain

Neighbors can easily negotiate

* + - * 1. Damages

Market for pollution won’t work, but market for easement might

The normal remedy is an injunction, this case is not in the majority

* + - * 1. How might Voss’ lawyer done better?

Show there was alternative access to Parcels B & from the (or a) road

Didn’t introduce evidence of annoyance trucks were causing

* + - * 1. Court says reasonable adjustments to easement allowed

… like if things change down the road

* + - * 1. Court balancing here
      1. **Most jurisdictions, an easement may not be used in connection with a nondominant estate, and any such use is subject to an injunction**
      2. General role: the location of an easement, once fixed by the parties cannot be changed by servient owner without permission of the dominant owner
         1. Restatement rejects this
      3. Elements of Undue Hardship/Balancing the Equities
         1. Defendant’s culpability
         2. Public interest (social value & utility of the activity)
         3. Defendant’s delay or acquiescence
         4. Hardship to plaintiff if only awarded damages
      4. Good faith on the person who is trying to avoid having an injunction imposed against him
      5. ***Preseault v. U.S.* (1996) [Rails to trails Act]**
         1. Rails-to-Trails Act
         2. Whether people who used to own land before RR took over had an interest in the land
         3. If RR owned land fee simple 🡪 no problem or did they just have an easement?
         4. 1st Question: what interest does RR have?

Owner had not agreed to voluntarily give the property – had to go to court

Condemnation

Court evaluates worth of parcels

* + - * 1. One owner did voluntarily give/sell the property?
        2. Result: different types of instruments conveying the different parcels
        3. Doesn’t specify what the interest is in the land

Is it fee simple or easement?

* + - * 1. One government defense

RR company had easement for RR purposes

Changed use the RR line into public pathway and that’s OK because it’s in the scope of the easement

Public pathway isn’t that different from RR

Still just moving people from A 🡪 B

* + - * 1. Court finds that this isn’t a permissible change
        2. Burdens are different but is the burden worse with the pathway?

Traffic is more constant

More people trespassing on their land

Trains are contained

* + - * 1. Easement in gross

Not tied to any particular property that RR owns

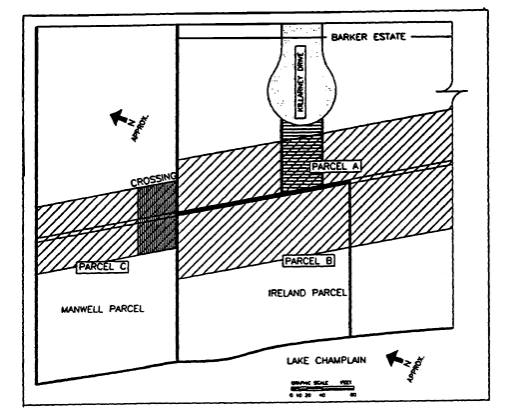
This kind of use wasn’t reasonably foreseeable

* + - * 1. Violation of the scope of the original easement

Taking under 5th Amendment

Exceeding scope of easement is like trespassing

Was easement abandoned?



* + 1. Negative Easements
       1. Common law is restrictive on what could (have been) be done with are negative easement
          1. Very few kinds of negative easements in English law
       2. Conservation easement – to preserve scenic and historic areas and open space
       3. Today, negative restrictions on land are usually treated as equitable servitudes. American courts sometimes refer to equitable servitudes as negative easements
  1. Covenants
     1. Servitudes
        1. Right to enter another’s land
           1. Affirmative easements (also profits)
           2. Bargaining around the law of trespass
        2. Covenants/equitable servitudes
           1. Rights regarding conduct on another’s land

Regulation

* + - * 1. Bargaining around the law of nuisance
      1. How to make arrangements durable
         1. To continue beyond the enforcement between two immediate parties
         2. Makes it more valuable
         3. Benefits and burdens to run with the land
      2. When do benefits run to new parties
         1. Can two complete strangers to original K invoke privileges?
         2. “touch and concern” the land
         3. Almost no one wants to enforce a covenant today

Those that regulate equitable servitudes are the bigger deal

* + - * 1. Only landlord-tenant relationship had privity
    1. Real Covenants and Equitable Servitudes
       1. Real Covenants (Original English)
          1. Promises = contracts running with the land
          2. Enforceable at law for damages
          3. Requirements:

Statute of Frauds is satisfied

Parties intend promise to run with land

Promise “touches and concerns” land

Benefit is not in gross

Burden is not a personal obligation

There is “privity of estate”

* + - 1. Equitable Servitudes (Original English)
         1. Promises relating to land enforceable at equity for specific performance
         2. Requirements:

Writing

Intent manifested in writing

Obligation “touches and concerns” land

Notice to burdened party

* + - 1. **Real Covenants (20th Century Liberalization)**
         1. A promise respecting the use of land that runs with the land at law.
         2. Writing satisfying the Statute of Frauds
         3. Intent to have burdens and benefits run manifested in writing
         4. Obligation relates to land or land value (“touch and concern”)
         5. ~~Instantaneous horizontal privity(landlord/tenant)~~
         6. Expanded horizontal privity somewhat – also included the grantor/grantee relationship
         7. But still no horizontal privity between “strangers”
         8. Vertical privity of estate
         9. Notice to burdened party

|  |  |  |
| --- | --- | --- |
|  | Burden | Benefit |
| Intent | Yes | Yes |
| Horizontal privity | Yes | No |
| Vertical privity | Yes | Yes |
| Touch and concern | Yes | Yes |

* + - 1. **Equitable Servitudes (20th Century Liberalization)**
         1. Writing
         2. Intent manifested in writing
         3. Obligation relates to land or land value (“touch and concern”)
         4. Notice to burdened party
         5. [if you have ES, pretty much always also have RC]
      2. Requirements (Definitions)
         1. Horizontal – privity of estate between the original covenanting parties

Required for the burden of a covenant to run at law

Not required for the benefit to run

Has to be a conveyance – can’t just be a regular agreeemnt

* + - * 1. Vertical – privity of estate between one o the covenanting parties and a successor in interest

Traditional doctrine requires vertical privity for both the burden and the benefit of a real covenant to run

On the burden side, the covenant is enforceable only against someone who has succeeded to the same estate as that of the original promisor

For running of the benefit, the promise is enforceable by a person who succeeds the original promisee’s estate or to a lesser interest carved out of that estate

In most jurisdictions, π may enforce the covenant regardless of vertical privity, in either circumstance:

The original parties expressly stated their intent to allow a party not in vertical privity to enforce the covenant

Where the implied benefit theory applies as a result of the existence of a common development scheme

For something to run with the land: Burdened has to be exact same estate , benefit can be same or lesser estate

* + - * 1. Intent: original contracting parties must have intended to bind successor to their respective estates
        2. Touch and concern

The promise must relate in some way to the enjoyment, possession, or use of the affect land rather than being of personal concern

* + - * 1. Notice of the covenant not required for the covenant to be valid, but the covenant may not be enforceable against one who lacks notice – actual, record, or inquiry
      1. Requirements to run with the land:
         1. RC

Intent to Bind successors

Touch and concern

Privity of estate

Horizontal P

Vertical P

Must be essentially same estate

* + - * 1. ES

Intent to Bind successors

Touch and concern

Notice

* + - 1. Requirements for Equitable Servitudes
         1. Intent to bind successors
         2. Touch and concern
         3. Writing
         4. Notice (burdened only, not benefit)
         5. Cannot violate public policy or fundamental right
      2. **What remedy is sought?**
         1. **If injunction, check elements of equitable servitudes**
         2. **If damages, check elements of real covenants**
      3. Restatement 3d, Servitudes
         1. “A servitude is a legal device that creates a right or an obligation that runs with land or an interest in land” §1.1

A negative covenant requires the covenantor to refrain from doing something (negative covenant and restrictive covenant are synonyms)

An affirmative covenant requires the covenantor to do something

* + - * 1. All remedies available in all cases
        2. Privity rules unified and rationalized
        3. Slightly stricter reqmts for affirmative covenants
        4. Running Reqmts (Negative Covenants)

Burden

Writing

Intent

Notice

Public policy limits

Benefit

Writing

Intent

Public policy limits

* + - * 1. Running Reqmts (Affirmative Covenants)

Burden

Writing

Intent

Notice

Public policy limits

Benefit

Writing

Intent

Public policy limits

Vertical privity

* + - 1. ***Tulk v. Moxhay* (1848) [Leicester Square Garden]**
         1. Equitable servitudes become preferred instrument
         2. Does away with privity requirements and replaces it with notice

Intentions of parties to make it durable, knowing acquisition (notice), touch & concern the land

* + - * 1. Leicester Square Garden
        2. What does “touch & concern” mean?

“The promise must relate in some way to the enjoyment, possession, or use of the affected land rather than being of personal concern to the original contracting parties”

Example: obligation to keep portrait up in a house

Personal interest

But also restriction on the use

So does it touch and concern the land?

Wife will sell to someone who doesn’t want to enforce it

It doesn’t touch and concern

* + 1. Terminating Covenants
       1. Termination (p. 545):
          1. Merger
          2. Release
          3. Acquiescence
          4. Abandonment
          5. Unclean hands
          6. Laches
          7. Estoppel
       2. ***River Heights Associates L.P. v. Batten* (2004) [subdivision forbidden from commercial use]**
          1. Other properties in division are still benefitting from restriction
          2. As long as beneficiaries are benefitting, it’s hard to overcome it
          3. The changes are outside (not inside) the development
       3. Changed conditions doctrine:
          1. Courts may modify or even terminate equitable servitudes on the basis of changed conditions
          2. As long as the restriction is of value to some land, courts usually will not terminate it, even though conditions have changed in such a way that the restriction decreased the value of other land
    2. Discriminatory Servitudes
       1. ***Shelley v. Kraemer* (1948) [racist covenant not to sell to black people}**
          1. Racist covenant in St. Louis neighborhood

No non-white people can live there

* + - * 1. Neighbors try to enforce it by injunction
        2. Preceding this, SCOTUS had ruled segregated/discriminatory zoning laws were unconstitutional

So private citizens took it upon themselves to be racist

* + - * 1. Meets first 3 requirements, but what about touch & concern?
        2. Restraint or alienations
        3. MO court upholds covenant 🡪 SCOTUS

There had been argument about whether covenant needed unanimous consent to be effective, MO court thought only those signed were bound, but predecessors to Shelley’s property signed this

* + - * 1. SCOTUS

Courts enforcing this covenant is (state) violation of 14th Amendment

not of the restrictive covenant itself

* + - * 1. Shelley’s got NAACP to support them
        2. Willing purchaser and willing buyer
        3. Lots of RE has these racist covenants still in their chain of title
        4. This case isn’t cited often in state action cases
        5. Other related cases

Marsh v. Alabama

White primary cases

* 1. Servitudes
     1. ***Neponsit Property Owners Ass., Inc. v. Emigrant Industrial Savings Bank* (1938) [money covenant]**
        1. Deed included annual assessment (maintenance of common areas)
           1. $4/year
           2. Up until this case, obligations to pay money doesn’t touch and concern the land
           3. Just opening your wallet, not doing anything that touches the land
        2. Why are we distinguishing this way?
           1. Assessment as touch and concern, but not portrait
           2. Affirmative covenants seem more invasive than negative covenants
        3. Why do we want to have durable obligations?
           1. No benefits accrue from wife’s satisfaction (in terms of contract)
        4. Footnote (look at email from Schroeder)
        5. Touch and concern confusion
           1. Restatement gets rid of it
           2. No court comes up with a satisfactory definition
           3. Covenants restricting use of land have almost always been held to touch and concern land – affirmative covenants are harder
        6. Focus on public policy, violation of rights or capricious (reasons for not enforcing)
        7. Enforceable unless unreasonable? (common in statutes)
        8. Neponsit gets around privity argument (Homeowners’ Association hasn’t owned any of the property
           1. Looking at homeowners association as agent or third-party beneficiary
        9. Restatement 3rd: presumption of validity
           1. Public policy, rights, capricious are hard to meet
           2. Relatively permissive test
           3. Other statutes follow
        10. Profit motive leads to sensible restrictions
            1. I.e. what kinds of maintenance, things do residents actually want
        11. Master Deed
            1. Developer restrictions on property
        12. Can change bylaws to reflect changed preferences
     2. A real covenant cannot arise by estoppel, implication, or prescription as can an easement.
     3. ***Sanborn v. McLean* (1925) [gas station]**
        1. Homeowner wants to build gas station within development of 91 lots
        2. Developer has haphazard approach in including restrictions for lots in the deeds
           1. Restrictions for single-family residences
           2. One of concern doesn’t have restrictions in its deed
        3. Wouldn’t see anything that puts him on notice with traditional grantee/grantor title search
           1. Think back to Guilette v. Daly Dry Wall
           2. Look at deeds McLaughlin granted (expanded search)
           3. When McLean looks at deeds of strangers, he’ll see restrictions on those properties, but these aren’t reciprocal (like they are in Guilette)
        4. Court says when there’s evidence common developer intents to develop lots to a common scheme 🡪 implied reciprocal obligation
           1. Court says, they should have figured it out
           2. Should have done expanded title search – seen it was in other deeds (51) and known it would apply here
           3. Inquiry notice – it was obvious from looking around neighborhood
        5. Many jurisdictions reject this – no implied reciprocal obligations
        6. Is court trying to protect interests of others in the neighborhood?
        7. Think of this as equitable servitude, not a reciprocal negative easement (not a common term)
        8. Court says this restriction applied to all lots
        9. Stuff happens, circumstances change
        10. Courts will take account of change circumstances and their effect on restrictions
        11. A majority of courts imply negative restrictions from a general plan
        12. Neponsit- declaration had a time limit
            1. Somewhat common
            2. By that time, community will be sufficiently well established

Or city would assume responsibility

* + 1. Implied reciprocal servitude theory: when a common grantor later sells a parcel from his remaining land, the prior purchaser is enforcing a reciprocal servitude that is implied from a common plan of development
    2. Third-party beneficiary theory:
       1. In most cases decided in recent decades, courts have followed this theory where there is evidence that the parties intended the prior purchaser to have the benefit of the covenant
  1. Common Interest Communities
     1. A form of residential ownership in which management of the development is separated from possession
     2. One of highest growing forms of real estate in the U.S. today
        1. About ¼ of Americans live in these communities
     3. Subdivision, gated communities, condos
        1. Created initially by developer with a plain
     4. Plat map – details of all parcels you’re creating
        1. Roads, easements
     5. Declaration of Covenants, Conditions & Restrictions (CCRs)
        1. If CCR meets requirements of equitable servitudes – they are enforceable
        2. Govern the community – must be discloded to purchasers
     6. Obligations (common law requirements)
        1. Writing
        2. Statement of intention to be bound
        3. Recording (notice)
        4. Touch and concern
     7. All 50 states enacted common interest community statutes
     8. It is well settled that homeowner associations do have standing to enforce development covenants if they have been given enforcement power
     9. ***Nahrstedt v. Lakeside Village Condominium Ass’n* (1994) [cat lady]**
        1. Plaintiffs move into condo with cats
        2. Condo government by defendant restrictions on condo includes no pets
        3. Plaintiffs challenges this says her cats aren’t harming anyone
           1. Uses Portola Hills (satellite) and Bernardo Villas (truck/camper) cases
        4. Effect of allowing plaintiff to have cat 🡪 other residents with pets
           1. This isn’t just about plaintiff, it’s about what would happen if this restriction was overturned
        5. People might have chosen this place because of valid health, safety reason with not pets
        6. Presumption of validity
           1. Need to show rule is arbitrary, violates fundamental right, violates public policy or burden > benefits
        7. Court leaves statute in the dust
     10. Common interest communities will run better if the stuff all residents agreed to are actually enforced
         1. Not enforcing leads to more litigation (which all property owners have to pay for)
     11. What’s public policy?
         1. Look to actions of other branches of government that related
         2. *State v. Shack*
         3. *Alienable*
     12. Restatement (Third) of Property: presumption that a servitude is valid unless it is illegal, unconstitutional, or violates public policy. It violates public policy if it:
         1. Is arbitrary, spiteful, or capricious
         2. Unreasonably burdens a fundamental constitutional right
         3. Imposes an unreasonable restraint on alienation
         4. Imposes an unreasonable restraint on trade or competition
         5. Is unconscionable
     13. In a housing cooperative, the title to the land and building is held by a corporation; the residents own all the shares of stock in the corporation and control it through an elected board of directors

1. Zoning
   1. Overview
      1. Most widespread/oldest public regulations: building codes and zoning ordinances
      2. A lot of land use regulation is state/local level
         1. For a long time, state common law dominated (nuisances)
         2. Common law devices (easement & covenants)
         3. But nuisance/problems were insufficient to keep up with harms stemming from urbanization and industrialization
      3. Expansion of the aims of zoning
         1. Techniques to accomplish goals of zones beyond Euclidian geometric zones
         2. Objectives of zoning have expanded
         3. Before: relation to nuisance disputes/preventing nuisances
            1. Separate incompatible uses
            2. Single family residential neighborhoods are main beneficiaries – isolated from traffic, etc.
         4. Changes because of population growth, increased pressures on the public fisc ($), rise of activist government generally, racial prejudice, an expanding environmental consciousness
         5. Now: producing benefits for the community
            1. Aesthetics, household composition, nature and size of local population
      4. City just needs rational
      5. Amortization – minority of jurisdictions not allowed at all
   2. Constitutionality
      1. Euclidian Division
         1. Separate city into zones
         2. Localities were concurrently enacting building codes
         3. Lots of people though zoning laws were unconstitutional
         4. Districts are graded form highest to lowest
      2. ***Village of Euclid v. Amber Realty Co.* (1926) [six zones]**
         1. SCOTUS
         2. Test case
            1. Many thought Amber Realty Co. (?)
            2. Court was relatively unfriendly to regulations of private property
            3. Some people thought zoning = taking without just compensation

Context (era with 4 horsemen)

* + - 1. Village (suburb of Cleveland)
         1. Concern about expansion of the city
         2. Six zones (cumulative zoning)

1 – single family residence (most restrictive)

2

3

4

5

6 – (most permissive) including manufacturing & industrial operations – left over

* + - * 1. Trying to keep nuisances away from single-family residences
        2. What’s the best way to design a city that works for people
        3. Court

Makes a lot of analogies to nuisance law

Looking at zoning (as a way to prevent nuisances)

Legislative (ex ante) v. judicial (ex post)

Zoning prevents nuisances ex ante

Court finds them ex post

A certain amount of overreach is justifiable in this context

But no nuisance by including apartments or multi-family residences among single family residences

Claims differentiation has to do with fire/child safety, traffic safety congestions, etc.

(undertones of classism?)

Employs kind of rational basis review

* + 1. Zoning v. nuisance
       1. Zoning regulates against a wider scope of public policies than nuisance
          1. Larger template of public policy concerns guide zoning
          2. More contentions
       2. Zoning operates in a rule-like way, nuisance is a standard
          1. Nuisance: behave reasonably, don’t interfere with someone else’s enjoyment unreasonably
       3. Zoning more susceptible to corruption by board
  1. Nonconforming use
     1. ***PA Northwestern Distributors, Inc. v. Zoning Hearing Board* (1991) [porn shop]**
        1. Plaintiff opened up an adult bookshop
        2. Defendant zoned plaintiff’s building out of the zone(s) where adult book stores could be operated
        3. Sharp line between regulating an existing use and regulating a future use
        4. People operate on reliance and put a lot of time/resources into setting up their land for a specific function
        5. Law of nonconforming use favors people who have put their land to productive use
     2. Nonconforming use usually protected, unless nuisance
     3. If you abandon use, they don’t let you come back
     4. Eminent domain – buy you out
     5. Vested rights
        1. Your right to do something on your property and the government can’t prevent you from doing it without compensation
        2. Your right is unconditional
        3. From review session:
           1. When do you have takings claim because your rights have vested
           2. Substantial investment - $ and reliance and good faith warrants giving the person the security
           3. Other jurisdictions, certain government approvals - cite plan approved or building permit issued
     6. Two main touchstones
        1. Substantial investments/expenditures into the land
           1. Some courts will find that if government originally approves/gives go ahead, you have a vested right and the government can’t change their mind last minute
        2. Where you are in the process
           1. Looks like part performances or estoppels
  2. Variances and Spot Zoning
     1. Zoning laws can inhibit socially and aesthetically desirable diversity
     2. Variance and special exception
        1. Means of avoiding undue hardships that might result from strict zoning enforcements
     3. Variance
        1. An administratively authorized departure form the terms of the zoning ordinance
        2. Variance must be necessary to avoid imposing undue hardship on the owner of the land in question
        3. The grant of the variance must not substantially impinge upon public good and the intent and purpose of the zoning plan ordinance
     4. Special exceptions (aka conditional uses)
        1. Use permitted by the ordinance in a district in which it is not necessarily incompatible, but where it might cause harm if not watched
     5. Spot zoning:
        1. Zoning changes, typically limited to small plots of land, which establish a use classification inconsistent with surrounding uses and create an island of nonconforming us within a large zoned district which dramatically reduce the value for uses specified in the zoning ordinance of either the rezoned plot or abutting property
        2. Invalid where a zoning amendment:
           1. Singles out a small parcel of land for special and privileged treatment
           2. Only for the benefit of the landowner rather than in the public interest
           3. In a way that is not in accord with a comprehensive plan
  3. Aesthetic Zoning
     1. ***State ex rel. Stoyanoff v. Berkeley* (1970) [modern home]**
        1. State owns the police power, city doesn’t have any, state has to enact statute to delegate police power
           1. Look at authority state has given
           2. Claim that city exceeds its power
           3. Also claim it’s constitutionally void for vagueness
        2. Prior MO case (State ex. Rel. Magidson v. Henze)
           1. Found this statute does not give city to control aesthetic
           2. Court says this case is not controlling here
        3. § 89.020 allows city to regulate lot size, height, size, spacing, and use of buildings and population density
           1. Aesthetics is not on the list
           2. Has a purpose provision
        4. § 89.040
           1. This court looks to this in a way that Magidson doesn’t
           2. Purpose for regulation: the general welfare and health
           3. Court thinks that aesthetics relates to the general welfare
        5. If you name the attributes in .020 why would you expand this in .050 without noting you were expanding
           1. Magidson ignored .040 because they didn’t think it had anything to do with .020
           2. In 10 years, more states regulating aesthetics
     2. Regulation is so vague and it delegates so much power to review board 🡪 due process violation?
        1. Ordinary people can’t/don’t know to conform behavior to it
        2. Can’t solve vagueness problem by delegating discretionary power to entity (to say what’s grotesque or not)
        3. A lot of process given by review board
        4. Procedural regularity is part of due process, vagueness is a substantive due process concern
     3. Depression of property values
        1. Dictates what’s grotesque
        2. Prevents it from being unconstitutionally too vague
        3. Depreciation is a question of fact
     4. How much do people really care about the aesthetics of surrounding properties when looking to buy a house
     5. Court gives generous zoning power and lenient judgment re: standard of review
     6. A majority of jurisdictions today follow Berman (broadened concept of public welfare p. 596) and accept aesthetics as a legitimate police power goal in itself
        1. But a good number still waffle on the issue and a few are opposed.
     7. Sign codes (p. 597)
  4. Household Composition
     1. ***Moore v. City of East Cleveland* (1977) [woman with grandson]**
        1. East Cleveland has housing ordinance that limits occupancy of a dwelling to members of a family
        2. Definition of family doesn’t include plaintiff (grandmother) and her son and two grandsons (one of son, and another that’s a cousin)
        3. Court strikes it down – interferes with extended family and family values
           1. Not a tight enough relationship between supposed purpose (ends) and means
           2. If you really cared about this, you’d be cracking down on families/houses with like 10 kids
           3. Over and under inclusive
           4. Closer to strict scrutiny

Family as a fundamental value/interest

* + - * 1. Court voids ordinance
        2. A lot turns on standard of review

Strict scrutiny (fundamental/important interest or suspect classification)

Rational basis review

* + 1. Generally okay for max. occupancy, but when you say WHO can live there
    2. ***Village of Belle Terre v. Borras* (1974)**
       1. Unrelated persons
       2. Plaintiffs were 6 unrelated college students challenging family zoning ordinance
    3. ***City of Edmonds v. Oxford House* (1995) [halfway house]**
       1. Fair Housing Act (FHA) case
          1. State and local officials have to make reasonable accommodations for disabled people in zoning regulations
          2. They have to justify not making an exception for group homes
          3. Become exempt from reasonable accommodation requirement of FHA if it’s number of occupants restriction (p. 603)
       2. Group homes are litigated often – residents tend to want them out of their communities
          1. No consistency in concerns raised

Road too narrow/too wide

Too dangerous in country/too dangerous in city

* + - 1. Court (RBG) says it can’t be a maximum occupancy rule – unlimited number of family members allowed to live together
         1. Lower courts to decide whether Edmonds actions violate FHA’s prohibition against discrimination
      2. Dispute between majority and dissent
         1. Whether maximum numbers across the board (family & nonfamilial)
         2. Dissent puts weight on word “regarding” (restrictions regarding)
  1. ~~Exclusionary Zoning~~
     1. **~~Southern Burlington County NAACP v. Township of Mount Laurel (1975)~~**
        1. ~~NJ state constitutional law~~
           1. ~~SCOTUS said housing is not a fundamental right 🡪 rational basis review~~
           2. ~~Wealth and income status are off the table as a suspect classification (SCOTUS)~~
        2. ~~Housing as a basic human need~~
           1. ~~Important good that people in all communities want~~
        3. ~~Scope~~
           1. ~~City gets authority from state~~
           2. ~~Locality of particular municipality has to take into account entire state (or region county)~~
        4. ~~Mount Laurel: Raising a drawbridge so that impoverished people can get housing~~
        5. ~~Can’t zone county in a way that provides realistic opportunities (for developers who want to build low income housing)~~
        6. ~~Today~~
           1. ~~Typically, zoning applies to municipality, not regional concerns~~

1. Takings
   1. Eminent Domain & Taking Property for “Public Use”
      1. Overview
         1. 5th Amendment & Takings
         2. Nor shall private property be taken for public use without just compensation
         3. Eminent domain is the power of the government
            1. It is assumed, but not in the Constitution
         4. Most controversies litigated are about whether compensation is just
            1. It’s less frequent to litigate what amounts to a taking and when compensation is necessary
         5. Questions (Requirements)
            1. What is a public use?
            2. What is just compensation?
            3. What is a taking of a property?
      2. Holdouts
         1. People don’t sell to developers/government
         2. Private developers can’t force people to sell
         3. Try to get a higher price of their property (higher than market price)
         4. Can wait out – get more money as time goes on
            1. But some people wait too long!
         5. The more (other) parcels the developer buys, the more leverage the holdout has
         6. Strategic holdout – doing it to get more money
         7. There are sentimental holdouts
            1. Property could be “priceless” to them
      3. The government can exercise eminent domain
         1. Public developments don’t have lasting holdouts like private developments
         2. They cannot use eminent domain to take property from one private party to give it to another
         3. They don’t really use the power unless it’s a last resort
         4. Will typically pay higher prices than fair market value to avoid backlash
      4. Two easy cases
         1. Government acquires property and turns it into a public facility (courthouse, library, road)
         2. Holder of property will be conveying a public service (RR, electric utility company, etc.)
            1. Putting the property to public use
      5. ***Kelo v. City of New London* (2005)**
         1. New city development plan (offices, housing, park, etc.)
         2. City wants to acquire land and give it to private developers to revitalize the city
            1. Goal to get city out of economic rut
            2. City has high unemployment rate
         3. 9 petitioners/15 properties refused to sell their land and also think this isn’t a public use
         4. This is not a blighted part of the city
            1. Reasonably nice properties
            2. Community is economically depressed, but this isn’t relatively bad
         5. Court had already upheld use of eminent domain/condemnation in blighted neighborhoods
         6. Turns public use into public purpose
         7. Wants to infuse economic activity
            1. No evidence of corruption or non-genuine motivation
         8. Stevens
            1. This is part of a comprehensive plan
            2. No evidence of double dealing 🡪 defer to priorities of city to make decision in the best interests of their community
         9. Kennedy
            1. Worry about pretexts, cover stories of purpose (in other cases)
         10. O’Connor
             1. Concerned about pretexts as well – even on this case
         11. Result
             1. Development plan never happened
             2. Pfizer moved on – litigation hold up was too much
             3. But SCOTUS ruled this taking was okay
         12. Is it “public use” if taking property to give to private entities, where public will not be able use property, but purpose is to benefit public through economic development?
         13. Yes—public use means public purpose, public purpose includes eco development, will not scrutinize whether govt scheme is likely to fulfill public purpose.
         14. Kennedy concurrence (crucial 5th vote)—Can scrutinize to see whether public purpose is pretext. Factors:
             1. Designed to address serious problem
             2. Comprehensive plan
             3. Extensive public hearings, debate, etc. in plan.
             4. Private beneficiaries not known when plan formed
         15. Dissents—O’Connor—may only take from A and give to B for private use when A’s property itself is cause of harm. Otherwise will make all property vulnerable.
         16. Thomas—Original understanding doesn’t permit; economic development takings will hurt least powerful
      6. No public use decision by SCOTUS since Kelo
         1. Huge public outcry against this opinion
         2. Many states have passed laws restricting state and city eminent domain power
         3. State standards can narrow Constitutional eminent domain power
      7. What is just compensation?
         1. Fair market value is the starting point
         2. What a willing buyer would pay willing seller in the open market
         3. People may hold out for sentimental value or because they want above market value
            1. Opportunistic is different from sentimental holdouts who find the property priceless
         4. Fair market value might not be just to sentimental holders
            1. Court has said they won’t account of subjective value
            2. We can’t verify what people’s subjective values are
            3. Proxies have been proposed for sentimental value (i.e. how many years you’ve lived there, etc.)

But these haven’t been successful in Courts

* + 1. Classic justification for government to take property under the eminent domain (with compensation)
       1. The holdout problem
          1. To avoid landowners getting in favorable monopoly position against government who needs land

Monopoly for the last parcels needed in land assembly

* + - * 1. How do private developers solve this problem?

Hide what they’re doing

Using different companies to acquire the properties

Government is more upfront/transparent

* + - * 1. But this doesn’t explain the just compensation requirement

It’s in the Constitution

Little Red Hen problem

Need to incentivize people to use their property efficiently and put resources into it

They wouldn’t if they knew government could just take it

Make government internalize the costs, prevent government form taking more than it needs

Fairness & justice/equal treatment

* + - 1. Equal Treatment
         1. Government ought not to force some people alone to bear public burdens which in all fairness and justice, should be borne by the public as a whole
      2. The problem of underinvestment
         1. Little Red Hen
         2. Demoralization/fear that they’ll do it to everyone/everyone’s at risk
      3. The problem of “fiscal illusion”
         1. If private property is underpriced relative to its fair market value, the government will tend to overuse it
  1. Implicit Takings
     1. Overview
        1. Government isn’t exercising eminent domain
        2. Goals of 5th Amendment Implicit Takings Jurisprudence
           1. Require compensation for actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from this domain
           2. 5th Amendment: Bar government from forcing some people alone to bear public burdens, which should be borne by the public as a whole

Disproportionate economic burdens

* + - * 1. Requiring just compensation when regulation “goes too far”
      1. Two broad categories of cases
         1. Relatively simple, easy to apply rules, bright line rules

Reduces demoralization, satisfies notice requirement

* + - * 1. Takings on ad hoc, fact-intensive approach (Loretto)
    1. Two Categorical Rules
       1. ***Loretto v. Teleprompter Manhattan CATV Corp.* (1982) [cable box]**
          1. Near the beginning of cable TV penetrating society
          2. Density of buildings in NYC 🡪 stringing cable across roofs of buildings

Too expensive to go underground

* + - * 1. Most landlords okay with it, nominal fee to landlord for cable benefits
        2. Law: landlord has to let CATV (or other cable providers?) string cables across roofs

Cable company had to pay a “reasonable” fee (only $1)

* + - * 1. Would having cable there increase value of property?
        2. New owner comes in and finds out about cable, says it’s unsightly 🡪 sues on 5th Amendment grounds
        3. SCOTUS overturns lower court, says law is unconstitutional

Distinguishes this case because it involves the entrance of a 3rd party on the property

Is that true? A law requiring a landlord to take affirmative action to comply with requirements isn’t more intrusive/invasive?

Court sousing out actions that are functionally equivalent to the classic taking

Qualitatively more invasive – taking more sticks out of the bundler (even if it’s a small space)

* + - * 1. Blackmun dissent:

There are way more intrusive landlord requirements by law

How do you distinguish this requirement?

* + - * 1. Per se rule: any permanent physical occupation = a taking

No matter how minor

Court has never been quite clear on what “permanent” really entails

Infinite?

Regulation changes

What about sunset provisions

There haven’t been a lot of Loretto-like cases since

Most cases are analyzed under an ad hoc approach

Permanent physical occupation = always a taking

* + - 1. ***Hadacheck v. Sebastian* (1915) [brickyard]**
         1. If law is abating a nuisance, never a taking
         2. Court treats this case as a nuisance
         3. Court upholds a more than 90% loss of value

Land at issue is way ore valuable as a brickyard than any other use of the property

Court doesn’t care that brickyard was there before LA grew out to the country

* + - 1. *Spur v. Webb Industries*
         1. Phoenix and cattleyard case
         2. Spur defense: I was here first, you moved closer to me
         3. Court rules for Webb/residential development

Temporal element is not dispositive

* + - * 1. Awarded compensated injunction

Webb had to pay to move Spur

Made a decision to move closer to nuisance, cost of eliminating nuisance falls on Webb

* + - * 1. If something is being regulated as a nuisance, no just compensation required from government agency

Inherent in title of land is that you can’t operate a nuisance

Whether there is a nuisance or nuisance-like behavior

* + - * 1. Is something a harm or a benefit?

Nuisance distinction persists in courts

* + - * 1. Who is the active party/side?

Passive actor usually gets favorable treatment

* + 1. Other Basic Rules
       1. Forfeiture of property used in criminal enterprise
          1. Government can take property (i.e. car) used in a crime without compensation
       2. Conflagration rule
          1. Fire sweeping through town, government can destroy your block/house to stop the fire/further damage
          2. In an emergency, don’t want government to hesitate on liability concerns
       3. Navigation – no compensation for property damage caused by regulation of navigable waters
    2. Rules Based on Measuring and Balancing (most applicable)
       1. **Pe*nnsylvania Coal Co. v. Manon* (1922) [coal mining]**
          1. Anthracite coal mining (cleaner kind) was confined to a 9-county area in PA
          2. Common to have surface ownership separate from mineral ownership

Mineral company usually doesn’t want surface

* + - * 1. PA recognized as support estate as a third type

Subsidence is a huge deal

Subsidence = sinking

Can contract for support ownership or just roll the dice

Typically stayed with mineral owners unless expressly transferred to surface owner

Here, expressed reserved to mineral owners

Surface owners had bargained to gamble in exchange for compensation

* + - * 1. Kohler Act prohibits mining of support estate

No, mineral owners can’t min where they previously could

Taking?

* + - * 1. Holmes

Focuses on diminution in value

This is a case of a single house

Not about preventing a general, public harm

Hadacheck was noxious & affected more people

Maybe not compensable taking if it provided an average reciprocity of advantage

* + - * 1. Brandies comes back and says that’s just Hadacheck

Diminution is subjective and relative

Look at value of whole property

Parcel as a whole – not three separate estates

Isn’t interested in average reciprocity of advantage for this case (for noxious use prevention)

Only relevant when the police power is exercised to confer benefits upon property owners

* + - * 1. Legislature just transferring asset from A to B when the parties explicitly contracted to give it to A

Public value to the statute

* + - * 1. Thinking about prior decisions municipalities and owners of surface estate not to acquire the support estate

But isn’t subsidence dangerous to all?

What legislature is trying to protect against

* + - * 1. Main disagreement is about the unit of analysis

0/3 (Holmes) vs. 2/3 (Brandeis)

Denominator problem

* + - * 1. Distinguishing this case from Hadacheck

Court looks at the brickyard as a nuisance/a noxious use

No stick in the bundle for “right to commit a nuisance”

* + - * 1. Later 5-4 decision (Keystone) upheld similar law to Kohler
        2. Overview

Holmes

Great diminution in value

Greater the diminution, greater likelihood of taking

Not preventing general harm to the public

Not securing an average reciprocity of advantage

Effectively destroyed property and contract rights; abolished estate in land (support estate)

Brandeis

Not a great diminution in value, must look at property as a whole

Preventing a noxious use/public danger

No reciprocity of advantage but this is not necessary when preventing a noxious use

Property rights cannot be increased by owner dividing property into surface and subsoil – look at property as a whole

* + - * 1. Intake box open for non-invasive regulatory action could amount to a compensable taking
      1. ***Penn Central Transportation Company v. City of New York* (1978) [Grand Central Station]**
         1. NYC Landmarks Preservation law passed in 1965
         2. 2 designs to build into airspace of Grand Central Station

Landmark Preservation Committee denies both proposals

* + - * 1. Transferrable development rights (TDRs)

Note 4. P. 650

More marketable since 2017 law

Plot of land – can acquire development rights to build higher than your zoning limitations

Grand Central Station had a shit ton of square footage of development rights

* + - * 1. Economic impact of landmark law

Without TDRs, value of property goes way down

With TDRs, value goes down less

Marketable asset to sell to other property owners

Value to other owners high and raises value of original land

* + - * 1. 3 Relevant Factors on p. 650

Economic impact

Interference with distinct, investment backed expectations

Character of the government action

* + - * 1. Does Brennan rely on Penn Coal approach?
        2. Distinct investment backed expectation

The law changes and interferes with investor’s expectation on how she could use the property

Brenan focuses on this

But it was not an expectation to build a sky scraper, when they bought it

Maybe not completely true – foundation was built to support 20+ stories

Doesn’t interfere with present train station use

They’re just interfering with a new use

* + - * 1. Character of the government action

Invasive vs. non-invasive

Invasive 🡪 more likely to be a taking

Penn Central emphasizes the distinction between invasion of property and generally applicable regulations of property

Physical invasion (e.g. Causby)

No one has really ever sketched out what distinctions are made within “character”

Not exhaustively defined

Program adjusting benefits and burdens of economic life to promote the common good (e.g. Euclid)

Zoning

Under our system of government, one of the state’s primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we in turn, benefit greatly from the restrictions that are placed on others”

* + - * 1. **Brennan’s Three Relevant Factors**

Economic impact

Interference with distinct investment-backed expectation

Character of the government action

Court leans in direction of allowing legislature to decide when a regulation is more beneficial than costly

* + - * 1. Rehnquist dissent

Relies on the Holmes Pennsylvania Coal consideration

Destroys a valuable property tight (use of air space)

Considers “air rights” in isolation

Is not preventing a nuisance (sees it as benefit conferring)

Has no reciprocity of advantage

They carry entire burden, everyone else gets to enjoy

* + - * 1. Court leans in direction of allowing legislature to decide when a regulation is more beneficial than costly

Comprehensive scheme to reach a public policy goal

* + - * 1. Very pro government
      1. Pennsylvania Coal and Penn Central – Combined; Considerations relevant to the question of “Has Property Been Taken?”
         1. In both, diminution in value is a key variable

Greater loss = greater the likelihood of taking

* + - * 1. Character of government action

Physical invasion vs. non-invasive

Others? right to exclude

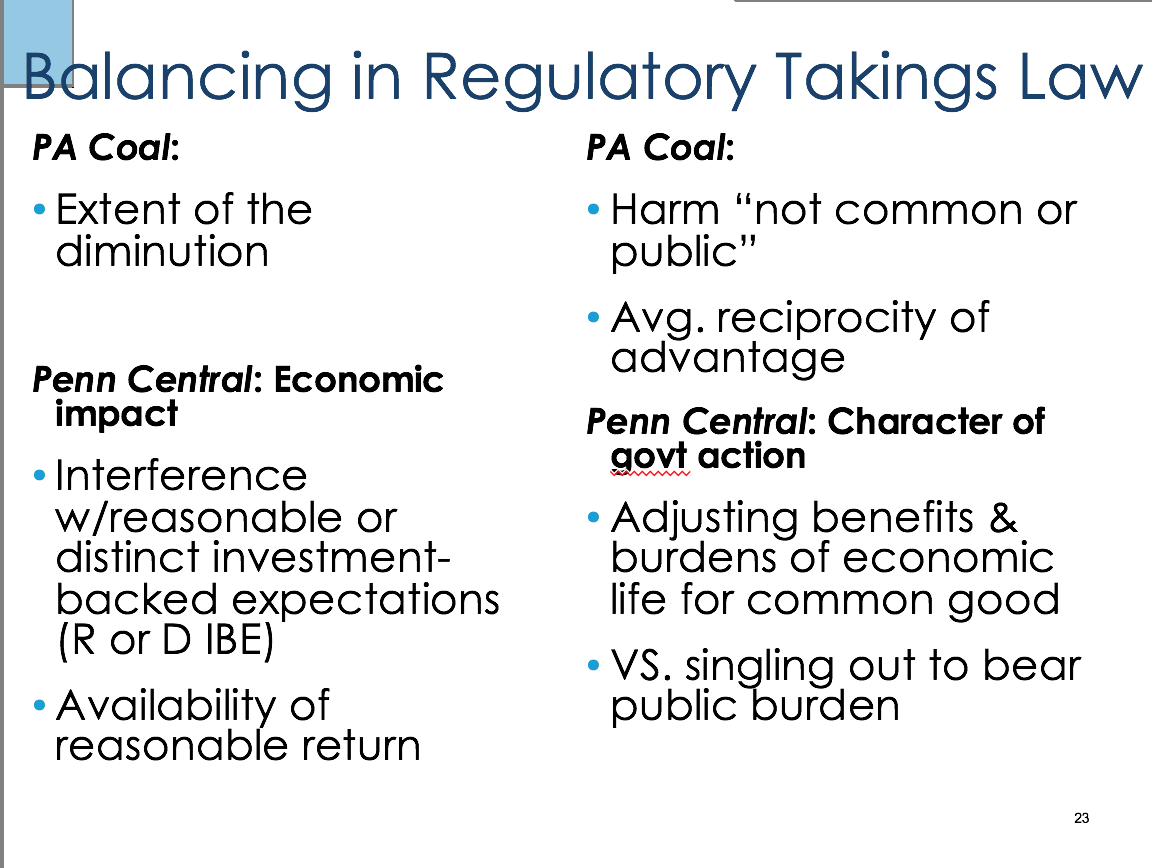
Right to transmit property at death?

* + - * 1. In both, destruction of recognized interest (e.g., support estate)
        2. Regulation of noxious use (all – both majorities and dissents – Hadacheck)
        3. Average Reciprocity of Advantage

If you’re being regulated, but you’re getting a comparable benefit to others 🡪 goes against there being a taking

Offsetting benefits to the burden

* + - * 1. Investment backed expectations



|  |  |  |
| --- | --- | --- |
| Not a taking | All other regulation | Per se taking |
| Nuisance/noxious use regulation (Hadacheck)  Zoning (Euclid)   * But if total economic deprivation, then regulation must fit traditional contours of nuisance and property law (Lucas) | Penn Central balancing   * Economic impact * Character of government action * Reasonable or distinct investment back expectation | Loretto – permanent physical occupation  Lucas – total economic deprivation unless regulation fits traditional contours of nuisance and property law |

* + 1. Another Categorical Rule
       1. ***Lucas v. South Carolina Coastal Council* (1992) [contiguous lots]**
          1. Regulation is a per se taking if it “denies all economically beneficial or productive use of the land”
          2. Unless state can show that the prohibited uses were “not part of [the] title to begin with”
          3. If uses are always unlawful because of the background principles or nuisance and property law, then the regulation is just making that explicit, and does not owe compensation
          4. Being regulated in a way that you can’t make any economic value of it is a taking
          5. There aren’t very many complete deprivations of values via regulations (relatively rare)

Won’t lead to a mountain of regulation

Only applicable to vacant lots – regulation prevents people from building homes

* + - * 1. Lucas claim not successful in SC state court

When a land use regulation is designed to prevent serious public harm, no compensation is due regardless of the regulation’s effect on the property’s value

Your property rights do not include a right to create a nuisance (not in the bundle)

Explains Scalia’s nuisance/common law exception to his categorical rule

* + - * 1. Scalia says nuisance distinction can’t be dispositive

Distinction between harm-preventing and benefit-conferring regulation is often in the eye of the beholder

* + - * 1. Blackmun

? you let this back in through the nuisance exception

* + - * 1. Hadn’t been very consequential – few cases come up

But Scalia shifts the institution who can make benefit-nuisance distinction from legislature 🡪 common law courts

Court continues to cite Hadacheck, etc.

Haven’t subscribed to Scalia’s idea we should ignore the distinction all together

Lucas is on the books, but not really employed now

* + - * 1. Remand to SC courts

Concluded state could not establish that what Lucas wanted to do would amount to a common law nuisance

* + - * 1. Lucas Footnote 7: “answer may lie in how owner’s expectation shaped by state property law – i.e. whether and to what degree the state’s law has accorded legal recognition and protection to the particular interest in land”
      1. Discussion
         1. When you have a total taking, categorical rule applies – unless exception applies (common law nuisance = no taking)
         2. Species of harms that would be considered nuisance but isn’t winnable in litigation (e.g. contributing to global warming)

i.e. isn’t affecting property values

* + - * 1. government police power has always been about more than protecting property interest
        2. Denominator

how you are defining the property changes how much is “taken”/destroyed/restricted

Changes the taking analysis

several different kinds of severance/slicing up

Vertical

Air space, surface, sub-surface

Functional

Looking at different sticks in the bundle

Temporal

Just for a period of time

Horizontal

Chopping up surface land (Murr)

* + - * 1. The Denominator Issue

In Mahon, Holmes though the support estate had been (case might be a total taking under Lucas)

Holmes Okay with vertical

In Mahon, Brandeis objected that landowner cannot slice up its property to create a taking claim. Impact on property as a whole is the appropriate inquiry. There, value of other property of plaintiff may be considerable.

In Penn Central, Brennan analysis impact of landmark legislation on “parcel as a whole”

In Penn Central, Rehnquist concludes NYC has impressed a servitude on Grand Central Station, entirely taking its air rights.

Relevant to both ad hoc analysis and Lucas analysis

The threshold “total taking” issue (Lucas)

The “extend of diminution” issue (Penn Central)

Lucas fn 24 (7): “Answer may lie in how owner’s expectations shaped by state property law -- i.e., whether and to what degree the State’s law has accorded legal recognition and protection to the particular interest in land …”

Tahoe-Sierra: Facing the “temporary total taking” issue, Court ruled that per se approach of Lucas did not apply; Penn Central did. Rehnquist is dissent asks how is temporary total taking distinguishable from total taking of a leasehold? Answer: must look at owner’s total holdings.

Pallazolo: Facing a 20 acre parcel, 18 of which were protected wetlands and 2 of which were upland and could be developed, Court, per Kennedy, expressed concern about “parcel as a whole” approach, but ducked the question

* + - 1. Tahoe-Sierra and Temporal Severances
         1. Court considered a number of possible per se rules

Any moratorium (= a temporary taking)

Courts rejected this – it takes time to plan construction

Anything more than “normal delays” to obtain permits, rezoning, etc.

Court said no

Anything more than a year

Court says is too arbitrary

* + - * 1. Tahoe-Sierra does not engage in temporal severance

Look at entire fee-simple timeline (eternity)

* + - * 1. Temporal severance has been practically foreclosed as a litigation strategy
      1. ***Murr v. Wisconsin* (2017) [contiguous lots]**
         1. Facts

Two lots – E & F both substandard

F with a cabin on the river; E undeveloped

Common terrain features

Owners want to sell E to pay for improvements to cabin on F

Grandfather clause on building, but plaintiffs bought their land after regulation passed

After failed efforts to get variances, owners use claiming unconstitutional taking of lot E

* + - * 1. Regulations:

Need one acre of buildable land for each lot

State/county has merger law that selling E separately if a common owner owns it and a contiguous lot F

Merger rule: one building lot can no longer sell undeveloped lot to build one

* + - * 1. Want to sell E to finance upgrade to cabin on F

Government says no

Value of parcel E goes from ~$350K 🡪 $40k

Government says wrong denominator – look at the lots together

That value is pretty high

Only about 10$ lower than developing and selling the lots separately

* + - * 1. What’s the right parcel?

Recognized as two lots for a long time (maybe forever)

Merger provision 🡪 one lot

* + - * 1. Kennedy – denominator determined by:

Treatment of land by state and local law

Physical characteristics of the land

Prospective value of the regulated land

* + - * 1. Roberts would just follow state law

Denominator would be each separate lot

Lot E by itself

Not sure exactly how to apply Kennedy’s test

* + - * 1. Values

Lot E, if you could build on it, would be ~$380K

Lot E as a non-buildable lot is about $30K

40K/380K = huge diminution in value

* + - * 1. Would Roberts put $40K in the numerator?

Or add in the benefit they’re receiving from having a combined, larger lot?

Seclusion, privacy, more space

Lots together would sell for $700K

Lot F alone is $373K

Lot E throws a lot of benefits to Lot F

He’d put the benefits in the numerator

Much smaller reductions in value

That’s why he doesn’t think there’s a taking

Roberts is dissenting on approach, not result

* + - * 1. Kennedy’s explanation

Is it a federal question what factors go into a takings analysis

Which combinations of property rights fit in and how

* + - * 1. All three factors point to keeping them together

Murrs knew of this regulation before they acquired the land

Having both of them increases the value of Lot F (recreational opportunities, increased privacy, quieter, etc.)

Compelling case to treat them as a single unit

* + - * 1. Denominator issue

Two lots, E and F. Both substandard. F with a cabin on the River; E undeveloped. Common terrain features. Owners want to sell E to pay for improvements to cabin on F.

State/County has a merger law that prevents selling E separately if a common owner owns it and a contiguous lot (F).

After failed efforts to get variances, owners sue claiming unconstitutional taking of lot E.

What is the “parcel”?

* + - * 1. Murr’s Theory

Lot E = the parcel for consideration of whether or not it has been taken.

Lot E’s value

Worth $398,000 as a developable lot ($771,000 -$373,000)

Worth $40,000 as an undevelopable lot

Total Taking under *Lucas*?

Considerable diminution of value under *Penn Central*?

Interference with reasonable investment backed expectations?

Character of the Governmental Action?

Not an invasion

General regulation balancing benefits and burdens of economic life?

Comprehensive land use regulation?

* + - * 1. Government’s Theory

Lots E and F as merged should be the parcel to be analyzed

Value of the two lots together, with the regulation in place = $698,000

Value of E and F separate and each buildable (i.e., without the merger restriction) = $771,000

* + - * 1. On the timing issue

A “valid takings claim will not evaporate just because a purchaser took title after the law was enacted;”

A “reasonable restriction that predates a landowner’s acquisition … can be one of the objective factors that most landowners would reasonably consider in forming fair expectations about their property;”

“T]he valid merger of the lots under state law informs the reasonable expectations they will be treated as a single property.”

* + - 1. Palazzolo
         1. Post-regulation acquisition does not imply that the regulations become background principles of state property law
         2. Post-regulation acquisition does not prevent new owner from having reasonable expectations that land has some value
         3. But existence of regulation at time of acquisition does inform the Penn Central Analysis (O’Connor)
         4. But existence of regulation should NOT inform the Penn Central analysis, unless regulations have become part of the background principles of state property law (Scalia)
      2. Examples
         1. Developer buys 100 acre farm 🡪 subdivides into 100, 1 acre lots

Records plat map

County decides it needs wetland protections and passes regulation

Three lots are now unbuildable

Is this a taking?

How does states and local law treat the lots?

Separate lots

Physical characteristics

Physically marshier

Prospective value of the law

We need more information

Presumably less on these lots

* + - * 1. If he bought it after the regulation…

The parcel is a whole

If county gets in there before subdivision 🡪 no taking

* + - * 1. Sells all lots off and buyers become plaintiffs

Nuisance exception?

Wetlands preservation: Court torn on whether it’s harm-preventing or benefit-conferring

Just Lucas

Configuration of ownership matters a lot

In some situations, you just look at the separate lot

* + - 1. Litigation will come about how these factors weigh in different configuration
         1. No enough guidance from SCOTUS yet
      2. Problem with state boundaries
         1. State and individuals can manipulate boundaries
      3. How to figure out harm-preventing vs. benefit-conferring?
         1. What’s the normal activity to be going on in the area/neighborhood

Nuisance behavior below normal level

Behaving in a better than normal way

Conferring a benefit

Penn Central

* + - * 1. Allowing legislature to define a nuisance?

Scalia doesn’t trust them to do it (“stupid staffer”)

* + 1. Takings Take Aways!
       1. Fifth Amendment is about “bar[ring] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” Armstrong v. US (1960)
       2. Court’s approach to regulatory takings “aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.” Lingle v. Chevron (2005).
       3. Court distinguishes regulations that “take” from regulations that “adjust the benefits and burdens of economic life.” Penn Central (1978)
       4. Penn Central is the “Polestar” for takings questions not covered by the per se rules of Loretto and Lucas (various)
  1. ~~Exactions; Taking of Personal Property~~
     1. ~~Exactions~~ 
        1. ~~Government is considering issuing you a land-use permit and wants something from you in return (in addition to compliance)~~
        2. ~~If we allow developer to build subdivision (for example), you may need a bigger sewer line, another school, etc.~~ 
           1. ~~Accommodate the people they bring in~~
           2. ~~Make them pay to offset negative externalities~~
           3. ~~Pass along to new residents~~
        3. ~~Not a lot of judicial scrutiny applied to these situations~~
           1. ~~NOT true of exactions~~
        4. ~~Heightened scrutiny analysis of exactions~~
           1. ~~Puts burden on permitting authority~~
        5. ~~Policing exaction is making sure that government isn’t withholding a benefit/infringing a right~~
        6. ~~Payment of money has been thought subject to many constitutional provisions, but not 5~~~~th~~ ~~Amendment~~ 
           1. ~~Eastern Enterprises~~
     2. ~~Nollan (CA) and Dolan (OR)~~
        1. ~~Logical connection (nexus) between):~~
           1. ~~The ostensible reason for denying the permit AND~~
           2. ~~The condition imposed on the owner/property~~
        2. ~~Higher scrutiny of government action~~ 
           1. ~~If you deny Nollan’s application to raise his house or Dolan’s application to expand her hardware store because it would contribute to environmental drainage 🡪 they would have been upheld~~
           2. ~~But it’s struck down in both~~
        3. ~~Fulcrum in both cases: unconstitutional conditions~~
           1. ~~Can’t condition government benefit on giving up a constitutional right~~
           2. ~~Loretto is pivotal in area of exactions~~

~~Per se rule~~

~~Would the exaction requested by a Loretto type taking or a regulatory taking outside the scope of permitting~~

* + 1. ~~Nollan~~
       1. ~~No logical nexus between easement along the beach and the increased height of the house~~
       2. ~~Court doesn’t see connection between decreased visibility from street and an easement for people already on the beach (no problem seeing the beach)~~
       3. ~~No nexus between negative externality and what they’re trying to get out of the property~~
    2. ~~Dolan~~
       1. ~~Store wanted to pave a parking lot, city said they had to have drainage and easement for bike path~~
       2. ~~Court said there’s somewhat of a nexus, but you’re asking too much of landowner in relation to what the problem is~~
       3. ~~Rough proportionality test between the natural extent of the required dedication and impact of the proposed development~~
       4. ~~City wants landowner to deed greenway space to a creek in exchange for permit to expand store~~
       5. ~~City says water run-off and increased foot & bike traffic~~
       6. ~~Court sees nexus, but not convinced problems are big enough to justify these actions~~ 
          1. ~~The roughly proportional test is roughly demanding~~
          2. ~~Burden of proof is on the government to show nexus & proportionality~~
    3. ***~~Koontz v. St. Johns River Water Management District~~* ~~(2013)~~**
       1. ~~Koontz wants to build on 3.7 acres he owns and needs a permit~~
       2. ~~Committee wouldn’t approve his proposal as is~~
          1. ~~Either he could build on 3.7 acres and pay to mitigate damage elsewhere~~

~~Paying to improve drainage elsewhere, etc.~~

* + - * 1. ~~Or he could build on 1 acre~~
      1. ~~He didn’t like these deals, they deny the permit~~
         1. ~~The government has not taken his property~~
      2. ~~Denial vs. grant is irrelevant to the court’s analysis~~
         1. ~~Evaluate the condition it was denied on~~
      3. ~~Fine for regulator to ensure that developer pay for negative externalities of the project~~
         1. ~~Heavy bias – voters vote commission~~
         2. ~~Members don’t want to pay for things required by newcomer projects~~
      4. ~~Kagan Dissent~~
         1. ~~Doesn’t think a condition was imposed, county never made firm demand~~
         2. ~~County welcomed alternative proposal from Koontz~~
         3. ~~Takes issue with this part of the argument 🡪 this is just property taxes~~
      5. ~~Big change in understanding of Nollan and Dolan~~
      6. ~~Alito worried about evasion of the cases~~
         1. ~~Says it’s consistent with Eastern Enterprises~~
         2. ~~Government isn’t taking any particular interest/specific asset~~

~~Like in Horne –~~ *~~those~~* ~~raisins~~

* + - 1. ~~Collision is happening between line of thinking~~
         1. ~~Exactions – don’t want government to have so much power that they could do something that would be a taking outside of the permitting process~~
         2. ~~Lienient level of review to regular land use regulations~~
      2. ~~Stable? Or qualified in the future~~
    1. ~~Old test (Landscape leading up to Koontz)~~
       1. ~~Fail to substantially advance a legitimate government interest~~
       2. ~~Deprive owner of all economic~~ 
          1. ~~Lingle v. Chevron (2005)~~

~~Concluded 1 was a due process concern – not a takings concern~~

~~Limited ability to object to means-ends fit between goals and methods~~

* + - * 1. ~~Another case~~

~~Court addressed claim by property owner who was denied a permit after repeated negotiation attempts~~

~~Land owner meeting requirements of agency and still got denied~~

~~Sued on claim that Dolan (Nollan?) requirement applied to denial of this permit~~

~~Court rules that roughly proportional test doesn’t apply to denials – no land has been taken – this is a due process concern~~

* + 1. ~~No one ever held that the 5~~~~th~~ ~~Amendment also applied to personal property because it was assumed that it applied~~
       1. ~~Government has to pay you if they come into your house and take your guns~~
    2. ***~~Horne v. Department of Agriculture~~* ~~(2015)~~**
       1. ~~In Lucas, Scalia says that personal property can be regulated more heavily (cite Andrus)~~
       2. ~~One way to look at this as just really heavy regulation on raisins~~
       3. ~~Scheme to raise market price for raisins – government uses extra raisins for non-competitive purposes~~
       4. ~~Unobjectionable to impose a strict quota limit on production (Wickard v. Fillburn)~~
       5. ~~Roberts:~~
          1. ~~Constitution care about means as well as ends~~
          2. ~~Government has to do things the constitutional way – no short cuts~~
          3. ~~Total ban and USDA order are functionally the same (result) but the USDA method is unconstitutional~~
          4. ~~Just wants to get it over with?~~
       6. ~~Dissent~~
          1. ~~Objection of Breyer (Schroeder agrees)~~
          2. ~~Have to offset benefit that program gave in calculating just compensation~~
          3. ~~Fair market value is just the starting point~~
          4. ~~By taking some of your property, government is increasing value of the property they aren’t taking~~
    3. ~~Exactions: idiosyncratic with relation to heightened scrutiny to heightened scrutiny~~