**1. INTERDEPENDENCE OF PROPERTY RIGHTS** **– Normative/Theory/Tensions**

***Conceptualizing*** ***and*** ***Studying*** ***Property*** ***Law***

* 1. **Core Functions of property law**
     + 1. Defines what property is
       2. Defines what we can do with property
       3. Creates a system that balances competing rights and responsibilities
     1. **Defines what property is—anything of value that the state protects** 
        1. Property is hugely political
        2. Property is not an indivisible whole—bundles of entitlements
        3. Core entitlements—to exclude, to use, to transfer, immunity from loss.
        4. Not enough only to ask who owns the property; need to resolve competing demands of owner w. others who have interest.
     2. **Defines what we can do w/ property**
        1. Tensions limiting the core entitlements.
        2. Balancing property interests of each owner.
     3. **Creating a system that balances competing rights and responsibilities.**
        1. Property law derives from a social compact, which leads to sovereign mandate.
           1. At the base, people agree to submit to a form of gov’t.
        2. Sovereign sets ground rules on property system.
           1. Has to define rights, rights determine what will be protected.
           2. Anytime there’s a clash of entitlements, the state has to resolve that dispute.

Non decisions equally as significant as decisions.

* + - 1. Property interests operate at two levels
         1. Inter-sovereign
         2. Within sovereign system (core entitlements; every one has a counter entitlement.)

Right to exclude v. right of access

Privilege to use v. security from harm

Power to transfer v. powers of ownership

Immunity from loss v. power to acquire

* + - 1. Sovereign holds some property rights for the public—stream beds, navigable waters
      2. Individuals hold 2 sets of property rights
         1. Publicly held b. Privately held
      3. Property on an individual level is combination of rights/responsibilities.

## *Core Entitlements / Tensions*

## Bundle of Sticks – Property Rights

|  |  |  |
| --- | --- | --- |
| Possess | Alter/Destroy | Transfer/Dispose |
| Enjoy Fruits/Profits/Benefits | Exclude | Use |

1. **Core Entitlement / Core Tensions within the Property System** 
   1. **Right to exclude v. Right of access** 
      1. Privacy and free association norms v. equality norms
   2. **Privilege to use v. Security from harm** 
      1. Owners not free to harm neighbors’ property substantially/unreasonably (negative externalities)
   3. **Power to transfer v. Powers of ownership** 
      1. Freedom of disposition gives owner power to sell, give away, write will to transfer, impose conditions like only residential use, etc.
      2. But cannot impose conditions that violate pub pol or unduly infringe on liberty interests of future owners (only transfer to someone of same race, vote Democrat, etc.)
      3. Freedom of disposition, freedom of owners to move and promote efficient transfer of property in the marketplace, freedom of future owners to use property as they wish, freedom of contract
   4. **Immunity from loss v. Power to acquire (eminent domain)**

***Calabresi & Melamed Theory***

1. Legal rules that create private CoA (or claims for relief) can be sorted into two kinds:
   1. Rules that **entitle** the claimant to an **injunction**. Associated with property rights, so call these "property rules"
      1. Property Rules:
         1. How it works: Property rules fix an ***absolute entitlement*** either to engage in the conduct or to be secure from the harm.
         2. In other words:
            1. The price to engage in the conduct is completely determined by the party holding the property right (the winner). Holder gets to decide value, and holder cannot be denied value unless she consents.
            2. The other (losing) party will have to try to buy out the winner in a negotiation. Someone who wishes to remove the entitlement from its holder must buy it from holder in a voluntary transaction in which value of entitlement is set by seller.
         3. P (Entitlement) – Injunction (Property right held by P)
         4. D (Entitlement) – Dismiss complaint
   2. Rules that **entitle** the claimant to **damages**. Associated with tort or contractual liability, so call these "liability rules"
      1. Liability rule: **Court** determines value.
         1. How it works: Liability rules prohibit each party from interfering with the interests of the other unless the party is willing to pay damages.
         2. In other words: The winner *cannot* get an injunction. The losing party *always* has the option of paying damages and interfering with the winner’s interests.
      2. P (Entitlement) – damages (Court determined)
      3. D (Entitlement) – purchased injunction (Court requires it)
   3. Injunctions / damages have different effects on future behavior and negotiation of claims.
2. Inalienability rule: entitlements that can’t be traded or denied even if consented to
   1. Inalienability Rules:
      1. How it works: Inalienability rules assign entitlements and forbid their transfer.
      2. In other words: The losing party is prohibited from interfering with the winner’s interests, *even if the winner wants to sell the property right.*
3. **Form of entitlement which gives rise to least amount of state intervention**:
   1. Once initial entitlement is decided upon, state does not try to decide value but parties say how much it’s worth, gives seller veto if buyer doesn’t offer enough.
   2. Property rules involve a collective decision as to who is to be given an initial entitlement but not as to the value of the entitlement.
   3. Whenever someone may destroy initial entitlement if he is willing to pay an objectively determined value for it, entitlement is protected by a liability rule. This value may be what it is thought the original holder of the entitlement would have sold it for. But the holder's complaint that he would have demanded more will not avail him once the objectively determined value is set. Thus, liability rules involve an additional stage of state intervention: not only are entitlements protected, but their transfer or destruction is allowed on the basis of a value determined by some organ of the state rather than by the parties themselves.
   4. An entitlement is inalienable to the extent that its transfer is not permitted between a willing buyer and a willing seller. The state intervenes not only to determine who is initially entitled and to determine the compensation that must be paid if the entitlement is taken or destroyed, but also to forbid its sale under some or all circumstances.
   5. Inalienability rules are thus quite different from property and liability rules. Unlike those rules, rules of inalienability not only "protect" the entitlement; they may also be viewed as limiting or regulating the grant of the entitlement itself.
   6. Alienable rights enforceable by injunctions require less state intervention than inalienable rights only enforceable by damage awards.

|  |  |  |
| --- | --- | --- |
|  | Use Right - π | Use Right - ∆ |
| Right protected by property rule | Enjoin ∆ (harm outweighs benefit) | No nuisance – use continues |
| Right protected by liability rule | ∆ pays π damages (benefit outweighs harm) | Enjoin use (force them move) but award them damages to do so (occurs when the π has moved to the nuisance) |

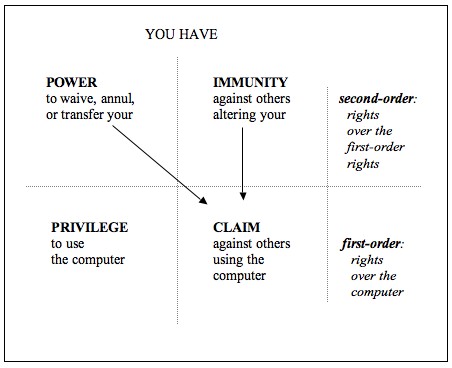
|  |  |  |
| --- | --- | --- |
| **Fairness Utility** | **Activity benefits society** | **Activity does not benefit society** |
| Fair to impose cost of activity on plaintiff | *Fontainebleau*: no nuisance; ∆ entitlement protected by property rule | *Webb*: purchased injunction; ∆’s entitlement, protected by a liability rule |
| Not fair to impose cost of activity on plaintiff | *Boomer*: damages; π’s entitlement protected by a liability rule | *Page County*: no nuisance; π’s privilege protected by property rule |

***Coast Theorem / Efficiency Theories***

1. Offer price v. asking price
   1. Price of things in or not in your possession
   2. Overvalue things in your possession
   3. Factory doesn’t internalize those costs but creates externality
   4. Forcing people to internalize externalities 🡪 efficiency?
2. **Efficiency**:
   1. Pareto superiority: Someone gains, no one is injured.
   2. Pareto optimality: No further exchanges can be made that would be Pareto superior.
   3. Kaldor-Hicks efficiency: This is wealth maximization. As long as the winners win more than the losers lose, a situation is efficient.
3. **The Coase Theorem:** 
   1. Describe economic efficiency of economic allocation/outcome in presence of externalities.
   2. **Theorem**: if trade in an externality is possible and there are sufficiently low transaction costs, parties will bargain, and bargaining will lead to an efficient outcome regardless of the initial allocation of property.
      1. Costs are reciprocal
      2. Assumes perfect information
      3. Legal outcome doesn’t matter because parties will reach an efficient solution
   3. Efficiency is achieved by giving the entitlement to the party who values it most, with value measured by willingness and ability to pay.
   4. But transaction costs cannot be neglected, initial allocation of prop. rights often matter.
   5. One normative conclusion drawn from Coase is property rights should initially be assigned to actors for whom avoiding the costs associated with the externality problem are the lowest.
      1. In real life, nobody knows ex ante most valued use of a resource, and also costs involving the reallocation of resources by government also exist.
   6. 2nd normative conclusion is government create institutions that minimize transaction costs to allow misallocations of resources to be corrected as cheaply as possible.
   7. Version 1: A clear delineation of private property rights is an essential prelude to market transactions.
   8. Version 2: As long as private property rights are well defined under zero transaction cost, exchange will eliminate divergence and lead to efficient use of resources or highest valued use of resources.
   9. Version 3: The allocation of resources is invariant to the assignment of private property rights under zero transaction cost and zero income effect.
   10. **Problems with Coast Theorem:** 
       1. Spite and malice (Fountainbleu)
       2. Competition – might want to NOT negotiate
       3. Transaction costs
          1. Bargaining, litigation
          2. Time dealing with dispute
          3. Information doesn’t come free
       4. Multiple parties
       5. Information
       6. Offer & ask different psychological effects
       7. Costs of liquidity (interest rates on loans. Take loan for now – interst)
       8. Courts bad at calculating damages. Damaging party doesn’t get better.
   11. Pollution of a river imposes a marginal social cost, *MSC*, on the victim and provides a marginal benefit, *MB*, to the polluter. The efficient amount of pollution is the one that makes *MSC* = *MSB*.
   12. In the example pictured, this is 4 tons per week. Why?
   13. If the polluter owns the river, the victim will pay $400 to avoid pollution beyond 4 tons. If victim owns the river, the polluter will pay $400 for the right to dump 4 tons per week.
   14. In either case, *the result is the same*.
4. **Critiques of Transaction Cost Analysis:** 
   1. Define value by reference to willingness and ability to pay. Those with more wealth have greater votes.
   2. **Posner**: justifies use of wealth maximization as a measure of both social welfare and justice, he notes that reliance on “willingness to pay” as a criterion of value may sometimes conflict with achieving a result that maximizes social utility.
   3. **Ronald Dworkin**: wealth does not constitute a value in and of itself. Since efficiency is a function of the distribution of wealth, it is incomplete as a criterion of justice without a defense of the existing distribution of wealth. Economic analysis cannot itself provide such a justification since it determines value by willingness and ability to pay, which in turn is determined by an initial distribution of wealth.
   4. It is therefore circular to define property rights by reference to the bargains people would make in the absence of transaction costs because what bargains they are likely to make depends partly on the initial distribution of property rights between them.

***Jural Relationships (The Genius of Wesley Hohfeld)***

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| ***Jural Opposites*** | | | | |
| *Right*  *No Right* | *Privilege*  *Duty* | *Power*  *Disability* | *Immunity*  *Liability* |
| ***Jural Correlatives*** | | | | |
| *Right*  *Duty* | *Privilege*  *No Right* | *Power*  *Liability* | *Immunity*  *Disability* |

* 1. Eight basic legal rights:
     1. 4 Primary legal entitlements (rights, privileges, powers, and immunities)
     2. Their opposites (No-rights, duties, disabilities, and liabilities)
     3. **Rights**: claims, enforceable by state power that others act in a certain manner in relation to the rightholder
        1. **No-Rights:** does not have the power to summon the aid of the state to alter or control the behavior of others
     4. **Privileges**: permissions to act in a certain manner without being liable for damages to others and without others being able to summon state power to prevent those acts
        1. **Duties**: absence of permission to act in a certain manner.
     5. **Powers**: state-enforced abilities to change legal entitlements held by oneself or others
        1. **Disabilities**: absence of power to alter legal entitlements
     6. **Immunities**: security from having one’s own entitlements changed by others.
        1. **Liabilities**: absence of immunity from having one’s own entitlements changed by others.
  2. Concept of **opposites**: One must have one or the other but not both of the two opposites.
  3. Concept of **correlatives**: Legal rights are not merely advantages conferred by the state on individuals. Ay time the state confers an advantage on some citizens, it necessarily simultaneously creates a vulnerability on the part of others. Legal rights are not simply entitlements but jural relations. Correlatives express a single legal relation from the point of view of the two parties.
  4. Important to think about: (1) who has the entitlement (2) against which specific individuals does the entitlement run and (3) what specific acts are encompassed by the entitlement.
  5. If you have a… 🡪 Someone else has a…
  6. Claim 🡪 Duty - First Order Right
  7. Privilege 🡪 No-right - First Order Right
  8. Power 🡪 Liability - Second Order Right
  9. Immunity 🡪 Disability - Second Order Right
  10. 

***Restatement § 826***

* 1. Injunctions are available where D’s conduct is unreasonable (more social harm than good) and causes substantial harm to P
  2. Damages are available where D’s conduct is reasonable (more social good than harm) but causes substantial harm to P (i.e., *Boomer*)
  3. Purchased Injunctions are available if D’s conduct is unreasonable *but* it is fair to impose cost of shutting D down on P (for example, if P comes to the nuisance)
  4. No Remedy if (a) harm to P is not substantial; (b) D’s conduct is reasonable and it is not unfair to impose costs on P; (c) imposing damages would totally stop D’s activity, resulting in net social loss

***Recurring Themes / Factors to Consider in Evaluating Property Laws***

* 1. Social Context
     1. Different typical models of property depending on whether it is owned individually or jointly, among family members or not, private/governmental entity, profitable/charitable purposes, residential/commercial purposes, open to public/private use
        1. Analyze property rights as relations among people regarding control of valued resources—every entitlement is limited by the competing rights of others.
        2. Examine role property rights play in structuring social relations and the way in which social relations affect access to property
  2. Formal v. informal sources of rights (which should prevail?)
     1. Formal: deed, will, lease, contract, government grant
     2. Informal: oral promise, course of conduct, actual possession, family relationship, oral gift, longstanding reliance, social customs and norms
  3. Alienability dilemma
     1. Fundamental tenet of property law system is that property should be “alienable” meaning it should be transferable from one person to another.
     2. Property should be alienable, which allows a market to function and enables efficient transactions and property use
     3. Promotes individual autonomy by allowing owners to sell or give away property when they please on terms they have chosen
     4. Cons:
        1. If owners are able to disaggregate property rights at will, it may be difficult to reconsolidate those rights
        2. If property rights are disaggregated among too many owners, transaction costs will greatly increase
     5. Many rules of property law limit K freedom so particular bundles of prop rights consolidated in same owner so tension btwn promoting alienability by consolidating rights in owners and allowing owners to disaggregate rights into unique bundles
  4. Contractual freedom and minimum standards
     1. Freedom to develop human relationships w/o govt intervention, create desirable packages of entitlements but there are certain minimum standards on contractual relationships (i.e. eviction process for landlord/tenants)
  5. Social welfare
     1. Pro: owners can obtain resources to satisfy their needs, encourages productive activity
  6. Justified / Reasonable Expectations
     1. Owners justifiably expect to use their own property for their own purposes and to transfer it on their own terms
     2. Bc property use often affects other, it must be limited to protect the expectation of others
  7. Distributive justice
     1. Wealth is unequally distributed between classes of race, gender, age, etc. so property laws should seek a way to equalize the wealth distribution
  8. Precedent
  9. Justice and Fairness
     1. Rights theorists – are there individual interests that are so important from a moral point of view that they deserve legal protection that overrides more general considerations of public policy
     2. Natural rights theorists – rights are in the nature of human beings
  10. Utility
      1. What are the consequences of alternative legal rules?
      2. What will create the behavior that is socially desirable? Will it create a more efficient market?
      3. Land Utilization – Wilderness
      4. Predictability
         1. Allows people to avoid court, can base their actions on predictable result
  11. Competing Rights
  12. Positivism and legal realism
      1. Positivism—equate law w/ rules from gov’t for reasons of social policy (protect individual rights, increase social wealth, etc.)
         1. Separate law from morals—although moral arguments might underlie rules of law, they aren’t fully enforced legal sanctions.
      2. Legal realism—the law is what officials will do in resolving disputes.
  13. Property Rights Not Being Absolute
      1. *Shack* – “Rights are relative and there must be an accommodation when they meet”
      2. *Shack* – one’s property should never be used to injure the rights of another
  14. Waste
      1. *Tragedy of the Commons*, Hardin
         1. When there are shared resources, an individual who increases his total share by +1 offset everyone else’s shares by (-1).
         2. The individual gains the full utility of his increase less the distributed loss which burdens everyone.
         3. Because the individual gains more than he loses, he repeats.
         4. This causes our common resources to slowly be depleted & destroyed.
         5. Solution: turn the commons into private property so individuals cannot destroy them.

***Labor Theory***

1. **John Locke:** Property rights from **rights of individuals** (negative rights that may not be taken)
   * 1. We own ourselves 🡪 we own things that we create (*Labor Theory*)
     2. *Labor Theory* of body points to parents (genetic + physical materials)
        1. Points us toward *Regression Theory*
     3. Under Lockean theory you can do whatever you want with your body
   1. Lockean theory of the **commons**
      1. You can claim whatever you make use of 🡪 whatever is beyond this belongs to others (**efficiency**)
   2. Locke’s theory does not work well for certain types of resources:
      1. Competing claims
      2. Claims on things that are not unclaimed
   3. Theory works best for IP and rural economies, unclaimed resources.
   4. National Parks:
      1. Leaving land fallow is not productive use 🡪 people lose title to land that they don’t develop.
   5. Take-Home: Theory is about **productive use of resources** and it envisions a particular type of society.
      1. Most attractive: abundant assets, low population (such as early colonies)
   6. Narrow libertarian view: Government should protect property rights, provide a forum, protect infringement.

## *Political Theory and Property*

1. **PRINCIPLE**
   1. **Protection of private property** is the **fundamental purpose of Government** because there is a direct correlation between property and liberty.
2. **DEMOCRACY (responsive open gov’t, individual rights, rule of law (objective application))**
   1. Property rights reinforce these principles because they are about control of resources (i.e. power).
      1. If you have control over things that people need then you have power over them.
      2. Classic move to **restrict minorities** is to take away property (repressive authority).
         1. See 1938 Reichsgesetzblatt (German law passed that took away all Jewish property rights)
      3. If you can accumulate resources, you can accumulate property.
3. **PROPERTY and LIBERTY (very important for emerging nations)**
   1. Capitalism/Socialism
      1. If State owns all the property then it can make demands on people for basic rights.
      2. All about access to capital and to markets.
      3. Friedman says *every* democracy has been capitalist (but not vice versa)
      4. This creates alternative centers of power to the State 🡪 promotes liberty.
   2. Power of Diffusion
      1. Middle class will lead to greater liberty.
      2. Stable property rights ensure stability.
   3. Tolerance — issues of distribution
      1. People are always torn between big ideas and individual problems
      2. Extremism is limited; people are more likely to settle issues.
      3. EU was a coal-trading union (France & Germany)
         1. Linking their economies forced them to negotiate with each other instead of going to war (WTO-GATT)
      4. Single most important aspect of upward mobility: access to capital.
      5. Modern democracy is a reaction to feudalism and slavery.
         1. Own yourself and you have a right to bargain.
4. **Common Law of Trespass and Public Policy Limits on Right to Exclude**

“The gift of an action of trespass is infringement on the right of possession.” Walker Drug Co. v. La Sal Oil Co. (Utah 1998).

1. **Common Law Trespass :** *Unprivileged* *intentional* *intrusion* *on* *property* *possessed* *by* *another.*
   1. Unprivileged
   2. Intentional – [voluntary act (walking) not intentionally on another’s land. mistake = trespass]
   3. Intrusion
   4. On property owned by another
   5. Infringement on the right of possession
2. When Can Trespass Be Privileged?
   1. When done out of **necessity** to prevent further harm.
   2. When entry is encouraged by **public policy.**
   3. When done with the **consent** of the owner.
      1. Consent, even if through fraud, is effective if it doesn’t interfere with security or privacy or interfere with underlying property interest.
      2. While implied consent is fraudulent, still effective bc of implied public policy of access to property (testers, restaurant critics, but not okay to steal trade secrets)
      3. Food Lion v. ABC: Consent was just for initial entry but not for what happened after- videotaping meat-packing practice.
3. Remedies
   1. Damages: nominal, compensatory (what it takes to repair; fair market value v. present value), punitive
   2. Injunction: legal order that trespasser must stay off.
   3. Declaratory judgment: establishing right/no right to go on property
   4. Criminal remedies

**State v. Shack (N.J. 1971) – “Public Policy” – Criminal Trespass**

1. **F:** Shack (D1) attorney non-profit funded by Office of Economic Opportunity pursuant to act of Congress. Tejeras (D2) field worker for non-profit funded under act. Orgs provide medical, legal assistance to migrant farm laborers. Tejeras to enter Tedesco’s property to administer medical, legal help to laborer who needed stitches removed. Shack sought to provide legal help to other laborer, w/ Tejeras. Tedesco demanded visits conducted in office and refused unsupervised access to laborers in living quarters. Shack and Tejeras refused leave Tedesco’s property, convicted trespass, fined $50
2. **H/R:** Tedesco’s property interest did not extend to right to exclude individuals providing access to governmental services for benefit of migrant farm laborers. No trespass.
   1. D arg labor camp same as company town, so 1st Amendment right to enter to aid laborers. Court rejected, held camp was ***not*** analogous bc not open to public.
   2. A man’s right in his real property is not absolute.
   3. Necessity, private or public, may justify entry upon the lands of another.
   4. Compromise btwn competing needs in light of the realities of the relationship between the migrant worker and farmer.
   5. A labor camp is not required to keep its property open to general public.
   6. Employer may reasonably require a visitor to identify himself and state general purpose.
   7. Employer may not deny worker privacy or interfere with opportunity to live with dignity and to enjoy associations customary among citizens.
3. **PubPol/Theory:** 
   1. Property rights ***serve*** human values. Property rights are BELOW human needs, rights
   2. Title to real property does not include dominion over the destiny of persons the owner permits to come onto that property. Their well-being must remain the paramount concern of a system of law.
   3. Parties cannot contract away what is deemed to be essential for their health, welfare, or dignity.
4. **Notes from Class:**
   1. Constitutionality:
      1. First Amendment Rights: (Being violated by state statute)
      2. State action doctrine – Constitution only applies to government (generally 13th)
         1. Here, Tedesco is a private actor, but case law – ***Marsh v. Alabama*** (US 1946)– if property open to public, only diff from company town and public town is that company town title in corporation (D arg like government company town) (still good law) and ***Amalgamated v. Logan Valley Plaza*** – open to public (mall) – not good law
         2. Favorable: Both Marsh and Amalgamated Logan Plaza – private but function like public open. Like a company town.
      3. Supremacy Clause- Constitution/Federal/Treaty Supreme, trumps state law contrary
         1. Favorable:
            1. Scope of law
            2. CRLS- purpose of law is to access aid to migrant population
            3. If federal law is constitutional, then state law interfering/overriding will be trumped
         2. Unfavorable: state law doesn’t have to ***help*** federal law. Federal law not totally in conflict
   2. NOT RELEVANT HERE: Did not look into Constitution but PROPERTY RIGHTS via NJ State Law – policy interpreted via state law (Williams, Scottish)
      1. Public Policy considerations animating migrant working concerns
      2. Some rights too fundamental for employees/people to contract away
      3. Migrant workers – unequal bargaining, communication limitations (phone, etc.)
      4. Lack of choice
      5. Tedesco lost control over right to exclude partially 🡪 ***visitors not interfering with business.*** Press given reasonable access. Members of these groups, their own visitors.
      6. Can exclude: merchants, solicitors, competitors, violent people, and can ask for ID
      7. Fundamental right to association, so landlord cannot stop tenant from associations

**Desnick v. American Broadcasting Companies (7th Cir. 1995)–POSNER! “Public Policy” - CIVIL**

1. **P**: Desnick Eye Center, ophthalmic clinic, and 2 of its surgeons Glazer and Simon
2. **D**: ABC television network, Producer of PrimeTime Live named Entine, reporter Donaldson.
3. **F**:  Entine informed P making program on cataract practices.  Entine asked if he can video P clinic, assured P no ‘ambush’ interviews/undercover, process will be ‘fair and balanced.’  P agreed, but D sent undercover patients to D’s other clinics, interviewed patients at clinic. Program showed P suggesting cataract surgeries to elderly people who were covered under Medicare, even though many of these people didn’t even require these surgeries.
4. **PH**:  P sue trespass, defamation, and other torts.  Lower court dismissed complaint.
5. **H:** When landowner permits entry to his property based on other’s misrepresentations or a misleading omission, will NOT always constitute trespass.
   1. “To enter upon another’s land without consent is trespass.”
   2. Though a person may enter land with different intention than what owner believes, trespass will not occur until there has been an **interference with ownership/possession of land**.
   3. Undercover videos of professional communications does not interfere w/ o/p of land.
   4. Here, clinic open to anyone.
   5. D did not reveal personal info of P, only revealed professional conduct of P. No work was disturbed, no embarrassingly intimate details revealed, no trade secrets stolen, so P cannot have a claim under trespass.
6. **Notes from Class**:
   1. Consent – either (a) implicit – meter reader, business ; (b) explicit (invitation)
   2. **Line is drawn by what interests trespass meant to protect – inviolability of the person’s property, security, integrity of person**
      1. Restaurant critic: objection would be to what he wrote, not to his entry, and since people have a right to eat and opinate, cannot limit this right. Similar to documentary
      2. False friend – violate property interest? No, friendship is difficult to define. What you wanted was a dinner guest so you got one even if that person doesn’t actually like you
      3. Investigative journalists is a slipper slope though? Everyone has a blog.
   3. Defining the boundaries of trespass:
      1. **Look to underlying interest for intent/interest (to exclude, privacy) then see if alleged act of trespass exceeded the scope of this interest**
      2. Scope of consent? = Desnick
      3. Public Policy = State v. Shack (Necessity)
         1. Obstruct, interfere with ownership of or possession of land
      4. Fraudulently obtained consent can be trespass

**Food Lion, Inc. v. Capital Cities/ABC, Inc. (4th Cir.) – Counter to Pub/Pol**

1. Facts: ABC Primetime aired program about food handling practices of Food Lion undercover reporting of investigative reporters. Food Lion sued, not defamation, but unfair trade practices, fraud, breach of contract, bc reporters gained access by getting jobs at Food Lion stores based on false resumes (no mention re: employed by ABC). District court Food Lion won.
2. Decision:
   1. Reporters not committed fraud but breached duty of loyalty
   2. Reporters trespassed; though initial entry was all right, secretly videotaping exceeded scope of invitation so trespass.
   3. ABC not responsible for lost profits incurred by Food Lion.
   4. First Amendment: claims ABC made on program were true, not defamatory, regardless of how information attained.
   5. Ds not guilty of fraud bc contract signed upon employment explicitly stated that either party could terminate employment at any time and for any reason, so Food had assume risk of early departure, the false pretenses under which they were hired were rendered irrelevant.
   6. Initial entry was consented to.

Questions!

* I am having trouble reconciling the trespass and scope of consent cases. I understand how to distinguish *Desnick*and*Food Lion*, but I'm having trouble reconciling *Food Lion*and*Moore v. Regents*. I know *Moore* was meant to illustrate the labor theory, but it feels so much like a trespass and consent case.
* For *Food Lion*, the initial entry was not a trespass (though entry was consented to based on false pretenses), but the taping was a trespass because it exceeded the scope of the consent. In class, we talked about how this holding focused primarily on the reporters' job duties for Food Lion? If so, that seems like the court used a formalistic delineation to achieve a desired result rather than forming a workable rule. For example, when an employee sets up a camera in their own office (on employer's property) and tapes interactions with a supervisor without his/her knowledge (i.e. because supervisor may potentially sexually harass), then that employee has done something outside their job duties and would not be protected. I don't know if the *Food Lion* court will want to reprimand that employee. Also, the disgruntled party would likely be mostly contesting the content (revealed information) and less the trespass. It also seems like the *Food Lion* rule punted the actual legal issue of whether videotaping is out of the scope of consent and relied on the employment context. What about the meter reader who videotapes his/her interactions for protection since that person is entering strangers' homes?
* I know the majority in *Moore* focuses on how Moore discarded his body tissue, essentially abandoning it, so therefore, his property interest was not trespassed. However, this feels unsatisfactory. *Moore* seems too close to *Food Lion*. For *Moore*, Moore consented to both the initial entry and the taking of his personal property (body tissue). Does Moore come out differently from *Food Lion*, because in *Moore*, the entry and taking were both performed within the scope of the doctor-patient relationship (unlike the employee duties in *Food Lion*)? But then the doctor-patient relationship also includes this legal duty to inform, so wouldn't that make Moore's consent ineffective?
* Should trespasses by investigative journalists be privileged because they further a strong public policy of protecting consumers from harmful products and services?
* Punitive damages are generally limited to cases involving “outrageous” or “egregious” conduct.
  + Are punitives warranted in either *Desnick* or *Food Lion*?
* A tenant in a three-unit apartment building lets his girlfriend move in with him. The landlord, who occupies another one of the units, says no. Who wins?

|  |  |  |  |
| --- | --- | --- | --- |
| Compensatory | Injunctive | Expectation | Specific Performance |
| Punitive | Declaratory | Nominal | Sanctions |

1. **Trespass to Chattels**
   1. Unprivileged
   2. Intentional
   3. Injury to property or dispossession or intentional “using or intermeddling” with property
   4. On property owned by another
   5. ***eBay Inc v. Bidder’s Edge*** (ND Cal 2000) (YES. D internet-based auction aggregating site accessed P’s internet auction trading site through automated program that sent 80k-100k information requests per day to P’s site by diminishing the quality or value of eBay’s computer systems by consuming at least a portion of eBay’s bandwidth and server capacity)
   6. ***Intel*** ***Corp*** ***v.*** ***Hamidi*** (no trespass could be shown in absence of dispossession unless communication damaged recipient’s computer system or impaired its functioning).
2. **Right of Reasonable Access to Property Open to the Public**
3. Private property (right to exclude strongest)
4. Private property held open to public (medium; right of reasonable access)
5. Public property (right of access absolute).
6. **Right of reasonable access:** You can’t be excluded for an arbitrary or discriminatory reason—have to have a good reason for kicking you out.
   1. No restrictions based on race/color/creed/national origin
   2. Analysis: case-by-case, look at facts and why person was excluded.
   3. Is there right of reasonable access?
   4. Were they excluded on arbitrary grounds?
7. ***Who***is subject to the right of reasonable access?
   1. Traditional rule: just innkeepers and common carriers
      1. **Innkeepers & Common Carriers** (planes, trains, buses)
         1. Duty to serve members of public unless there is a good reason not to
         2. Public *does* have a right of reasonable access
      2. All Other Businesses
         1. **Absolute** power to exclude for nearly any reason
         2. 🡪But note limitations on power to exclude on the basis of race
      3. Are internet carrier common carriers? DC Circuit struck down.
   2. Minority rule: all establishments held open to the public
      1. Right of reasonable access applies to ***all***businesses holding themselves out to the public.
         1. Exclusion may still be justified, but must be reasonable.
8. Why inns and common carriers? (Common understanding)
   1. Necessity
   2. More likely to be monopoly
   3. Hold out to public and public rely on them

**Uston v. Resorts International Hotel, Inc.,  (N.J.1982) – Minority Rule**

* 1. **F:** D excluded P from blackjack tables in its casino bc P is expert card counter. Casino Control Commission upheld decision saying appellant had common law right to exclude from premises anyone, so long as to do so was not violation of law.
  2. **R:**  **When property owner open premises to general public in pursuit of property interests, no right to exclude people unreasonably.** State v. Schmid (NJ 1980).
     1. Owners have right and duty to exclude who disrupt ‘regular and essential’ operations of premises or pose security f
        1. *State v. Schmid* (NJ 1980): constitutional right - literature on private univ. campus.
     2. Duty not to act in an arbitrary or discriminatory manner toward persons who enter premises- Applies not only to common carriers, innkeepers, owners of gasoline service stations, or to private hospitals, but all property owners who open premises to public.
     3. P does not fit category, not disruptive and did not interfere with regular functioning of casino, not dangerous/security risk. P possesses right of reasonable access to casino.
     4. Casino Control Commission ruling allowing appellant casino to bar appellee.
        1. Casino Control Act N. J. Stat. Ann. §§ 5:12-1 to 152 kept appellant from barring appellee from casino. Act prevailed over any other provision of law in conflict or inconsistent with its provisions, including common law rule.
        2. Act gave sole command to commission to regulate gambling to assure vitality of casino operations and fair odds to and maximum participation by casino patrons.
        3. It alone had the authority to exclude patrons based upon their strategies for playing licensed casino games or to change the rules of blackjack.
        4. Appellee had not violated any commission rule, nor disrupted the functioning of any casino operation.

Question! A large department store located in downtown Boston has become a gathering place for homeless persons during the winter months. Shoppers are uncomfortable because of disheveled appearances and worries of mental illness. There have been no problems, but worries have been deterring customers. Management develops policy that anyone appearing homeless is asked to leave. One person sues, arguing the store has a duty to serve public, and can only exclude for cause. Massachusetts has the traditional rule. Should the court adopt the minority rule described in *Uston*? If so, would the exclusion of homeless people be okay?

1. **The Public Trust,** pp. 56-69
2. Traditional Public Trust Doctrine:
   * 1. “Air, water, sea, shores are common to all mankind” - Anti-democratic doctrine
     2. Lands are held by the sovereign [the state] for the benefit of everyone
   1. Area Covered: navigable waters; tidelands/forelands
   2. Uses: “Historically Included” (ie navigation and fishing)
   3. Conception: Public Right created by Sovereign Duty; pre-existing encumbrance on the land; no private interests involved
3. Public Trust Doctrine under ***Avon*** (*Boroh o Neptune City v. Boroh o Avon-by-the-Sea, NJ* ***1972***)
   1. “[L]and covered by tidal waters belonged to the sovereign, but for the common use of all the people.” (Avon, p. 58)
   2. Area: Extended to dry sand beach immediately landward of the high water mark.
   3. Uses: Extended to “recreational uses, including bathing and swimming”
   4. Conception:Still tied to Sovereign Duty, but emphasis on land being municipally-owned shows an awareness of potential future conflict with private rights
4. Public Trust Doctrine under ***Matthews (NJ 1984)***
   1. Area Covered: Extended to include dry sand area owned by quasi-public body
      1. Factors in considering what dry sand must be opened (p. 60):
         1. (1) Location of dry sand area in relation to foreshore
         2. (2) Extent and availability of publicly owned upland sand area
         3. (3) Nature and extent of public demand
         4. (4) Usage of upland land by owner
   2. Uses: Extended to allow crossing beach to get to water
   3. Conception: An interest held by the public, not an encumbrance on land; balance public’s right and private interests (new conception!)
5. Arguments in support:
   1. Want to give public access to limited resources where it’s impossible to give everyone a private share.
   2. Protect lands from exploitation.
   3. Shouldn’t give particular lands to just a few people.
   4. Has always been relied on, traditional rule.
6. Arguments against:
   1. Private property rights will lead to best use of land—property put to best use of land, avoid trampling by public.
   2. Society has evolved from time when rule came about.

***Matthews v. Bay Head Improvement Association (N.J. 1984)***

1. Public must be given both access to and use of privately-owned dry sand areas as reasonably necessary, by allowing membership in the association to be open to the public at-large.
2. **Facts**: In Bay Head, private properties corner beach, 6 parcels owned by Bay Head Improvement Association (D), a non-profit association whose purpose is improving and beautifying Bay Head by cleaning, policing, etc. Beach only accessible to members of the association who pay fees -restricted to property owners and residents of the town of Bay Head.
3. **PH**: Point Pleasant brought action asserting D prevented Point Pleasant residents from accessing beach contrary to public trust doctrine.
   1. **Precedent**: public rights in dry sand areas limited to beaches owned by a municipality.
   2. “[T]he public trust doctrine dictates that the beach and the ocean waters must be open to all on equal terms and without preference and that any contrary state or municipal action is impermissible.”
4. **Held**: D activities paralleled those of municipality in operating beach front, so membership must be open to public at large
   1. Public right to use the foreshore would be meaningless if the only feasible access route cut off, effectively eliminating rights of the public trust doctrine. Nothing said that all privately owned beachfront property must also be opened. **Case appears to turn on the quasi-public activity of the Defendant association.** If public has the right to use the beaches, but has no way to access the water because the beach is surrounded by private property, then precedent will be useless.
   2. Therefore, the ct. stated: “…recognizing the increasing demand for our State’s beaches and the dynamic nature of the public trust doctrine, we find that the public must be given both access to and use of privately-owned dry sand areas as reasonably necessary.”
   3. In the current case, a quasi-public organization is involved and it can exclude public from its property only when exclusion is lawfully exercised in furtherance of the public welfare related to its public characteristics.
   4. The practices of D in this case are not furthering any public good.
   5. D will have to open up its property for people to reasonably access sand and water front.
   6. P argues that all of private property should be opened to the public.  But that is not necessary at this time.  If D sells all its property to some private entity, then it will become necessary to decide on the issue of whether private property should be opened to public.  But at this time, it is not necessary.  So held for P.

**3 common law doctrines (other than public trust) to grant rights of access to public:**

1. Dedication—gift of real property from private owner to public.
   1. Requires offer by owner and acceptance by public, must be unequivocal act, clear intent for public use.
2. Prescription—if public has used property possessed by another for certain purpose for a long time (measured by SoL), public can acquire rights of access permanently, even if they never had them in the first place (or if had been limited by private ownership)
3. Easement—permanent right to do something on someone else’s land.
   1. Generally created by agreement BUT if landowner fails to exclude trespassers from property, she may lose right to sue them under SoL
   2. Right of public: *prescriptive* *easement*
4. Traditionally: most cts refused to allow public to obtain easement by prescription, but today most will recognize such easements.

**Right to be somewhere and problem of homelessness**

* 1. ***Pottinger*** ***v.*** ***City*** ***of*** ***Miami***
     1. ACLU sues Miami bc of sweep of homeless people before 1988 Orange Bowl Parade—many more homeless people than what could be handled in shelters.
     2. Judge ordered police to stop arresting people for “innocent, harmless and inoffensive acts”: eating/sleeping/bathing/sitting down in public.
  2. ***Tobe*** ***v.*** ***City*** ***of*** ***Santa*** ***Ana***
     1. CA Sup Ct upheld muni ordinance that banned camping/storage of personal property in public areas, despite evidence that shelters were 2,500 beds short.
     2. Said ordinance didn’t inevitably conflict w. constitutional prohibitions.
     3. Ordinance didn’t punish individuals for being homeless bc it regulated conduct, not status. No constitutional obligation to make accommodations on/in public property to facilitate homeless people’s exercise of right to travel.

1. **Obligations Re: Quiet Enjoyment: Unreasonable Land Use, [p. 368-84]**
2. **Nuisance**:
   1. An **unreasonable** act or omission which causes…
   2. **Substantial interference** with the use or enjoyment of land
3. Restatement (Second) of Torts defines land use as “**unreasonable**” when the “gravity of the harm outweighs the utility of the actor’s conduct.”
   1. To evaluate the gravity of the harm, courts are to look at:
      1. Extent of the harm involved
      2. Character of the harm involved
      3. Social value that the law attaches to the type of use or enjoyment invaded
      4. Suitability of the particular use or enjoyment invaded to the character of the locality
      5. Burden on the person harmed of avoiding the harm
   2. The evaluate the **utility** of the conduct, courts are to look at:
      1. Social value that the law attaches to the primary purpose of the conduct
      2. Suitability of the conduct to the character of the locality
      3. Impracticability of preventing or avoiding the invasion
4. Right to Use v. Right to Enjoy/Use = Nuisance Law
   1. Use your property so as not to injure another’s property. A lot of balancing.
   2. Remedy? Money damages or injunction
      1. Substantial interference
      2. Unreasonable interference
      3. Use and enjoyment of land harmed
5. Intentionality: must be intentional – not intent to do harm but intent to do act
   1. Strict liability: no intent, whether or not you took utmost care. Ultrahazardous activity
6. Nuisance is a flexible doctrine:
   1. Typically: activities that are “offensive, physically, to the senses and which by such offensiveness makes life uncomfortable such as noise, odor, smoke, dust, or even flies.”
   2. Ex: vibration/blasting damaging a house, emission of pollutants (smoke/dust/gas/chemicals), offensive odors, and noise.
7. General rule for **who you can sue:**
   1. Liability on any actor who “materially participates” in causing the harm.
   2. D’s conduct must be a “substantial factor” in bringing about the alleged harm.
8. Trespass: different interests underlying (possessory interest)
   1. Indirect invasion, like smoke, not physical invasion per se
   2. Not easy to distinguish
   3. Some cts distinguish trespass from nuisance by arguing trespass has to be direct (bullet fired across land; therefore pollution is nuisance b/c particles carried by wind is indirect invasion) and physical objects have to be larger than microscopic to constitute trespass
      1. Modern trend is to recognize invasion by particles as both trespass and nuisance and to allow P to recover under both theories.
      2. ***Bradley*** ***v.*** ***American*** ***Smelting*** ***&*** ***Refining*** ***Co.*** (trespass and nuisance claim against factory emitting arsenic and cadmium that fell on P’s land)
         1. T can only occur if particles fell to ground (remaining in air insufficient).
         2. D liable for T only if P can prove “substantial damage”— reconciling interests of many who are unaffected by possible poisoning w/ few who are affected
9. Negligence: unreasonablility of conduct
   1. Nuisance: unreasonable effect
   2. Unreasonable—involves substantial harm that an owner shouldn’t have to bear for the good of society.t
   3. Right protected by nuisance = quiet enjoyment of one’s land.
   4. Negligence implies judgment that reasonable person would have foreseen harm and prevented it.
   5. Nuisance focuses on result of conduct rather than conduct itself—whether *interference* was unreasonable.
10. Permanent v. Temporary Nuisance
    1. Permanent: irreparably injures property or is of such a character that it is likely to continue indefinitely. SoL for bringing claim starts at time nuisance begins.
    2. Temporary: can be alleviated by changes in D’s conduct. SoL refreshes w/ each new injury.
11. Private v. Public (Enforced by public official)
    1. Nuisance per accidens = lawful 🡪 nuisance
    2. Nuisance per se = unlawful 🡪 nuisance
12. Hypersensitive use: above average use of property (Page County) (normalcy standard)
    1. Argument against: unfair, social utility, efficiency, insufficient jury instruction
13. **Defining** **unreasonable** **land** **use**:
    1. Determine what *interests* fall under “use and enjoyment” of land.
    2. How serious must interference be for nuisance to be present?
       1. Traditional: “substantial: to be protected
    3. If D has substantially interfered, how do we determine whether harm is unreasonable
    4. Can focus on rights (P’s right to security v. D’s right to freedom of action) or fairness
    5. Social utility/welfare analysis—costs v. benefits of providing remedy.
    6. Rights considerations
    7. **Conflicts** **btwn** **D’s** **right** **to** **freedom** **v.** **P’s** **right** **to** **security—main** **balancing** **test** **in** **opinions.**
       1. Some states deem activity nuisance bc conduct is disfavored (spite fences to piss off neighbors)
       2. Some states deem activity nuisance when type of harm involved is one that owners shouldn’t have to bear, at least w/o compensation.
          1. Nuisances *per* *se*—criminal activity (drug manufacturing/sales).
          2. Activities not customary to area—probably not protected.
          3. Certain activities not nuisances b/c regulating them restricts freedom of action too much and regulation will cause unfair surprise.
          4. ***Page*** ***County*** ***Appliance*** ***v.*** ***Honeywell,*** ***Inc****.* (TC should have let jury decide whether App Center was devoting its premises to an unusually sensitive use)
       3. Some activities not nuisances bc harmful activity was there first.
          1. P’s coming to nuisance not absolute defense—operating factory may be wrong if it’s eventually surrounded by homes.
       4. Some states have right to farm statutes that protect farmers from liability for nuisance if farms were established before surrounding residential property was built.
          1. NB: one ct struck down this law on ground it unconstitutionally deprived Ps of right to sue for nuisance.
14. Social welfare considerations in N law.
    1. **Utility** **factors:** Social value that the law attaches to primary purpose of the conduct
       1. Suitability of conduct to character of locality
       2. Impracticability of preventing or avoiding invasion
    2. **Fairness**: character of harm, distributive concerns, and fault.
    3. **Welfare**: costs and benefits, incentives, lowest cost avoider.
15. Vegetation in nuisance (traditionally not addressed in trespass)
    1. ***Fancher*** ***v.*** ***Fagella*** (sweet gum tree ruining neighbor’s property—was it a nuisance, and could the ct grant equitable relief in the case of the existence of a nuisance?
16. **Remedies**
    1. Two separate questions
       1. Which party has basic entitlement?
       2. Does P have right to be free from the harm, or does D have right to engage in that activity?
       3. What remedies for N action?
    2. Property—fix absolute entitlement either to engage in the conduct (no liability) or to be secure from the harm (injunctive relief). Fixed by private bargaining rather than court order.
    3. Liability—prohibit each party from interfering w/ interests of the other unless the party is willing to pay damages determined by a court of law.
    4. If P protected by law, D has to pay damages.
    5. If D can engage in activity, P won’t be entitled to injunction unless it compensates D for stopping activity—purchased or conditional injunction.
    6. Inalienability—assign entitlements and prohibit them from being sold/exchanged.

***Page County Appliance Center, Inc. v. Honeywell, Inc. (Iowa 1984)***

1. Synopsis: Person responsible for a nuisance may be liable even though that person has used the highest possible degree of car to prevent or minimize the effect.
2. Facts: 1953, Page County Appliance Center operated appliance store, no reception trouble with display TVs. Jan. 1980, customers complained TVs bad. ITT computer manufacturer and vendor (Honeywell) provided electronic services to nearby travel agency. ITT computer placed at travel agency generated interference, leaking radiation. Computer was installed, maintained by Honeywell. Honeywell engineers made many unsuccessful trips to fix. Both say not responsible.
3. PH: Page sued nuisance and tortious interference w/ business relations. P won both, awarded by jury $71,000 compensatory $150,000 punitive. Trial awarded ITT full indemnity. Both Ds appeal.
4. H:
   1. A person’s use of property should not unreasonably interfere with or disturb a neighbor’s comfortable and reasonable use and enjoyment of his or her estate.
      1. Nuisance is defined as a substantial and unreasonable interference with the use or enjoyment of land. Restatement version?!
   2. Page alleged private nuisance “an actionable interference with a person’s interest in the private use and enjoyment of his or her property”-- Nuisance *per accidens*– a lawful activity conducted in such a manner as to be a nuisance.
   3. The test of whether operation of lawful industry is nuisance (Restatement version):
      1. reasonableness of conducting it
         1. in the manner,
         2. at the place, and
         3. under the circumstances shown by the evidence
         4. Also: priority of location, character o the neighborhood, nature of the alleged wrong, character and gravity of the resulting injury is major factor. Balancing gravity of wrong and utility and meritoriousness of conduct.
      2. not affected by intention of creator not to injure anyone.
      3. Each landowner’s time of arrival will be given weight.
   4. A person responsible for a nuisance may be liable even though that person has used the highest possible degree of car to prevent or minimize the effect. Not based on negligence.
   5. Right being protected by a nuisance claim is right to quiet enjoyment of the land. Not an absolute protection because harm must be substantial and interference unreasonable.

***Fancher v. Fagella (Va. 2007)***

1. Facts: Fancher, Fagella neighbors. D Fagella, large sweet hum tree root system damaged and displaced retaining wall. Root system damaged Ps patio, blocked sewer + water pipes, impaired foundation of house. Fancher attempted self-help but continues to worsen his property.
2. Held:
   1. Encroaching trees and plants may be regarded as a nuisance when they cause actual harm or pose an imminent danger of actual harm to adjoining property.
   2. When encroaching tree only cast shade, drops flowers, or fruit on adjoining property that is not considered a nuisance.
   3. Person has a right to use and enjoyment of his property. When something infringes upon that right it is considered a nuisance and damages will follow.
   4. If there is no actual damage to the property, the only remedy is self-help.
   5. If there is damage from roots and branches the courts treat the tree as trespassing upon another person’s property which is actionable.
      1. Self-help remedy is still good, but owner of tree will be responsible for cutting down encroaching branches and roots if it cause damage to his neighbor.
   6. Only reviewed cases in rural times and utilized persuasive authority to overrule precedent.
   7. Other Precedent:
      1. Virginia Precedent: self-help but also if noxious and cause substantial injury, then get more. But what does noxious mean? “Bad” – unworkable definition
      2. Massachusetts: Self-help only (outdated re: urbanization)
      3. Restatement Rule: artificial v. natural vegetation. If natural, then self-help only. If artificial, then get to do more. Sets weird incentives though. If you let your trees and weeds go wild that’s okay, but well-tended garden gets strict review. Also what is natural versus artificial?
      4. Hawaii: If cause actual harm or pose an imminent danger of actual harm, then owner is liable for that harm
         1. Trespass and nuisance used interchangeability
3. **Obligations regarding Quiet Enjoyment: Light and Air [p. 384-403]**
4. One must use his property so as not to injure the **lawful rights** of another
   1. (sic utere tuo ut alienum non laedas).
5. Generally, no US precedent for right to light and air.
   1. ***Fontainebleau*** ***Hotel*** ***Corp.*** ***v.*** ***Forty-Five*** ***Twenty-Five,*** ***Inc.*** (Using property to as not to injure the lawful rights of another was not violated in this case bc there is no legally protected right to the free flow of light and air from adjoining land, therefore the construction of the building creates no cause of action.
6. Economic Analysis of the Law
   1. Descriptive analysis: explain existing legal doctrine as set of rules that promote efficiency
   2. Prescriptive/normative analysis: using economic efficiency as value to determine what the legal rules should be
   3. Economic analysis of law—cost benefit analysis
      1. Costs and benefits measured by market value—how much would you pay for it, or how much you would have to be paid to give it up.
7. Evaluating legal rules: whether a change from one legal rule (baseline) to another will increase or decrease social wealth.
   1. 3 elements: initial distribution of property rights, offer price by non-owner, asking price by an owner.
   2. Must determine initial distribution of wealth and initial allocation of entitlement
   3. ***Boomer*** ***v.*** ***Atlantic*** ***Cement*** ***Co*.** (1970): Neighbors complained that cement factory was billowing black smoke and depositing soot on a nearby residential community.
      1. Entitlements: right to pollute v. right to be free from pollution. Assume that either factory has initial right to pollute or residents have initial right to be free from pollution—then measure costs and benefits depending on who has to pay.
8. Traditional externalities analysis: cost internalization
   1. Externalities—costs imposed on third parties by legal actors that are not taken into account in actor’s own revenue cost determination.
      1. EX: pollution in *Boomer*—unless law intervenes, factory won’t have to take this cost into account in determining whether operations are profitable.
   2. Want to choose legal rules that give actors incentives to choose activities whose benefits to society outweigh their costs—goal of efficiency analysis is to increase social wealth.
      1. EX: Factory would have to internalize its external costs—account to society for harm it causes.
9. Justice Brennan—*those* *who* *profit* *from* *an* *activity* *should* *bear* *its* *costs*
   1. Argued that economic costs incident to land development should be borne by “those who engage inU!
   2. such projects for profit,” rather than adjoining landowners.
10. Rights argument: those who benefit from an activity shouldn’t impose costs of others; property can’t be used to unfairly harm legitimate security interests of neighbors.
11. Social welfare argument: economic actors should internalize their external costs to promote efficiency.
12. *Coase* *Theorem*
    1. **Part** **1** **of** **Coase** **Theorem:** If there are no transaction costs, it doesn’t matter which legal rule is chosen because any legal rule will achieve an efficient result.
       1. EX: Fontainebleau case: in absence of transaction costs, parties will agree for some sum between $6 and $10 million to allow project to move forward (pg. 391).
    2. **Part** **II** **of** **Coase** **Theorem:** In the presence of transaction costs, the choice of entitlements by the courts may have an effect on efficiency. The courts may increase efficiency by assigning entitlements to the parties who would purchase them in the absence of transaction costs.

|  |  |  |
| --- | --- | --- |
|  | Use Right - π | Use Right - ∆ |
| Right protected by property rule | Enjoin ∆ (harm outweighs benefit) | No nuisance – use continues |
| Right protected by liability rule | ∆ pays π damages (benefit outweighs harm) | Enjoin use (force them move) but award them damages to do so (occurs when the π has moved to the nuisance) |

|  |  |  |
| --- | --- | --- |
| **Fairness Utility** | **Activity benefits society** | **Activity does not benefit society** |
| Fair to impose cost of activity on plaintiff | *Fontainebleau*: no nuisance; ∆ entitlement protected by property rule | *Webb*: purchased injunction; ∆’s entitlement, protected by a liability rule |
| Not fair to impose cost of activity on plaintiff | *Boomer*: damages; π’s entitlement protected by a liability rule | *Page County*: no nuisance; π’s privilege protected by property rule |

|  |  |  |
| --- | --- | --- |
|  | **P** **has** **entitlement—**  **Landlord** **responsible** | **D** **has** **entitlement—**  **Landlord** **not** **responsible** |
| **Property** **Rules** | P can get injunction against D landlord, otherwise D has to pay P to allow drug dealers to stay/cost of relocating/damage to property caused by dealers **Ps** **get injunction** | Landlord has entitlement, can rent to whoever but can give entitlement away if Ps are willing to pay **no** **nuisance** |
| **Liability** | Ps can get damages from D landlord but not injunction; depreciated value of property, D can continue harm if he pays off Ps, allow drug dealers to stay **Ps** **get** **damages** | Ps can stop D’s conduct if P pays D for cost of kicking drug dealers off **purchased** **injunction** |

***Boomer v. Atlantic Cement Co. (1970)***

1. One of first most influential instances of court applying permanent damages.
2. **Facts**: Land owners with property adjacent to a cement plant sued, alleging dirt, smoke and vibration issuing from it constituted nuisance. Trial court agreed, awarded damages, but rejected request for an injunction to cut off problem.
3. **Opinion**:
   1. “Where a nuisance has been found and where there has been any substantial damage shown by the party complaining, an injunction will be granted.”
   2. That would result in closing the plant; court sought to avoid "**drastic remedy**"
   3. Instead engaged in cost-balancing analysis, contrasting trial's finding total permanent damages done to plaintiffs $185,000 but investment in plant (>$45,000,000) & 350+ jobs
   4. "The parties could settle this private litigation at any time if defendant paid enough money and the imminent threat of closing the plant would build up the pressure on defendant”
   5. [G]rant[ing] the injunction unless defendant pays plaintiffs such permanent damages as may be fixed by the court seems to do **justice** between the contending parties.
      1. All of the attributions of economic loss to the properties on which plaintiffs' complaints are based will have been redressed ... [and i]t seems reasonable to think that the risk of being required to pay permanent damages to injured property owners by cement plant owners would itself be a reasonably effective spur to research for improved techniques to minimize nuisance.
   6. Concept of “**servitude on land**” Servitude, in property law, ties rights and obligations to ownership of land so that they run with the land to successive owners.
      1. Majority described the damage imposed by the cement plant as a servitude on the land. Claimed that payment of permanent damages would constitute full compensation for the servitude
   7. **Outcome:** Court granted injunction against cement plant for nuisance, but permitted plant to pay permanent damages after which the court would vacate the injunction.
   8. In essence, court permitted plant to pay net present value of its effects and continue polluting.
4. **Dissent**: Imposing a servitude on land where impairment continues for a private use is unconstitutional.
   1. State constitution: “**private** property shall not be taken for **public** use”—remarking that it does not mention **private** use.
   2. “the permanent impairment of private property for private purposes is not authorized in the absence of **clearly** **demonstrated** **public** **benefit**.”

***Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc. (Fla. 1964)***

1. **Facts**: 2 hotels, Fontainebleau and Eden Roc, next to each other on beach. Fontainebleau making it taller, but block sun after 2PM on Eden Roc. Eden sought injunction, addition would render beach unfit for enjoyment of its guests and choice to build motivated by malice. Temporary injunction granted in lower court.
2. **Held**:
   1. Doctrine of *sic utere tuo ut alienum non laedas* does not mean that one can never use his property in a way that would hurt his neighbor.  It only means that ***one must use his property so as not to injure the lawful right of anothe***r.
   2. There is ***no legal right to air and sunlight***
   3. When a structure serves a useful and beneficial purpose it does not give rise to action under nuisance for damages/injunction under maxim, even if it causes injury to neighbor.
   4. No common law, statutory, contractual rule for legal right to free flow of light and air across adjoining land of a neighbor.
   5. Best left to legislature. No common law easement for light or air, but legislature imposed height restrictions.
      1. Height restrictions raise takings and just compensation issues.
      2. Court states duty to interpret and not enact new laws.
      3. If construction against public interest, legislature create statute/zoning reg

**II. ACQUISITION AND APPORTIONMENT OF PROPERTY**

1. **Conquest and Distribution by the Sovereign, pp. 97-114, 120-121**

***RELATIVITY OF TITLE!***

***Johnson v. M'Intosh (U.S. 1823)***

1. Tribes had no power to transfer fee simple to their land to anyone other than US gov’t, only to grant and use rights subject to tribal law.
2. So, private citizens cannot purchase lands from Indians.
3. US has exclusive power to extinguish the Indian right of occupancy.
   1. All that Opinion holds with respect to aboriginal title is that it is inalienable, a principle that remains well-established law in nearly all common law jurisdictions. Rest dicta
   2. Did NOT hold tribal possession of land had no legal recognition.
4. **Facts**: Thomas Johnson, one of first Supreme Court justices bought land from Piankeshaw Native American tribes in 1773 and 1775. Plaintiffs lessees of Johnson's descendants, who had inherited land. Defendant M'Intosh subsequently obtained land patent to land from US federal govt.
   1. Illinois and Piankeshaw nations sold land to non-Indian purchasers. Subsequently, US transferred those lands, title to which it received from Indians, to M’Intosh.
   2. M’Intosh was sued for ejectment by the original grantees who traced their title from their direct purchase from the tribes.
5. 
6. **Opinion (Marshall, unanimous)**- Affirm dismissal.
   1. Lengthy discussion of history of the European discovery of the Americas and the legal foundations of the Colonies, each European power acquired land from indigenous.
   2. Problematic justifications:
      1. Incompatibility of two cultures
      2. High-spirited and violent
      3. Never owned property (nomadic)
      4. Didn’t mix labor with land so not efficient
   3. Marshall traces outlines of "discovery doctrine"— namely, a European power gains radical title (also known as sovereignty) to land it discovers.
   4. As a corollary, discovering power gains exclusive right to extinguish "right of occupancy" of indigenous occupants, which otherwise survived assumption of sovereignty.
   5. When declared independence from Great Britain, US inherited British right of preemption over Native lands.
   6. Legal result is only Native conveyances of land which can create valid title are sales of land to federal govt.
7. By holding only federal govt purchase Native lands🡪 system of monopsony, avoided bidding competition between settlers, enabled acquisition of Native lands at lowest possible cost.

***Tee-Hit-Ton Indians v. United States (U.S. 1955) – RELATIVITY OF TITLE***

1. Rule: While Indian title is a recognized property right under federal common law, it is not “property” within the meaning of the 5th A, but a license that can be revoked at will by the US w/o compensation.
2. **Facts**: Ps, Alaskan tribe argue have full ownership of disputed property – national forest – bc they resided there for centuries.   Ps argue right to “unrestricted possession.” US govt uses timber from forest and sells it. Ps claim that they have a right to be compensated for use of their land and sold timber under 5A. P argued Congress had sufficiently recognized its possessory rights in the land so as to make its interest compensable.
3. **Held**: Statutes P cites do not indicate intention by Congress to grant P permanent rights in land.
   1. Congress only gave “recognized possession”
      1. When Congress grants authorization to occupy it does not automatically and simultaneously grant a “permanent right” to land.
      2. While Congress has authority to grant permanent right, they must do so explicitly or demonstrate some “definite intention” to grant the permanent right.
   2. Congress’s grant of occupancy does protect Ps land from interference from outside parties but not against Federal Govt itself as interfering party. P no right to compensation.
   3. Indians say never been conquered by Russia, and US bought from Russia. Why are Russia and French different? Do they need to prove conquer every tribe or just Indians overall?
4. **First Possession: Animals and Natural Resources, pp. 152-167**
5. Why does possession matter?
   1. Investment, clarity, efficiency
   2. Why suspicion? People take things, if resources are scarce must be used efficiently, if monopoly exists, if too many people
6. Possession versus Labor?
   1. Possession, Pros: Less lawsuits, confident investment, clear rules, efficiency
   2. Possession, Cons: incentivize proof?
   3. Labor, Pros: Incentivizes labor, no free-rider problem, extends what you can possess (like intellectual property)
   4. Labor, Cons: Harder to pin down, One definition of labor hard, Divisibility is difficult, How do you decide how much labor? What kind of labor? Sometimes good to conserve (oil, gas, water) and ownership is better for this.
7. What counts as possession?
   1. Declaring intent🡪 Gather hounds, horse, gun🡪 Release hounds🡪 Arrive on site🡪 Spotting fox🡪 Pursuit🡪 Closing in with reasonable expectation🡪 Wounding 🡪 Mortal wounding🡪 Killing🡪 Grabbing
   2. Holding: Mortal wounding, deprive of natural liberty like constructive possession, because effectively in your control.

***Pierson v. Post* (N.Y. 1805)**

1. **Facts**: Lodowick Post, a fox hunter, was chasing a fox through a vacant lot when Pierson came across the fox and, knowing it was being chased by another, killed the fox and took it away.
2. **PH**: Post sued Pierson- action for trespass to chattels. Post argued he had ownership of fox as giving chase to an animal in the course of hunting it was sufficient to establish possession. Trial court found in favor of Post.
3. **Opinion** (Future VP Tompkins):
   1. Mere pursuit gave Post no legal right to the fox, but that he became the property of Pierson, who intercepted and killed him.
      1. In order to obtain title to a ferae naturae (wild animal) a person must take it. “first to kill and capture” is the superior rule of law. Even pursuit with wounding is not enough. Must be mortally wounded, sufficient since this would have **deprived the animal of its natural liberty**. P only able to show pursuit
   2. Cites ancient precedent in deciding the case: Justinian's Institutes, and Fleta, adopt principle that pursuit alone vests no property or right in the huntsman; and that even pursuit, accompanied with wounding, is equally ineffectual for that purpose, unless the animal be actually taken. Same principle is recognized by Bracton; Puffendorf defines occupancy of beasts feræ naturæ to be actual corporeal possession; Bynkershoeck same.
   3. Court reasoned that given the common law requirement to have control over one's possessions, merely giving chase was not sufficient. Something more was needed, otherwise law would create a slippery slope.
4. **Dissent** (Future SCOTUS Brockholst Livingston): Not satisfied by authorities used.
   1. Instead pursuit should be sufficient, as it serves a useful purpose of encouraging hunters to rid thecountryside of that "wild and noxious beast.”
      1. Both matter of public interest (noxious beast) and encourage of labor (efficiency)
   2. Possession in relative terms where continued chase may merely be a formality of the pre-existing control already exerted by the hunter.
   3. Dissent: Property in animals ferae naturae (wild in nature) may be acquired without bodily touch or manucaption, provided pursuer be in reach, or have a reasonable prospect of taking, what he has thus discovered with an intention of converting to his own use.
5. Berger notes in It's Not About the Fox: The Untold Story of Pierson v. Post- dispute really about use of the land on which the fox was caught, part of the commons in which Pierson's family, like other descendants of the original settlers of Bridgehampton, had special rights.

***Keeble v. Hickeringill***

1. Facts: Keeble owned land with a pond equipped with duck decoys, netc, etc. for hunt and Hickeringill discharged a gun so that the ducks would be scared away from the pond.
2. Issue: Was it unlawful for D to scare away the ducks?
3. Property right at issue: Ducks
   1. **How** H got the ducks is very important 🡪 If the ducks had simply preferred H’s pond then he didn’t do anything wrong.
   2. H **interfered** with K’s property 🡪 A gun is not OK but a decoy would have been OK.
4. Held: Although K said H took something that was his, the Court said that it depended on **how**.
   1. The decision depends on the achievement of a certain social end.
5. Take-Home is about **competition**:
   1. Unfair competition should not be encouraged.
   2. Fair competition should be encouraged.
   3. Property rules are used to encourage certain types of behavior (like good competition).
   4. Achieves a certain **social end.**

**Popov v. Hayashi** (Ca. Sup. Ct. 2002).

## Facts: Popov (P) and Hayashi (D) Bonds’ record home run baseball. Popov caught ball, mob engaged in violent and illegal behavior. Popov buried, intended to establish and maintain possession of ball but it left his glove. Hayashi involuntarily forced to the ground. While on the ground Hayashi saw the loose ball and took it but committed no wrongful act.

## PH: P brought suit for conversion, trespass to chattel, injunctive relief and constructive trust.

## Holding and Rule: Conversion: wrongful exercise of dominion over personal property of other

## If actor undertakes significant but incomplete steps to achieve possession of abandoned personal property, effort interrupted by unlawful acts of others, actor has legal pre-possessory interest in property.

## Hayashi argues for complete control (Gray)

## Popov argues for intent to control and manifest intent by stopping forward motion of ball without full control (Bernhardt & Finkelman)

## Court adopts Gray’s rule of complete control, BUT also hold that Popov has a pre-possessory interest. *This pre-possessory interest constitutes a qualified right to possession that can support a cause of action for conversion.*

## Whoever has property has presumption of ownership so burden on Popov.

## Must be actual interference with Ps dominion.

## If person entitled to possession of personal property demands return, unjustified refusal to give the property back, withholding is interference, so yes conversion.

## Act constituting conversion must be *intentionally* done.

## BUT no requirement D know property belongs to another, D need not intend to dispossess true owner of its use and enjoyment.

## Injured party may seek specific performance to regain property or monetary damages.

## Trespass to chattel, in contrast, exists where personal property has been damaged or where the defendant has interfered with the plaintiff’s use of the property.

## Actual dispossession is not an element of the tort of trespass to chattel.

## Conversion does not exist unless baseball rightfully belongs to Popov. Before it was hit it belonged to Major League Baseball. At time it was hit, intentionally abandoned. First person who came in possession became new owner.

## An award of the ball to P would be unfair to Hayashi (premised on unsupported assumption Popov would have caught ball). Award of ball to D unfairly penalize Popov (unsupported assumption Popov would have dropped ball).

## Popov’s COA for conversion sustained only as to his equal and undivided interest. Each man has a claim of equal dignity as to the other and both P and D have an equal and undivided interest in the ball. Ball sold and profits divided equally.

**Oil and Gas Rights**

(analogs for all rules in water rights as well) ---- 4 rules in different jurisdictions

1. **Traditional absolutist rule**
   1. You get absolute right to anything you can extract from your land
2. **Correlative rights rule**
   1. Variation on absolutist concept absolute shared right to proportion of pool that is proportionate to your land.
   2. Main problem: doesn’t incentivize capturing resources
3. **Rule of capture**
   1. Natural resource is like a wild animal, you don’t own it until you capture it.
   2. Main problem: leads to waste (inefficient for market bc it drives prices down, and hasty extraction creates possibility of huge disasters that could end resources for everyone).
4. **Reasonable use rule (Extension of Rule of Capture?)** 
   1. You can extract to the extent that it’s reasonable.
   2. Main problem: low predictability—in each case, ct will look to see if you were reasonable (huge leeway).
   3. ***Elliff*** ***v.*** ***Texon*** ***Drilling***: negligently wasting another’s natural resources deprives a person of her property rights in those resources, including the right to profit from them. Waster should compensate injured party for her loss
      1. 2 questions in the analysis:
         1. Did petitioners have property interest in the gas?
         2. Ct says NO bc TX has rule of capture and they didn’t capture it.
         3. Did respondents have duty to act non-negligently?
         4. Ct says YES, even if no property right, still can’t act negligently.
         5. Ct combines these to get to reasonable use rule—balancing liberty interest w/ safety interest.
5. **Traditional rule: Rule of Capture**
   1. Pros: Certainty, Investment (in discovery and extraction) is protect 🡪 Internalizes the benefits of capture, free-rider problem not issue, encourages first-mover to invest and find, easier regulation
   2. Cons: Slant drilling, common pool issue, encourages bad competition, safety, encourages quick & inefficient drilling, and quick extraction, environmental impacts, can harm market (fast extraction causes surplus supply and market crash. Absolute right v. rule of capture in conflict.
      1. 2 big problems:
         1. When you drill too quickly natural pressure lessens and the oil is lost 🡪 society is actually worse-off
            1. If pull petroleum out too fast, can’t get to ALL of oil, so leave a bunch. More efficient to do collaboratively.
         2. Tragedy of the Commons:
            1. If B pumps quickly, A must pump quickly 🡪 issue about maintenance of the market
            2. **Negative externalities** hurt price
   3. Neighboring owners can extract as much as they want regardless of the land they own, but no slant drilling.
      1. ***Ab infimus usque ad caolum***
      2. No system operates by overland ownership
6. **Solutions**
   1. **State regulation** — prorationing regulation (to keep oil at a good price) where Gov’t steps in.
   2. **Unitization** — sort of like share holding
      1. When particular % of owners agrees on plan, state can order holdouts to comply by law.
   3. **Well-spacing** — only a certain number of wells per area
      1. Reduces **wildcats** but is not a complete solution.
7. New problem: **Fracking** (hydraulic fracturing)
   1. Horizontal drilling technology to get natural gas 🡪 there’s actually 4x more natural gas in economy than 10 years ago
   2. It’s illegal in NC because the concern was trespass without the owner knowing it
   3. In some states the land title system is based on split estates/mineral estates
      1. Subsidence can cause houses to collapse.

***Elliff v. Texon Drilling Co.*** *210 S.W.2d 558 (Tex. 1948)*

* **Key Facts:** Landowners owned surface and certain royalty interest of land upon which a producing well was located, as well as mineral estate underlying land. While oil companies were engaged in drilling an offset well, offset well blew out, caught fire, cratered, resulted in destruction of landowners’ well and drained large quantities of gas and distillate from their land.
* **Applicable Law:** TX: landowner has absolute ***title in severalty*** to oil and gas beneath land.
  + Oil and gas will migrate across property lines towards low pressure area created by production from common pool. Migratory character of oil and gas given rise to ***rule of capture*:** owner of land acquires title to oil or gas which he produces from wells on his land, though part of the oil or gas may have migrated from adjoining lands. He does not need consent and does not incur liability. (first come, first served)
  + Nonliability based on theory that after drainage, title or property interest of former owned is gone. Each owner whose land overlies the basin has a like interest, and each must of necessity exercise his right with some regard to the rights of others.
  + **But court imposes a domestication of rule of capture:** No owner should be permitted to carry on his operations in reckless or lawless irresponsibility, but must submit to limitations as necessary to enable each to get his own.
  + Law of capture did not absolve the oil companies from liability because the negligent waste and destruction of the landowners’ gas and distillate was neither a legitimate drainage nor a lawful or reasonable appropriation of them.
  + Under the common law, the oil companies were legally bound to use due care to avoid the negligent waste or destruction of the minerals, and they failed to discharge this duty.
  + Court did not think non-liability rule should apply to negligent waste/destruction of oil.
  + Appellate court without authority to pass upon propriety of the measure of damages adopted by trial court because no such assignment was presented to it.
  + Would this have been different if not waste but about just taking all the gas?

1. **First Possession: Finders , Singer, pp. 168-177**
2. Types of Unpossessed Property
   1. Abandoned: Property that an owner forms intent to relinquish.
   2. Lost: Property that an owner accidentally misplaced
   3. Mislaid: property owner intentionally left somewhere; then forgot where
   4. Questions:
      1. A watch is found in a jewelry store after its band broke and it fell to the floor without its owner noticing.
      2. A watch is found in a jewelry store after the owner, noticing its band was broken, took it off and laid it on the counter intending to pick it back up. She left having forgotten to do so.
      3. A watch is found in a jewelry store after its owner noticed its band was broken, set it on the counter, declared “I never want to see this cheap watch again,” and left the store.
3. Conflicts between true owner and finder
   1. If lost or mislaid 🡪 true owner
   2. If abandoned 🡪 finder
4. Conflicts between finder and third parties
   1. If lost or mislaid 🡪 true owner still wins over finder and appraiser
   2. If abandoned 🡪 finder wins over true owner and appraiser
5. Conflicts between finder and landowner
   1. If finder is trespassing 🡪 landowner
   2. If finder is *not* trespassing:
      1. In a private home 🡪 landowner
      2. In a public place 🡪 courts are divided. Some courts distinguish between lost and mislaid: lost property to the finder to reward her, and mislaid property to the owner of the premises, because the true owner may return to claim it.
   3. If property is embedded in the soil 🡪 landowner
   4. If property is a treasure trove (gold, silver, or money) 🡪 finder
6. **FINDING RULES:** 3 Rule Options
   * 1. Finder gets it
        1. Incentive for people to lie, incentive for thieves
        2. It’s not easy to administer
        3. Makes people more careful with goods
     2. Locus Owner get it
        1. If it was misplaced then you know where to go get it.
        2. Finders may lie about finding things.
     3. Split the difference
   1. Rules conflict: you must decide **which policy goal you want to encourage.**
   2. \*Focus on the relativity of the claim 🡪 depends on the nature of the good.
      1. Only the person who lost the item knows 🡪 intent
      2. Court must use judgment to determine what the owner thought.
7. Native American Graves Protection and Repatriation Act of 1990
   1. Fed statute, Indian cultural objects on tribal or federal lands belong to tribe having strongest connection w/ them. Doesn’t apply to objects found on private property.
8. **RELATIVITY OF TITLE**
   1. F1, F2, F3 with a watch: the closer you are to the original owner, the stronger your claim is.
   2. It’s not the court’s job to find F1 if F2 sued F3
   3. “**Original owner**”, F1, is usually out of the picture.
   4. F2 is the “**true owner**” if F1 is out of the picture.
   5. Conflicting **policy concerns**:
      1. True owner 🡪 true owner 🡪 bona fide sale 🡪 purchaser
      2. You cannot protect prior possession and bona fide sales
   6. **Common Law Rule**: Prior possession trumps.
      1. Problem with chattel is that there is no proof.
      2. Prior possession rule avoids litigation.
      3. Cheap and effective means of establishing ownership.

***Wilcox v. Stroup*** *(4th Cir. 2006)*

* **Brief Fact Summary**. P Willcox found 444 documents, from administration of governors of South Carolina, involved in civil war and wishes to sell. D Stroup wishes to prevent sale claiming documents owned by state of South Carolina.
* **Held**: BC of appellee's family's possession of papers, presumption that family owned papers.
  + Absent evidence of superior title, law presumed in favor of possessor, for possession alone prima facie evidence of a good title.
  + Presumption of private possession did not frustrate public's interest because copies of papers were available on microfilm.
  + Appellants had not rebutted this presumption because it did not establish that South Carolina law at the relevant time treated gubernatorial papers as public property.
  + Purpose for standard is help court with undeniable limitations that occur with lack of evidence, and for good public policy to promote stability.
  + Fair?: State claim ownership of all historical documents if possessor didn’t have proof
  + Not unfair bc presumption rebuttable. Standard of review = preponderance of evidence.

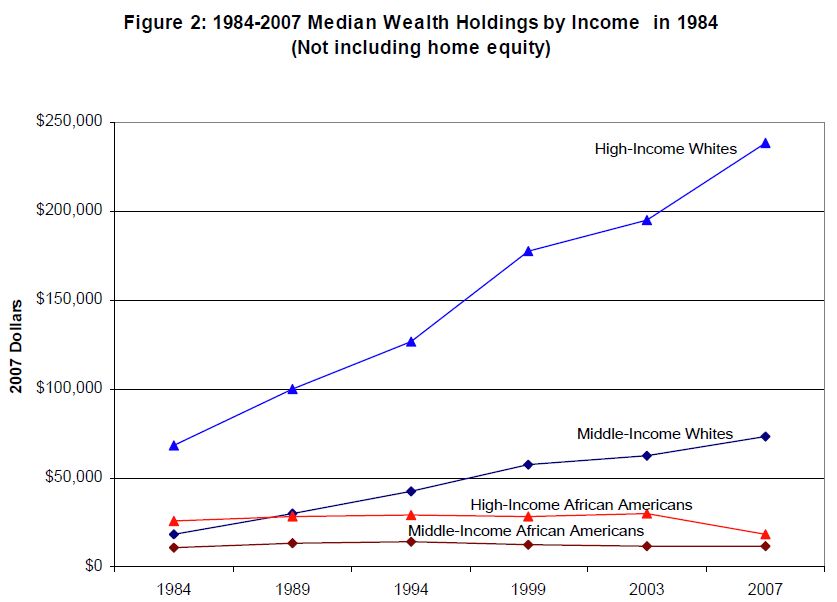
***Charrier v. Bell (****1986 La. App.)*

* **Synopsis of Rule:** Objects found in burial plots are not abandoned property; instead, they belong to the descendants and cannot be acquired over the objection of the descendants.
* **Facts**. Charrier amateur archaeologist, found site of Indian village, 3 yr excavating, knew he did not have permission from landowner. Bc he was unable to prove ownership over artifacts, could not sell collection. Sought judgment declaring owner of artifacts, or in alternative, compensation under theory of unjust enrichment for his time and expenses. Trial court denied both claims.
* **Held**. Judgment affirmed.
  + Though Indian tribe claiming ownership of objects cannot provide perfect chain of title that traces ancestors to buried in village, enough evidence to prove descent
  + Though tribe moved from location, they did not abandon property. Objects that are buried are done so with intention that they remain in ground. Another person cannot claim ownership of those objects by simply excavating them.
  + For claim of unjust enrichment, P must prove he sustained impoverishment (occurs when P was not at fault or negligent or did not take action at his own risk. Charrier knew acting at own risk or out of negligence bc he knew did not have permission from landowner.

Questions!

1. You are tasked with coming up with a legal regime to govern the salvage of shipwrecks. What kind of a rule do you invent?
2. Is property put out on the curb in trash bins abandoned property?
3. Children were playing in the woods belonging to a neighbor with the neighbor’s permission. While digging, they found money that had been placed in the soil by someone. They reported it and gave it to the police. Who should receive the money?
4. Archeologist get permission to dig on private property in Georgia. She finds some 300-year-old Cherokee objects.
5. **Family: Support and Inheritance, p. 146-52**

***Wealth v. Income:***

* Income: Measure of what you earn, either through work or through use of your wealth to generate more wealth. “Nouveau Riche” have high incomes.
* Wealth: Measures the valuable possessions and property you currently have. It’s your set of assets. “Old Money” people are wealthy.
  + Wealth is heavily associated with (not to say identical to) wealth of their parents.
  + One reason for this is that the law permits people to pass wealth directly to their families when they die, through inheritance.
* Distribution of wealth:
  + The richest 1% of own 35.4% of the wealth.
  + The next 19% own 53.5% of the wealth.
  + The bottom 80% own 11% of the wealth.
  + This distribution means that the 85 richest people in the world have the same amount of wealth as the bottom 50% of the global population.
  + The Walton siblings alone have net worth—much of it from the company they inherited—greater than the bottom 30% of Americans ($160 billion).
  + The bottom quarter of Americans have zero or negative net.
  + Thus, if you have no debts and have $10 in your pocket you have more wealth than 25% of Americans.
  + Given your student loans, many of you are in the bottom quarter.
* 

***Gifts, Inheritance, Wills, and Estates***

* ***Elected shares:*** Proportion of estate which surviving spouse of deceased may claim in place of what they were left in decedent's will.
  + To prevent from falling into poverty and becoming a burden on community.
  + Amount to be reserved for a spouse is determined by state where estate is located.
  + In most states, elective share is between ⅓ and ½ of all the property in the estate, though many states require the marriage to have lasted a certain number of years for the elective share to be claimed, or adjust the share based on the length of the marriage, and the presence of minor children. Some states also reduce the elective share if the surviving spouse is independently wealthy.
  + Can disinherit your children generally
* ***Gift***: Transfer of property from one person to another without payment.
  + *Inter vivos* gifts: transfers from one living persont o another
  + *Testamentary transfers*: transfers at death through a valid will or inheritance
    - Possibilities:
      * Destroy it
      * Bury it w/ testator
      * Treat as unowned and allow free for all
      * Allow gov’t to confiscate it
      * Honor testator’s wish for conveying it.
        + First two are wasteful and don’t maximize the utility of the wealth the testator creating during his/her lifetime (but could create incentives so that people get rid of their property before death).
        + #3 and 4 seem the most fair.
    - Strongest arguments for private transmission
      * Autonomy of decedent—peace of mind
      * Efficiency
      * Family ties, prevents need for state support.
      * Encourage caretakers—people are aware they could be disinherited.
      * Incentivizes hard work during life, incentivizes saving $.
  + Law of Gifts **Requires**:
    - **Intent** to transfer title
    - **Delivery** of the property
      * Generally physical exchange
      * But constructive delivery recognized if owner of locked box gave only key to done. Some courts only permit if delivery inconvenient or impossible.
      * Today, delivery can be accomplished by writing.
      * Many states allow gift to be made through formal deed or even informal writing that indicates a present intent to relinquish possession and to transfer title to the done.
      * Present intent to transfer ownership does not necessarily mean physical exchange. Life estate in piano, but piano kept at owners house til death.
    - **Acceptance** by the donee.
* Property transferred at death either by written will or (in its absence) by the terms of state statute— intestacy statute
  + Limits ability to completely disinherit a spouse—laws in every state grant surviving spouses some portion of the property owned by the deceased spouse at death.
    - Law in US allows parents to completely disinherit their kids—EU takes different approach, gives kids same rights as spouses.
* Wedding rings: Because wedding ring is given under understanding that parties would be married, most cts require ring to be returned if engagement is called off.
  + Some cts refuse to inquire into whose fault it was that the marriage was called off.
  + Some cts won’t allow you to recover a ring if you break off engagement w/o justification

Hypothetical:

* In ***Eyerman v. Mercantile Trust Co.***(Mo. Ct. App. 1975): Johnson’s will directs executor to raze her beautiful house, sell the land, and distribute proceeds to beneficiaries. Neighbors object.
  + Should the provision in the will be enforced? Will it be enforced?
  + Court agreed to injunction finding the will provision ordering the house to be destroyed both to be “eccentric” and to violate public policy.
  + Destruction of home harms the neighbors, detrimentally affects the community, causes monetary loss in excess of $39,000 to the estate and is without benefit to the dead woman.
  + Judicial taking?

**CHILD SUPPORT**

1. Generally, children of divorced children entitled “to be supported at least according to the standard of living to which they had grown accustomed prior to the separation of their parents. ***Pascale v. Pascale* (NJ 1995).**
2. States evenly divided on question of requiring noncustodial parents to pay for college—19 require it.
   1. Some cts interpret legislation setting age of majority to liberate parents from duties of support at the same time that the child is liberated from parental control
   2. FL: any duty to pay for child’s college education is a moral one, not legal one— married parents have no duty, so why impose it on divorced ones? Denies divorced parents equal treatment under the law.
3. Langbein—argues that giving college education is major mechanism (other than inheriting family home) by which wealth is transferred btwn generations.

***Bayliss v. Bayliss (Ala. 1989) – overturned***

1. **Synopsis**: Children of divorced parents, who are minors at the time of divorce, are given the same right to a college education before and after they reach the age of majority that they probably would have received if their parents had not divorced.
2. **Facts**: Patrick Bayliss son of Cherry Bayliss (P) John Bayliss (D), divorced. When he turned 18, his mother sought to have D help her pay for his college education.
3. **Held**: Parents of post-minority support children have to pay for the college education of children if the marriage was terminated by divorce, if the parents would have paid for it had they stayed together.
   1. Generally, a divorced, noncustodial parent has no duty to contribute to support of child after the child has reached the age of majority.
      1. Expanding exception to general rule for college education by expanding definition of children beyond just minor children
      2. **Changing times**: College increasingly important today, so need new definition
      3. **Precedent** for disabled “children” to include those above age of majority
   2. Money may be awarded out of property and income of either or both parents for post-minority education of a child of a dissolved marriage, when application is made before child attains age of majority.
   3. Factors that will be looked at include the financial resources of the parents and the child and the child’s commitment to and aptitude for the requested education.
   4. ***Fairness rationale*:** Children of divorced parents, who are minors at the time of divorce, are given the same right to a college education before and after the reach the age of majority that they probably would have received if their parents had not divorced.
      1. Children of divorce at a disadvantage as compared to other children.
4. **Labor and Investment: Cells/Organs [p. 231-41]**
5. Elements of a Patent
   1. (1) Patentable subject matter
      1. Machine
      2. Method of manufacture
      3. Composition of matter
      4. Business method
      5. Genetics and cells?
   2. (2) Novel
   3. (3) Nonobvious (more than a minor obvious change)
   4. (4) Useful/Utility (easy to show it will have some benefit)
6. **Justifications/Rationales**
   1. Incentive Justification: Allows innovators to exclude
      1. But merit depends on the area of patent.
   2. Funding: Can’t get (venture-capital) funding without it.
      1. A patent is proof/validation of novelty of an idea.
      2. But the patent office is not perfect 🡪 they do put out false-positives.
      3. Patents provide signals that a company is well-organized and something interesting is going on within the company.
   3. Markets for Technology
      1. If not for patents everyone would keep things as trade secrets and the market would be injured.
   4. Patent Races
      1. Tech rises more quickly but maybe duplicative research occurs.
7. Common Law exceptions patentable subject matter: abstract ideas, laws of nature, products of nature
8. **Philosophical Bases of IP:** 
   1. **Utilitarian**
      1. Encourages investment (oyster beds) but does not over-restrict ideas.
      2. You can protect your own work but exclusive rights also raise costs.
      3. Cumulative invention problem.
      4. But would ideas even come about?
   2. **Labor Theory**
      1. You reap what you sew.
   3. **Personhood Theory**
      1. A lot of things that we create are personal and possessive.
      2. Patents don’t fall in this well — it’s about protecting person’s idea (their property).
   4. **Distributive Justice (Equity)**
      1. Common Heritage of Mankind falls into this.
      2. Like natural resources/biodiversity/pharmaceutical drugs.
      3. There are communal property rights that the law should protect.

**Moore v. Regents Univ. of CA (Cal. 1990) \*\* Blocher doesn’t think this is a well-reasoned opinion!**

1. Synopsis: Moore underwent treatment for hairy cell leukemia at UCLA Medical Center under supervision of Dr. Golde. Moore's cancer was later developed into a cell line that was commercialized. Held Moore had no right to any share of the profits from commercialization of anything developed from his discarded body parts.
2. Facts:
   1. Moore visited UCLA Medical Center after learning had hairy-cell leukemia. Golde confirmed, recommended spleen removed. Golde informed Moore that he had reason to fear for his life, and that the proposed splenectomy operation was necessary to slow down the progress of his disease.
   2. Based on Golde's representations, Moore **signed consent authorizing** splenectomy, hospital "dispose of any severed tissue or member by cremation." Moore returned at Golde's direction and based on representations visits necessary and required.
   3. Golde withdrew blood, serum, skin, bone marrow aspirate, and sperm. Moore traveled from Seattle.
   4. Different consent said: "I (do, do not) voluntarily grant to the University of California all rights I, or my heirs, may have in any cell line or any other potential product which might be developed from the blood and/or bone marrow obtained from me", refused to sign, turned over to attorney, who discovered patent.
   5. D conducting research on Moore's cells. Golde established cell line, negotiated agreements for commercial development and products derived from it, $330,000 over three years, including a pro-rata share of Golde's salary and fringe benefits.
3. PH:
   1. Moore sued Golde, Regents of UC, Quan, researcher, Genetics Institute, and Sandoz Pharmaceuticals Corporation.
   2. Court found Moore had no property rights to discarded cells or profits made from them.
   3. Court concluded research physician did have obligation to reveal his financial interest in the materials harvested from Moore, and that Moore would be allowed to bring a claim for any injury that he sustained as a result of the physician's failure to disclose those circumstances.
4. Held: (Panelli, 4-7)-
   1. On conversion issue, Moore argues that he continued to own his cells following their removal from his body, at least for the purpose of directing their use.
      1. To establish conversion, P must establish actual interference with ownership or right of possession.
         1. No court has ever upheld conversion liability for this
      2. Moore did not expect to retain possession of his cells following conversion, so he must have an ownership interest in them.
      3. Subject matter of the patent, the cell line, cannot be M
   2. Moore relies on privacy rights and unwanted publicity. This is not property law, and a conversion claim must be based on property law.
      1. Lymphokines have the same molecular structure and function in every human being. It is not like a name or a face, since they are not unique to Moore.
      2. These interests already protected by informed consent.
   3. CA statutory law drastically limits a patient's control over excised cells for public health reasons. Can be used for research, but if not used for research they must be discarded.
      1. Court noted laws that required the destruction of human organs as some indication that the legislature had intended to prevent patients from possessing their extracted organs.
      2. Legislature should make this decision.
   4. Court feared extending property rights to organs lead to chilling effect on research.
      1. Laboratories doing research receive a large volume of medical samples and could not be expected to know or discover whether somewhere down the line their samples were illegally converted.
      2. We don't want to threaten civil liability for medical research for those researchers who have no reason to believe that use of a particular cell sample is against a donor's wishes
   5. Property at issue not Moore's cells but cell line created from Moore's cells.
      1. Patented line factually and legally distinct from cells. Patent rewards inventive effort (labor theory), not just discovery of naturally occurring raw material.
      2. "[The cells are] no more unique to Moore than the number of vertebrae in the spine or the chemical formula of hemoglobin."
   6. Court discusses disclosure issue- says doctor was required to disclose research interests.
      1. Moore's complaint states a cause of action for breach of fiduciary duty or lack of informed consent, not conversion.
5. Concurrence (Arabian): Strange hahahahaha.
   1. P wants us to recognize and enforce a right to sell one’s own body tissue for profit. He entreats us to regard the human vessel- the single most venerated and protected subject in any civilized society – as equal with the basest commercial commodity. He urges us to commingle the sacred with the profane.
   2. Does it uplift or degrade the “unique human person” to treat human tissue as a fungible article of commerce? Would it advance or impede the human condition, spiritually or scientifically by delivering the majestic force of the law behind plaintiff’s claim?
   3. To treat them simply as issues of ‘tort’ law, susceptible of judicial resolution.
6. Concur/Dissent (Broussard):
   1. Clear under CA law that before body part is removed it is patient, rather than his doctor or hospital, who possesses right to determine use to which body part will be put after removal.
   2. If, as alleged in this case, P's doctor improperly interfered with P's right to control the use of a body part by wrongfully withholding material information from him before its removal, P may maintain a conversion action.
7. Dissent (Mosk):
   1. Argument that this is a decision for the legislature is crap; the whole point of having common law is that it can morph to changing needs.
   2. Commercial exploitation is not scientific use, so shouldn't be covered by statute permitting scientific use.
   3. Even if it did include commercial use, it does not follow that P does not have a property right for purposes of conversion.
   4. Many cases where law forbids exercise of certain rights over certain forms of property.
   5. Patentability has significantly reduced the free access of researchers to new cell lines and their products.
   6. Application of the law of conversion in this case will not hinder research by restricted access.
   7. It is inequitable and immoral that P should not be compensated when without Moore's cells the profitable cell line would have never been created.
   8. Moore could have been denied some property rights and given others.
      1. At least Moore had "right to do with his own tissue what Ds did with it."
      2. That is, as soon as the tissue was removed Moore at least had the right to choose to sell it to a laboratory or have it destroyed- so no need to hold labs strictly liable for conversion when property rights can be broken up to allow Moore to extract a significant portion of the economic value created by his tissue.
   9. In order to prove damages from informed consent Moore must prove both that he would not have consented to the procedure had he been properly informed and that a reasonable person would not have consented to the procedure if they had been properly informed. Thus Moore's chances of proving damages through informed consent are slim.
   10. Finally, Moore can only sue his doctor and nobody else for failing to adequately inform him. Thus Moore is unlikely to win, could not extract the economic value of his tissue even if he refused consent and could not sue the parties that might be culpable for exploiting him.
8. Calabresi/Melamed lens. Why should it be a property rule? Is it more efficient as a liability rule? What might get in the way of the market efficiently pricing people's cell lines? If the cell line gets a liability rule, should the resulting "invention" be patent-eligible (i.e., allowed a property rule)?

Questions!

* Should it be lawful for people to sell their blood to blood banks?
* Should blood banks be able to offer money to induce people to donate blood?
* Coroner removes deceased man’s corneas for us as anatomical gifts without consent of wife. Sixth Circuit finds that wife had property right. Would California reach the same result?

**III. PROPERTY AND SOCIAL ORDERING**

1. **From Trespass to Adverse Possession, P. 281-311**
2. Adverse possession: **actual possession** of another’s property in a manner that is **exclusive**, **visible** (open and notorious), **continuous**, and **without** the owner’s **permission** (adverse or hostile) for a **period** defined by state statute by non-owner that transfers title from true owner (formal title holder) to adverse possessor.
   1. If possession lasts for more than period defined in relevant SoL, owner is barred from bringing action in ejectment against possessor.
3. Elements of Adverse Possession:
   1. For the statutory **period**:
      1. Actual **possession**
         1. Physical control
            1. Some state statutes define what types establish “actual” possession.
            2. In absence of statute: “ordinary use to which land is capable and such as an owner would make of it.”
            3. Purpose 🡪 productivity
         2. Color of title (deed is defective bc formality not complied with).
            1. Arises when APor who has deed purports to transfer land in question but is ineffective to transfer title bc of defect in deed or in process in transferring it.
            2. Can get entire parcel, but you need the deed (land area described in title used as conclusive evidence of property that is being adversely possessed).
            3. ***Romero*** ***v.*** ***Garcia*** (deed was defective but Ps sued based on AP for more than statutory requirement under color of title and payment of taxes; deed wasn’t void for want of proper description, if surveyor can ascertain boundaries w/ deed and extrinsic evidence on the ground).
         3. Claim of title (claiming property outside of a formal deed)
            1. APor only gets portion he’s claiming.
            2. ***Brown*** ***v.*** ***Gobble*** (Ds may have had ownership of the tract of land via the AP of their predecessors, through tacking theory, even though a survey revealed that tract was part of Ps’ property)
      2. **Exclusive**
         1. One of the “sticks” 🡪 true owner would exclude and so should the adverse owner (act like you own it)
         2. Use is of a type that would be expected of true owner of land in question and that “adverse claimant’s possession can’t be shared w/ true owner.”
         3. APors possess jointly may acquire joint ownership as co-owners
      3. **Visible** (open & notorious)
         1. No secret use of land 🡪 must be conspicuous.
         2. What a reasonable inspection would disclose (objective test, average use)
         3. Purpose: Helps provide notice.
      4. **Continuous**
         1. Occupy land for entire statutory period of time.
         2. Depending on type of property, extended absences may not defeat claim.
            1. seasonal use of summer cabin—relied on customary use, how reasonable owner would use summer cabin - ***Nome*** ***2000*** ***v.*** ***Fagerstrom***
         3. **Tacking**: succeeding periods of possession by different people can be added together to establish continuity.
            1. Successors can add original adverse possessor’s holding period only if they are in privity w/ one another—original adverse possessor formally transfers title to the property to the successor w/o interruption in the chain of title.
            2. Successive adverse possessors can count the prior occupiers time towards the statutory period, as long as there is privity
            3. Privity exists when there is a transfer of property under color of title, but if no color of title, privity req is stricter.
            4. Privity requires judge to determine that deed formally transferred title, whether or not deed was imperfect or if process was imperfect.
      5. **Without** owner’s **permission** (adverse or hostile)
         1. *True* *Owner’s* *State* *of* *Mind* – must not have given consent.
            1. Cts at least agree AP must prove use was nonpermissive
            2. Cts generally hold presumption that possession of another’s property is non-permissive if owner hasn’t said anything
            3. If co-owners, need statement of intent to take possession and send to co-owner (ouster)
            4. ***Presumption of permission (pros/cons)***

Tort liability – if trespasser, less liability

Will get rid of a lot of adverse possession claims

Burden on record owner

Fits with intent to exclude (background presumption)

Burden on person to not trespass

* + - 1. *Estoppel* *in* *property*
         1. If owner allows another to possess property for long time, possessor reasonably relies on permission to invest in land, may be granted possessory rights bc owner is estopped from denying continued permission.
      2. *Adverse* *possessor’s* *state* *of* *mind* *–* *4* *approaches*
         1. **Objective** **test** **of** **lack** **of** **permission—overwhelming** **majority** **of** **jurisdictions.**

APor’s state of mind is irrelevant, only thing that matters is that APor lacked permission from true owner.

* + - * 1. Claim of right—must have intent to appropriate and use land as his own to the exclusion of all others.

Most states: APor acts toward the land as an average owner would act, need not be express but can be implied by claimant’s conduct (essentially the objective test).

Subjective test: APor’s intention to appropriate and use the land as his own to the exclusion of all others (essentially the intentional dispossession test).

* + - * 1. Intentional dispossession\*\*\*

APor must be aware he is occupying property owned by someone else, must intend to oust/dispossess true owner.

Mistaken occupation can’t give rise to AP if APor has no intention of taking over property she doesn’t own.

Normally limited to boundary disputes

Rejected by vast majority of cts and scholars bc it rewards wrongdoers and fails to protect innocents who have mistakenly occupied land.

* + - * 1. Good faith\*\*\*

Only innocent APors can acquire ownership by AP.

Some states have short SoL if not in good faith.

Argument that even though most states reject good faith test, in practice they grant AP only to good faith APors by manipulating elements.

* + - * 1. \*\*\* These are disfavored tests bc it’s hard to establish state of mind.
      1. **Maine Doctrine**: There must be **intent** 🡪 no mistakes are allowed.
         1. You get into evidentiary problems showing intent since there is an incentive to testify falsely.

It’s hard to prove in urban environments because you would have to get a surveyor to come out everytime the boundary was questioned.

* + - * 1. Rewards the ruthless trespasser over the mistaken trespasser!
      1. Intent is not important 🡪 It does not matter whether you knew or not.
  1. AP operates as a statute of limitations.
  2. There’s a sense of **abandonment** with AP Law.
  3. **For** **the** **statutory** **period.**
     1. Varies widely: 5-40yr
     2. Many states toll SoL if true owner is under disability (infancy, insanity or incompetence), statute runs starting after disability ends, shorting SoL period once disability removed, or setting max period longer than normal SoL.

1. **Types of AP Claims:**
   1. **Ejectment Action:** call original owner a trespasser.
   2. **Quiet Title Action:** clear all previous claimants.
      1. Claim: asks ct to grant declaratory judgment that adverse possessor has become owner of disputed property through adverse possession.
      2. Can also be defense to trespass or ejectment claims by record holders.
   3. **Under Color of Title**: Documented basis but it’s faulty/fraudulent and title itself can’t stand in Court 🡪 acting in good faith
      1. This was very frequent in the West where titled were often inaccurate (leaps and bounds were imprecise)
   4. **Not Under Color of Title**: Rule is that constructive possession does not trump active possession.
      1. Hypo: Owner has 100 acre farm in 1960 and then A enters under color of title for 40 acres and improves/occupies for statutory period of 20 years. A gets only the 40 acres.
      2. YOU GET WHAT YOU POSSESS.
2. **Doctrine of Agreed Boundaries**
   1. Supersedes title/deed; requires actual statements that cannot be inferred.
3. **Claims against government**
   1. Cts normally hold that AP claims can’t prevail over gov’t property—those who use/possess gov’t property can’t acquire prescriptive rights.
   2. Gov’t entity = absolute defense to AP claim.
   3. Significant number of states have statutes limiting/abolishing gov’t immunity from AP
   4. Fed statute allows AP of federal land in certain cases, if APor has occupied property for 20 years in good faith reliance on a claim/color of title, and has either cultivated land/constructed improvements
   5. Government has already decided on the best use of the land for productivity’s sake.
   6. Public lands are already in service: “There is no adverse possession against the Crown.”
   7. Tee-Hit Ton. Indian title not okay
   8. Government not expected to act like typical private individual owner. Not feasible.
4. Hypothetical:
   1. Statute of limitations is 21 years.
   2. Record owner leaves property in 1980
   3. Adverse possessor enters in 1990
   4. Suit is brought in 2002
   5. Changing the facts
   6. Adverse Possessor A occupied the property from 1980 to 1989
   7. Adverse possessor B occupied the property until the time of suit
   8. Assume tacking is available
5. **JUSTIFICATION FOR AP LAWS**
   1. They are in every state and they endure because of:
      1. *Personhood Theory:* Over time you develop a relationship with a piece of property.
      2. *Labor Theory:* Productive use of land.
      3. Discourages people from sleeping on their rights 🡪 more transaction costs.
         1. Sometimes conservation better for society
      4. *Cooter & Ulen:* by quieting title and closing off stale claims, AP “lowers the cost of establishing rightful ownership claims by removing the risk that ownership will be disputed on the basis of the distant past.”
      5. Uncertainty inhibits transactions or increases costs (lowering profitability)
         1. But outdated: nowadays, there are modern recording systems and ability to use scientific surveying methods to fix the boundaries of property and clear ownership. Always more efficient and economical to rely on boundaries fixed in the record title to identify the record owner than it is to conduct a lawsuit to determine whether the complicated and confusing elements of adverse possession have been met.
      6. Posner: Person loses attachment to property that he regards as no longer his own and the restoration of the property would give him therefore only moderate pleasure. Marginal utility of income. AP would experience greater deprivation of property as a diminution of his wealth.
      7. Holmes: Protect expecattions of AP who has come to “shape his roots to his surroundings, and when the roots have grown to a certain size, cannot be displaced without cutting his life.”
      8. Radin: An object is fungible if it is perfectly replaceable with money; it is personal if it has become bound up with the personhood of the holder and is no longer commensurate with money. AP’s interest is initially fungible but becomes more and more personal as time passes. This requires a moral judgment.
      9. Why give land to land pirate? Resting on good faith too unpredictable and more litigation (hard to prove good faith), failure for owner to object is like abandonment, SoL.

***Brown v. Gobble (W. Va. 1996)***

1. Facts: Ds bought property in 1985, property had fence enclosed 2 ft of land, disputed land. P purchased neighboring property 1989, survey property revealed 2 ft of land enclosed by Ds fence in fact Ps. Ps did not raise issue until 1994 when Ps decided to build road. Ds claim title.
2. PH: Putative owners filed action to prevent adverse possessors from interfering with plans to build road. Adverse possessors claimed title by tacking. Trial held adverse possessors failed to prove claim by clear and convincing evidence that use of property was adverse and continuous. D presented evidence that prior owners from 1937-1985 believed owned tract and treated as own.
3. Rule: To establish title under doctrine of adverse possession, must meet elements:
   1. That he had held the tract adversely or hostilely
   2. That the possession has been actual
   3. That it has been open and notorious
   4. That possession has been exclusive
   5. That possession has been continuous
   6. That possession has been under claim of title or color of title.
4. Opinion:
   1. D belief that 2 ft of land theirs does not defeat right to claim under this doctrine.
   2. For continuous, “tacking”, D present evidence that predecessors fenced land since 1937- meets statutory required period.
   3. For hostile and adverse, Ds evidence predecessors fence around and claimed ownership.
   4. For actual possession, D evidence predecessors regularly planted flowers/mowed grass.
   5. For open and notorious, D evidence reputation in community theirs and predecessors’
   6. For exclusive, D testified since 1937, they had exclusive right to 2 ft of land.
   7. Preponderance standard falls short of meeting demands of fairness and accuracy in the factfinding process in the adjudication of adverse possession claims, we hold that the burden is upon the party who claims title by adverse possession to prove by clear and convincing evidence all elements essential such title.

***Romero v. Garcia (N.M. 1976)***

1. Facts: Ida Garcia Romero P and deceased husband purchased 13 acres of land from husband’s father, Antonio Garcia D. Mrs. Garcia did not join in conveyance, making deed void. Romero and husband built home with parents' assistance and lived on land until 1962, when husband died and she moved to Colorado.
2. PH: Romero filed a claim to quiet title to the 13 acres against the Garcias, claiming adverse possession for more than 10 years under color of title. The trial court found in favor of Romero. The Garcias appealed. What about property taxes?
3. Held: Affirmed. Void deed had sufficient color of title.
   1. D claim deed insufficient for adverse possession bc failed to adequately describe parcel of land which can be ascertained from the ground – BUT held that deed will not be void for want of a proper description if with the deed and extrinsic evidence, a surveyor can ascertain the boundaries of the land intended to be conveyed.
   2. Also, subsequent acts of the parties in building a house and pointing to the land were adequate to establish the boundaries.
   3. Former daughter-in-law paid taxes in each case before a tax deed was issued to the state.

***Nome 2000 v. Fagerstrom (Alaska 1990)***

1. Facts: Nome 2000 (P) record title holder of parcel. Fagerstroms (D) used northern parcel seasonally— not suited for winter- for activities, housing camper trailer, planting trees, building picnic area, outhouse, fish rack, reindeer shelter- from 1944-1987 but did not build a house on it until 1978. Nome tried to argue that since home only on land for 9 years could not meet adverse possession. Fagerstroms only used southern parcel for recreation on preexisting trails and picking up trash. Fagerstroms allowed others to use entire property for activities such as picking berries and fishing, but many in community testified thought Fagerstroms owned property.
2. PH: Nome 2000 filed suit to eject the Fagerstroms from the property. Fagerstroms filed counterclaim, stating they acquired title via adverse possession, statutory period of 10 years. Nome 2000 filed MDV. Jury found adverse possessed entire parcel.
3. Rule: Whether a claimant’s physical acts upon the land of another are sufficiently continuous, notorious, and exclusive does not necessarily depend on the existence of significant improvements, substantial activity, or absolute exclusivity.
   1. Hostility has nothing to do with possessor’s belief or intent, but rather hostility is whether the possessor acts toward the land as if he were the owner.
   2. Use consistent with the use by a similarly situated owner is sufficient to establish a claim by adverse possession
      1. The nature of the land defines the continuity of its use and how a reasonable owner would interact with land
4. Trial court erred in its denial of title holder's MDV as to southerly portion. Adverse possessors not entitled to entire disputed parcel because use of southerly portion did not provide a reasonably diligent owner with visible evidence of exercise of dominion and control.
5. **Prescriptive Easements, p. 311-319**
6. Servitude: Legal device that creates a right or an obligation that “runs with the land” or with an interest in the land.
   1. Runs with the land: passes automatically to successive owners or occupiers of land or interest in land with which the right or obligation runs.
   2. Aff v. Neg.
      1. Affirmative: right do something on someone else’s land
      2. Negative: right to stop someone else from doing something with their land
         1. Options: negative easements, restrictive covenants, equitable servitudes
   3. Easements, Covenants, Equitable Servitudes:
      1. Easements – irrevocable; can be transferred by grant, gift or will
      2. Covenants – contractual agreements by which owners agreed to restrict the use of their own land for the benefit of either their landlord or neighboring owners.
      3. Equitable Servitudes - created to relax some of the technical requirements and imposing land use restrictions when it seemed fair to do so, even if those restrictions had not been formally created according to traditional legal requirements
      4. Modern trend (R3d) Proposal:
         1. Abolish term negative easement and equitable servitude
         2. Instead:
            1. *negative or restrictive covenants*: ALL obligations restricting what one can do with one’s own land
            2. *easements*: ALL affirmative rights to do something on someone else’s land
   4. Dom v. Serv
      1. Dominant estate – receives the benefit of the servitude
      2. Servient estate – bears the burden of the servitude
   5. License v. Servitude
      1. License – revocable; cannot be transferred or bequeathed, so not servitudes
         1. Can become irrevocable because of a reliance interest granted over use over a period of time
7. Issues in law of servitudes:
   1. What are formal requirements to create a right or obligation that will run with land?
      1. When are informally created expectations enforceable by/against subsequent landowners?
   2. When meaning of servitude is unclear, how should ambiguities be interpreted?
   3. What are substantive requirements for validity of servitudes?
      1. Both (a) determining when land use restrictions are immediately void as against public policy and (b) determining when rights or obligations, although valid as contracts between the parties who agreed to them, will not be allowed to run with the land binding and/or benefiting future owners.
   4. How can servitudes be modified or terminated?

***Types of Easements***

1. Affirmative easement: Right to use another's property for a specific purpose
2. Negative easement: Right to prevent another from performing an otherwise lawful activity
3. appurtenant – runs with the land
4. in gross – person to the holder, not the land
5. What Kind of Easement is it?
   1. Express?
   2. Prescriptive?
   3. Estoppel?
   4. Implied by prior use?
   5. Implied by necessity?

**Prescriptive Easement**

1. **Prescriptive easement:** easement upon another's real property acquired by continued use without permission of the owner for a period provided by state law to establish the easement. Do not show up on title reports, and exact location and/or use of the easement is not always clear and occasionally moves by practice or erosion.
2. Elements essentially same as adverse possession.
   1. For the statutory period:
   2. Actual **use** [instead of possession]
   3. Exclusive
      1. Most states drop this requirement
   4. Visible (open & notorious)
      1. More difficult than AP claim
   5. Continuous
   6. Without owner’s permission (adverse or hostile)
   7. Significant # states require PE claimant prove ***acquiescence*** by true owner as element
      1. ***Acquiescence***:
         1. Owner did not assert right to exclude by bringing trespass action (so duplicative and unnecessary rule); OR
         2. Independent element: landowner must have *known* about the use and *passively* *allowed* it to continue without formally granting permission.
         3. Known can be would or should have known of use (duplicative of open and notorious)
3. **Presumption that use is adverse**. (unless used by general public-policy reasoning to make people share their land).
4. Traditionally **public** could not acquire a prescriptive easement, but strong trend of modern cases is public may acquire prescriptive easements, presumption that public access to private land is permissive in the absence of clear evidence to the contrary.
5. **RESULT**: PE creates a possessory interest in land, similar to adverse possession
   1. BUT PE interest claimed leads to a ***NON-FEE INTEREST*** (AP is in fee)
   2. Right to continue kind and amount of use that persisted during statutory period (as opposed to AP which transfers title).
   3. Can buy and sell easements (shopping mall?)
6. Cannot get ***negative prescriptive easement*** in US. Fontainebleuau Hotel. Mere fact that one has enjoyed light and air on one’s property for many years will not create an easement for light and air that prevents one’s neighbor from building on her property.
   1. Hard to have notice requirement. Calcify land use.
7. ***Claim of Right***: use is not permissive but is engaged in by PE claimant regardless of wishes of true owner.
   1. Duplicative of requirement that use be nonpermissive.
   2. Some courts interpret this: state of mind (subjective) knowing you’re trespassing
   3. Most states have presumption that use by non-owner is nonpermissive as w/ AP (exists bc it’s hard to prove)
   4. BUT fair number presume that use is permissive, neighborly gesture, more justified in assuming limited uses are permissive rather than occupation being permissive.
8. Good faith?
   1. ***Warsaw v. Chicago Metallic Ceilings, Inc. (Cal. 1984)***: Community Feed cited this: adverse user clearly knew trespassing, Ps planned construction of large commercial building on their property but left insufficient space between edge of building and property line, so had to move trucks on other’s land. D’s planned construction on their property, and P sued for PE. D constructed on strip of land. P won. Awarded trespassing party and own negligence in building negligently.

***Community Feed Store, Inc. v. Northeastern Culvert Corp. (Vt. 1989)***

1. Facts: P owns feed store next to Ds business. Parcel of land covered with gravel north of Ps mill. Vehicles turn on gravel lot. D bought in 1956, did not realize until 1984 that gravel area did not belong to P. Feed and predecessors used land from 1929 until North found out it owned part of lot and built a barrier in 1984. D erected barrier prevented Ps use of lot.
2. PH: Feed sued declaratory judgment for prescriptive easement. North counter for ejectment. Trial found for North bc Feed failed to prove w/ sufficient particularity width/length of easement and use of area was w/permission of landowner.
3. Held: Reversed. In VT, to establish a prescriptive easement, establish: adverse use/possession which is open, notorious, hostile and continuous for 15 yrs, and acquiescence in use/possession by person against whom claim is asserted. Possessor then receives non-fee interest.
   1. Open/Notorious/Continuous elements met: Used by vehicles since 1920s and uninterrupted until barrier in 1984.
   2. P proved met time period of fifteen years by doctrine of tacking. The chain of title from 1929 showed area had been used by predecessors.
   3. Feed evidence of general outlines of prescriptive easement with reasonable certainty so it met its burden. General outline of consistent use is sufficient
4. **Easements Implied from Prior Dealing or Created Expressly**

**Creation** **by** **Implication**

1. Types of Easements
   1. Easement by estoppel – Where a party represents existence of an easement, or acquiesces in use, it cannot later deny that easement. (*Holbrook v. Taylor*)
      1. EbyE: converts a license into an easement, immune from revocation
   2. Easement by prior use (quasi-easement) – Where landowner has used single piece of property in particular way, subdivides land, then sells part, courts may treat it as if he *intended* to convey an easement preserving that use. (*Granite Properties v. Manns*)
   3. Easement by necessity – Where a parcel is landlocked and an easement is *absolutely necessary* to reach it, courts will create one. (*Finn v. Williams*)
2. **Does Implied Easement Run With Land?**
   1. Is future owner obligated to allow easement owner continued access to or control over her land under terms of original easement?
   2. Implication, necessity, estoppel, and prescriptive easements are generally held to run w/ land if:
      1. Intended to do so (normally held to be the case) AND
      2. Are reasonably necessary for enjoyment of dominant estate.
3. **Easements by estoppel**
   1. Types: Irrevocable Licenses or Oral Easements
   2. May prevent owner from revoking license if owner has granted licensee right to invest in improving property, or otherwise induces licensee to act in reasonable reliance of license.
   3. Owner estopped from denying continued access to his land for whatever period is deemed just under circumstances
   4. Converts revocable license 🡪 irrevocable easement
   5. Key: Acquiescence of D (suffices for prescriptive easements)
   6. ***Holbrook*** ***v.*** ***Taylor***
   7. Recognized principle that right to use roadway over another’s lands can be established by estoppel.
4. **Elements of Easements Implied by Prior Use**
   1. Common grantor previously owned the two parcels
   2. Servient parcel was previously used for the benefit of the dominant parcel in a manner that was visible and continuous (this is the “prior use” that matters)
   3. Use of the servient parcel is convenient or reasonably necessary for enjoyment of the dominant estate (does not need to be absolutely necessary)
   4. Implied easements: recognized in particular kinds of relationships despite absence of express contract to create an easement.
      1. Sometimes carry out intent of parties as manifested by conduct.
      2. Sometimes contradict actual intent of parties, but implied by law as a result of public policy judgment about fair/efficient allocation of property rights (estoppel relationship).
      3. ***Granite*** ***Properties*** ***Limited*** ***Partnership*** ***v.*** ***Manns***
   5. In absence of express agreement to the contrary, transfer imparts grant of property w/ all benefits and burdens which existed at time of conveyance.
   6. Easements by grant & reservation
      1. Easement by grant: *Grantee* ***gains*** an easement over property retained by grantor
      2. Easement by reservation: *Grantor* ***retains*** an easement over the property conveyed to the buyer
5. **Elements of Easements by Necessity**
   1. A common owner severed the property
   2. Easement is strictly necessary for egress/ingress to landlocked parcel
   3. Necessity for egress and ingress existed at time of severance
   4. Granted to owner of landlocked parcel over remaining lands of grantor to obtain access to parcel. ***Finn*** ***v.*** ***Williams***
6. **Policy (for Implied Easements)**
   1. Filling in terms of deal that were not explicitly addressed cannot expect all parties to reasonably address (effectuate intent of parties)
   2. Create opportunities for either fraud or unfairly depriving interests that the owners have not transferred
   3. Creates uncertainty to say there are informally created easements; requiring them all to be in writing makes it easier to determine whether or not there is an easement
   4. Effectuates the owners intent because the neighbors have been acting in a certain way for a certain period of time
   5. Efficient use of land
   6. Public policy judgment about the fair and efficient allocation of property rights in the context of the relationship established by the parties
   7. Cons: May contradict actual intent of parties

**Creation by Express Agreement**

1. Easements that are specifically created by signed deed, conveying easement or property burdened/benefited.
2. Kinds of Express Easements
   1. Appurtenant easement: Runs with the land. Intended to benefit whoever owns the dominant parcel, and is enforceable by future owners of that parcel.
      1. They are *transferable*. (Note 4, pg. 461)
      2. These are not *severable* from the land. (Note 3, pg. 461)
   2. Easement in gross (“personal easement”): Does *not* run with the land. Belongs personally to the grantee, not in connection with his ownership or use of any parcel of land.
      1. These are *not* transferable. (Note 4, pg. 461)
3. Running With The Land
   1. Express easements run with land to burden future owners of *servient* estate if:
      1. The easement is in writing (Statute of Frauds);
      2. The original grantor intended the easement to run with the land;
      3. Subsequent owners of the servient estate had notice at purchase
         1. Actual: Subsequent owners in fact know about the easement
         2. Inquiry: There are visible signs of use by nonowners
         3. Constructive: Title search would lead to discovery of the deed
4. Does **benefit** run with the land? (appurtenant v. in gross)
   1. **Appurtenant** easement: if benefit runs w/ land, it’s treated as if it were attached to that particular parcel of land.
      1. Cts have constructional preference for appurtenant easements—some say there is a presumption that easements are appurtenant rather than in gross
      2. Favorable bc limit # of people w/ easements over the land to the number of neighboring parcels
      3. Easements in gross create more uncertainty about land use rights than appurtenant.
      4. Cts generally hold that appurtenant easement cannot be severed from the land—pass automatically to whoever owns dominant estate.
   2. **Easements** **in** **gross**: if benefit doesn’t run w/ land, it isn’t attached to particular parcel of land and there is no dominant estate.
   3. **Test** **for** **distinguishing** **the** **2** **types** **is** **the** **intent** **of** **grantor**—can be recitation in deed, but problem arises when it is ambiguously stated/unstated.
   4. ***Green*** ***v.*** ***Lupo*** (when language of intent is ambiguous in deed, ct may consider situation involving property and parties, surrounding circumstances at time instrument was executed, and practical construction of instrument given by parties as proved by their conduct or admissions).
      1. Granting of easement by Ds for ingress, egress, and utilities to the owners of adjacent land is evidence of an intent that the easement benefit the grantees’ adjacent land, thereby being an appurtenant easement.
         1. Will follow possession of dominant estate through successive transfers, even if dominant estate is subdivided into parcels.
      2. Appurtenant easements can only be enforced by the person who owns the dominant estate, so can’t be sold separately from land

**Modifying** **and** **terminating** **Easements**

1. Easements last forever unless terminated by:
   1. Agreement in writing
      1. Release of easement by the holder
   2. Their own terms
      1. EX: if deed conveying easement expressly states that it is to last for 10 yrs.
   3. Merger
      1. Holder of servient estate becomes owner of dominant estate.
   4. Abandonment
      1. If it can be shown that the owner of the easement, by her conduct had intent to abandon easement.
   5. Adverse possession or prescription
      1. By owner of servient estate or 3rd party.
   6. Frustration of purpose
      1. Finding that the purpose of the easement has become impossible to accomplish, or that easement no longer serves its intended purpose.
   7. Marketable title acts
      1. Enacted by many states, require that easements and other encumbrances on property interests be re-recorded periodically (every 30-50 yrs) to be binding on future purchasers.
      2. Purpose: limit how far back a buyer has to look in chain of title to determine validity of seller’s title and existence of encumbrances.
         1. Failure to comply w/ Act may leave easement owner unprotected from subsequent purchaser of servient estate—depending on language in statute, may be entitled to buy property free of burden of easement.

## Easements by Estoppel

* 1. Rule [Holbrook]
     1. **The party must show (1) he invested in the land (2) based on a reliance by the owner that he could use the land**
  2. Policy
     1. If the TO grants permission for a neighbor to use and improve his land, he should not be able to revoke use of the land by the improver

***Holbrook v. Taylor (Ky. 1976) – Easement by Estoppel***

1. Synopsis: If landowner lets another improve property and reasonably rely on access to property, owner will be deemed to have created easement by estoppel and not able to deny improver access
2. Facts: 1942: Holbrooks bought tract of land.  1944: permission granted to someone to cut road on Holbooks’ land to haul coal.  1949: roadway not used as much; road closed.  1957: Holbrooks built a tenant house and tenants used the road again. 1961: tenant house burns down. 1964: appellees Taylors buy land adjacent to Holbrook.  Hol let Tay use the easement (haul road) to move stuff in, watched as they improved on road by widening it.  After appellants constructed new home, continued to use roadway as before.  Only after appellees improved road of egress/ingress was the suit for quiet title (already invested $500), as Holbrook wanted Taylors to sign a form relieving Holbrook of all liability on the road
3. Held:
   1. No right to an easement by prescription bc use not adverse, continuous or uninterrupted.
   2. BUT, right to use road on land of another may be established by estoppel.
   3. When a license includes right to make improvements at licensee’s expense on the land as well as a right of entry, licensor may not revoke license. License becomes irrevocable.
   4. License is a grant through estoppel bc it would be unconscionable to revoke license when licensee has made improvements and used land in reliance on licensor’s promise.
   5. Use of road by Appellees and improvements done with consent of Appellants, so license may not be revoked- easement by estoppel
   6. The court looked to the intent of the party as part of the prescription claim.

## Easements Implied by Prior Use

* 1. Rule [Manns]
     1. The dominant and servient *parcels were previously under common ownership* and a subsequent conveyance or transfer separating that ownership
     2. The earlier common owner *used part of the united parcel for the benefit of the other* part, and this *use was apparent, obvious, continuous and permanent*
        1. The more pronounced the continuous and apparent use is, the less the degree of convenience of use is necessary
     3. The claimed *easement is necessary and beneficial to the enjoyment of the parcel* conveyed or retained by the grantor or transferor
     4. Important circumstances from which inference of intention to create/reserve an easement may be drawn: [Restatement]
        1. Whether the claimant is a conveyor or the conveyee
        2. The terms of the conveyance
        3. The consideration given for it
        4. Whether the claim is made against a simultaneous conveyee
        5. The extent of necessity of the easement to the claimant
        6. Whether reciprocal benefits result to the conveyor and the conveyee
        7. The manner in which the land was used prior to its conveyance
        8. The extent to which the manner of prior use was or might have been known to the parties

***Granite Properties Limited Ptnrshp v. Manns (Ill. 1987) – Easements Implied by Prior Use***

1. Facts: Servient estate (taken advantage of) owner of a driveway used by dominant estate (taking advantage). Dominant estate Granite/P owned tract of property included shopping center, apartment complex, each's respective driveway. Granite sold to Manns (Ds) (servient estate) tract between apartment and shopping center. Driveways on land conveyed to Manns, Manns knew this when bought property. Driveways were used by Granite for years before it conveyed land to Manns. Driveway A to shopping center used for deliveries, trash. Granite testified Driveway A necessary bc not enough room otherwise for delivery trucks to turn around and exit. Driveway E to lot of apartment complex. No other feasible place to put parking lot and Driveway E only way residents could access lot. After Manns bought the tract, told Granite to stop using driveways.
2. PH: Granite sued Manns, stop interfering driveways. Court ruled against Granite re: Driveway A but in favor of Granite re: Driveway E. Appellate court ruled in favor of Granite on both.
3. Holding:
   1. Easement implied from a prior existing use, often called “quasi-easement,” arises when owner of entire tract of land or of two or more adjoining parcels, after employing a part thereof so that one part of the tract or one parcel derives from another a benefit or advantage of an apparent, continuous, and permanent nature, conveys or transfers part of the property without mention being made of these incidental uses.
   2. Easement must be 1) common ownership 2) easement must have been used in an apparent, obvious, continuous, and permanent way before the property was transferred 3) necessary and beneficial
   3. Court found (1) driveways in question had been used by dominant estate owner or predecessors in title since respective properties developed, (2) driveways permanent in character, being either rock or gravel covered, (3) servient estate owners were aware of the driveways’ prior uses before purchased parcel.
   4. Restatement (1944): 8 important circumstances from which the inference of intention to create or reserve an easement may be drawn (see above)
   5. Here, problematic ones are: (1) claimant is the conveyor (2) easement not absolutely necessary to the beneficial use and enjoyment of the land.
   6. But implied by prior use need not be absolutely necessary bc have implied by necessity as option, so required extent of necessity less here. The test then is REASONABLE NECESSITY (reasonably convenient to the use of the land benefited, flexible test)
      1. Think of it like “important to the enjoyment of the conveyed quasi-dominant or quasi-servient parcel”

## Easements Implied by Necessity

* 1. Rule [Finn]
     1. Where an owner of the land conveys a parcel of land which has no outlet except over the grantor’s land, a way of necessity over the grantor’s remaining land is created
     2. A way of necessity may lay dormant through several transfers of title and still pass with each transfer as appurtenant to the dominant estate

***Finn v. Williams (Ill. 1941) – Easements Implied by Necessity***

1. Facts: Charles Williams owned a large tract of land and conveyed a part of it to Thomas Bacon. Finns (Ps) eventually acquired title to this conveyed part. Zilphia Jane Williams (Williams) (D) inherited remaining part of Charles Williams’ land. Only means of getting to nearest highway and market from the Finns’ land was by crossing over Williams’s land or that of a stranger. Williams refused to give the Finns permission to cross over land.
2. PH: Finns brought this action seeking declaratory judgment granting them an easement by necessity over Williams’s land. Lower court held Ps owners of right-of-way easement of necessity over Ds one hundred acres
3. Held:  Since there was at one time common ownership of the lands of P and D, an easement by necessity will remain over the lands of the original grantor.
   1. The right of way over the land is treated has having been dormant through the transfers of title, and can be used at any time by one of the landowners when no other means of access to a road exist.
   2. The easement is based on strict necessity, so it does not matter that the claim did not exist when the land were unified.
   3. Buyers will not buy property unless they have guaranteed access to it by an easement over a neighboring land.
   4. Granting access effectuates the intent of the parties.
   5. As Ps' land was entirely surrounded by property of strangers and land of D from which it was originally severed, a right-of-way easement of necessity was necessarily implied in the conveyance severing the two tracts.

## Express Easements

* 1. Rule [Green]
     1. The easement runs with the only if:
        1. The easement is in *writing*
        2. The original grantor who created the easement *intended* the easement to run with the land
           1. The intention of the parties is determined from the language of the instrument
           2. Where the language is ambiguous, the court may consider

The situation of the property and the parties

The surrounding circumstances at the time the instrument was executed

The practical construction of the instrument given by the parties’ conduct or admissions

* + - 1. Subsequent owners of the servient estate had *notice* of the easement at the time of the purchase of the servient estate
         1. Actual notice – owners were told
         2. Inquiry notice – something on the land would suggest there was an easement
         3. Constructive notice – notice based on the original deeds found in the recording office
  1. Policy
     1. For: there is a strong presumption in some states that easements are appurtenant to some particular tract of land because it is easier to discover existing easements
     2. Against: we want to limit the number of easements, so it would be best to expire them with people

***Green v. Lupo (Wash Ct. App. 1982)***

1. Facts: Greens (Ps) owned tract of land. Lupos (Ds) bought parcel of land (the north tract) from Ps. While they were still paying for that land, Ds requested a deed release to a small section of the north tract to allow financing for the construction of a home. Ps agreed in return for a promise of an easement along the north tract when Ds eventually obtained title. Parties entered into a writing about the easement, but it did not state whether the easement was in gross (personal) or appurtenant (run with the land). But when Ds obtained title, they refused to grant the easement. Ps brought an action for specific performance.
2. Held: An easement is not personal if there is anything in the grant to suggest that it was intended to be tied to the land
   1. Presumption of easement appurtenant and if appurtenant presumption it runs with the land for subdivisions.
   2. Parol evidence was properly admitted to define scope of easement.
   3. Written agreement that created easement was ambiguous because it evidenced an easement that was both appurtenant to the land and personal to the easement holders.
   4. There was a strong presumption against personal easements.
      1. Trial court erred bc evidence did not support its determination that easement was personal.
      2. Evidence of an appurtenant easement outweighed evidence of a personal easement.
   5. Trial court abused its discretion when it enjoined all motorcycle traffic on the road created by the easement because it did not properly consider the ban's effect on the easement holders' use of the easement and because the ban unreasonably interfered with their use of the easement.

Hypotheticals:

* Ben and Caleb own adjoining parcels. Ben’s parcel borders a hunting preserve. Knowing of Caleb’s love of hunting, Ben conveyed a right of way easement to Caleb across his property to the preserve. Caleb later subdivided his parcel into 50 separate lots, conveying his easement in the deeds to the individual lot owners. Many of the lot owners are now inviting friends and using the easement daily during hunting season. Often, they gather at the edge of the reserve to socialize before and after hunting, causing significant noise and disruption.
  + Ben wants to prevent everyone but Caleb from crossing his land. Advise him on his possible claims.
* David bought a 40-acre parcel of property and built a house on the northern edge. His only access to a highway was via a small dirt driveway on the property that led south. Elizabeth, David’s neighbor to the north, had access to a much more convenient highway. After getting to know David, Elizabeth allowed him to use her driveway to access this highway to the north. David began to use Elizabeth’s driveway regularly for ingress and egress to his property.
  + Thereafter, David divided his property into two lots and sold the northern half (with the house) to Frank. Frank assumed David had an easement across Elizabeth’s driveway to access the highway to the north. But Elizabeth put up a locked gate to prevent Frank’s use, having only intended for David to use the driveway. David also put up a locked gate, to prohibit Frank from using his driveway to access the highway to the south. Accordingly, Frank now lacks access to his property.
  + Advise Frank on his claims.

1. **Covenants and Commercial Ordering, p. 475-501**

***Equitable*** ***Servitudes*** ***(writing,*** ***intent,*** ***touch*** ***and*** ***concern,*** ***notice)***

1. Covenant that regardless of whether it runs with the land at law, equity will enforce against the assignees of the burdened land who have notice of the covenant.
2. **Injunction** is typical remedy against violation of the covenant
   1. If P wants an injunction, must show that the covenant qualifies as ES
3. Requirements:
   1. Writing (unless negative implied)
   2. Intent to bind Successors
   3. Touch and Concern
   4. Notice
   5. **(don’t need privity)**

***Covenants***

1. **Elements of a Covenant**
   1. **Writing**: Must be written.
   2. **Notice**: Owns of burdened property must have notice of restriction.
   3. **Intent**: Grantor must have intended restriction to run with land on both sides, binding future owners of servient estate *and* benefiting future owners of dominant estate.
   4. **Touch and Concern**: Restriction must “touch and concern” both servient and dominant estate.
   5. **Privity of Estate**: There must be privity estate between the original covenanting parties (horizontal privity) and between those parties and their successors (vertical privity).
2. **Modern** **approach** **to** **analysis**
   1. Privity = relaxed vertical privity
   2. T&C modified
   3. Reasonableness/PP analysis done as separate analysis
   4. Remedy not determined by formal requirements of C/ES but by circumstances of case
      1. ***Davidson*** ***Bros.,*** ***Inc.*** ***v.*** ***D.*** ***Katz*** ***&*** ***Sons,*** ***Inc.***
3. **Types of Notice**
   1. Actual:actually told about the covenant
   2. Inquiry: any condition of the premises indicated that the property was burdened by a covenant
   3. Constructive: if covenant was recorded in the registry of deeds along with the deed or lease creating the covenant (or, as in the Sudden Valley example, if a declaration containing the restriction was recorded prior to the sale)
4. ***Touches and concerns* the land**
   1. Must be satisfied on burden & benefit side
      1. Burden – must restrict or somehow regulate use of land
      2. Benefit – must increase the enjoyment or fair market value of the land
   2. Modern approach – gets rid of touch and concerns and looks at ***reasonableness PP***
      1. Whether the covenant had an impact on the consideration exchange
      2. Whether it is reasonable concerning area and duration
      3. Whether it violates public policy because it constitutes an unreasonable restraint on trade or otherwise interferes with the public interest
5. **The grantor *intended* the restriction to run with the land on both sides**
   1. Express intent – intent is shown if covenant recites (1) that is made to the grantor or grantee and ‘their heirs or assigns’; (2) ‘is binding/intended to bind future owners’, ‘is intended to run with the land’
   2. Presumed intent – courts generally presume there to be intent if it “touches and concerns the land”
6. ***Notice* of the restriction on the party against whom enforcement is sought** (only for equitable servitudes)
   1. Actual notice – buyer/lessee was actually told about covenant
   2. Constructive notice – covenant was recorded in registry along with deed/lease creating covenant
   3. Inquiry notice – conditions on the premises indicated that the property was burdened by a covenant
7. ***Privity of estate* exists between the original covenanting parties and between those parties and succeeding parties**. Horizontal privity between original parties and strict vertical privity of estate (original party to the covenant and the subsequent owner)
   1. Horizontal Privity– regulates the relationship between the original covenanting parties; whether or not owners have an interest in each other’s land. At the time original parties enter into agreement, parties share some interest in the land independent of covenant (landlord/tenant, mortgagee/mortgagor, holders of mutual easements).
      1. Types of Horizontal Privity:
      2. Simultaneous privity (also known as “mutual privity”)– two owners have a simultaneous interest in the same parcel of land (landlord-tenant, owner appurtenant easement over land)
         1. Easiest example of this is the landlord-tenant relationship.
         2. Tenant has a present possessory interest.
         3. Landlord has a reversion (the right to get property back at end)
      3. Instantaneous privity – covenant attached to both parcels if it is created at the moment the owner of one parcels sells the other parcel (through a sale or conveyance)
         1. Exists when the restriction was imposed at the moment property was transferred from one to the other.
      4. Excluded relationships:
         1. Agreements between neighbors not part of a separate conveyance because neighbors not in privity
         2. Agreements between grantors and grantees not made at the same time as the conveyance of the property burdened or benefited by the property
      5. Note: Can just use strawbuyer so this requirement is a little unnecessary
   2. Vertical Privity: Relationship between original party to covenant and subsequent owner. To be bound by the covenant, successor must hold the entire estate in land held by the original party (strict vertical privity of estate).
      1. Because strict vertical privity required for a burden to run, lessee could not have burden enforced against them. But benefited party could sue owner of reversion of estate, and owner could possibly sue the lessee for waste.
      2. Types of Vertical Privity:
      3. Strict Vertical Privity (traditional)
         1. Grantor cannot retain any future interests.
         2. For example, vertical privity is present when an owner sells a property but not when the owner leases it.
      4. Relaxed Vertical Privity (modern)
         1. Imposes benefit/burden on any future *possessor*.
         2. Imposes the burden on any future possessor of burdened land and benefit of covenant on any future possessor of the benefitted land
         3. This is the Restatement rule.
         4. Excluded relationships
            1. Successors in interest who have an estate of lessor duration than the prior owner (landlord/tenant)
            2. Neighbors who aren’t successor owners/possessors of the parcels owned by the covenanting parties
            3. Prior purchasers from a grantor who imposed restrictions on subsequently sold parcels

Courts created vertical privity to ensure future owners had notice

Rights and obligations of original covenanting parties

Generally allow enforcement by the original covenantee if the agreement contains explicit language to the effect

Restatement allows the benefit to be enforced *in gross* but only if the person seeking enforcement can demonstrate a legitimate interest in enforcing the servitude

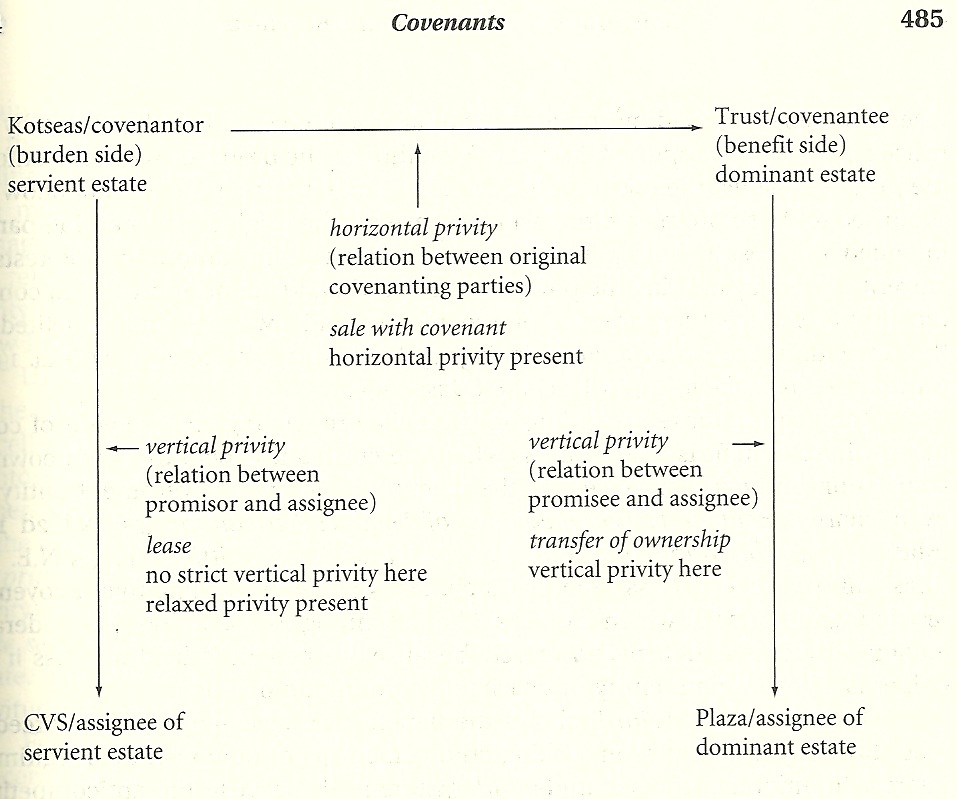
While prior owners are not responsible for the actions of subsequent owners, landlords are responsible for the actions of their lessors

1. Policy: Developed as a flexible approach to create private arrangements between parties; contract law was insufficient because it could not be assigned to subsequent owners
2. Tension between interests of buyers & interest of owners
   1. Buyers – want to do what they want and not be bound by anything they didn’t agree to
   2. Owners – buy in reliance of restrictions and have acted accordingly
3. Reasons for covenants
   1. Thought to bolster property value, gives security to existing owners
   2. People are free to choose to live on a property that has/doesn’t have a restrictive covenant
   3. Decreases transaction costs because people will not have to contract with all existing owners in an area to do what restrictive covenants can otherwise do
4. Retaining touch and concern requirement
   1. For (Future owners)
      1. Enhances free choice and combats dead hand by limiting
      2. Although future owners are freedom bound, current owners are freedom enhancing
      3. Future owners are not current property owners, their interests are not as important as current owners
      4. Future owners will have notice of covenants
   2. Against (Current owners)
      1. Collective restriction on the current owner’s freedom of choice / contract
      2. Favors future owners interests over current owners
      3. Constructive notice is sufficient
5. Remedies
   1. Injunctions – allow better bargaining rights between parties; damages may be unable to capture idiosyncratic value of the parties (equitable servitudes)
      1. Granting of injunctions always been discretionary.
      2. Benefits of Injunction:
         1. Parties get to bargain to determine who values entitlement most and to set appropriate price.
         2. Avoid time and expense of litigation.
         3. Avoid inaccuracy of damage awards set by 3rd party who less knowledgeable about benefits of non-compete Cs and value to parties
   2. Damages – more appropriate for commercial properties because the meaning of land is not as great as with personal property (covenants)
      1. Damages often thought to be inadequate bc of unique value attached to location of land and desire to use particular unique structures.
      2. Benefits of damages: Litigation can produce result where transaction costs might prevent parties from bargaining to mutually beneficial result.
   3. Modern trend toward case-specific remedies

***Winn-Dixie Stores, Inc. v. Dolgencorp, Inc. (Fla. Dist. Ct. App. 2007)***

1. Facts: Winn-Dixie (P) anchor tenant grocery store in plaza, its lease gave it exclusive right to sell groceries in plaza, but other stores in plaza could sell groceries if dedicated <500 sq ft to it. Lease provided all provisions in lease covenants that ran with land. Short form of lease recorded. Dolgencorp (D) became tenant and sold groceries >500 sq.ft.
2. Held: Covenant ran with land and tenant had constructive notice of it under recording statute, and implied actual notice (experienced commercial tenant had obtained such covenants for itself so obliged to make inquiry/examine landlord's chain of title to determine whether exclusive covenant)
   1. Dolgencorp argued that agreement was a contract and that they were not liable to uphold the contract only the shopping plaza was. Court disagreed; these types of covenants have long been held to run with the land.
   2. When a covenant touches and concerns the land, and creates higher value or makes something more beneficial for the parties, then covenant runs with land. Agreement states it will run with land and that all users of this property must follow this covenant.

***Whitinsville Plaza v. Kotseas (Mass. 1979)***

1. Facts: In 1968, Kotseas (D) conveyed parcel to 122 Trust, owned by Whitinsville Plaza (Plaza/P). Deed included land use restrictions and covenants bound Kotseas and Trust, prohibited Kotseas from using adjoining land, which he owned, to operate business in competition with discount store Trust planned to operate on land. Trust opened discount department store; in 1975 conveyed land, subject to covenant, to Plaza. Kotseas leased portion of adjoining land to CVS for use as discount department store. Lease expressly subject to deed restrictions.
2. 
3. Held: Reasonable anticompetitive covenants are enforceable in most states- except Mass, so Mass needs to change.  It would be unfair not to enforce anti-competition clause bc P probably paid extra money in return for restrictions and restriction was one reason Trust bought land.
   1. *Reasonable* covenants to compete may be considered to run with the land when they serve a purpose of facilitating orderly and harmonious development for commercial use.
   2. An enforceable covenant will be one which is consistent with a reasonable overall purpose to develop real estate for commercial use.

***Davidson Bros., Inc. v. D. Katz & Sons, Inc. (N.J. Super. Ct. App. Div. 1994)***

1. Facts:  Davidson (P) supermarket downtown New Brunswick (George Street) then acquired 2nd supermarket 2mi away. Closed GeorgeSt bc lost sales to new store. Sold GeorgSt to Katz, subject to covenant that no one use GeorgeSt as grocery. Closing created significant hardships for downtown residents (elderly) did not have access to car and could not get to store. George only area downtown suitable for grocery store. New Brunswick Housing Authority (NBHA) acquired George property and leased to C-Town, provided it used as grocery store.
2. Held: Covenant adversely impacted public interest so unenforceable.
   1. Hardships on citizens, lost only reasonably close location. P restriction impeded relocation of another supermarket. Contrary to public policies in New Jersey Urban Enterprise Zone Act. A scorched earth policy that under circumstances was unreasonable
   2. A noncompetition covenant will be enforced against a subsequent purchaser with actual notice if the covenant is *reasonable*.
   3. **“Reasonableness Factors”**
      1. **intention of the parties when the covenant was executed**
      2. **if consideration was paid in exchange for the covenant**
      3. **whether the covenant clearly and expressly set forth the restrictions**
      4. **whether the covenant was in writing and recorded**
      5. **whether the covenant was reasonable in time/duration**
      6. **whether an unreasonable restraint on trade**
      7. **whether interfered with public interest**
      8. **whether changed circumstances now make covenant unreasonable**
         1. **the hardship which enforcement at the present time will impose on the covenantor (or his successor) has substantially increased since the time of the covenant due to unforeseen circumstances**
         2. **the benefit which enforcement will give to the covenantee has sub. Decreased**
3. Hypothetical: Suppose the lease merely included the restraint on competition and did not include the language making the covenant run with the land. Should the court presume that such a covenant was intended to be binding on subsequent lessees or purchasers of the dominant estate?
4. **Common Interest Communities, p. 532-40**
5. Common Interest Community
   1. Residential areas where a homeowners association exists to enforce covenants or restrictions.
6. Homeowners Associations and Condos
   1. Created by a declaration filed by the developer before the first sale.
   2. No privity but we allow them to enforce covenants because notice and interests are so intertwined – also association is the agency of the developer, eventually becomes the agency of the homeowners.
   3. HA empowered to enforce Cs or restrictions, bring lawsuits to compel compliance
   4. Each owner is member of HA; owners empowered to vote for members of a board.
   5. ONLY OWNERS have voting rights—tenants and other family members don’t get to vote.
   6. Votes may be unequal, based on lot size.
   7. R.3d: Developers can’t use power to amend declaration in a way that would materially change the character of declaration, unless it fairly puts buyers on notice that the power could be used in that way. Can’t violate notice principles by materially changing general development plan of subdivision w/o fair warning.
7. Condominium
   1. Essentially, common interest communities (CICs) in apartment-style buildings. Each unit is owned in fee simple; each common area is owned collectively as tenants in common (which we’ll discuss more soon). A condo board plays the role of the homeowners association.
   2. Every owner is a member; ownership interests usually proportional to %age of building taken up by individual unit.
   3. State condo rules regulate them by establishing ground rules for organizing condo—normally prohibit partition of common areas, define basic structure of CA, requiring declaration, bylaws, supermajority votes for certain decisions of CA.
8. Cooperative:
   1. Whole building is owned by a single nonprofit cooperative corporation, in which individual owners buy stock and then lease their unit. There is a single mortgage for the entire thing
   2. Ownership vested in corp—entire coop will be financed by single mortgage that coop takes out.
   3. So if individual owner fails to make monthly payment, other owners have to make up difference to avoid foreclosure.
   4. Overall: much greater financial interdependence. Much less common than condos
9. Community land trusts buy and hold cheap land, then separate the land from the building by giving a long-term ground lease to a developer to possess the building and use it in a way that low-income people can afford.
   1. For example, the **D**urham **C**ommunity **L**and **T**rust! [www.dclt.org](http://www.dclt.org)
   2. Nonprofit corp, normally w/ elected BoD and open membership.
   3. Buys and holds title, usually by buying cheap land in depressed area/subsidized by government loans.
   4. Retains title, sells building located on it to poor buyer/group of buyers
      1. Called ground lease (lease building for long time, often 99 yrs, often renewable).
   5. This is ok because
      1. Trust retains title to land; sells/leases building only.
      2. Non profit: purpose is to provide affordable housing rather than maximize profits/returns.
      3. Land is in area w/ low real estate value.
      4. Normally gets assistance: loan guarantees, local property tax abatements, contributions from charitable institutions, direct gov’t subsidies.
   6. Important: agreement btwn owner and lessee/buyer that building will be sold only to community land trust, or another low income owner, at price well below market value (NOT on open market for fair market value).
   7. Normally fixed at amount equal to owner’s initial investment and future investment, w/ adjustment for inflation.
   8. Ground lease normally gives community land trust right of first refusal to buy building for fixed price—ensure property remains low cost in future.
10. Limited equity cooperatives are like community land trusts, but they’re organized like regular co-ops. The sale price of the shares is set at an artificially low level, so the seller can’t benefit from any increases in market value. Buyer gets shares in coop and gets lease to a certain unit.
11. Private governments and gated communities
    1. HAs raise issues about legitimate scope of powers over individual owners and ability to engage in exclusionary conduct (privatizing previously public areas).
       1. Disenfranchising renters bc of voting allocation.
       2. Oppressive micromanagement of individual units—infringing on liberty of owners to be free from control by neighbors.
    2. Creating private governments.
12. Rule [Appel]
    1. Provisions allowing amendment of subdivision restrictions are subject to reasonableness requirements
13. Policy
    1. “To permit individual lots within an area to be relieved of the burden of such covenants, in the absence of a clear expression in the instrument so providing, would destroy the right to rely on the restrictive covenants which has traditionally been upheld by our law of real property.”
14. Rule, Developers [Restatement]
    1. A developer may not exercise a power to amend or modify the declaration in a way that would materially change the character of the development or the burdens on the existing community members unless the declaration fairly apprises the purchasers that the power could be used for the kind of change proposed.
15. Rule, Condominiums / Coops [Condo. And Coop. Conversion Protection and Abuse Relief Act]
    1. Coops/condos formed after 1980 may, by a two-thirds vote, terminate without penalty management contracts of more than three years entered into between the association and the developer while the developer had majority control of the condo/coop.

**Appel v. Presley Cos (N.M.1991)**

1. Synopsis: Provisions allowing for amendment of restrictive covenants will be allowed, as long as amendments are reasonable so as not to destroy general plan or scheme of development.
2. Facts: Presley Companies (D) recorded restrictive covenants concerning subdivision. Covenants regulated land use, building type, quality and size of the residential single-family dwellings. Appels (P) bought home in a subdivision after representations were made about subdivision and purpose of restrictive covenants; they relied on these representations when purchased lot. After purchase, subdivision committee made amendments to covenants, and townhouses constructed on lots. Restrictive covenants contained a provision that allowed for amendment of the covenants.
3. Held: Provisions allowing amendment of subdivision restrictions are subject to a requirement of reasonableness.
   1. A clause in a restrictive covenant that allows a subdivision developer to make amendments to the restrictions is a valid clause as long as it is exercised in a reasonable manner so as not to destroy the general scheme or plan of development.
   2. Reasonableness includes a regard for the property rights of the people who bought the land in reliance on the restrictive covenants which applied at the time of their purchase. Clause in these restrictive covenants allowing for amendment permissible. Trial court must decide if amendments reasonable.
   3. Even after real property is purchased, restrictive covenants may be changed by the seller, provided that those changes are reasonable and fit into the development scheme.
   4. A determination of whether the exceptions were reasonably exercised or whether they essentially destroyed the covenants required resolution of a factual matter, so MSJ for developer on that issue inappropriate. Trial court erred in granting MSJ on claims of misrepresentation and unfair trade practices.
4. **Racially Discriminatory Covenants, p. 540-51**

## 

## Racially Discriminatory Covenants

* 1. Restrictive Covenants [Shelley]
     1. Individuals free to enter into restrictive covenants, but **courts / state officers cannot enforce restrictive covenants** bc such action would be state action prohibited by 14A.
  2. Themes:
     1. Property owners’ liberty interests inevitable conflict w/ security interests.
     2. Once property opened to public marketplace, different rules apply (explains a lot in *Shelley).*
     3. Property rights always limited by others’ property rights.
     4. Our system seeks to prevent illegitimate concentrations of ownership that wrongfully preclude access to market for property.

***Shelley v. Kraemer (SCOTUS 1948)***

1. Courts cannot enforce racial covenants on real estate.
2. Facts: In 1945, African-American family (Shelley) purchased house in St. Louis, Missouri. At purchase, they unaware restrictive covenant on property since 1911. Covenant barred "people of the Negro or Asian Race" from occupying.
3. PH: Kraemer lived 10 blocks away sued to restrain Shelleys from taking possession of property they had purchased. Supreme Court of Missouri held covenant enforceable against purchasers bc covenant was a purely private agreement between original parties and "ran with the land" and was enforceable against subsequent owners. Since restriction purported to run in favor of an estate rather than merely a person, it could be enforced against third parties. A materially similar scenario took place in companion case McGhee v. Sipes. Supreme Court consolidated two cases.
4. Opinion: (Vinson 6-3):
   1. "[T]he restrictive racially-based restrictive covenants are not, on their face, invalid under the Fourteenth Amendment."
   2. BUT private parties may voluntarily abide by terms of restrictive covenant but may not seek judicial enforcement of such a covenant bc enforcement by courts would constitute **state action**.
   3. Such state action would be discriminatory, so enforcement of racially-based restrictive covenant in a state court would violate 14A EPC.
   4. Court rejected arg that since state courts would enforce a restrictive covenant against white persons, judicial enforcement of restrictive covenants would not be EPC violation.
   5. 14A guaranteed individual rights, equal protection of the law is not achieved with the imposition of inequalities.

***Cy Pres Doctrine***

* Allows a charitable trust to be devoted to a different but related purpose if:
  1. Original purpose can no longer be fulfilled; and
  2. Settler would have wanted the trust to continue rather than to fail completely.
  3. This permits a court to carry the trust into effect in such a way as will as nearly as possible effectuate testator intention.

1. Alternative to *Shelley* [Evans v. Abner]
   1. If there is no state action, then restrictive covenants can be enforced by private parties.
      1. Facts: Governor donated a park for use by white residents only. City was appointed the trustee, but eventually began to allow black residents to use the park. Board of directors sued to have the city removed as trustee and appoint a private trustee
   2. In *Evans*, the main issue was whether or not there was state action:
      1. The interest was a defeasible fee and when the limit was reached, the property reverted ownership on its own; no court was necessary, and therefore no court was necessary and no state action was taken
      2. If that was the case, the parties would still need to go to court to prove it was a defeasible fee
   3. Three reasons why *Shelley* and *Evans* came out different
      1. Shelley was fundamentally different bc wrong was so big court felt obliged to intervene
      2. Lower courts in Shelley were perpetuating discrimination
      3. Shelley was about covenants, where Evans was about defeasible fees: the repercussions of covenants is much greater because it applies to the widespread areas of land over a long period of time, not one piece of land
2. Policy
   1. Property rights are never absolute; they are always limited by other’s property rights
   2. Our system of property rights seeks to prevent illegitimate concentrations of ownership that wrongfully preclude people from accessing the market of property

***Evans v. Abney (U.S. 1970)***

1. Facts: Senator Bacon willed park to Macon, GA but restricted park for whites. Bacon intent could not be fulfilled (*Evans v. Newton* U.S. 1966 held city park must be w/o race discrimination), park could not operate on discriminatory basis. Supreme Court of GA ruled grantor’s intention impossible to fulfill, trust failed, property reverted to Senator’s heirs. Black citizens sought to have park integrated by using doctrine of *cy pres*.
2. Held: Georgia cities and towns are authorized to accept devises of property for establishment of parks and hold that property in charitable trust for class of persons named by the testator.
   1. When Senator made trust, racial restrictions allowed, but now prohibited.
   2. Doctrine of cy pres allows court to carry out general charitable intent of testator where intent might otherwise be thwarted by impossibility of the particular plan or scheme provided by testator.
   3. But occasionally, doctrine cannot be applied bc testator had only a particular purpose in creating trust, and if that purpose failed, testator would want whole trust to fail. Senator made clear only whites to use park. Racial separation was an inseparable part of the testator’s intent, so cy pres cannot be used.
3. Dissent (Douglas): Returning property to Senator’s heirs will not necessarily achieve racial segregation Senator desired. When buildings are constructed on that land, minorities must be allowed inside. There is no constitutional way to assure this property will not be used by blacks.
4. Dissent (Brennan): Under EPC, state may not close down a public facility solely to avoid its duty to desegregate that facility. Closing of the park sends message of community involvement in racial discrimination.
   1. Though majority claims that no state action is involved in closing the park, there are actually three types of state action involved:
      1. 1) There is state action whenever a state enters into an arrangement that creates a private right to compel or enforce the reversion of a public facility;
      2. 2) state action exists when a court enforces a racial restriction to prevent parties of different races from dealing with one another and
      3. 3) state action exists when a state singles out racial discrimination for particular encouragement, and thereby gives it a special preferred status in the law, even though the state does not itself impose or compel segregation.
5. **Restraints on Alienation, p. 551-64**
6. Types of “Total Restraints”
   1. Disabling restraints: directly forbids the owner from transferring an interest in the property. You cannot sell. “Any transfer of Blackacre shall be null and void”
   2. Promissory restraints: grantee promises not to alienate his interest in land.
      1. Convey to A. A promises not to convey again. “A promise that Blackacre shall never be conveyed”
   3. Forfeiture restraints: a future interest that will vest if the owner attempts any transfer.
      1. If you sell, you forfeit to B. “If A ever tries to convey Blackacre, it reverts to grantor”
7. Partial Restraints - depends on reasonableness
   1. Grantor Consent Clause: “A can only transfer Blackacre with grantor’s consent”
   2. Right of First Refusal: “If A ever wishes to sell Blackacre, grantor shall have priority over all other buyers in purchasing it.”
   3. Options to Purchase: “At any time, grantor may purchase Blackacre from A for its FMV”

|  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| |  |  |  |  | | --- | --- | --- | --- | |  | **Disabling** | **Forfeiture** | **Promissory** | |  | To A, and A may not transfer  the land. | To A, but if A attempts to transfer the land, automatically reverts to grantor. | To A, and A promises not to transfer the land. | | **Fee simple** | Void | Void | Void | | **Fee simple**  **Limited in time** | Void in most states | Void in most states | Void in most states | | **Fee simple**  **Partial as to number of persons** | Void if number of potential  grantees is small | Void if number of potential  grantees is small | Void if number of potential  grantees is small | | **Life estate** | Void | Valid | Valid | | **Leases** | Valid in most states | Valid in most states | Valid in most states | |

* 1. Rule, Modern Approach
     1. **Restraints are allowed if they are reasonable** (weighing the utility of the restraint against the injurious consequences of enforcing the restraint) [Horse Pond]
        1. Factors:
           1. Whether the reason for exercising the right (e.g., of first refusal) is rationally related to the protection, preservation or proper operation of the property and the purposes of the association set forth in its governing instruments
           2. Whether the power was exercised in a fair and nondiscriminatory manner
        2. Unreasonable restrictions:
           1. Require 100% vote of board members
           2. Unlimited in duration
           3. Requiring the organization to be dissolved before the property can be alienated
           4. Purpose which is capricious and whose enforcement would accomplish no worthwhile purpose
     2. **Exception**: restraints are allowed when the property owner is a charity.
  2. Rule, Traditional Approach
     1. Covenants restraining a grantor’s ability to sell property are inconsistent with a grant of fee simple and are thus invalid. [Serio]
     2. A restrictive restraint on the sale of fee simple title is a violation of public policy. [Riste]
        1. Limitation: reasonable restraints are allowed if they are justified by legitimate interests, such as ‘due on sale’ clauses in real estate mortgages
  3. Policy
     1. Traditional Rationale
        1. Efficient use of property – if restrictions are allowed, property cannot change hands easily, therefore limit the number of people who can acquire property
        2. Costs – information and transaction costs on behalf of buyers will bog down the market
        3. Interest of future owners – excessive restraints on alienation give prior owners control over future owners
        4. Fairness – we want to allow property to be distributed fairly and equally and restrictions hinder this goal
     2. Modern Rationale (I)

***Horse Pond Fish & Game Club, Inc. v. Cormier (N.H. 1990)***

1. Synopsis: Restraints on alienation void only if they are unreasonable.
2. Facts. Horse Pond Fish & Game Club (P) obtained title to land by deed, free of restrictions. P deeded property to two members- conveyed it back to P same day with restrictions against alienation written in deed. Restrictions stated there would not be alienation of land unless 100% of members approved or club dissolved. P registered with charitable trust division of AG's office as charitable corp. Due to increased residential nature of area, (hunting) Club sought to sell part of property and enter into land swap with neighboring club. Member William Cormier (D) voted against plan; deal could not go through.
3. PH: P sought declaration that deed restriction was void as an unreasonable restraint against alienation. Club filed MSJ, which was granted.
4. Held: Restraints on alienation are allowed when the holder of the property interest is a charity. Otherwise, the restraint must be reasonable in order to be valid.
   1. Validity of a restraint against alienation depends upon its reasonableness in regards to the interests of the parties.
   2. A restraint against alienation will only be void if it is unreasonable.
   3. Rule of reasonable restraints does not apply in the case of a gift to a charitable corporation. An express provision or condition against alienation contained in a gift made to a charitable corporation may be a valid restraint.
   4. A sale of land owned by a charitable entity may be permitted if an equity court determines that due to unforeseen circumstances, the sale is necessary and would be in the best interests of the charity.
   5. Judgment reversed/remanded. Lower court must determine if P is a charity before deciding if restraint is invalid.

***Northwest Real Estate Co. v. Serio (Md. 1929)***

1. Synopsis: When title to land is given in fee simple, the grantor cannot restrict the grantee from selling the land to third parties
2. Facts: Northwest (P) granted deed in fee simple to its grantees, which contained a provision that the land should not be subsequently sold or rented, prior to a designated date, without the consent of the grantor. The grantee contracted to sell the land to Charles Serio (Defendant), but Plaintiff refused to consent to the sale. This suit was brought to compel specific performance of the sale. Northwest- D- deeded a lot in fee simple with a provision that the grantees could not sell the property for a certain period of time without Northwest’s consent. Subsequently, the grantees contracted to sell the lot to the Serios (plaintiffs). When Northwest did not consent to the sale, the Serios brought suit for specific performance of their sale agreement on the grounds that the grantor consent clause in the original deed was invalid.
3. Held: Restriction by the deed on sales is repugnant to the fee-simple title which the deed conveyed. The object of the restriction was to deprive the grantee of the unrestrained power of alienation incident to the absolute ownership that a fee simple creates. A grantor consent clause in a deed for a fee simple interest in property will be invalid as a restraint on alienation.
4. Dissent: Restraint on alienation merely gives the developer the power to control the character of the development. This is not against public interest. These types of restraints will open the area and provide houses on convenient terms, which will be a public benefit rather than a detriment.

***Riste v. Eastern Washington Bible Camp, Inc. (Wash. Ct. App. 1980)***

1. Facts: E WA Bible Camp (Camp) (D) owned subdivision subject to restrictions that land would not be sold without Camp’s consent or to anyone not subscribing to beliefs of Assembly of God Church. Riste (P) acquired title to lot in Camp subdivision from his parents. Riste contracted to sell lot to someone who did not subscribe to Camp’s faith. Camp refused to allow sale and Riste brought suit for a declaratory judgment that the restriction was invalid.
   1. Restriction 6: No residents shall conduct themselves in a manner in conflict with general practices and principles of church.
   2. Restriction 8: Property shall not be resold without written approval by the Seller or its agent.
2. PH: Trial court held for P, restrictions void. COA affirmed.
3. Holding/Rule:
   1. Estates in fee cannot be subject to restrictions on occupancy and resale.
   2. EWBC (D) claims that restriction limiting sale of land to members of a church is reasonable and should be enforced by courts.
   3. Restriction 8 is a direct restrain on alienation. WA rule is that such a clause is void as repugnant to the nature of an estate in fee. Exception allows reasonable restraints that are justified by legitimate interests. Ex: "Due on Sale" clauses in real estate mortgages. Doctrine of estoppel (P knew about restrictions) does not apply, because this is a disabling restraint upon which there is a presumption of invalidity.
   4. Restriction 6 is also invalid, because Law Against Discrimination forbids restrictions on conveyance to persons of a certain creed. It is understandable that Ds want a quiet lake with no drinking or gambling or Sunday working, but the outright grant of fee in the deed is fatal to their hopes.
   5. In WA, clause in a deed prohibiting the grantee from conveying land to another without the approval of the grantor is void as repugnant to the nature of an estate in fee when the grantor transferred a fee simple estate to the grantee.
   6. The restraint in the deed is disabling and restrains the alienation of land.
   7. The restriction dealing with religion is also invalid. When a provision in a deed restricts the conveyance based on creed, which is a system of religious beliefs, that provision will be void.
   8. An absolute restraint on alienation of land is repugnant to the nature of a fee simple interest and will be voided.
   9. Public policy ground that this disabling restraint on a fee is void as repugnant to the nature of an estate in fee, court throws out both restrictions and P can do whatever he wants
   10. Exception: reasonable restraint are justified by legitimate interests such as DUE ON SALE clauses in real estate mortgage
   11. Can not sell property until pay off whole mortgage
   12. Not equitable estoppel because P acquired property with knowledge that there were restrictions

**Wolinsky v. Kadison** (Ill. App. Ct. 1983)

1. Synopsis: Condominium association’s officers and board members must exercise its right of first refusal in a reasonable manner. They also owe a fiduciary duty to members of the association, so they must act in a manner reasonably related to that duty, and failure to do so will result in liability for the association as well as individual members.
2. Facts: Wolinsky (P) unmarried woman with children, owned unit in condo and contracted to purchase another unit. Board of directors of condominium (D) notified her that it was exercising its right of first refusal with regards to unit, so contract for sale terminated. Bylaws state when exercising right of first refusal, board must first obtain 2/3 affirmative vote of ownership of common elements. Chicago’s condominium ordinance states that “no person shall be denied the right to purchase or lease a unit because of race, religion, sex, sexual preference, marital status or national origin.” Municipal Code of Chicago 1978, ch. 100.2, par. 100.2-4. P alleges that board exercised an unreasonable restraint on alienation in violation of the bylaws and breach of fiduciary duty and violated the anti-discrimination section of the Chicago condominium ordinance.
3. PH: Her complaint was dismissed on MTD, so appealing.
4. COA:
   1. 1: Breach of Fiduciary Duty – special duty owed to someone. Does a condo board have some kind of fiduciary duty to someone who lives there.
      1. Probably yes. Probably not right that outright condo board members have a fiduciary duty all the time for everything. But probably is a fiduciary duty to follow the condo bylaws
      2. Does this come out differently if she was a random purchaser and not a person in the process of selling her condo. Yes. Probably different.
   2. 2:
      1. Condo response is that they did not deny her right to purchase or lease a unit but just prevented the seller to sell.
         1. Resident claimed she had standing to bring action for unreasonable restraint on alienation. Resident had substantial, real interest in action bc she unable to purchase unit for which she contracted
5. Held:
   1. Board must exercise its right of first refusal reasonably upon consideration of purchaser’s application in light of the economic and social reasons, which justify the right of refusal.
      1. Implication that this right of first refusal must be exercised reasonably.
      2. The test for reasonableness has two parts:
         1. Whether exercise of the right is rationally related to the protection, preservation or proper operation of the property and
         2. Whether power was exercised in a fair and nondiscriminatory manner.
      3. Exercise of the right of first refusal by a condominium board must be done reasonably. Otherwise it would be an unreasonable restraint on alienation and would also be a breach of the fiduciary relationship between the board and the association members.
   2. Condominium association officers and board members become fiduciaries to the members of the association when they take office.
      1. A fiduciary is bound to act in good faith with regard to the interests of the other and must act in a manner reasonably related to the exercise of that duty.
      2. Failure to do so will result in liability for the association and the individuals. There is a duty to strictly comply with the condominium declaration and bylaws.
      3. Board breached fiduciary duties in failing to follow condominium association's bylaws, which required 2/3 vote
   3. Discrimination based on sex or marital status is explicitly prohibited by the city’s ordinance. No person shall be denied the right to purchase or lease a unit because of race, religion, sex, sexual preference, marital status, or national origin.
      1. Resident stated CoA under the Chicago, Ill. Ordinance ch. 198, para. 198.7B-3, which prohibited discrimination with regard to the purchase of condominium units.
   4. Affirmed dismissal of allegations against individual board members for willful and wanton disregard.
6. How is a right of first refusal different from an option?
   1. You have the option to buy whenever you want. Right of first refusal is trigger is when person decides to sell. Option, you can force the sale.

**IV. ESTATES AND COMMON OWNERSHIP**

1. **The System of Estates**, pp. 607-625

* Property interest can be disaggregated into various rights (right to exclude, use, sell, transfer)
* Estate law: slicing those rights and property interests over time.
* Estate: an ownership interest that is or may become possessory and is measured by some period of time (even if indefinitely).
  + If you own it now: owner of right to possess the land *now* owns a possessory / present interest.
  + If you own it in the future: owner of right to possess (or possibly possess) the land *in the future* owns a future interest.
  + Fee simple determinable always has some kind of future interest
  + A person who owns a future interest owns this interest ***now*** (even if land itself is not in owner’s possession)
* Hypothetical: O grants Blackacre to A, and then to B if she graduates from law school.
  + A has a present/possessory interest (likely a fee simple). B has future interest.

**The Function of Estates – Why do we want estates?**

* Estate laws provide clear rules, reduce transaction costs in a society where land is a commodity.
  + *Numerus clausus*: too many different kinds of property reduce certainty.
  + Rule against creation of new estates: The formalized estates are the *only* permissible categories of estates.
    - Function: Keep simple going forward, Certainty for owners, Certainty for buyers
* Autonomy, Intent, Ownership: Allows present owner to decide *who* will own property, or *how* it will be used.
  + *A conveys Blackacre to B so long as no liquor is ever served on the property*.
  + Can transfer some ownership rights without losing complete control over what happens to your property.
  + Some estates allow “dead hand” control after the owner dies.
  + Family, concentration of wealth, encouraging wealth creation

|  |  |  |  |
| --- | --- | --- | --- |
| **Present Interest** | **Words Used to Create** | **Future Interest** | |
|  |  | *In grantor* | *In third party* |
| Fee Simple Absolute | “to A (and her heirs)” |  |  |
| Fee Simple Determinable | “as long as” “while”  “during”  “until”  “unless” | Possibility of reverter |  |
| Fee Simple Subject to Condition Subsequent | “provided that”  “on condition”  “but if” | Right of entry or power of termination |  |
| Fee Simple Subject to Executory Limitation | “until (/unless)…, then to…”  “but if…, then to …” |  | Executory interest |
| Life Estate | “for life” | Reversion | Remainder   * Vested * contingent |

**Overview of Estates Available:**

* **Possessory Estates**
  + Fee simple
  + Life estate
  + Defeasible Estates
    - Determinable Estate
    - Estate Subject to a Condition Subsequent
    - Estate Subject to an Executory Limitation
* **Future Interests**
  + Retained by Grantor
    - Reversion
    - Possibility of Reverter
    - Right of Entry
  + Conveyed to a Third Party
    - Remainder
      * Contingent Remainder
      * Vested Remainder
        + Absolutely vested remainder
        + Vested remainder subject to divestment
        + Vested remainder subject to open
      * Executory Interest
        + Shifting
        + Springing

## Generally

* 1. Possessory Estate
     1. **Fee Simple** (“O to A [and heirs / in fee simple]”)
        1. Largest of all estate; owner has right to possess, use, sell, gift, devise, etc.
        2. Conveys all interests, unless conveyance states otherwise
     2. **Fee Tail** (“O to A and the heirs of his body”)
        1. At death, property passes in successive life estate to the heirs
     3. **Life Estate** (“O to A for life”)
        1. Reverts back to grantor at grantee’s death
           1. Future interest: reversion
     4. **Term of Years** (“O to A for \_\_ years”)
        1. Ends at end of the term
           1. Future interest: reversion
  2. Added Limitation
     1. Future Interest in Grantor
        1. **Determinable Estate** (“O to A as long as B remains single”)
           1. Limitation is placed *before the punctuation mark* signaling the end of the description of estate
           2. Future interest: possibility of reverter

Automatic transfer

* + - * 1. Language: “until, so long as, while and during”
      1. **Estate Subject to Condition Subsequent** (“O to A for life, but if A divorces, then to O”)
         1. Limitation is placed *after the punctuation mark* signaling the end of the description of the estate
         2. Future interest: right of entry / power of termination

Grantor decides to use

* + - * 1. Language: “but if, provided that, on condition that, and however”
    1. Future Interest in Grantee / Third Party
       1. **Estate Subject to Executory Limitation** (“O to A, but if A stops farming the land, then to B”)
          1. Limitation transfers ownership to third party on the happening of an event
          2. Future interest: executory interest
  1. Future Interest
     1. Retained by Grantor
        1. **Reversion** (“O to A for life”)
           1. Grantor’s future interest following an estate that ends naturally
           2. If grantor has both reversion and possibility of reverter, he retains reversion (greater of the two)
        2. **Possibility of reverter** (“O to A as long as the land is used for a library”)
           1. A grantor’s future interest following a determinable estate
        3. **Right of entry** (“O to A; however, if the land is not used for a library, to O”)
           1. Grantor’s future interest following an estate subject to a condition subsequent
     2. Conveyed to Third Party
        1. Remainder
           1. **Contingent Remainder**

Not certain to become possessory; contingent if:

The remainder is given to an unascertained person (neither born nor identified), *OR*

Subject to a condition *precedent* other than the natural termination of the preceding estate:

Is set out within the description of a particular estate, *and*

Must be satisfied before that estate can become possessory

Limitations

Traditional: destroyed if (1) did not vest before the preceding life estate ended, or (2) merged

Modern: remainders are indestructible

* + - * 1. Vested Remainder

Certain to become possessory; any other remainders

**Absolute Vested Remainder** (“O to A for life, then B”)

Not subject to change

**Vested Remainder Subject to Divestment** (“O to A for life, then to B, but if A sells liquor on the property, then to O”)

May be destroyed by an event that occurs after the original conveyance, that can *prevent the remainder from becoming possessory*

**Vested Remainder Subject to Open** (“O to A for life, then B’s heirs”)

Divided among persons who will be born in the future

Limitation: rule of convenience – stops the limitation after death (if the remainder is split among B’s children, only includes children born between A granted title and before A’s death)

* + - 1. Executory Interest
         1. Any future interest in a third party is created by placing a limitation on an estate that will transfer ownership to a third party on the happening of a stated event
         2. **Shifting Executory Interest** (“O to A, provided that if A allows the timber to be cut, then to B”)

Follows an estate in a grantee

* + - * 1. **Springing Executory Interest** (“O to A for life, then to B 5 years after A’s death”)

There will be a gap in time between when one estate ends and another is created

* 1. Policy
     1. Effectuating grantor’s intent – recognizing that people are more willing to let go of their property if they can place restrictions on it
     2. Dead hand – someone who is long gone will have control over the actions of those who are present

**Possessory Estates**

* **Possessory Estate: Fee Simple Absolute:** 
  + The largest estate! As big as Property Law will let you own!
  + Fee: interest in land
  + Simple: ownership of unlimited duration; no known event will end it
    - Seized by government/creditor, adverse possession, natural changes
  + Absolute: no future interest exists that could cut short ownership
  + A “full” bundle of rights. The owner has the right to possess and use the property, to sell it, to give it away, to devise it by will or to leave it to heirs
  + Can be inherited, can be devised. Alienability is great for this.
  + This is the default conveyance, unless the language says otherwise.
  + Hypothetical: O conveys Blackacre to A and her heirs.
    - A has fee simple absolute. Heirs have nothing. Heirs do not hold a future interest.
    - Exclusion of all other interests, so heirs have no interest.
* **Fee Tail – DOES NOT EXIST ANYMORE**
  + To create fee tail: “to A and the heirs of his body”
  + Grantee’s lineal blood descendants no matter what
  + Would be accompanied by a future interest
  + Could be accompanied by a reversion in O or a remainder in some third party
* **Possessory Estate: Defeasible Estates** 
  + A present / possessory interest that terminates at the happening of a specified event other than the death of the current owner.
    - Person who gets the estate on the happening of that event holds a future interest.
  + There are two different metrics for the terminating event:
    - Whether future interest is in the grantor or in a third party.
    - Whether future interest becomes possessory ***automatically***, or whether the holder of the future interest simply has an ***option*** (holder needs to take another step)
    - Automatic Transfer to Grantor: When future interest reverts *automatically* to the grantor at the happening of a specified event:
      * The present interest is called the fee simple determinable.
      * Always accompanied by the future interest called a possibility of reverter in the grantor.
      * FSDPOR Frank Sinatra Didn’t Prefer Orville Redenbacher
      * Only future interest and only one that accompanies the fee simple determinable.
      * Key words: “so long as,” “while used as,” “until,” “during the time that”
      * Grantor must use CLEAR durational language
      * If condition is violated, forfeiture is automatic
      * Hypothetical*:* A gives Whiteacre to B so long as Whiteacre is used for residential purposes.
        + “so long as”
        + B has fee simple determinable. A has possibility of reverter
    - Transfer Only If Grantor Asserts Property Rights: When grantor must ***affirmatively*** *assert* his or her future interest, rather than it transferring back automatically upon the happening of a specified event:
      * Present interest is called a fee simple subject to a condition subsequent (FSSCS).
      * The future interest is called a right of entry or power of termination.
      * Key terms: “provided that,” “on condition of,” or “but if" PLUS “right of entry”
      * To A, but if X happens, grantor reserves the right to reenter and retake.
      * Clear durational language and carves out right to reenter
      * NOT automatically terminated, but it can be cut short at the grantor’s option if the condition occurs.
      * Hypothetical: *A gives Whiteacre to B so long as Whiteacre is used for residential purposes; in the event that it is not so used, A shall have a right of entry*
        + A has FSSCS
  + Note on Adverse Possession: Traditionally, one of the major differences between possibilities of reverter and rights of entry has to do with adverse possession.
    - In hypothetical above, if B does not use for residential purposes, property goes back to A, but if B living on land still and this were a fee simple determinable situation, then Grantor would prefer right of entry and not reverter
    - Courts do treat types more similarly now:
    - Laches: you slept on this interest for too long, so you can’t just come in and assert now. Like SOL. Unfair for person who has right of entry to sit on it and try to get land back way later.
    - TRADITIONAL APPROACH: DISTINCTION between possibility of reverter and right of entry: statute of limitations for adverse possession (SEE P.609)
      * For FSD/PoR: Statute of limitations starts running immediately and if holder of PoR does nothing during statutory period, title shifts back to current possessor
      * For FSSCS/RoE: Statute of limitations triggered only when holder of RoE demands possessory right from current possessor
    - MODERN APPROACH: treat PoR and RoE the same for purposes of statute of limitations; under 2 theories:
      * Apply doctrine of laches to RoE: prevents recovery when unreasonable delay in asserting legal rights unfairly prejudices another
      * Policy: even with RoE, start running statute of limitations at moment of violation of condition (concern about perpetual possibility of claim by RoE holder)

**Transfer to a Third Party**

* When a third party, rather than the grantor, acquires the estate upon the happening of the specified event:
  + The present interest is called a fee simple subject to executory limitation.
  + The future interest is called an executory interest.
* These behave exactly like fee simple determinable estates.
* Third party can still have a right of entry
  + To A, but if X event occurs, Then to B.
  + This estate will automatically be forfeited if the condition occurs. Harsh.
  + Works in favor of someone other than grantor 🡪 C
* Hypothetical*: A gives Whiteacre to B so long as Whiteacre is used for residential purposes; in the event that it is not so used, to C.*
  + B has fee simple subject to executor limitation
  + C has executory interest
  + Note: since A has conveyed both the possessory interest and the future interest, what interests does A have?
    - A has NOTHING
  + What does C have to do to get her interest? Nothing. It’s automatic. Like Fee Simple Determinable
* Executory Interest – HE DOES NOT CARE ABOUT THIS
  + Shifting executory interests cut short some interest in another transferee (i.e., not the grantor).
    - They’re called that because they “shift” the interest from one transferee to another.
  + Springing executory interests divest or cut short some interest in the grantor.
    - They’re called that because they “spring” out of the grantor’s original grant.

**Possessory Estate: Life Estates**

* Possessory or future interests that are tied to the length of a particular person’s life.
* Explicit lifetime terms (To A for Life)– never in term of years
* Of course in any life estate there must also be a future interest, because no one lives forever.
  + If the future interest is held by the grantor, it’s called a **reversion**.
  + If it’s held by a third party, the future interest is called a **remainder**.
* Doctrine of waste: puts some limitations on person who has life interest to use and not abuse the land or hurt the future interest holders. Person with life interest, think that they can discount the land, Don’t have long-term investments beyond their life. This may harm future interest possessor.
* Hypo: *O gives Whiteacre to A for life*.
  + Understood that it’s for A’s life. Pegged to A.
  + A has life estate, so after A dies, reverts back to O or O’s estate.
  + O has a reversion.
* A is free to transfer his life estate to a third party, B.
  + To B for the life of A.
  + B has what is known as a life estate per autre vie—a life estate “for someone else’s life.”
  + If B dies, then it reverts back to A
  + If B does not die, but A dies, then it reverts back to O.
  + To Madonna for the life of David Letterman. Madonna has a life estate per autre vie. Life estate measured by the life of another party.
* O to A and her heirs, then to B
  + B is not a remainder since a remainder cannot follow an estate held in fee simple absolute
* O to A for life, then to B
  + B is a vested remainder since the remainder is given to an ascertained person (B) and there are no precedent conditions (such as "if B is not married").
* O to A for life, then to B if B reaches 21, and if B does not reach 21 then to C and C's heirs
  + B and C are both contingent remainders. While B and C are ascertained persons, the condition (reaching 21) implies alternative contingent remainders for both parties.
* Hypo: *O gives Whiteacre to A for life*, *then to C forever. A dies, and then C dies.*
  + O has nothing
  + A has life estate
  + C has a vested remainder
  + Goes to C’s heirs
* Hypo: *O conveys Whiteacre to A for life, remainder C. A is alive at the time of the grant, but dies soon thereafter. C’s heir is D. Subsequently, O dies.*
  + A has life estate
  + C has remainder. Goes to D.
* Future Interest Capable Of Creation in Grantor
  + Possibility of Reverter – only accompanies the fee simple determinable FSDPOR (Frank Sinatra)
  + Right of Entry/power of termination – only accompanies fee simple subject to condition subsequent (Bobby Brown)
  + Reversion – Catchall. Arises whenever grantor has something leftover after conveying a present estate. If convey anything less than fee simple absolute, then likely something leftover.
* Future Interest Capable of Creation in Transferees
  + Remainders – waits for the proceeding estate to end
    - REMAINDERS NEVER FOLLOW DEFEASIBLE FEES
    - To A for Life then to B.
    - B has a remainder.
    - Either Contingent or Vested!
      * Vested: Created in a known taker AND not subject to condition precedent
        + To A for life then to B.
      * Contingent: Created in yet unknown takers OR subjected to conditions precedent
        + To A for life, then to B’s first child.
        + B has no children. B has contingent remainder.
        + To A for life and then if B graduates from college, to B.
        + B is still in high school. B has a contingent remainder.
  + Executory Interests
* **Contingent Remainders**:
  + There are two ways in which a remainder can be contingent:
  + The remainder will only take effect upon the happening of an event that is not certain to happen (the condition precedent).
    - *A gives to B for life, then to C if she reaches 21, otherwise to D*.
    - B has a life estate. C has a contingent remainder, because it’s a third party, it’s not A, and it’s contingent, because C might die (might not make it to 21). D has the same, and also depends on whether C reaches 21.
    - C reaching 21 is the condition precedent.
  + The remainderman (person holding the remainder) is currently unknown (might never exist).
    - *A gives to B for life, then to C’s children. C has no children at the time of the conveyance.*
    - B has life estate. C’s children ownership is contingent on C’s children being born. If B dies and no C children born, reverts to A.
  + Hypo: *A give to B for life, then to C and her heirs if C survives B, otherwise to D and his heirs*
    - *B has a life estate. C has a contingent remainder. D has contingent remainder*
  + Hypo*: A gives “to B for life, then to C and her heirs if C attains the age of 21 before B dies”*
    - B has life estate. C has a contingent remainder.
  + Traditional rule was destructible
  + Modern law: they are not treated as destructible
  + To be indestructible, means that interest can be reverted to grantor and back to remainderman down the road.
    - *O to A for life, then to B if she has been elected president of the United States*.
    - A has life estate. B has contingent remainder.
    - B becomes President before A dies, A keeps property.
    - Traditional rule was that the remainder would be destroyed when A died.
    - Modern rule: Preserves remainder. When A dies, it goes back to O. O has reversion. Then, 10 years down the road, B is elected President, then it goes back to B.
    - B has fee simple absolute if everything above happens in right order.
    - If A dies, reverts to O. B not President. What does O have? Defeasible Fee.
  + **Rules that limit Contingent Remainders** 
    - **Now abolished: Rule of Destructibility:** Contingent Remainder will be destroyed if it was still contingent when the preceding estate ended.
      * To A for Life, if B reaches 21, then B
      * A has died leaving behind B only 19yo, at common law, B’s future interest would be destroyed.
    - **Now abolished: Rule in Shelley’s Case** 
      * Historically: To A for Life then to A’s heirs
      * A is alive
      * Present and future interest merge giving A a fee simple absolute.
      * Will promote alienability
      * BUT NOW: A has a life estate. A has a contingent remainder.
      * Contingent because we don’t know heirs until A died.
    - **STILL SURVIVES TODAY: Doctrine of Worthier Title** 
      * Applies when O who is alive tries to create a future interest in his heirs.
      * O to A for life then to O’s heirs.
      * If no doctrine of worthier title, then A has life estate and O’s heirs have a contingent remainder
      * If doctrine of worthier title exists, then contingent remainder in O’s heirs is VOID. Instead, A has a life estate and O has a reversion
      * Exists to promote free transfer of land – Alienability

**Vested Remainders (They have in some sense become legally owned.)**

* NOT CONTINGENT. CREATED IN KNOWN TAKER NOT SUBJECT TO CONDITION PRECEDENT.
* Absolutely vested remainders – not subject to change. There is no question that the designated person will get it. Taker is known.
  + *A conveys to B for life, then to C for life, then to D and his heirs*.
  + B has a life estate. C absolute vested remainder (to become a life estate). D absolute vested remainder in fee simple.
  + D’s interest might never become possessory, but they have that future interest now for sure, so that’s why not contingent.
* Vested remainders subject to open – remainder that may be divided among persons who will be born in the future.
  + Vested in a group or class where at least one member is eligible to take.
  + *A gives to B for life, then to B’s children. B has one child, C, at the time of the devise.*
  + B has a life estate, C has a vested remainder subject to open.
  + The Rule of Convenience: At the time at B dies, they’re going to close the clasp. B’s not going to have anymore kids.
  + Class is closed when no one else can join. Closes whenever any member can demand possession. (Like when B dies).
  + Class is open when others can still join.
* Vested remainders subject to divestment – grant contains a condition subsequent that can result in divestment.
  + Condition subsequent: Some event that if it occurs will take away interest
  + *A gives to B for life, then to C, but if C marries then to D.*
  + B has a life estate. C has vested remainder subject to divestment
  + D has a contingent remainder
* Contingent Remainders v. Remainders Subject to Divestment
  + Compare:
  + *A gives to B for life, then to C, but if C operates a tavern, then to D.*
    - V Re Subj to Divest
  + *A gives to B for life, then to C if C has never operated a tavern, otherwise to D.*
    - Contingent remainder
  + Vested remainder: They are going to get the interest, but can be taken away if that person does something
  + Contingent: might never get it. Something that might never happen.

|  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| |  |  |  |  | | --- | --- | --- | --- | | **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,” “until,” “unless” | 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 | | |

|  |  |  |
| --- | --- | --- |
| **Bundle of Sticks** | **Life Tenant (LT)** | **Remainderman (Rman)** |
| Possession | √ | X |
| Use | √ but no waste | X but they can inspect |
| Alter/Destroy | √, maybe if it’s not waste | X |
| Enjoy Fruits | √ | X |
| Transfer | √ | √\*Future interest can be sold |

1. The Doctrine of Worthier Title:
   1. *O to A for life, remainder in the heirs of O* becomes *O to A for life, remainder in O*.
   2. Cuts out the heirs. Goes right to O instead of O’s heirs.
   3. Would try to avoid estate taxes by granting to their heirs during life instead of leaving it upon their death.
   4. Modern policy justification: You can only determine heirs at time of death, so heirs of O’s is nobody.
   5. Could say reversion: O to A for life, reversion in O.
2. *Shelley’s* *Case*
   1. *O to A for life, remainder to A’s heirs* becomes *O to A for life, remainder in A*
   2. What does A have? A has a fee simple
3. Trusts
   1. The trustee holds legal title to the property and manages it for the benefit of the beneficiaries, who have legally enforceable rights against them
   2. Anytime anyone has a legally enforcement right (like the beneficiary), then trustee has duty to beneficiary (likely fiduciary duty)
   3. Person who sets up the trust is the settler.
4. **Interpreting Ambiguous Conveyances: The Presumption Against Forfeiture**: In interpreting ambiguous conveyances, courts rely on two somewhat conflicting policies:
   1. Seek to implement the intent of the grantor
   2. Employ a presumption against forfeiture—that is, a presumption against finding future interests.
      1. Presumption in favor of covenants and against conditions
      2. Why? Disfavor dead hand control. Intent
   3. Future interest is a forfeiture, because it transfers from one person to another.
   4. Covenant: A conveys Blackacre to B provided that the property is used for residential purposes
   5. Condition: A conveys Blackacre to B so long as the property is used for residential purposes
   6. Covenant vs. condition
      1. If covenant, remedy is likely money damages or injunction
      2. If condition, remedy is likely to transfer ownership (so long as, fee simple determinable likely)
5. ***The Doctrine of Waste: A Problem for Life Estates*** *A conveys Whiteacre to “B and then to C*”
   1. Permissive waste: life tenant fails to take appropriate steps to preserve or protect the property (e.g., *necessary repairs*).
   2. Affirmative waste: life tenant intentionally or negligently causes permanent injury to the property.
   3. Ameliorative waste: life tenant *increases* the value of the property.
6. ***Wood v. Board of County Commissioners (1988) p. 616*** 
   1. **Facts.** Woods (Appellants) conveyed land to Fremont County by warranty deed for construction of a county hospital. County built a hospital and operated it, then sold the hospital to a private company, that moved the operation and put premises up for sale. Appellants now contend that the language of the deed created either a fee simple determinable or a fee simple subject to condition subsequent with a right of reversion if the land ceased to be used as a hospital. Possibility of reverter is automatic. Right of entry requires some action so fee simple subsequent
   2. **Issue.** When a conveyance is ambiguous and the intent of the grantor is unclear, is a presumption against the existence of a future interest valid?
   3. **Held.** Yes. Disputed language in a deed is reviewed to determine the intent of the parties from the plain language in the deed considered as a whole.
      1. There is presumption every conveyance of real estate passes all the estate of the grantor unless intent to pass less is expressly stated or is necessarily implied in the terms of the grant
      2. The plain language in the deed does not clearly state that the estate conveyed will expire automatically if the land is not used for the stated purpose. It does not evidence an intent of the grantors to convey a fee simple determinable, and so no fee simple determinable was created when the land was conveyed.
      3. There is no limiting language in the deed that would evidence an intent not to convey a fee simple determinable.
      4. Further, the plain language of the deed does not clearly sate an intent of the grantors to retain a discretionary power to renter the land if the land ceased to be used for the stated purpose. So, appellants did not convey a fee simple subject to a condition subsequent.
      5. Privileging rules against forfeiture against intent of parties. Intent less important.
   4. **Discussion.** When the intent of a grantor is unclear, courts will attempt further the alienability of property by presuming against the existence of a future interest.
7. ***Edwards v. Bradley (Va. 1984)***
   1. Appellant heir challenged decision that under will at issue, life estate was devised to appellee beneficiary with remainder to her six named children in fee simple.
   2. **Issue**: Whether by certain provisions in her will a testatrix had devised a fee simple estate or a life estate in real property therein described.
   3. **Decision**: Affirmed. Court found that testatrix intended beneficiary to have the use and benefit of the real estate free of the claims of her creditors.
      1. **What estate did Margaret Edwards have?**: Fee Simple or Life Estate 🡪 If fee simple, Bradley out of luck, but if life estate, then will go to her heirs, including Bradley
      2. **Court decides Margaret had a life estate. Grantor was Viva Parker Lilliston.**
      3. Used fee simple in other parts of will, but absent from section regarding Margaret
      4. Therefore, intent of grandmother trumps alienability
      5. Although will did not expressly designate beneficiary's children as remaindermen, conditional limitation to them indicated that they were intended to take the farm when their mother's interest terminated, whether by violation of the conditions or otherwise.
      6. Trial court properly ruled that the beneficiary acquired a life estate in the property with remainder at her death in fee simple to her six children
8. **The Doctrine of Waste: A Problem for Life Estates**
   1. *A conveys Whiteacre to “B and then to C*”
   2. Permissive waste: life tenant fails to take appropriate steps to preserve or protect the property (e.g., *necessary repairs*).
   3. Affirmative waste: life tenant intentionally or negligently causes permanent injury to the property.
   4. Ameliorative waste: life tenant *increases* the value of the property.
9. Rule Against the Creation of New Estates
   1. Stability. Confidence that investment in next generation will last. Encourages future planning.
   2. Simplicity. System is already complicated, so encourages more transfers, reducing ambiguities lowers transaction costs
10. ***Johnson v. Whiton (Mass. 1893) p. 627*** 
    1. **Synopsis**: A person cannot create a new type of inheritance by will.
    2. **F:** A will gave to a granddaughter and her heirs on her father’s side property. She attempted to convey the property to another, but the party did not think she could convey a fee simple absolute.
    3. **I:** When a testator puts words of limitation that restrict the descent of the property, will those limitations be valid?
    4. **H:** No. The clause in the will conveys legal title. The words limiting the conveyance to heirs on her father’s side are words of limitation; it restricts the intestate descent of property. A person cannot create a new kind of inheritance, such as the testator attempts to do here. The words of limitation will be stricken, and the granddaughter will be deemed to have a fee simple absolute.
    5. **Discussion.** When a person tries to convey property in a way that does not conform to one of the traditional estates, the limitations in that conveyance will be invalid. This is to prevent restraints on alienation.
11. **Future Interests and the Rule Against Perpetuities, p. 626-41**

**The Common Law Rule Against Perpetuities**

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.***
   1. Some kinds of future interests are void if there’s a chance that they vest 21 years after death of measuring life.
   2. The interests that might not vest to protect property from dead hand control and make property more conveyable. Prevents future interests (traditionally contingent remainders and executor interests) from vesting after a certain amount of time.
   3. Can be interest through wills and trusts, but can also be options.
2. **Three Steps to any Rule Against Perpetuities (RAP) problem:**
   1. **Identify interests subject to the rule.**
      1. Only some interests are subject to the rule
   2. **Test the interest to see if it may vest, if ever, too far into the validating life**
      * 1. MAY vest. Just the possibility that the interest MIGHT vest too far into the future
        2. So, easier to look at that which might invalidate instead of validate
      1. Identify a validating life.
      2. Apply the perpetuities period (starting at the time the interest was ***created***).
   3. **Find a remedy**
      1. Almost always strike offending language and leave the rest
3. **Step 1: Identify interests subject to the rule.**
   1. Only categories susceptible to RAP:
      1. Contingent remainder
         1. “O to A for life, then to B if B graduates”
      2. Executory Interest
         1. “O to A, so long as used for hospital, then to B”
      3. Vested remainders subject to open
         1. “O to A for life, then to A’s children”
         2. (He has one son, but unborn children, the interest is contingent and not vested)
   2. Exempted from RAP:
      1. Future Interests in O
      2. Future Interests That Must/Has Vested
         1. Vested Remainder Absolutely Vested
         2. Vested Remainder Subject to Divestment
            1. (You get the interest. It vests, but you might lose it. While a contingent remainder: you might never get it- which is why contingent remainder is not exempt here)
      3. Future interests that the original grantor might hold
         1. Reversions
         2. Possibility of reverter
         3. Rights of entry
         4. Policy rationales? English views all these non-fee-simple grant as carved out of estate. They were still holding onto the real thing. It wasn’t a cloud but a string. Policy rationale harder to see. Some reason that states are getting rid of RAP is to encourage trusts.
4. **Step 2: Testing the Interest: (a) Identifying a Validating Life.**
   1. A validating life is any person who is:
      1. **Alive *at the time the interest is created*, AND**
      2. **Named in the conveyance or who can be implied in the conveyance**
   2. *O grants to A, but if A ceases to use the property for gambling purposes, to the grandchildren of B.*
   3. If they’re alive right now, then they’re given a letter. If there is no letter, then they are typically not alive, so… O and A
      1. If the children of A and grandchildren are alive, then they’re validating life.
5. **Step 2: Testing the Interest: (b): Applying the perpetuities period.** 
   1. When does the interest vest?
      1. **Executory interests** vest when the contingency occurs.
         1. Consider: *O to A so long as used for gambling purposes then to B*
         2. A has a fee simple determinable; B executor interest
         3. Contingency: not used for gambling purposes
      2. **Contingent remainders** vest is when the condition that makes it a contingent remainder disappears.
         1. Consider: *O to A for life, then to B provided that B finishes law school.*
         2. A has a life estate. B has a contingent remainder. Contingency is finishing law school.
         3. B’s interest can vest before B can take possession of the land if B finishes law school even if A is alive. So B’s interest vested.
         4. If A dies before B finishes law school, so if contingent remainders are not destroyed, then it reverts to O subject to B’s remainder, and then it springs back to B if B finishes law school. (if not, then B’s interest destroyed)
      3. For **vested remainder subject to open**, it depends on the nature of the class.
         1. Consider: *O to A for life, then to A’s grandchildren*
            1. A has life estate. Grandchild has vested remainder subject to open, because grandchild has to wait until other grandchildren born. Contingent remainder is contingency of other grandchildren’s existence.
         2. If the class **closes** on A’s death, no problem for RAP.
            1. Vested remainder not subject to open. So therefore, whatever grandchildren were alive when A died.
            2. Rule of Convenience: the class closes at the time someone in the class is able to take possession
         3. If the class is **open** (i.e., A had another child after the conveyance)…
            1. Under the all or nothing rule, the whole class gift to the grandchildren is invalidated.
            2. Under the vertical separability approach, the gift is upheld for the grandchildren who are alive at the creation of the interest.
         4. Apply the RAP:
         5. *O to A for life, then to A’s grandchildren*
            1. Identify the validating lives: O, A, A’s children/grandchildren that are alive at the time of this conveyance
            2. A has another kid. All validating lives die. New child has child 21 years after death. Does not count
         6. After O and A dies, 21 years pass, then A’s child births child (A’s grandchild), then that grandchild will not have an interest. Fertile octogenarian rule.
         7. If someone is pregnant, then adds on another 9 months.
         8. Assume A is male. A conceives the day
   2. Wait and See Approach
      1. 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.
      2. The modern approach: Courts will *wait* until the end of the perpetuities period *and see* whether the interest fails to vest
6. **Step 3: Finding The Remedy**
   1. The basic rule: strike out the offending language.
      1. *O to A for residential purposes, then to B*.
      2. Becomes
      3. *O to A for residential purposes.*
   2. *Cy Pres* (equitable reformation)
      1. *O to A for life, then to the first child of B to reach 25 years of age.*
      2. Becomes
      3. *O to A for life, then to the first child of B to reach 21 years of age.*
7. **Uniform Statutory Rule Against Perpetuities (USRAP)**
   1. Apply the common law RAP. If it’s satisfied, then so is 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.”
8. **Abolition of the rule**
   1. Some states have abolished the rule entirely, created extremely long perpetuities period, or permitted dynasty trusts.
   2. I wonder why?
   3. *Lucas v. Hamm* - 56 Cal. 2d 583 (1961).
   4. Attorney not liable for malpractice for violating the rule against perpetuities in a will, because reasonable lawyers could make the same mistake.
   5. “Few, if any, areas of the law have been fraught with more confusion or concealed more traps.”
   6. But now you understand it!

**To A for Life then to A’s children**

**A is alive but no children alive.**

**Step 1: This is a contingent remainder, because waiting for a taker to be ascertained.**

**Step 2: What has to happen for future interest holder to take? A must die leaving a child**

**Step 3: Find a measuring life: A’s life is central**

**Step 4: Will we know within 21 years of A’s death if there is a taker or not? Yes we will know. We will know the instant of A’s death.**

**So OK. Does not violate RAP.**

1. **Concurrent Ownership, p. 663-82**

**Three Forms of Concurrent Estates:**

1. *Joint Tenancy – 2 or more own with the right of survivorship*
2. *Tenancy by the Entirety – Marital interest between married partners with the right of survivorship*
3. *Tenancy in Common – 2 or more own with no right of survivorship*
4. **Tenancy in Common – when in doubt, construe in favor of tenancy in common**
   1. Who may own: anyone (can own entirety of the parcel)
   2. Nature of interest: undivided but not necessarily equal
      1. Can own separate proportion of interest
      2. But has right to possess the whole no matter the size of the respective share
      3. Why matter? If you rent, you can split rental income by proportion, same for selling
   3. Formalities of creation: none
      1. Not hard. You can just convey (O conveys to A and B as tenants in common, A with 40% of interest)
   4. Rights of survivorship: none
      1. When one owner dies, person’s interest goes to his/her survivors (not to the other tenant)
   5. Transferability of interests: transferable without co-owner consent
   6. Partition: judicial or voluntary partition
      1. One files suit against the other. Court has the option of partitioning the property in two ways:
         1. Physically partition or Force a sale to divide up the property
5. **Joint Tenancy** 
   1. Who may own: anyone
   2. Nature of interest: undivided; equal interests
   3. Formalities of creation:
      1. Four unities- Time, Title, Interest, Possession
         1. Time: Take their interest at the same time
         2. Title: By the same Title, in the same instrument
         3. Interest: With identical interests
         4. Possession: With the right to possess the whole
      2. In addition!: Grantor must clearly state the right of survivorship.
      3. Courts will not permit O to transfer to O and A. Instead, O will need to sell to B and then back to O and A 🡪 straw buyer
   4. Rights of survivorship: YES
      1. If A and B are joint tenants, and A dies, then B gets entire interest and A’s heirs get nothing.
      2. If A, B, C joint tenants, and C dies, C’s interest splits equally between A and B
      3. NOT DIVISABLE OR DESCENDABLE
   5. Transferability of interests: transferable without co-owner consent (this is severance)
      1. Severance: Joint tenant destroys right of survivorship, so it becomes a tenancy in common.
      2. You do not need to ask for permission, so either person can destroy at any time
      3. A and B joint tenancy, B sells to C, now A and C are tenants in common
      4. A, B, and C joint tenants, and C sells to D, then A and B are still joint tenants, but D is tenant in common with A and B. So if B dies, then his interest goes entirely to A (A has 2/3 of ownership, and D has 1/3)
      5. If A and B joint tenants, then B sells to C and then transfers it back to B, then joint tenants, and A will never know and have no survivorship
   6. How do you sever a joint tenancy? Principally by sale. Joint tenant can sell or transfer her share during her lifetime. She is even allowed to do so secretly. One joint tenant’s sale or dispossession of her share, severs the joint tenancy as to the seller’s interest. So the Buyer is a Tenant in Common.
      1. Suppose O conveys Blackacre to Phoebe, Ross, Monica as joint tenants with the right of survivorship🡪 Joint tenancy. Each owns one third plus the right to enjoy the whole. Phoebe sells to Chandler. What is the state of the title? Phoebe’s act severs the joint tenancy as to Phoebe’s interest. Ross and Monica hold 2/3 as joint tenants. Chandler holds 1/3 as their tenant in common.
         1. Ross now dies, leaving behind his heir Rachel. What is the state of the title now?
         2. Monica takes Ross’s share, meaning Monica now holds 2/3 with Chandler who holds 1/3.
         3. Monica and Chandler are tenants in common.
         4. Rachel takes nothing.
   7. Partition: Means available for co-owners to dissolve their relationship.
      1. Judicial or voluntary partition
      2. Partition in kind is a physical division by the court of Blackacre. Best for rural or agricultural
      3. If in the best interests of all parties, force sale, proceedings are divided up proportionately.
6. **Tenants by Entirety** 
   1. Who may own: ONLY MARRIED PARTIES
   2. Nature of interest: undivided; equal interests
   3. Formalities of creation: Four Unities, plus marriage
   4. Rights of survivorship: Indestructible
      1. In comparison to joint tenants
      2. Neither tenant acting alone can defeat the right of survivorship by trying to sell to another.
   5. Transferability of interests: cannot transfer without spousal consent
   6. Partition: only upon divorce
   7. Cant partition or encumber without other spouse’s consent, so creditors would be screwed
   8. If married couple, need to put tenants by entirety to get it. Default is joint tenants.
7. Community property: anything you’ve owned during your marriage is marital community property
8. ***Olivas v. Olivas (1989)*** 
   1. **SYNOPSIS**: Respondent husband challenged the district court's final order dividing community property in a divorce action that was filed by petitioner wife.
   2. **DISCUSSION**
      1. Why can’t he just demand her to pay rent? Because Tenants in Common, so they both have undivided right to possess the entire property (so no rent owed)
      2. Ouster: When one cotenant is forced out of property unlawfully, then person may owe rent
      3. **Rule:**When a spouse departs a residence held as community property due to marital friction, a constructive ouster is effected.
      4. **Constructive Ouster:** It does exist, but in this case, he left to live with his girlfriend instead of his wife, so not entitled to compensation
         1. Substantial evidence that husband's purpose in leaving the community residence was to live with a girlfriend and his departure was the reason that the wife filed for a divorce.
         2. Long delay (several years) between leaving property, divorce, and case
      5. Husband maintained that after divorce, he used his salary to pay taxes (would’ve been in favor of constructive ouster) and community owed him for such payments, but court held he was not entitled to compensation because he failed to meet his burden of proof that he used his salary to pay the taxes.
      6. As far as awarding compensation for missing equipment, the court ruled that there was no bailment in the wife for missing tools and that other alleged missing equipment was awarded to the wife and so she bore the loss, or that the evidence was lacking to establish the claim.
      7. Further, the court found that although the husband may have increased the value of the wife's property and would ordinarily be entitled to a credit, the value of the increase was de minimus and failed to justify the district court's reconsideration.
   3. CONCLUSION: court affirmed the property distribution as ordered by the district court.
9. **Hypothetical** 
   1. A woman has always lived with her son who has multiple disabilities but is able to get around and take care of himself with some assistance from a hired caretaker. The woman dies and leaves the house to her son and her daughter as tenants in common. The daughter wants to continue to let her brother continue living in the house but wants to get rent from him, without partitioning.
   2. Assume that her brother has enough money to pay one-half of the fair rental value, and that the house is not big enough to be occupied by the brother and sister, since she has a partner and two children.
   3. Should the daughter be able to demand rent?
10. **Hypothetical** 
    1. A woman lives with an abusive husband who has struck her several times. The wife moves out after suffering battery at his hands. The husband asks her to return, but she refuses. They are separated for two years, then divorced. The wife sues for one-half of the fair rental value of the house during the two-year period. Is he obligated to pay one-half the fair rental value to his wife?
       1. Yes, this is an actual ouster, because physical abuse threat like physically kicking out.
          1. Actual ouster might have to be an intentional act.
       2. Yes, this is a constructive ouster, because physical abuse threat enough to prove she cannot go back to the house. Impractical.
       3. No, she waited 2 years, and she had no intent to return so abandoned
11. **Hypothetical** 
    1. Same basic facts as problem one, except that the wife throws the husband out of the house rather than fleeing. Can the husband demand rent?
       1. Yes, actual ouster, because she physically forced him out.
       2. No, if she got a restraining order, he has no legal right to be there? Unclear. Ousted by the state. Then he can’t sue for rent.
12. ***Carr v. Deking (1988)*** 
    1. **Summary:** In a tenancy in common, one co-tenant makes a lease with a third party, unknown to and against the wishes of the co-tenant.
    2. **Synopsis of Rule:** In a tenancy in common, a cotenant may lease his interest in the common property to a third party without the consent of the other tent.
    3. **Facts:** Joel Carr (P) and his father George Carr owned a parcel of land as tenants in common. They leased land to Richard Deking (D) on a year-to-year oral agreement over several years. One year, P informed D that he wanted cash rent, but D did not agree. D and George Carr entered into a 10-yr lease, unknown to P. P never consented to the lease and did not authorize his father to act on his behalf. P informed D that his lease had expired, but D claimed possession through the lease with George Carr. P seeks to eject D; D seeks partition.
    4. **Issue:** In a tenancy in common, can one co-tenant enter into a lease with respect to his own undivided one-half interest in the property without the consent of the other co-tenant?
    5. **Held.** Yes. Each tenant in common of real property may use, benefit, and possess the whole property, subject only to the equal rights of the co-tenants. A co-tenant may lease his own interest in the common property to a third party without the consent of the other tenant, even if the co-tenant does not join in the lease. Nonjoining cotenant is not bound by the lease. The third party becomes a tenant in common with the other co-tenant for the duration of the lease. The nonjoining tenant may not demand exclusive possession against the lessee; he may only demand co-possession.
       1. Here, P may not eject D from property because lease is valid. Partition is the proper remedy.
       2. Why is D seeking partition? Because if he loses under P’s theory, then he gets nothing. At least if he wins on this claim, he at least has something.
    6. **Discussion.** Co-owners of real property have the right to lease the land without the knowledge or consent of the other co-owners. When co-owners cannot agree on the use of the property, the court may order a partition, which is a division of the land
13. ***Tenhet v. Boswell (1976)*** 
    1. **F:** Johnson and P owned property as joint tenants.  Without P’s knowledge, Johnson leased to D with an option for purchase.  Johnson died shortly after.  Upon death, P, believing to have been a joint tenant, then sought sole ownership of the property.  P sued D to have his lease agreement invalidated and lost at trial.
    2. **R:** A joint interest is one owned by two or more persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy.”
    3. **Issue 1:** Whether when a joint tenant leases his interest in the joint tenancy property to a third person for a term of years, and dies during that term, the lease does not sever the joint tenancy, but expires upon the death of the lessor joint tenant.
       * + 1. Did he create a severance? He leased his interest in the property to someone else, so he only had future interest. If severance, then right of survivorship cannot kick in, and lease will be valid for tenant.
       1. Yes.
          1. Option 1: Lease by a joint tenant to a third person effects a complete and final severance of the joint tenancy
          2. Option 2: Temporary severance view: as long as lease is in effect, there is a temporary severance, but it reverts to the original owner, and they go back to being joint tenants together. So, if he dies BEFORE lease ends, then it’s still severed, and it stays severed.
          3. Option 3: Lease does not sever interest
          4. The stated rule “does not abrogate the common law rule that four unities are essential to an estate in joint tenancy:  unity of interest, unity of time, unity of title, and unity of possession.”
          5. Presumption against forfeiture
          6. “It is our opinion that a lease is not so inherently inconsistent with joint tenancy as to create a severance, either temporary or permanent.”
          7. Johnson extinguished the joint tenancy through his own actions; and therefore the tenancy is no longer a joint one.
          8. Johnson had a right to alienate his interest during his lifetime under common law.
          9. A joint tenancy is created only with specific intent. Severing such a joint tenancy would should require more than a unilateral lease by one of the joint tenants.
    4. **ISSUE 2:** Whether P may receive sole ownership of the property “unencumbered by the lease.”
       1. Yes.
          1. “By the very nature of joint tenancy … the interest of the nonsurviving joint tenant extinguishes upon his death.”
          2. Lease valid only where the interest of the lessor is valid.  Therefore, the lease expires upon Johnson’s death.
          3. “The right of survivorship is the chief characteristic that distinguishes a joint tenancy from other interest in property.”
          4. The correct rule is that a joint tenant may certainly lease during his lifetime, but the lease is thereafter terminated when the lessor joint tenant dies.
          5. Not doing so would contravene the other joint tenant’s right to survivorship in executing the joint tenant agreement in the first place.
14. ***Kresha v. Kresha (1985)*** 
    1. Synopsis: P mother brought a forcible entry and detainer action against D son to obtain possession of certain land. County court dismissed action and District Court affirmed.
    2. F: Court found that mother was co-owner of land in question with her husband, the father. Father, without mother's consent, leased land to son for 6yr. When mother learned of lease, she filed an action for separate maintenance against father and awarded land. Mother attempted to terminate lease, but son continued occupancy. Mother filed instant forcible entry and detainer action, which the lower courts dismissed.
    3. Opinion:
       1. On appeal, mother contended lease was not valid as to the father's interest in the land, which the father had at the time of the lease's execution.
       2. Court disagreed, holding one of several tenants in common was entitled to lease his own interest to a third person.
       3. Mother also contended that judge who dissolved marriage considered the son's leasehold interest when distributing the property.
       4. Court held mother took property subject to lease because she knew at the time of acquisition that the property was encumbered by the lease
    4. Holding: Affirmed district court, affirmed county dismissal of the forcible entry and detainer action.
    5. Kresha v. Tenhet: In Kresha, tenants in common, so right of survivorship. In Tenhet, joint tenants
15. **Marital Property, p. 688-93**
16. Under traditional English common law
    1. An adult unmarried woman was considered to have the legal status of **feme sole**
       1. *femme seule*, 'single woman'
       2. Had right to own property and make contracts in her own name.
    2. A married woman had the status of **feme covert**.
       1. *femme couverte*, 'covered woman'
       2. Not recognized as having legal rights and obligations distinct from those of her husband in most respects. Instead, through marriage a woman's existence was incorporated into that of her husband, so that she had very few recognized individual rights of her own.
       3. A married woman could not own property, sign legal documents or enter into a contract, obtain an education against her husband's wishes, or keep a salary for herself. If a wife was permitted to work, under the laws of coverture she was required to relinquish her wages to her husband. In certain cases, a wife did not have individual legal liability for her misdeeds, since it was legally assumed that she was acting under the orders of her husband, and generally a husband and a wife were not allowed
17. Married Women’s Property Acts
18. Majority Rule: Separate Property/Equitable Distribution
    1. During Marriage
       1. Each spouse owns whatever he or she owned prior to the marriage, plus any individual property acquired during marriage (i.e., wages).
       2. They might *choose* to share, but they don’t have to
    2. Upon Divorce
       1. Equitable distribution kicks in
       2. A judge will divide all property, both owned individually and shared
          1. Court may consider such factors as "substantial contribution to the accumulation of the property, the market and emotional value of the assets, tax and other economic consequences of the distribution, the parties' needs, and any other factor relevant to an equitable outcome."
          2. Fairness is the prevailing guideline the court will use.
          3. Alimony payments, child support obligations and all other property will be considered.
          4. Even non-tangible contributions such as a spouse's domestic contributions to the household will be taken into account, whether that spouse has anything titled in their name or not. A spouse who has made non-tangible contributions may claim an equitable interest in the marital property at divorce.
          5. 20 States have adopted: Uniform Marriage and Divorce Act §307 (UMDA §307) also allows: "the duration of the marriage, and prior marriage of either party, antenuptial agreement of the parties [which is the same as a prenuptial agreement or premarital agreement], the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties, custodials provisions..." etc. Marital misconduct is not a factor in the decision-making process.
    3. At Death
       1. Many states have a statutory forced share for the surviving spouse.
       2. If no will is written, the spouse will almost always get something, if not the entire estate.
19. Minority Rule: Community Property
    1. Nine states have what is called a community property approach: California, Arizona, Idaho, Louisiana, Wisconsin, New Mexico, Texas, Nevada, and Washington.
    2. In those states, the earnings of either spouse during the marriage are *shared equally*.
    3. What counts as community property? Everything except
       1. Property brought to the marriage, and
       2. Property received by gift, devise, bequest, or inheritance
    4. Upon Divorce
       1. Most community property states have the same equitable distribution rule as the separate property states discussed above. Others give each spouse his or her separate property, plus half of the community property.
    5. At Death
       1. There’s no reason for a statutory forced share in these states, because each spouse already owns half of the community property
20. Hypothetical One: ***In re Graham* (Colo. 1978)**
    1. Anne and Dennis Graham get married. Anne works throughout the marriage, which allows Dennis to go to school part-time over 3.5 years of the marriage. He earns a B.S. in Engineering and an MBA. Anne contributes 70% of the financial support throughout the marriage, and also does the bulk of the housework.
    2. By the time they divorce, Dennis has an executive position with a large corporation. Alimony is not a possibility. Should his increased earning power count as a marital asset?
       1. Cost of housework, cost of loans,
       2. Marriage, wasn’t doing this for money, nothing.
       3. Actual holding: degree/education not marital property subject to equal distribution.
       4. **Reasoning:** There are necessary limits upon what may be considered property; one definition is "everything that has an exchangeable value or which goes to make up wealth or estate."
          1. In deciding if something in this category, can look to whether it can be assigned, sold, transferred, conveyed, or pledged, or whether it terminated on death of the owner.
          2. Here, the degrees/education satisfy none of the requirements of property.
          3. A spouse who provides financial support while the other spouse acquires an education is not without a remedy; when there is marital property to be divided, such contribution to the education may be taken into account by the court.
          4. Here, no marital property had been accumulated.
       5. **Dissent:** The most valuable asset acquired by either party during this six year marriage was the husband's increased earning capacity, which resulted from wife's income. She invested in his education. Equity demands that courts seek extraordinary remedies to prevent extraordinary injustice. If they had remained married longer and accumulated marital property, there would be no problem.
21. Hypothetical Two: ***Elkus v. Elkus* (N.Y. App. Div. 1991)**
    1. Frederica Von Stade and her husband Peter Elkus are married for 17 years, have two kids. She goes from making $2,250 annually as an opera singer to $621,878. He acts as voice coach, photographer, primary parent of two children.
    2. Peter argues that he is entitled to equitable distribution of her future earning capacity because her career/celebrity status is property.
    3. **Held.** Reversed, to the extent D’s contributions led to increase in value of P’s career, this appreciation was a product of the marriage and subject to equitable distribution. Things of value acquired during marriage are marital property even though they may fall outside the scope of traditional property concepts. The statute does not mandate that the thing in question be transferable, assignable, or salable.
    4. The enhanced skills of an artist such as P, albeit growing from an innate talent, may be valued as marital property subject to equitable distribution.
    5. The nature and extent of the contribution by the spouse seeking equitable distribution, rather than the nature of the career, should determine whether it is marital property.

**V. TRANSFERRING PROPERTY INTERESTS**

1. **Leaseholds: Conflicts about Rent, p. 770-82**
2. Traditional notion of a lease: transfer of a property exchanging possession for payment.
   1. Covenants were *independent*
   2. Leases contain *no implied duties*
3. Modern notion of a lease: a contract
   1. Covenants may be *dependent*
   2. May include implied terms like warranty of habitability
4. Trend from considering leases in property lens to contracts
5. Covenants were independent 🡪 went away to some extent
6. Leases had no real implied duties on landlord side, but contract model implies some duty
   1. Implied warranty of livability/habitability
   2. Implied
   3. Residential leases – cannot
   4. Commercial leases – can contract around some of these background rules
   5. Why? Commercial actors are more sophisticated parties, so equal bargaining power
7. Four types of tenancy:
   1. Term of Years lease:
      1. Length of a term of a year’s lease can be any amount of time.
      2. Up whenever agreed to.
      3. Landlord holds a reversion (means they’ll get it back )
      4. Term of Years Lease over 1 year must be in writing – STATUTE OF FRAUDS
   2. Periodic lease:
      1. Length can be any amount of time, but difference between first and second lease is that this one automatically renews
      2. Continues for successive intervals until proper notice is given.
      3. Terminated by: Notice by either party. Notice must be given to terminate a periodic tenancy. Notice must be given at least equal to the length of the period itself unless the parties otherwise agree (like in the lease) – except for year or greater (6 mon)
      4. To T for month or month OR year to year OR week to week
   3. Tenancy At Will
      1. Length: Any specified period of time
      2. Terminated by: Choice of either party, without notice
   4. Tenancy At Sufferance
      1. 🡪 Happens when person who is rightfully in possession stays on after lease has terminated.
      2. Possession is 9/10th rule, so presumption
      3. Online definition: a "hold-over" tenancy after a lease has expired, but before the landlord has demanded that the tenant quit (vacate) the premises. During a tenancy at sufferance the tenant is bound by the terms of the lease (including payment of rent) which existed before it expired. The only difference between a "tenancy at sufferance" and a "tenancy at will" is that the latter was created by agreement.
8. No matter which type of lease you have, Statute of Frauds applies.
9. Tenant’s duties:
   1. Maintain premises and make ordinary repairs
   2. T must not commit waste
10. Problems for landlord:
    1. Tenant remains in property but owes back-rent
       1. You want rent or possession (to re-rent)
       2. Traditional rule: Landlord seeking to establish possession could engage in self-help (change the locks, physically remove belongings or person)
          1. Landlord needed legal right and should do it peacefully
       3. Modern rule: Landlord must rely on legal process (summary process)
          1. LANDLORD CANNOT ENGAGE IN SELF HELP
          2. Summary process narrows the kinds of defenses that can be raised by tenants
          3. ***Berg v. Wiley* (Minn. 1978)**
    2. Self-Help against Tenant in Possession
       1. Traditional approach: LLs can use self-help to regain possession if LL was legally entitled to possession and LL’s means of reentry were peaceable
       2. Modern approach: LL cannot use self-help; must rely on court proceedings
          1. *Berg v. Wiley* (Minn. 1978)
          2. n.b. Possibility of summary process.
    3. Tenant leaves owing rent
       1. Back-rent/going forward/damages
       2. Landlord can: SIR (surrender/ignore and hold T responsible for rent/
          1. Accept surrender; re-let on LL’s account
             1. Might prefer: Empathy, can let for more money if price value up, get rid of problematic tenant, cost of litigation
             2. Damages: advertising costs, utilities, repairs, reduced rent for new tenant (FMV rent and agreed upon rent)
          2. Refuse surrender (lease still in effect); re-let on T’s account
             1. Might prefer: you don’t take on the risk (replacement is not up to you, but tenant is obligated to pay)
          3. Refuse surrender (lease still in effect); wait and sue when term is up
             1. Might prefer: Don’t have to do anything. Can charge accumulating costs on tenant
             2. Negatives: Inefficient (tying up land), risk that court will award damages, cost of litigation, tenant might be judgment proof
       3. Hypothetical:
          1. Landlord lets to tenant 1 for year lease. Tenant 1 leaves after 6 months. Landlord finds Tenant 2 for same rate as Tenant 2. Tenant leaves after 4 months. How does this playout?
             1. Option 1: Landlord is out of luck
             2. Option 2: Tenant 1 is on the hook, because Landlord never permitted surrender.
             3. Option 3: Tenant 1
11. **Sommer v. Kridel** 
    1. **Synopsis**: A landlord has a duty to mitigate damages by attempting to re-let an apartment vacated by a tenant at fair market value.
    2. **F**: Kridel (D) signed 2yr lease for apartment owned by Sommer (P). D paid security deposit and first month. Prior to even obtaining keys to apartment, D broke off engagement, became a student and attempted to terminate lease by letter to P. P did not attempt to re-let the apartment until months later. P was able to relet later, but trying to sue for entire 2 yr term
       1. P sued D for full amount due under 2yr lease. Trial court found P had a duty to mitigate by attempting to re-let premises. App court reversed, D appealed.
    3. **I**: Whether landlord seeking damages from a defaulting tenant has a duty to mitigate damages by making reasonable efforts to re-let an apartment wrongfully vacated by a tenant.
    4. **Held:** Reversed, a landlord does have an obligation to make a reasonable effort to mitigate damages in this situation for the following reasons:
       1. Application of K rule requiring mitigation of damages to a residential lease is justified as a matter of basic fairness.
          1. Putting cost on tenant after already saying you do not have money puts burden on party already unable to bear it
       2. Tying up land is waste of resources
       3. If LL has other vacant apartments besides one which tenant abandoned, he has a duty to make reasonable efforts to attempt to re-let apartment, treat part of vacant stock.
       4. To assess if LL made reasonable efforts to mitigate, court should consider whether LL offered/showed the vacant apartment, advertisements, among other factors.
       5. LL need not accept less than fair market value rent or substantially alter his obligations as established by the pre-existing lease
    5. **Discussion**:
       1. Court overruled precedent based on theory that when landlord signed lease with a tenant, landlord may not interfere with estate granted to the tenant by lease.
          1. When lease, owner gives stick in bundle to rightfully possess the land, so landlord cannot take back that bundle and re-let to mitigate damages
       2. Held lease for residential property no longer distinguishable from ordinary K and thus subject to K rule requiring mitigation of damages.
       3. Why shouldn’t LL have to mitigate?
          1. Losing opportunity to rent out another vacant apartment. If I have more stock, then that means that
          2. Costs will burden landlord, raising rent for everyone
          3. WTPWW is that both parties agreed to this lease, to bargain for the tenancy
       4. Why should there be a difference between small landlord and big landlord?
          1. For individual, it might be within the same building, so it’s not just finding a tenant that can pay but an acceptable tenant
       5. Burden is on the landlord to prove mitigation of damages (information is in landlord’s hands – how diligently they advertised, etc.)
12. **Riverview Realty Co. v. Perosio**
    1. D entered into 2 yr lease with P. Lease prevented D from subletting or assigning apartment without the consent of LL. D took possession and occupied the premises for 1 yr. D vacated the premises after having paid rent until Jan 1974. P sued for rent due on remaining ten months. D answered complaint alleged there was a valid surrender and P failed to mitigate damages.
    2. Lower courts held for LL because of precedent.
    3. SC granted certification and held that damages must be mitigated by the landlord, and that courts are trending in this direction.
       1. Distinction between a lease for ordinary residential purposes and an ordinary contract can no longer be considered viable.
       2. Attention must shift to the intentions of the parties, as with normal contracts.
13. **Hypo**: Should this be allowed: LL puts in lease that if tenant leaves, rent is accelerated, and landlord has no duty to mitigate damages.
    1. This is akin to liquidated damages, so some courts say it’s fine (probably different in commercial v. residential context)
    2. This will likely be in every single contract, so it’ll be a de facto rule
    3. NY has no duty to mitigate but tenants have a right to sublet subject to a landlord’s approval which cannot be unreasonably withheld (tenant mitigates)
14. Rent-Control
15. **Leaseholds: Tenants’ Rights to Habitable Premises, p. 782-98, 802-7**
16. Sources of Tenant’s Rights:
    1. Express terms
    2. Implied terms
       1. The Covenant of Quiet Enjoyment
          1. Actual eviction – physically barring T from property
             1. Partial actual eviction – traditional rule relieves T of rent obligation; modern rule abates rent to FMV
             2. In this situation, tenant does not have to pay rent. Damages for trespass, etc.
             3. Partial Actual Eviction (portion of property blocked by sale of parcel to someone who does not permit me access to my school).

Therefore, abatement of rent for loss of value to me proportionality

* + - 1. Constructive eviction – making property unlivable
         1. Traditional rule: only covers “substantial” interference, LLs not liable for 3rd party conduct; Ts must actually vacate

Traditionally, tenant would have to leave property and then claim for back rent

* + - * 1. Restatement: requires that interference be “more than insignificant,” LLs liable for some 3rd parties (*Blackett*); Ts need not vacate
        2. Traditional and modern majority rule: Constructive eviction of covenant of quiet enjoyment. Landlord him/herself in such a way to destroy quiet enjoyment in property. Landlords are not responsible for actions of third parties, including other tenants, unless the lease says responsible for other tenants (then express terms, not implied term) 🡪 Except *Blackett*

Pros: Landlord may have power to evict, and then, instead of working out situation, landlord causes eviction.

Cons: Might be left without a remedy, deeper pockets for landlord.

* + 1. The Implied Warranty of Habitability
       1. Remedies if Implied Warranty of Habitability is Breached:
          1. Rescission or right to move out before lease term ends
          2. Rent withholding
          3. Rent abatement
          4. Repair and deduct
          5. Injunctive relief or specific performance
          6. Administrative remedies
          7. Criminal penalties
          8. Compensatory damages

1. ***Minjak Co. v. Randolph* (528 N.Y.S.2d 554, 1988 N.Y. App. Div.)** 
   1. Synopsis: When suit is brought for nonpayment, tenant may assert as defense doctrine of construction eviction, even if he abandoned only portion of premises due to landlord’s acts, which made that portion unsuitable for use. (deserting portion not required, generally residential)
   2. Facts: Randolph and Kikuchi (Respondents) rented loft space from Minjak (Petitioner). Petitioner gave them a commercial lease, though Respondents told Petitioner they would use the space as residence and at the time of the signing, building was used predominantly for residential purposes. Respondents used 2/3 space as music studio.
      1. Another tenant began use unit as health spa, fully functioning jacuzzis, bathtubs, saunas. At least 40 leaks appeared in Resp’s apartment, they complained, Petitioner did not respond.
      2. Petitioner began construction work on building, work was hazardous (stairs missing without warning), caused health problems to Respondents. Dangerous construction prevented Respondents from using music studio portion of loft.
   3. PH: Jury awarded Respondents rent abatement of 80% from July 1981 – Nov 1983 (for constructive eviction from music studio), 40% abatement from Jan 1981-Nov 1983 (breach of warranty of habitability of residential portion), 10% abatement on rent attributable to residence for all of 1979, for breach of habitability. Punitive damages of $20k
      1. Appellate Ct reversed saying doctrine of constructive eviction could not provide defense because tenants had not abandoned premises, and reversed awarded of 80% for studio
   4. Issue. May doctrine of constructive eviction be used as a defense to the nonpayment of rent, if the tenant only abandons only a portion of the premises?
   5. Held:
      1. Yes. Tenant may assert defense to nonpayment of rent doctrine of constructive eviction, even if he abandons only portion of premises due to landlord’s acts making unsuitable for use.
         1. Based on *East Haven Assoc. v. Gurian* (tenant may assert defense even if have not abandoned only a portion, issues of social policy and fairness)
      2. Respondents compelled to abandon music studio due to landlord, substantially and materially deprived tenants of use and enjoyment of that part of the loft.
      3. Respondents only need to pay a portion of rent for months a part of the premises was uninhabitable.
      4. Punitive damages may be awarded in breach of warranty of habitability cases when landlord’s actions/inaction intentional, malicious. Determining factor is the moral culpability of Def. Landlord permitted construction work to be done in a dangerous and offensive manner with a disregard for the rights and safety of others.
   6. Housing is difficult to acquire, so people should not be required to move out because only a portion uninhabitable.
2. ***Blackett v. Olanoff* (Mass. 1976)**
   1. Synopsis: Tenant’s implied covenant of quiet enjoyment is violated when landlord leases property to another tenant, and lease gives landlord right to control level of noise, but landlord does not prevent the undesirable conduct.
   2. Facts: Landlords (P) leased property for lounge in an area where leased premises for residential purposes. Provision in lease stated that entertainment in the lounge had to be conducted in a way so could not be heard outside building. Residential tenants (D) objected to noise, when landlords complained, lounge became quieter from time to time. Noise caused Ds to move out.
      1. Would the case come out differently if there was no express term in the lease? Probably not?
   3. PH: P brought suit for nonpayment of rent against Ds, who raised the doctrine of constructive eviction. Landlord does not dispute noise, but argue that its not their fault, not their conduct, third party. Judgment for Ds.
   4. Issue: When acts of one tenant prevent the other tenants from enjoying their premises, will the landlord be liable when the lease prohibits the tenant from disturbing others?
   5. Held: Yes. Judgment affirmed.
      1. Occasionally, a landlord has not intended to violated a tenant’s rights, but a breach of landlord’s covenant of quiet enjoyment still occurs which flowed as natural and probable consequence of the landlord’s actions, inactions, or what he permitted to be done.
      2. As a matter of law and of fact, landlord had power to control noise
         1. P had ability and right to control noise, caused D to vacate apts bc of provision in the lease that regulated noise.
      3. Landlord’s conduct, not his intentions, is controlling.
      4. Though Ps only knew there would be potential noise problem at time they gave lease, experience demonstrated that acceptable music level at lounge is unacceptable for residential
      5. Bc disturbing condition was natural and probable consequence of Ps permitting lounge to operate in that location, and since they could control actions of the lounge, they should not be able to collect rent for residential premises that were not reasonably habitable.
      6. Tenants in these situations should be able to bring a claim against the landlord.
   6. Discussion: Covenant of quiet enjoyment implied in every landlord-tenant relationship, holds landlord promises not to disturb the tenant’s quiet enjoyment of his premises. As seen in this case, the landlord will be liable when the disturbance comes from another tenant.
3. ***Javins v. First National Realty Corp.* (D.C. Cir. 1970)– this case is a BIG deal!** 
   1. Synopsis: In regards to residential property, the landlord makes an implied warranty of habitability, and the standard of habitability will be set by the relevant housing codes.
   2. Facts: Landlord, First National Realty Corp. (Appellee), sought possession based on default.
      1. 29 Tenants all agreed to not pay rent until fix housing violations. 1500 Housing Violations.
      2. One of rent strikers agreed to submit affidavit saying landlord coerced him, only 6 left at trial
      3. Bags of mice, mice feces, brought into trial. Pictures, etc.
      4. Appellants alleged numerous violations of statutory housing regulations as a defense.
   3. Issue. In the lease of an apartment, is there an implied warranty of habitability?
   4. Held. Yes.
      1. Holding: “Warranty of habitability, measured by the standards set out in the Housing Regulations for the District of Columbia, is implied by operation of law into leases of urban dwelling units covered by those Regulations and that breach of this warranty gives rise to the usual remedies for break of contract.”
         1. Substantial violations of housing code violations = breach
      2. Three Main Considerations:
         1. Old rule based on factual assumptions that are no longer true
            1. Shift from rural, agrarian, feudal property law to modern urban, city dwellers
            2. City dweller not a jack of all trades who can fix anything (fix houses, etc.)
            3. We don’t have a long-term stake in property
            4. Low-income tenants do not have long-term interest for collateral of loan
         2. Leases of urban apartments should be treated as contracts, and be in line with consumer protection law within those contracts
            1. Modern contract law has recognized that the buyer of goods and services in an industrialized society… goods and services purchased are of adequate quality… implied warranties of fitness and merchantability”
            2. Inequality in the bargaining power between landlord and tenant. Tenants cannot really demand better housing.
            3. What the Parties Would’ve Wanted / Reasonable Expectations:

Since a lease specifies a certain period of time in which the tenant will use the apartment, the tenant may legitimately expect that the apartment will be fit for habitation for that time. There is no allegation that the apartments were in poor condition or in violation of the housing code at the time the leases started. Since the tenants continued to pay the same rent, they were entitled to expect that the landlord would keep the premises as it were in the beginning of the lease.

* + - * 1. Must abide by the law

“the old no-repair rule cannot coexist with the obligations imposed on the landlord by a typical modern housing code, and must be abandoned in favor of an implied warranty of habitability.”

***Brown v. Southall Realty Co.*** (D.C. 1968): LL knew at time of signing lease that building violated housing code, rendering apt “unsafe and unsanitary”- held that lease was illegal contract

***Cannot rely on agency, because not enforcing obligations***

Holding: The housing code requires that a warranty of habitability be implied in the leases of all housing that it covers.

By signing the lease, the landlord takes a continuing obligation to the tenant to maintain the premises in accordance with the law. The code implies a warranty of habitability measured by the standards outlined in the code into all leases that it covers.

Appellants’ obligation to pay rent depends upon Appellee’s performance of his obligations. Appellants’ must be given an opportunity to prove violations that breach the warranty in order to determine if rent is owed.

* + - 1. Nature of today’s urban housing market (mixed with consumer protection)
         1. Again, inequality in the bargaining power between landlord and tenant. Tenants cannot really demand better housing.
         2. Ability to know condition of property
    1. Job of courts is to update doctrine with modern ideals
       1. “Courts have a duty to reappraise old doctrines in the light of the facts and values of contemporary life – particularly old common law doctrines which the courts themselves created and developed…. ‘The continued vitality of the common law … depends upon its ability to reflect contemporary community values and ethics.’”
    2. Obligations are imposed on landlords by modern housing codes to keep the premises in a habitable condition, evidences modern shift
  1. Discussion: When landlord breaches implied warranty of habitability, the tenant has a legal right to stop paying rent.
  2. Is this a good rule?
     1. Private enforcement, because public agencies
     2. Contracting perspective:
        1. Freedom of contract, and renters have different incentives and goals
        2. No perfect information and access to information. So can’t let the market work itself out.
  3. Is this a bad rule?
     1. Defects came in afterwards

1. What about commercial spaces? Should we imply suitability?
   1. Most say no, they can contract what they want

**Remedies for Tenants after Breach of Warranty of Habitability**

1. Withhold rent
2. Rescind the contract
3. Rent abatement
4. Repair and deduct
5. Injunctive relief or specific performance
6. Administrative remedies
7. Criminal penalties
8. Compensatory damages
9. Self-help (public shaming)
10. **Real Estate Transactions: The Recording System, p. 872-86, 892-3**
11. Requirements for a Deed
    1. *Identify* the parties
    2. *Describe* the property being conveyed
       1. Meats and bounds descriptions (describe boundaries of property)
    3. State the grantor’s *intent* to convey the interest in question
    4. Contain the grantor’s *signature*
       1. 🡪 Deed must be *delivered* to the grantee in order to transfer ownership.
12. Common Problems
    1. Problems with delivery (especially for gifts)
       1. Doctrine of constructive delivery (in a safety deposit box is okay)
    2. Unknown encumbrances and claims
    3. Disingenuous grantors ( O🡪A then O🡪 B – ni mo dat)
13. Three Ways to Identify and Protect the Title Owner
    1. Covenants and warranties of title (six forms)
       1. **Warranties of Title: Present Covenants**
          * 1. At the time of closing/conveyance.
            2. These covenants are breached if at all at the time of the conveyance (the closing). That is when the statute of limitations starts to run.
          1. Covenant of seisin – grantor promises that he owns what he’s conveying
          2. Covenant of right to convey – grantor promises that he has power to convey it
             1. Life estate with restraint on alienability
          3. Covenant against encumbrances – grantor promises that there are no mortgages, leases, liens, etc.
       2. **Warranties of Title: Future Covenants**
          * 1. If these are beached, they are after the closing, when the disturbance to the grantee’s possession occurs. SOL runs when possession is disturbed.
          1. Covenant of warranty

Grantor promises to compensate the grantee for any monetary losses occasioned by the grantor’s failure to convey the title promised in the deed.

The below must run with the land. (touch and concern, horizontal/vertical privity, written, notice, intent)

* + - * 1. General warranty deed (majority)

Against all defects in title.

* + - * 1. Special warranty deed

Limits the covenant to defects in title caused by grantor’s own acts but not by the acts of prior owners

* + - * 1. Quitclaim deed

No warranty of title whatsoever. You have superior title to me.

* + - 1. Covenant of quiet enjoyment (basically same as 1)
      2. Covenant for further assurances (rare)
         1. Requires seller to take further steps to cure defects in title such as paying off adverse possessor.
    1. Remedy for breach: generally measured by price paid for property that has been lost. Price is generally near the fair market value of the property at the time of the closing.
  1. Title Insurance
  2. Recording Acts
     1. Conflicts between grantees: A conveys land to B; then conveys same land to C
     2. Conflicts between grantor and grantee: A does not own land, but purports to convey land to B. A later acquires the land.
        1. Estoppel by deed will vest later-acquired interest in grantee.
     3. **Who is protected by recording acts?**
        1. Owners who record property interests – purchaser without notice of any conflicts who records will be protected against conflicting claimants who register later
        2. Purchasers who check records before purchasing – a subsequent purchaser without notice of any conflict who records will typically prevail over any prior unrecorded interest
     4. **How to use a grantor-grantee index**
        1. All instruments listed alphabetically and chronologically by the grantor’s/grantee’s name
        2. Start in the grantee index to find who the grantor was and continue back for required period (varies locally). You then have a list of grantors who are predecessors in interest of the current owner.
        3. Switch to grantor index and go forward in time under name of each grantor, starting on date grantor acquired her interest and going forward until an instrument conveying that interest to a subsequent grantee is recorded.
        4. How could this fail?
           1. Things never get recorded
           2. Might be during limbo period
           3. Wild deeds: things might get recorded too early or too late
     5. Hypo: You are thinking of purchasing a piece of property owned by Dan, which was previously owned by Charlie, Beth and Amy. How would you proceed to search title in the grantor-grantee index?
        1. Look up Dan 2000 in grantee index (then Charlie 1990 🡪 Beth 1970🡪 Amy 1960)
        2. Look up Amy in grantor index starting in 1960. And so on
  3. **Race Statutes (NC and LA)** 
     1. As between successive purchasers, *the person who records first prevails* (not the person to receive title). Does not matter if the person who records first knows of an earlier conveyance to someone else.
     2. Clarity. Bright line rule. Encourages people to record.
  4. **Notice Statutes** 
     1. A subsequent purchaser prevails over an earlier purchaser *if the subsequent purchaser did* ***not*** *have notice* of the earlier conveyance. Does not matter which purchaser records first. Protects any purchaser without notice.
     2. Types of notice:
        1. Actual
        2. Constructive
        3. Inquiry
  5. **Race-Notice Statutes** 
     1. A subsequent purchaser prevails over prior unrecorded interests only if she (1) has no notice of the prior conveyance at the time she acquired her interest *and* (2) records before the prior instrument is recorded.
     2. 🡪Unlike race statutes, these do not reward unscrupulous subsequent purchasers.
  6. Hypothetical: “Every grant of an estate in real property is conclusive against the grantor, also against everyone subsequently granting under him, except a purchaser who in good faith and for a valuable consideration acquires a title or lien by an instrument that is first duly recorded.”
  7. Problem 1:
     1. O to A (A does not record).
     2. O to B (B has notice of the earlier conveyance to A).
     3. B records. A records.
     4. B sues A for title.
     5. 🡪What result in a race jurisdiction? B wins
     6. Notice? A wins because B had notice
     7. Race-notice? A because B had notice
  8. Problem 2:
     1. O to A (A does not record).
     2. O to B (B has no actual notice of the earlier conveyance to A).
     3. B records. A records.
     4. B sues A for title.
     5. 🡪What result in a race jurisdiction? B wins
     6. Notice? Maybe. Said actual notice. Did not say constructive or inquiry.
     7. Race-notice? B
  9. **Sabo v. Horvath (1976)** 
     1. **Synopsis:** If a grantor transfers prior to obtaining title, and the grantee records prior to title passing, a second grantee would not discover this conveyance, and so the second grantee is an innocent purchaser and his interest will prevail in a dispute over title.
     2. **F:**
        1. 1965-68: Lowery in process of acquiring . Grover C. Lowery (Lowery) occupied land for the purpose of obtaining a patent.
        2. 1/3/1970: Lowery issued Quitclaim Deed to Horvaths (Defendants).
        3. He could’ve also given him a warranty deed.
        4. At that time, Ds knew that patent and title were still in US Govt’s possession, but, they did not re-record their interest after the patent had passed to Lowery.
        5. 1/5/1970: Horvaths record deed
        6. 8/10/73: Lowery issued the patent after the deed was conveyed.
        7. 10/15/73: After patent was issued, Lowery executed another quitclaim deed to Sabos
        8. 12/1973: Sabos (Ps) recorded document
     3. **Issue:** 
        1. Can Sabos be innocent purchasers within meaning of statute? By the very nature of quitclaim deed, puts them on notice that something might be out there. Court concludes that quitclaim deed may still be innocent purchasers.
        2. Why don’t Sabos have constructive notice? Because Sabos only had to look back a little earlier, because L gets patent in 8/10/73. L to H quitclaim was in 1970.
        3. Alaska = race-notice state.
        4. Between two recorded interests, second purchaser who does not have notice of previous recordation, which was outside chain of title have prevailing interest in the property. Ds received valid interest from L bc L had complied with the statute to a sufficient extent so as to have an interest in the land, which was capable of conveyance.
        5. Estoppel by deed does matter here.
           1. If H and L got into dispute after L got deed, then H will win (L is estopped from claiming ownership), so H outranks L. BUT doesn’t change outcome, because S was innocent purchaser and wins over H and L. S-H-L.
           2. Estoppel by deed: If a grantor purports to convey a property interest she does not own to a grantee, and the grantor subsequently omes to own the property interest by receiving the deed, ownership is automatically vested in the grantee.
        6. A grantee who receives a quitclaim deed can be protected by the recording system, assuming the grantee purchased for valuable consideration and did not otherwise have actual or constructive knowledge as defined by the recording law. This grantee can be considered an innocent purchaser.
        7. P claim D recording is wild deed because it was outside chain of title
        8. Purchaser has notice only of recorded instruments that are within his chain of title. If a grantor transfers prior to obtaining title, and grantee records prior to title passing, a second grantee who examines all conveyances under the grantor’s name from the date that the grantor secured title would not discover the prior conveyance.
        9. A wild deed does give constructive notice to a subsequent purchaser who duly records.
           1. This is a wild deed, because it was recorded too early.
        10. P cannot be charged with discovery of the pre-patent transfer to D when searching the chain of title.
        11. Requiring a title check beyond the chain of title would add a large burden to real estate purchases. Theoretically, the records for each grantor would have to be checked back to the later of the grantor’s date of birth or the date when records were first retained. This would defeat the purpose of a recording system.  
            Rerecording an interest once title passes is less of a burden than requiring property purchasers to check indefinitely beyond the chain of title.
        12. In order to promote simplicity and certainty in title transactions, a deed recorded outside the chain of title does not give constructive notice to subsequent grantees and thus is not duly recorded. First duly recorded interest without actual or constructive knowledge of the deed will prevail.
     4. Discussion. Under this rule, a party searching title does not have to check the records under a grantor’s name until the grantor actually receives title to the property. The title searcher is relieved of a large burden because it is easier for a party to rerecord an interest than to conduct an indefinite search. “least cost avoider”
     5. H’s options: Sue L, buy off S.
  10. Hypothetical: O to A, A to B, B records, O to Z. B sues Z.
      1. Z wins, because he’ll look for O’s ownership in grantor index. And nothing’s been recorded.
      2. If race jurisdiction: then B would win.
  11. **Shelter Doctrine:** Grantee who has received an interest in property from abona fide purchaser will also be protected as a bona fide purchaser, even if the grantee would not legally qualify for this status. The grantee is "sheltered" from other claims by the grantor's status as an actual bona fide purchaser.
      1. Will restrict the purchaser who had no idea. Alienability of property.

1. **The Fair Housing Law, p. 925-44, 955-60, 978-80**
2. Two sets of cases:
   1. Discriminatory treatment (discriminatory intent, focus is on **nature** of D’s conduct)
   2. Disparate impact (discriminatory effects of D’s conduct, focus is on **effects** of D’s conduct).
   3. NB: employers are generally vicariously liable for acts of employees; but officers are generally not personally liable unless they acted to direct or approve discriminatory practices.
3. Standing: 2 categories of people have standing under statute
   1. Those directly injured by discriminatory acts
   2. Those who have sufficient incentive to litigate the case
      1. Includes testers and fair housing organizations.
4. **Three-part burden of proof of analysis for prima facie case under FHA:** [Ashbury]
   1. Plaintiff must come forward with a prima facie case of discrimination, which requires:
      1. She is a member of a racial minority
      2. She applied for and was qualified to rent the apartment
      3. She was denied the opportunity to rent or to inspect or negotiate for the rental of the apartment
      4. The housing opportunity remained available
   2. If plaintiff proves prima facie case, the burden shifts to defendants to produce evidence that the refusal to rent or negotiate for a rental was motivated by legitimate, non-racial considerations
   3. Once the defendant proves non-discriminatory reasons, the burden shifts back to the plaintiff to show the reasons were pretextual
      1. Showing through evidence of a tester or otherwise that defendant did not follow the policies it presented as justifications for failure to rent or sell
      2. Showing that the reasons given at the time of the discrimination were different from the reasons given at trial
      3. Negating the facts (i.e., by showing that apartments were in fact available when defendant said they were not)
5. **FHA may be used to prevent the use of rigid racial quotas of indefinite duration that maintain a fixed level of integration in public housing.** [Starrett City]
   1. Three factors courts look to in evaluating race-conscious plans:
      1. Projected duration
      2. History of a problem with the particular entity
      3. Whether it is an access quota vs. ceiling quota
         1. “While quotas promote Title VIII’s integration policy, they contravene its antidiscrimination policy, bringing the dual goals of the Act into conflict”
   2. Purpose of plans are usually designed to prevent white flight / tipping
      1. If the landlord goes beyond a certain percentage / tipping point of minorities, the white families will leave, which frustrates integration.
      2. Dissent believes that the FHA was not designed to apply to such actions; the purpose of the FHA is to maintain and further integration, not limit it.
6. **Circumstantial evidence is sufficient to establish discrimination.** [LaBrie]
   1. The point of the burden shifting regime is used because there is usually no direct evidence of discrimination.
7. Because the FHA is a remedial statute, it is interpreted broadly and exceptions are interpreted narrowly. [LaBrie]
8. Advertising
   1. It is okay for a landlord to engage in affirmative advertising efforts to attract white tenants in a historically black area to promote integration.
9. **Reasonable accommodations of persons with disabilities**
   1. Cannot refuse reasonable modifications at claimant’s expense if they are necessary to afford full enjoyment of premises
   2. Cannot refuse to make reasonable accommodations in rules, policies, etc. if necessary to afford equal opportunity to use and enjoy premises
10. Discrimination need not be the only reason for the refusal of renting.
    1. Race being the only factor for refusal would set an extremely high bar for proof
    2. There’s likely to be other factors in the determination to refuse renting
    3. However, there might be a correlation between the impermissible factor and a permissible reason, which leads to over-enforcement of the FHA
11. Punitive damages – awarded against defendants when his conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others
12. Policy
13. For
    1. Free transfer of property, promotes alienability – ensures everyone can participate in an active market
    2. Furthers norms of participation and autonomy by allowing individuals to integrate
    3. Increases utility by ensuring people use land that’s available
    4. Dislike property being concentrated in the hands of few people
    5. Combats dead hand control – dislike old social assumptions and prejudices continuing because of land ownership
14. Against
15. **§13.1.1** **Fair** **housing** **Act**
    * 1. FHA only applies to ‘dwellings’; not ‘commercial properties’
         1. §1982 applies to all properties, but only for racial discrimination
      2. FHA prevents landlords to discriminate on the basis of: race, color, religion, sex, handicap or disability, marital or familiar status, or national original, number of children
    1. §3601 *Declaration* *of* *policy:* “It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.”
    2. §3602 *Definitions*
       1. Dwelling= any building or portion of building; any vacant land offered for sale for the construction of any building.
       2. Family= includes 1 person
       3. Handicap does not include current, illegal use of or addiction to a controlled substance.
    3. § 3603(b) *Exemptions*
       1. Only subsection c of §3604 applies to single family homes sold or rented by owner, as long as owner doesn’t have more than 3 single family homes at the same time.
       2. Sale/rental will be exempted from the subchapter only if it is sold/rented (A) without use of any professional real estate agents, and (B) without the publication of anything in violation of §3604(c).
       3. Also doesn’t apply if owner is one of maximum 4 units in a dwelling, intended for 4 independent families.
    4. §3604 *Discrimination* *in* *sale* *or* *rental* *of* *housing* *and* *other* *prohibited* *practices.*
       1. A) Can’t refuse to sell/rent based on race, color, religion, sex, familial status, or national origin.
       2. B) Can’t discriminate in terms/conditions/privileges of sale/ or rental for the same reasons.
       3. C) Can’t make advertisements that discriminate or state preferences.
       4. F) No discriminating against handicapped people
          1. After Sept. 13 1988, all dwellings have to be designed so that people with wheelchairs/handicaps can use them.
    5. §3613 *Enforcement* *by* *private* *persons*
       1. A) creates right of action no later than 2 years after occurrence or termination of discriminatory practice.
       2. B) court can appoint an attorney or allow commencement/continuation of civil action without payment if the court finds that the person can’t afford it.
       3. C) Court may award actual and punitive damages, may grant relief in the form of permanent/temporary injunctions, temporary restraining orders, or others (ex: enjoining D from engaging in such practices, or ordering such affirmative action as may be appropriate).
       4. Also can award attorney’s fees and costs to P (reasonable) as long as P isn’t the US.
    6. §3617 *Interference,* *coercion* *or* *intimidation;* *enforcement* *by* *civil* *action*
       1. Can’t intimidate people if they exercise their rights/ help others exercise their rights under the previous sections.
    7. §3631 *Violations;* *penalties*
       1. If you injure/intimidate/interfere with anyone you will be fined under Title 18 or imprisoned for no more than a year or both.
       2. If acts include use, attempted use, or threatened use of a dangerous weapon, explosives, or fire then you get fined under Title 18 or imprisoned not more than 10 years or both.
       3. If acts result in death or if acts include (attempted) kidnapping, (attempted) aggravated sexual abuse or an attempt to kill, you get fined under Title 18, or imprisoned for however long or for life, or both.
16. Fair Housing Amendments Act of 1988 (FHAA) significantly expanded FHA
    1. Prohibited discrimination against families w/ kids (familial status) and against people w/ disabilities (handicap)
    2. Extended SoL from 6 months to 2 years and by eliminating $1000 limit on PD
    3. Granted Housing and Urban Development power to enforce statute.
    4. Aggrieved people can file lawsuit in fed ct for injunctive relief, comp and PD.
    5. They could also file complaint w/ HUD—power to investigate an adjudicate dispute.
    6. If HUD finds evidence of violation, it must issue a charge on behalf of the person, explaining the facts which give the Secretary reasonable cause to believe discriminatory practice may be in place.
17. **Discrimination** **by** **housing** **providers**
    1. *Burden* *shifting* *regime* *for* *discriminatory* *claims*
18. **Asbury v. Brougham (10th Cir. 1989)**
    1. **Synopsis:** Fair Housing Act prohibits discrimination based on race. P must present a prima facie case of discrimination. Then, D must produce evidence that the refusal to rent or negotiate for a rental was motivated by non-racial considerations. Third, if D can give non-discriminatory reasons, P must show the proffered reasons were pretextual.
    2. **Facts:** Rosalyn Asbury (P) black woman went to apt complex and tried to rent an apartment. Manager of Broughham Estates (D) told her there were no vacancies and that she did not keep a waiting list. D would not let her fill out application or view model units, but suggested she look at a complex that housed mostly black families. Ps income was sufficient to pay rent on Ds apartment. When white customers inquired about units, they were told units were available. D rented units to whites after P was told nothing was available
    3. **PH:** P brought suit under the Act, which prohibits discrimination on the basis of race. Jury found in favor of P, discrimination on race and/or sex (compensatory and punitive damages)
    4. **Opinion:** Held. Yes. Act prohibits discrimination based on race. P must prove a discriminatory intent.
       1. A violation occurs when **race is a factor** in a decision to deny a minority applicant the opportunity to rent or negotiate for a rental, but **race need not be the only factor** in the decision.
       2. Act prohibits giving false information about availability of housing based on race
       3. Three-part burden of proof:
          1. P must present a prima facie case of discrimination.
          2. D must produce evidence that refusal to rent or negotiate for a rental was motivated by non-racial considerations.
          3. If Ds can give non-discriminatory reasons, P must show proffered reasons were pretextual
       4. To present a prima facie case: P has to prove:
          1. (1) she is a member of a racial minority;
          2. (2) she applied for and was qualified to rent an apartment or townhouse in the complex;
          3. (3) she was denied the opportunity to rent or inspect or negotiate for the rental of a townhouse or apartment; and
          4. (4) the housing opportunity remained available.
       5. Here, prima facie case was presented. P is black, she went to rent an apartment that she could afford, but was not even allowed to view one. She was told that no vacancies existed and was denied the right to fill out an application. D then rented to white applicants.
       6. D said that they don’t rent apartments to people with children, but no apartments available. Only townhouses. D has high percentage of minority occupancy in the apartment so claim of intentional discrimination.
          1. P showed that owners of the property had let families with one child rent apartments, so that answer is questionable.
          2. P said that townhouses were not available, but they actually were.
          3. Statistical evidence is not dispositive of a claim of intentional discrimination
          4. D had a policy of visually inspecting prospective tenants, and under these circumstances, it can be inferred that the policy operated to screen prospective tenants on the basis of race.
          5. D never say sorry for his employee. Did not separate himself.
          6. D has had multiple complaints against him (unclear if just Wanda) so he had notice, and he didn’t take any affirmative steps to fix problem.
       7. 1988 Amendments included familial status, so this case in 1989 might’ve occurred before Act.
       8. Damages:
    5. **Discussion**: FHA is an attempt to prevent racial discrimination in housing. Shifting burdens of proof give both parties a chance to explain reasoning and motives for their actions.
19. **United States v. Starrett City Associates (2d Cir. 1988)**
    1. **Synopsis:** FHA may operate to prevent rigid racial reservation systems from being maintained indefinitely to perpetuate a fixed level of integration in public housing, if such systems fail to provide adequate access to public housing for the minority.
    2. **Facts:** 
       1. Starrett City (D) owned and operated largest public housing complex in the U.S.
       2. Had a unique tenant rental system which provided for a permanent mix of 64% white tenants, 22% black and 8% Hispanic.
       3. Prevent mass exodus of white tenants and achieve racial integration.
       4. Each departing tenant being replaced by a new one of similar race or national origin.
       5. Undisputed that this practice prevented minority communities from having increased access to the complex. (80% of people on waiting list)
    3. Discussion:
       1. Quota set by racial animus (worried about tipping, so fears driven by wrong parties)
       2. Quota set to racial percentage as a whole, so not discriminatory
       3. FHA main goals: (1) promote integration or (2) prevent discrimination – but the FHA doesn’t tell us which should be the dominant policy
       4. Courts and Legislature has said that only need to show impact. No intent required.
       5. This is a cap and not a floor. Floor might be different.
       6. Point of the statute is more. Intent. Cannot just stop with language of the statute.
    4. **PH:** 
       1. Group of black applicants brought action against Starrett alleging tenanting Starrett procedures violated federl and state law by discriminating by race
          1. They settled, saying they’d make an additional 35 units available each year for next five years for black and minority applicats.
       2. Government (P) subsequently sued Starrett on ground of minority discrimination on the basis of race, in violation of the Fair Housing Act.
       3. Both parties moved for summary judgment in their favor.
       4. Court granted summary judgment to the Government, permanently enjoining Starrett to abandon its selection process which prevented adequate minority access to the complex on account of their race. Starrett appealed.
    5. Issue. Does the Fair Housing Act operate to prevent rigid racial reservation systems from being maintained indefinitely to perpetuate a fixed level of integration in public housing, if such systems fail to provide adequate access to public housing for the minority?
    6. Held. (Miner, J.)
       1. The Fair Housing Act may operate to prevent rigid racial reservation systems from being maintained indefinitely to perpetuate a fixed level of integration in public housing, if such systems fail to provide adequate access to public housing for the minority.
       2. A housing practice may fall foul of the FHA not only for being racially discriminatory but for affecting minorities out of proportion to the majority community.
       3. Quota systems, as a rule, work against the dual aims of the FHA, integration and anti-discrimination.
       4. Any system which makes classifications purely on the basis of race is presumed to be discriminatory.
       5. However, an affirmative action which takes account of race need not be in conflict with constitutional or statutory law.
       6. However, such actions should be intended to be for only a short time and to end on attaining a specific goal. Such actions usually result in increasing or ensuring minority participation and are upheld. On the other hand, plans to maintain a fixed level of integration usually restrict minority participation and are not usually valid.
       7. A last point is that quotas are meant to redress past minority discrimination or imbalance.
       8. In this case, Starrett’s only rationale for its quota system is maintaining a fixed level of integration. It has been maintained for more than fifteen years. It has no redressal goals in view.
       9. It prevents any increase in the minority participation in the complex. Fear of the whites leaving en masse cannot justify restriction of minority access. In this case the use of a racial quota is not inappropriate. The verdict is affirmed.
    7. Dissent. (Newman, J.) The FHA was meant to prevent segregation from being a permanent phenomenon, and not to prohibit fixed racial quotas meant to achieve and maintain racial integration as Starrett was trying to do
    8. Discussion. A housing practice need not be racially discriminatory to violate the FHA. It can also violate this law by having some effect on the minorities which is out of proportion to their number. All racial classifications are not discriminatory, even if they adversely affect minorities,  unless their motive is such as to depress the minority races. For instance, a justifiable increase in the rental may cause a drop in the percentage of minority tenants, but may not be racially motivated and so may not violate the FHA.
20. Racial steering
    1. Many cases brought under FHA concern claims against realtors who have done “racial steering”—showing blacks housing in certain areas and whites housing in others.
       1. Violate act by otherwise making unavailable housing because of race, and violating express prohibition against discrimination
       2. Proving that a realtor has engaged in racial steering often involves use of testers. f. Advertising
    2. Ads that limit housing to whites clearly violate FHA
       1. ***Ragin*** ***v.*** ***NY*** ***Times*** ***Co***—newspaper’s practice of publishing real estate ads with almost always white models in a city w/ significant minority population might violate FHA by showing discriminatory preference—ultimate issue for fact finder was whether a natural interpretation by an ordinary reader is a racial preference.
       2. NB: Communications Decency Act of 1996: immunizes websites and service providers from liability for discriminatory roommate advertisements posted on its website (would have faced this liability if it were a regular newspaper).
21. ***Human Rights Commission v. LaBrie, Inc.***
    1. Brief Fact Summary. A couple lived in a mobile home park with their baby. Eviction proceedings were commenced against them.
    2. Synopsis of Rule of Law. The state fair housing act prohibits discrimination in renting if a person intends to occupy a dwelling with minor children.
    3. Facts:
       1. Vermont Fair Housing and Public Accommodations Act (Act) prohibits discrimination against persons with minor children. Linda and Ernest LaBrie (Defendants) owned mobile home park, which had a two-person occupancy limit (the rule was amended to this version after previous no kid rule, after FHA made it illegal to discriminate according to family status). Scott and Luanne McCarthy purchased a mobile home and were childless at the time. After they had a baby, they received an eviction notice from Defendants. McCarthys filed a complaint with the Human Rights Commission (Plaintiff), who commenced this action. Defendants claim the restriction is needed because of a limited water and septic capacity at the park. Plaintiffs lost
    4. Issue. Is a restriction against living in a mobile home park with children discriminatory
    5. Held. Yes. The Act prohibits discrimination in renting if a person intends to occupy a dwelling with minor children.
       1. The FHPA is a remedial statute, so should be read broadly
       2. A violation of the Act will exist if disparate treatment is found (when Defendants intentionally discriminate against members of a statutorily protected category because of their membership in that group)
       3. Evidence of direct discrimination is sufficient to establish the intent to continue discrimination through a neutral policy.
       4. Here, the lease stated that there was a two-person maximum in each mobile home. This appears facially neutral, but no minor children have moved into the park since Defendants purchased it. This is sufficient to prove that the limit was set for the purpose of eliminating or limiting persons with minor children from the park.
       5. Based on Defendant’s action against the McCarthys and their pattern and practice of excluding minor children from the Park, there was an intent to discriminate against persons intending to occupy a dwelling with one or more minor children.
       6. The septic and water capacity considerations brought up by Defendants is a pretext for discriminating against persons with minor children. Less restrictive means are available to Defendants. No evidence was presented that an increase in the number of occupants per living unit would adversely affect the septic or water systems.
    6. Discussion. While there may be valid reasons for a landlord to exclude some children, a policy that prohibits any children will be found discriminatory.

**VI. PROPERTY, PUBLIC ORDERING, AND THE CONSTITUTION**

1. **Zoning, p. 1027-55**
2. Zoning
   1. Use zoning divides an area into districts and says what can be done within each one.
   2. Area zoning regulates the size of lots, height of buildings, and so on. It may differ from district to district.
3. Mechanics of Zoning: Process
   1. Zoning enabling acts delegate state power to municipalities.
   2. Zoning ordinances are local zoning laws.
   3. Municipalities must create a comprehensive plan
      1. The comprehensive plan describes the various divisions (residential, agricultural, industrial, etc.) and the policies underlying the plan.
   4. **Generally:** 
      1. The state may enact statutes to reasonably control the use of land for the protection of the health, safety, morals and welfare of its citizens.
      2. Zoning is the division of a jurisdiction into districts in which certain uses and developments are permitted or prohibited
      3. Power is based on state’s police power and is limited by Due Process Clause of 14 Amendment and Fifth Amendment: “no taking without just compensation clause”
4. **History** **of** **Zoning**
   1. Response to problems created by rapid urbanization
   2. **LANDMARK** **CASE:** Village of Euclid v. Ambler Realty, 1926
   3. Effects of *Euclid*
      1. Gave rise to spread of similar ordinances across the nation. Euclid ordinance was cumulative: each successive district permitted all the uses allowed in the previous district plus some. Not the case anymore (would have houses in industrial areas which is bad)
      2. Evolution: now serves a number of purposes
      3. Preserving neighborhood character, protective property values, preventing environmental degradation, encouraging economic development
5. Mechanics of Zoning: **Zoning Variants**
   1. Planned unit development – a public-private partnership in which the zoning board set general terms of density requirements and then work directly with a developer to establish a more specific plan.
   2. **Conditional** (or **contract**) zoning vs. **Euclidean** zoning
   3. Euclidean: traditional zoning - separating districts and setting standards for each.
   4. Conditional: the zoning board agrees to a proposed rezoning on the condition that the developer do something else, such as use limitations, height restrictions, gifts to the public of abutting land, etc.
   5. Unilateral arrangements are commitments by the owner to do certain things in exchange for rezoning. But there is no promiseof rezoning; it’s just an incentive.
   6. Bilateral arrangements involve agreements on both sides. These are worse, at least in some courts’ eyes, because they circumvent the normal public process and bind the zoning boards.
   7. Spot zoning?
6. **Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926)**
   1. **Facts**: Ambler Realty owned 68 acres (0.28 km2) of land in the village of Euclid, a suburb of Cleveland. Village, in an attempt to prevent industrial Cleveland from growing into and subsuming Euclid and prevent the growth of industry which might change the character of the village, developed a zoning ordinance based upon 6 classes of use, 3 classes of height and 4 classes of area. Ambler Realty’s property divided into three use classes, as well as various height and area classes, thereby hindering developing land for industry. Ambler Realty sued, arguing zoning ordinance had substantially reduced the value of the land by limiting its use, amounting to a deprivation of Ambler's liberty and property without 14A due process
   2. **Held**:
      1. Zoning measures would be struck down as unconstitutional only if it was **clearly** **arbitrary** and **unreasonable**, having no substantial relation to the public health, safety, morals, or **general** **welfare**.
      2. Use zoning scheme, insofar as it reduced traffic/noise in residential areas and facilitated fire prevention met the standard.
      3. Court did not evaluate each minor provision, instead looked at the overall reasonableness of the scheme was clear
      4. Court held zoning ordinance was not an unreasonable extension of police power and did not have the character of arbitrary fiat, and thus not unconstitutional.
      5. Speculation was not a valid basis for a claim of takings.
         1. Ambler Realty had offered no evidence that ordinance had in fact had any effect on value of property, but based assertions on speculation only.
      6. Challenger in a due process case would have to show that the law in question is discriminatory and has no rational basis.
         1. Euclid's zoning ordinance in fact did have a rational basis.

1. **Prior nonconforming uses** are uses that are legal when ordinance goes into effect, and would not be permitted under the new rules.
2. ***Durand v. IDC Bellingham, LLC***
   1. Brief Fact Summary. IDC wanted to build a power plant in a town, in an area zoned for other purposes. Then IDC offered a gift of $8 million if they would re-zone the area for industrial purposes.
   2. Synopsis of Rule of Law.  Zoning bylaws will only be overturned if they are arbitrary or unreasonable or substantially unrelated to the public health safety and general welfare of the citizens.
   3. Facts. The Town wanted to increase its property tax base. An economic development task force was appointed by the town’s board of selectman to study the issue. They issued a report stated the town needed to industrialize some of the town. They picked an area of town zoned for agricultural use that was next to an area zoned for industrial use as the place they should change. The first vote fell short. IDC owned a power plant in the town and wanted to build a second plant. To that end IDC offered $8 million dollars to the town if they rezoned that area. The $8 million was to be a gift to the town to use for any municipal purpose it seemed fit.  There was a new vote and by a majority vote the area was rezone for industrial purposes. A group from the town brought suit stating this was a contract zoning so the vote to rezone should be considered invalid.
   4. Issue. Whether a town meeting vote to rezone an area of the town is invalid if the prospective owner (IDC) offered the town $8 million dollars if rezoning was approved and a power plant was built on the site.
   5. Held.  A zoning by law will not be held invalid unless there is a demonstration by preponderance of the evidence that the zoning regulation is arbitrary or unreasonable. Zoning bylaws enacted by town meetings is an exercise of independent police power and a legislative act which carries a strong presumption of validity. The motives for granting a zoning bylaw does not affect the analysis of whether a zoning bylaw is valid or not.  The reason for the presumption is that municipal zoning procedures are highly governed by statutes and the exercise of police power is very important to all municipalities. When someone offers money in exchange for the promise to vote for rezoning it’s considered contract zoning which is invalid. Here no promise was made contingent upon the money where the board promised to vote one way or the other. Also the judge determined that the rezoning was not arbitrary or unreasonable. A zoning bylaw will not be held invalid for of the extraneous consideration of gift offers, only if there was a promise made based on that gift or there was a constitutional violation.
   6. Discussion. In general zoning bylaws are considered legislative acts. Such acts will not be held invalid for its motives. Unless a clear standard or rule is violated a zoning bylaw will be upheld.

**Variances** - permits the owner to develop land in a way that otherwise violates the ordinance.

1. Types of variances
   1. Use variances: permit uses otherwise prohibited in the district.
   2. Dimensional variances: permit deviations from areas, bulk, setback, street frontage, floor space, and other nonuse requirements.
2. Ways to get a variance (“undue hardship”)
   1. No economically viable use
   2. Practical difficulties
   3. Unusual circumstances
3. Special exceptions – permits the owner to develop in ways that are only conditionally authorized by the zoning ordinance. To get a special exception, the owner must show:
   1. 1) ordinance lists use as a special exception,
   2. 2) use will meet all standards and conditions set out in the ordinance
   3. 3) the special exception will not detract from the area’s health, safety, and public convenience beyond that inherent in the normal conduct of the activity itself.
4. Most states say that owners have vested rights to existing zoning regulations if they have invested substantially in reliance on those regulations.
   1. Substantial investment (majority rule): may require acquisition of a building permit as well as substantial expenditures.
   2. Site-specific approval: May be unnecessary even to get a building permit. A preliminary subdivision plan might be enough

***Town of Belleville v. Parrillos***

1. **Synopsis:** An existing nonconforming use can only continue of if it is a continuance of substantially the same kind of use as that which the premises were devoted at the time of the passage of the zoning ordinance. Nonconforming uses may not be enlarged except where the change is so negligible or insubstantial that it does not warrant judicial or administrative interference.
2. **Facts:** Parillo’s (Defendant) operated a restaurant and catering service. The Town of Belleville (Plaintiff) passed an ordinance, which did not allow restaurants, but since Defendant existed before the ordinance was passed, they were allowed to remain in operation. Defendant made renovations and turned their property into a nightclub. They applied for a license, were rejected, and still operated the club. Plaintiff filed charges.
3. **Issue:** May the nonconforming use of property continue if it is not substantially the same kind of use as that to which the premises were devoted at the time of the passage of the relevant zoning ordinance?
4. **Held:** No. A nonconforming use is the use of a premise that lawfully existed prior to the enactment of a zoning ordinance and which is maintained after the effective date of the ordinance, even though it does not comply with the use restrictions applicable to the area in which it is situated.
   1. The property has the right to continue, despite the restrictive zoning provisions.
   2. To limit nonconforming uses, the method used is either to prevent any increase or change in the nonconformity.
   3. An existing nonconforming use can only continue of if it is a continuance of substantially the same kind of use as that which the premises were devoted at the time of the passage of the zoning ordinance.
   4. Nonconforming uses may not be changed except when the change is so negligible or insubstantial that it does not warrant judicial or administrative interference.
   5. Converting the restaurant to a nightclub was a substantial, and therefore impermissible, change. The entire character of the business has been altered.
5. Discussion. Nonconforming uses of property are inconsistent with the objective of uniform zoning. So, strict limitations are placed upon nonconforming uses.

**Cochran v. Fairfax County Board of Zoning Appeals**

1. Synopsis:A variance should only be granted if the current zoning ordinance interferes with all reasonable beneficial uses of the property taken as a whole
2. Facts.
   1. Fairfax: A man named Michael R. Bratti applied for four variances from local zoning. He wanted to demolish his house and create a bigger house with a side garage. There was a zoning ordinance requiring all properties to be back 15 feet. He conceded that the project could be done without violating zoning but it would not be the ideal house he wanted and cut down on square feet of living space. The Board of Zoning Appeals (BZA) granted all four variances stating his request were modest ones and his land had unusual topographical considerations.
      1. Defending Bratti: Your property is personal and unique. You have a right to change for aesthetic reason. Castle. More efficient. Lot will suffer.
      2. Against Bratti: All use of the property must be disturbed.
      3. He loses in the end
      4. Undue hardship test is a high high burden
   2. Pulaski: Mr. and Mrs. Nunley owned a corner lot in the Town of Pulaski. There was a zoning ordinance for corner lots that required property to be back 15 feet from the road. The Nunleys requested an ordinance to have no set back so that they could create a garage on the side of there house. The house had public streets on three sides of the house. The only way they could construct the garage closer to the house would be to construct a ramp due to curving property line and difficult topography of the land. Also there is a stone retaining wall behind the house that would be weakened or destroyed if the garage was built closer. Neighbors objected because it would be a blind area and create an eyesore. The BZA granted a modified variance that required them to not altering or destroy the aesthetic looks of existing vegetation.
      1. Board has already compromised, concession, can’t be that bad
   3. Virginia Beach: Mr. and Mrs. Pennington owned a parcel of land in a subdivision know as Avalon Terrace in the City of Virginia Beach. There is a zoning ordinance that requires all accessory structures to not exceed 500 square feet of floor area or 20 percent of the floor area of the principle structure, which ever is greater. They applied for a variance of 816 feet for a storage shed and also to make their existing garage be in conformity with zoning. First the BZA denied the variance for the storage shed by allowed the garage to be compliant. They then filed a petition stating that Mr. Pennington was ill and his daughter was moving back home to take care of him and the shed was to store her things. The court found they now met the hardship requirement and granted the variance.
3. Issue. Whether the granting of zoning variances should be granted on a case by case basis even if the property still has beneficial use without such variance.
4. Held. There is particular standard in allowing zoning variances.
   1. Until property has lost its value due to zoning such variances should not be allowed.
   2. It seems reasonable that considerations of harm to the community, aesthesis, tax base, lack of opposition, support of such variance, and serious personal needs should be considered.
   3. However zoning boards do not have such authority to do so. The only way a zoning variance can be granted is if that zoning bylaw makes all reasonable beneficial use lost on that property.
   4. Which each case the project on each property could still be completed without the variance, or the land could be used for other reasonable beneficial uses.
   5. This is because zoning is a valid exercise of police power. It is understood that zoning cannot be tailored to each parcel in a particular town.
   6. Therefore there is usually one particular zoning structure.
   7. If zoning renders a particular property useless it is unconstitutional. In order to prevent unconstitutional zoning, zoning boards are allowed to grant variances to protect our property rights.
5. Discussion. Some states allow zoning boards to allow variances in cases of undue hardship. This court finds that in Virginia, undue hardship occurs when the zoning reasonably restricts the utilization of the property.

**Stone v. City of Wilton**

1. **Synopsis:** The standard for determining if a property owner has vested rights in a zoning classification is dependent on the type of the project, the location, the ultimate cost, and primarily, the amount of monies expended while the use was in conformity.
2. **Facts:** 
   1. In preparation of building multifamily homes, P had incurred expenses for architectural fees and engineering services in the preparation of plans and plats to be submitted to the city council. Ps also secured a Farmers’ Home Administration (FHA) loan commitment for the project.
   2. Dec 1979, P filed a preliminary plat for the project with the city clerk.
   3. Mar 1980, following a public meeting, the planning and zoning commission recommended to city council that land in northern part of the city be rezoned to single family residential based on alleged inadequacies of sewer, water and electrical services.
   4. Rezoning recommendation affected Ps tract. Ps application for a building permit was denied in May, 1980, due to the pending zoning recommendation.
3. PH: Ps filed a petition seeking a declaratory judgment invalidating the rezoning of their property, temporary and permanent injunctions to prohibit passage of any rezoning ordinance, and in the event of rezoning, $570,000.00 in damages for monies expended, anticipated lost profits and for the alleged reduction in value of Plaintiffs’ land.
   1. The city council, on recommendation of the planning and zoning commission, passed the ordinance rezoning the Plaintiffs’ land to single-family residential in June, 1980. Following the city council’s passage of the rezoning ordinance, the Plaintiffs’ preliminary plat was approved by the planning and zoning commission.
4. Issue. Did the Plaintiffs have a vested right in developing their property as subsidized, multi-family housing, which the rezoning ordinance took without just compensation?
5. Discrimination Claim: Trial court disagreed, and held affirmed here.
   1. P says rezoning driven by desire to advice private economic intersts of a member of the commission and by racial discrimination.
   2. Council faced with a number of competing concerns.
   3. “But racial discrimination is not just another competing consideration. When there is proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified” 🡪 No such evidence here to prove purpose.
6. Vested Right Claims: Held. No. The decision is affirmed.
   1. Ps as a factor in their purchase of the property, did buy the tract because it was zoned to permit multi-family residences. Ps made expenditures in preparation for obtaining governmental approval for the project. Expenditures totaled about $7,900.00, in addition to time and effort expended by Plaintiffs.
   2. Standard for determining if a property owner has vested rights in a zoning classification is dependent on the type of the project, the location, the ultimate cost, and primarily, the amount of monies expended while the use was in conformity.
   3. Ps only took the most preliminary steps toward the project while the use was in conformity. Trial court found that the plans of the architect were the kind that could be found in a magazine and not the working plans of a contractor. No contracting bids were sought, no materials were placed on site, and no construction was started.
   4. Court agrees with the trial court that Plaintiffs’ expenditures were not so substantial as to create vested rights in the completion of the housing project on that particular tract of land.
7. Discussion. Note the fluid boundary between expenditures, which are substantial enough under the test and those which fall short. The primary factor in this analysis is the amount of money expended while the land was in conformity.
8. Problem Pg. 1053:
   1. For her: Educational facility either under day care and high school students who are deaf.
   2. Against: Day care center and educating high school students entirely different
   3. Will she get a variance?
      1. For her: undue hardship (cost, not economically viable, practical difficulties)
         1. Destroy the building and build a new one (no house you can build on there that will recoop the cost of having to destroy and build a new one
      2. For town: There may be other uses. Does it need to be providing classes for deaf people. Might be learning center. What does she need to do to lower insurance? Insurance going up doesn’t mean exceptional; seems self-imposed
9. **Exclusionary Zoning, p. 1014-26**
10. Exclusionary Zoning = Use Zoning
11. Mt Laurel doctrine is minority rule
12. New remedies
    1. Procedural innovations – regional judges to oversee cases coming from different areas.
    2. Affirmative remedies – courts had power to order remedies, including government subsidies, incentive zoning (to encourage private developers), mandatory set-asides, etc…
    3. Builder’s remedy: allows a builder to proceed with a project that includes lower-income housing unless the municipality can show that it is “clearly contrary to sound land use planning”
13. **Exclusionary** **Zoning**: Refers to land-use controls that tend to exclude low-income/minority
    1. Euclidean zoning designed to separate land uses, but soon used to keep certain groups and uses out of community
    2. Typical examples of devices which might be used to exclude people:
       1. Ban on multiple dwelling
       2. If apartment buildings are allowed, a minimum floor area for each living unit
       3. Prohibition on publicly-subsidized housing
       4. If apartments are allowed, set limit on number of bedrooms (prevents large families from burdening school system e.g. Mt. Laurel)
       5. Ban on mobile homes
    3. Traditionally, states were reluctant to invalidate exclusionary zoning devices, and granted municipalities a great deal of latitude in furthering “general welfare”
    4. **Today**, courts have expanded notion of general welfare from present residents of the particular community , now consider welfare of the entire region
    5. Zoning interest falls under state so must be in interest of the state
14. ***Southern Burlington County, NAACP v. Township of Mt. Laurel,* N.J. 1975**
    1. Rule: Zoning as an action under the police power must promote the general welfare and cannot be motivated by other considerations such as minimizing the local property tax rate.
    2. Facts:
    3. **Facts**: P represented Black and Hispanic persons living in/near Mt. Laurel who claimed that town’s zoning policies prevented them from finding low/moderate-income housing.
       1. Mt. Laurel zoning plan contained 2 exclusionary features
       2. 1) all areas zoned for residential use required single-family detached dwellings with substantial minimum lot-size and floor area restrictions and
          1. Attached townhouses, mobile homes, and apartments are not allowed anywhere in D town under zoning ordinance. All four residential zones provided in the town’s zoning ordinance, only permit one house per lot of single family, detached dwellings.
       3. 2) nearly 30% of the town’s land area was zoned for industrial use seven though < 1% was actually used and the rest was vacant.
       4. PUD’s had been built but were designed to contain upper-income apartments (mainly 1B so no families w/ school aged kids would be allowed).
       5. Town ar: only doing for tax reasons, to make sure that new housing would in effect pay its own governmental way so wanted as few children as possible.
    4. **Findings:** 
       1. Court determined that restriction to single-family dwellings realistically only provides housing options for those with “at least middle income.”
       2. Record substantiated that D had an affirmatively and historically developed a policy to control development density and attract selective growth.
       3. Finances had been expended solely for the benefit of upper and middle income people.
       4. NJ does not permit industrial areas to be used for residential areas
    5. **Held**: A municipality must by its land use regulation create an appropriate variety and choice of housing. Actions under the police power are affirmatively required to promote general welfare.
       1. Conversely, the zoning enactment is contrary to the general welfare and is invalid. A municipality “must zone for the welfare of the people and not for the benefit of the local tax rate.”
       2. Scheme violated substantive due process and equal protection rights guaranteed by state constitution, failed to serve the general welfare of the region as a whole.
       3. Municipality may not foreclose opportunities for low/moderate-income housing and must offer opportunity for such housing ‘at least to the extent of the municipality’s fair share of present and prospective regional need’
       4. Fair share of regional housing needs: confinement to certain county isn’t realistic but restriction within the boundaries of a state seemed ok.
       5. Ct. rejects tax argument and fiscal considerations as a legitimate defense for exclusionary zoning b/c municipalities must zone primarily for the living welfare of people and not for the benefit of the local tax rate.
       6. **Intent** **not** **important:** **effect.**
    6. **Rule**: A zoning regulation, like any police power enactment, must promote public health, safety, morals or the general welfare. Presumptively, the town can’t prevent opportunity of class of people mentioned to get low/mod income housing, regs must affirmatively afford that opportunity.
    7. **NB*:*** ***MINORITY*** ***RULE***; only a few states have interpreted their state constitutions in the same way.
    8. **Holding:** Town has to use zoning laws to give low/mid income families appropriate choice and variety of housing***.*** Town has 90 days to comply, but Ps have opportunity to attack amendments via supplemental complaint (they did).
       1. Court felt that the regulations were designed to limit the number of school children and thus lower the tax rate.
       2. Remedy was in the hands of the municipality who should have the “first full opportunity” to perform the function of enacting appropriate land use regulation that would provide for low and moderate income housing of without judicial supervision.
       3. Poor people have to live somewhere, and if one area does this, then they’re just going to move somewhere else, but it’ll continuing on.
15. **Mount Laurel II: South Burlington Count N.A.A.C.P. v. Township of Mount Laurel (1983)** 
    1. Eight years later. Accompanied by five other cases that were heard together bc raised similar issues, decided in a single opinion
    2. *Mount Laurel II* put teeth in the original doctrine by creating a fair share formula to measure each municipality's obligation to provide affordable housing, and by fashioning a "builder's remedy" to force municipalities to fulfill that obligation.
    3. Trust in town unfounded: 8 years later Mt. Laurel still had exclusionary zoning and no low/middle income housing. New challenges brought, 6 consolidated in single appeal
    4. Extended obligation to every municipality in the state, not just “developing” communities.
    5. Imposed affirmative remedies on towns to encourage construction of low/mid income housing:
       1. **Density** **bonuses**: right to build extra housing beyond normally allowed by zoning ordinance if builder promises to make some units be low income
       2. **Federal** **subsidies**: Cooperating w/ developer to obtain federal subsidies for low income housing
       3. **Eliminating** bans on Mobile homes
       4. **Builder’s** **remedy**: ordering a municipality to allow a developer to construct a particular project that includes a substantial amount of lower-income housing unless the “municipality establishes that because of environmental or other substantial planning concerns, the P’s proposed project is clearly contrary to sound land use planning.
       5. **Mandatory** **set** **asides:** requiring developers include a minimum amount of lower income housing in their projects to get a permit to build
       6. **Appointment** **of** **a** **master** **to** **revise** **zoning** **ordinance:** in extreme case of municipal disregard of the law, appointing a master to rewrite the zoning ordinance to comply w/ the constitutional obligation to provide for the municipality’s resident poor or its fair share of the regional low-income housing need
16. **Legislation**
    1. *Mt.* *Laurel* *II* invited NJ legislature to act to implement constit. obligation to precent exclusionary zoning.
    2. *Fair* *Housing* *Act* *of* *1985*
       1. Transferred authority of Mt Laurel cases to state admin agency—Council on Affordable Housing.
       2. Allowed municipalities to buy their way out of Mt Laurel obligation by paying neighboring communities to absorb up to half of fair-share obligation.
       3. NB: Tows can avoid Mt. Laurel obligations by taking property by eminent domain, if the taking is motivated by “legitimate public policy concerns.”could be literally anything.
17. **Inclusionary** **Zoning:** Some states have adopted legislation to limit exclusionary zoning or to promote inclusionary zoning, for example through linkage ordinances that condition real estate development on providing low income housing
    1. Recent evidence: inclusionary zoning programs have produced significant amts of low income housing, but benefits mainly elderly and white people (more means and more likely to take place in suburban areas)
18. **Growth control**
    1. ***Zuckerman*** ***v.*** ***Town*** ***of*** ***Hadley***
       1. MA Sup. Ct. held that town’s permanent limit on # of annual building permits was detrimental to public welfare, therefore not legitimate zoning purpose, therefore unconstitutional.
       2. Can’t serve general welfare of state to allow one town to deflect wave of newcomers onto neighbors.
19. **Efficiency** **Concerns**
    1. Robert Ellickson
       1. Zoning = tax on new construction b/c some units that would otherwise not be profitable must be included in the development thereby raising the cost of providing new housing
       2. When cost is artificially raised by gov't less will be providing thereby exacerbating housing shortage for low/moderate income
    2. Other scholars
       1. Such techniques are likely to restore the efficient use of land by removing inefficient restrictions on development contained in existing exclusionary zoning laws
       2. Laws that exclude low-income housing from the community arguably decrease social welfare by attempting to create protected subdivisions w/o accounting for the externalities of limiting low-income housing
       3. Also artificially Inc. cost of low-income housing by excluding it from Ares in which developers could otherwise profitably build
20. **Eminent Domain; Origins of Regulatory Takings Problem, p. 1071-91**
21. “Property rights serve ‘twin roles – as protector of individual rights against other citizens, and as safeguard against excessive government interference.’” Jeremy Paul
    1. “Property rights mediate disputes by defining legal relations among people regarding control of valued resources. Property rights are not absolute because owners do not live alone; their rights are limited to protect the property and personal rights of others, the state must have the power to *define* the scope of property rights so as to establish the basic framework of legal relationships in the market and to ensure that property rights are not exercised in ways that infringe on the legitimate interests of the other owners or the public at large. Thus, the state must have the power to pass laws regulating and limiting the use of property to protect public health, safety and welfare.”
    2. “Property rights not only protect people against other persons but serve as a bulwark against state power.”
    3. Decentralize power relationships, individuals rather than officials in centralized state bureaucracy, have control of many of society’s most valued resources.
    4. “This dual role of property law creates an awful dilemma.”
22. Role of Courts? “role as definers and defenders of property rights”
23. Categories
    1. Eminent Domain
       1. Must meet two prongs: Public Use (ish) and Just Compensation
          1. Just Compensation: Fair Market Value
             1. For homes, generally straightforward
             2. For business, don’t get compensation for customer loss
    2. Regulatory Takings
       1. Reduce speed limit, some truck companies go out of business
       2. Ban Four Loko
24. Takings Clause – 5th Amendment
    1. No person… nor shall private property be taken for public use, without just compensation.
    2. Enabling/enumerated power – Government can do this, but subject to conditions
       1. During war
       2. Planning for cities and development, canals, roads
       3. Liability rule or purchased injunction
       4. Holdouts (certain kinds of sales we want to happen)
    3. Limits of government
       1. History of British government taking property without warning/invasion
       2. Similar to 3rd Amendment
25. 5th A supposed to fill dual role as applied to **federal** government takings
26. 14th A supposed to fill dual role as applied to **state** gov’t takings.

# Takings

## Eminent Domain

* 1. Generally
     1. US Const. 5A: “nor shall any private property be taken for public use, without just compensation”
     2. Three requirements: (1) a taking (2) for public use (3) without just compensation
        1. Types of takings
           1. Physical – piece of land is physically seized and/or occupied
           2. Regulatory – land use is regulated in a way that leads the owner to argue the property was constructively taken
  2. Rule, Public Use Requirement
     1. Modern Approach [Kelo]
        1. If the taking serves a ‘public purpose’ (e.g., a revitalization plan) then it qualifies for as a ‘public use’ and therefore, a taking under the 5A.
     2. Development
        1. Berman v. Parker
           1. A department store located in a blighted DC area could be taken even though it wouldn’t be exclusively used for the public
           2. Public use: the plan must be looked at as a whole, not piece by piece, in which case the Court should defer to the legislature
        2. Hawai’I Housing Authority v. Midkiff
           1. The gov’t was allowe to transfer parcels of land from the lessor to the tenant because the concentrate of land was owned by private parties
           2. Public use: removing land ownership from a small group of people into a larger group of people (all private)
        3. Ruckelshaus v. Monsanto Co.
           1. Public use:
     3. Alternative Rules [Kelo]
        1. Kennedy – public use met if public benefits and characteristics of the intended use substantially predominate over the private ones
        2. O’Connor – public use not met unless nature of property itself justifies the taking (i.e., it is harmful)
        3. Thomas – public use met if requirement means public ownership or use by public
  3. Policy
     1. Many states have passed legislative reforms since *Kelo*, narrowing the definition of ‘public use’ to exclude increased tax revenue
     2. Most state legislation excludes blighted areas; *key is how blight is defined*
  4. Case
     1. Kelo v. City of London
        1. Facts
           1. New London (∆) sought to revitalize the city by undergoing a large construction project which would draw large company to the area
           2. π were landowners whose land would be taken by the project, filed suit to prevent taking
        2. Holding
           1. The project was allowed under the taking clause even though portions of the land weren’t being used for the public; the public was going to benefit by the revitalization of the city
        3. Arguments
           1. π suggested two alternative tests:

Bright line test, which prevents any economic development from qualifying as a public use (problem: could be boundless)

Heightened standard of review, which requires a reasonable certainty public benefits will accrue (problem: could take too long before any benefits accrue)

* + - 1. Dissents/Concurrences
         1. Kenney (C) – courts should use rational basis review to strike down any taking that clearly favors a private party and only ahs pretextual public benefits
         2. O’Connor (D) – majority’s holding significantly expands meaning of public use to include ‘incidental benefits to the public’
         3. Thomas (D) – taking should only be available when land is available for use by public

1. ***Kelo v. City of New London (2005)*** 
   1. Facts
   2. ***Berman v. Parker (1954)*** – upheld redevelopment land of blighted area of DC (5,000 inhabitants most housing was beyond repair), condemned and part utilized for construction
      1. Challenge:
         1. Piecemeal. Whatever’s wrong with overall area is not occurring to me and my department store. Court says that comprehensive plan, so some profitable businesses or homes will be incorporated. Does not have to be piecemeal
         2. Not a public use. Court says that legislature can decide what public use is.
   3. ***Hawai’i Housing Authority v. Midkiff (1984)*** – 100 landowners in Hawaii, so state took title away from original owners and distributed it to new people.
      1. Upheld. Court held that legislature can define its own public use and purpose.
      2. Alternatives: High taxes for those with lots of land. Coup.
   4. ***Ruckelshaus (EPA) v. Monsanto (1984)*** – regulatory taking case.
   5. Opinion (5-4, Stevens with Kennedy, Souter, Ginsburg, Breyer)
      1. How do we fit this into those two?
         1. Government cannot just take property from A and give to B (private)
            1. Why wrong? Constitution permits public use
         2. Government can take for government to keep for public use
            1. Constitution
      2. How can you find out if public use is really private A🡪 B
         1. Contributions – campaign, private developer
         2. What they want to do with the land, and how much private parties will pay to lease the land afterwards (here, $1 for each year)
         3. Kennedy: Comprehensive plan v. one-to-one
         4. Similarities and differences between proposed used and current use
         5. Private developer created plan and pitched for own profit
         6. Is it addressing an actual need
         7. Nepotism
         8. Kennedy: Procedural requirements (hearings, public meetings, comments)
      3. How do define public use?
         1. NO. Public use means use by the public – public can use the property as roads, school, facilities, park, etc.
            1. May still be too broad (public still needs to be defined)
            2. May be too narrow (even if not directly used by public, still can be used by private parties
            3. Military use (wouldn’t be covered by this, and was contemplated by framers of Constitution- and public benefit still exists)

But functions of government like military and city buses etc by saying that most government public general welfare

* + - * 1. Used by the public but owned and operated by private company
        2. Thomas: Originalism (dictionaries written 1773)

Use = actually employing

Midkiff = use is being used by public (not just small group of people)

Berman = wrong case. discriminatory purpose (slum clearance)

97.5% black in DC blighted area

* + - 1. YES. Public use is “public purpose”
         1. Court says that public use strict test is too difficult to administer (how to define and quantify) and too restricting for modern times.
         2. Broader
         3. Even aesthetic, spiritual goals, legislature
         4. Pros:
         5. Cons: Too broad, no lines, distributive too broad
      2. Other option: Heightened Scrutiny for Public Use (Standard)
         1. Clear and convincing evidence that the economic benefit would in fact come to pass.
         2. Will not defer to the legislature
         3. Incentivize cities to get in bed with developer right away, so fears of capture by private actors
         4. Institutional competence (is it better to have the city do this or the court?)
         5. Was there an alternative?
      3. Other option: Bright Line rule against economic benefit takings (Rule)
         1. Holdout problem was whole issue. Here, whole problem
         2. Thomas: Small guy will always lost. Discriminatory takings.
      4. Other option: Ending an affirmative harmful use of the property (O’Connor) with directly achieving a public benefit
         1. Does not fix discriminatory takings
         2. How will you ever build roads?
         3. Cares about powerful few having ability to take whatever they want
    1. Will not decide whether A🡪 B solely because of increased tax revenue
       1. Probably yes, but comprehensive plan? Will this stand
  1. Aftermath: States set different standards
     1. Did Kelo set a floor or a ceiling? Floor.
     2. States took away their own power because opinion was so bad?

1. Who should decide takings?
   1. Courts
      1. Etc.
   2. Legislature
      1. 5A was enumerated power
2. **Regulatory Takings**, pp. 1103-23

**Regulatory Takings**

1. **Types of regulatory takings**
   1. Per se takings
      1. Supreme Court has now clarified that there are only “two categories of regulatory action that generally will be deemed per se takings. Lingle v. Chevron:
         1. Permanent physical invasions
         2. Regulations that completely deprive all economically viable use
            1. [unless] background principles of nuisance and property law independently restrict the owner’s intended use of the property.
   2. Ad Hoc 3-Factor Test – particular circumstances of each case
      1. The character of the government action
         1. More preventing a harm (severe blight)
         2. More conferring a benefit (lower carbon emissions)
      2. The protection of/interference with distinct, reasonable investment-backed expectations
      3. The economic impact of the regulation on the particular owner
         1. “In evaluating these three factors, the Court’s goal is to apply the ultimate test of ‘fairness and justice.’”
   3. Three categories of cases that have significantly more chance to be deemed unconstitutional takings of property under this test:
      1. Deprivation of certain core property rights or estates in land
      2. Retroactive deprivation of vested rights belonging to owners who invested in reasonable reliance on a prior regulatory authorization
      3. Required dedications of property imposed as conditions on land use development permits when those exactions do not substantially advance the same interests that land-use authorities asserted would allow them to deny the permit altogether.

## Regulatory Takings

* 1. Rule, Ad Hoc Test
     1. **Factors to consider in ad hoc inquiry “whether a particular restriction will be rendered invalid by the government’s failure to pay for any losses proximately caused by it”:** [Penn Central]
        1. The economic impact of the regulation
           1. The greater the impact, the more likely it is a taking
           2. No owner is entitled to the full economic use of their land
        2. The extent to which the regulation has interfered with distinct, reasonable investment-backed expectations
           1. Lost opportunity cost is not persuasive; requires action taking to pursue a particular use before the regulation
        3. The character of the governmental action
           1. A physical invasion by the government is more likely a taking than an interferences which arises from some public program
     2. Problems
        1. Denominator Problem
           1. How should the property being taken being defined?

10 acres on a 100 acre form – either 100% of 10 acre plot hiis being taken, of 10% of the farm is being taken

* + - 1. Average Reciprocity of Advantage
         1. When zoning disadvantages a particular landowner, it is likely to disadvantage neighbors; but in takings, only one parcel is being disadvantaged by the action
  1. Rule, Per Se Takings
     1. **Two takings *generally* qualify as per se takings:**
        1. Government-mandated “permanent physical invasions of property” [Miller]
        2. Regulations that completely deprive the landowner of *all* economically viable use of the property, *unless* background principles of nuisance and property law adequately restrict the owner’s intended use of the property [Lucas]
           1. Temporary building moratoriums may be a taking under *Lucas* depending on how long the moratorium last, other factors. [Tahoe-Sierra Preservation]
  2. Case
     1. Miller v. Schoene
        1. Facts
           1. Cedar tree carried a virus that infected apple trees within a two mile radius
           2. Agricultural dept. decided to destroy the cedar trees because apples were a valuable economic resources
        2. Holding
           1. The destruction of one type of property to save another is of greater value to the public and therefore does not exceed the state’s constitutional powers
     2. Penn Central Transportation Co. v. New York City
        1. Facts
           1. π owned Grand Central Terminal and wanted to do construction above it to build a skyscraper, but GCT was a landmark which did not allow for modifications
           2. ∆ denied their permits to build the office building
        2. Holding
           1. No taking has occurred

1. ***Miller v. Schoene (1928)*** - classic property rights case in balancing rights of a property owner against social policy that is not unreasonable.
   1. Facts: State entomologist in Virginia acting under the Cedar Rust Act of Virginia ordered the plaintiffs' ornamental red cedar trees growing on the plaintiffs' property to be removed to prevent the spread of rust disease to nearby apple orchards. The plaintiffs appealed the order to the circuit court of Shenandoah county, which affirmed the order, but allowed the plaintiffs to recover $100 to remove the trees. The Supreme Court of Appeals of Virginia also Affirmed the decision.
   2. I: Did Virginia's Cedar Rust Act and order to remove Miller's cedar trees violate the Due Process clause of the Fourteenth Amendment?
   3. Opinion: Inanimous decision found that the statute and the order to remove Miller's cedar trees did not violate the Due Process Clause. The Court recognized the State's interest in preventing the cedar rust from damaging nearby apple orchards as they were the "principal agriculture pursuit" in the state. The Court held that the destruction of Miller's trees would be a taking of his property; however, the State "did not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public.”
2. ***Penn Central Transportation Co. New York City (1978)*** 
   1. NYC Landmark Preservation Commission rejected Penn proposals for construction of high rise atop Grand Central, Penn filed suit, arguing under New York Historical Preservation Law it entitled to reasonable return on value of its property, whereas in existing condition Grand Central could not break even; because (a) Penn Central was a regulated railroad, and (b) it was in bankruptcy, it could not cease deficit-causing operations, thus suffering taking of its property, for which it was entitled to compensation. Trial court agreed. Appellate Division reversed, Penn did not use proper accounting methods to demonstrate that it was suffering an ongoing deficit. Court of Appeals affirmed. Appellate Division different legal theory—that in NY, a property owner was entitled to a return, not on the value of his entire property, but only on that increment of its value that was created by private entrepreneurship.
   2. Supreme Court Decision:
      1. Purpose of the takings clause: bar the 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
      2. Unable to develop any set formula for when justice and fairness re: taking
      3. Keystone about public interest but Mahone is not. (Holmes opinion too)
      4. But creates a new ad hoc test:
         1. Economic impact of the regulation on the claimant
         2. Extent to which the regulation has interfered with distinct investment-backed expectations
            1. New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel. More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a "reasonable return" on its investment.
         3. Character of the governmental action
            1. More readily found when interference with property can be characterized as a physicial invasion by the government (US v. Causby 1946) than just interference arises from some public program adjusting benefits and burdens of economic life to promote public good
         4. Also:
            1. Miller v. Shoane: When they have to choose between two private uses
            2. Coal cases (Keystone):
      5. Penn argues:
         1. Air Rights- Took all my air rights. They had right to develop up to certain heights according to zoning rules
            1. Claiming total taking of air rights, but this is the denominator problem. How do you describe what is being taken away. If it’s about air rights, then they’ve lost it all. If it’s about Grand Central as a whole or the city block, then it’s only a part.
            2. “In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole – here, the city tax block designated as the ‘landmark site.’”
         2. Losing value for other people’s benefits. Imposition on us to maintain the property.
            1. Government can’t bring in money from each citizen interested in keeping Grand Central, but tourists can’t be taxed.
            2. Sophisticated parties that can bargain
      6. Economic impact on Penn Central was not severe enough to constitute a taking because Penn Central could continue with its present use whose return, it conceded, was not unreasonable, so the regulation did not interfere with its reasonable investment-backed expectations.
      7. Dissent: Net transfer from Penn to people of the city who were meant to benefit.
         1. Entire burden of preserving Grand Central fall on its owners (nonconsensual servitude). That cost is the opportunity cost of not developing the airspace over the terminal.
         2. Full compliance with zoning, height limitations and other health and safety requirements. Multimillion dollar loss.
         3. Saying it’s a comprehensive plan, but it’s not. It’s reverse spot zoning from commercial zoning to not.
         4. Average reciprocity of advantage
         5. “Typical zoning restrictions may, it is true, so limit the prospective uses of a piece of property as to diminish the value of that property in the abstract because it may not be used for the forbidden purposes. But any such abstract decrease in value will more than likely be at least partially offset by an increase in value which flows from similar restrictions as to use on neighboring properties. All property owners in a designated area are placed under the same restrictions, not only for the benefit of the municipality as a whole but also for the common benefit of one another.”

Question!

* A scientific research company builds a facility to test chemical weapons in the middle of a city, pursuant to a government contract. Though experts agree there is no real risk of public health problems, voters approve a referendum to amend the zoning law to forbid the testing. The facility cannot be used for any other scientific purpose without substantial rebuilding.
* What are the best arguments for the company and the city about whether this is a taking?

1. **Regulatory Takings, cont., p. 1144-68**
2. Why is government physical invasion per se rule?
   1. Exclusion is most fundamental property right, then permanent physical invasion is against it
   2. Originalism
   3. Public Use = Government invasion physical is most obvious form
3. Is the 13th Amendment a taking?
4. ***Lucas v. South Carolina Coastal Council (1992)***
   1. Established the "total takings" test for evaluating whether a particular regulatory action constitutes a regulatory taking that requires compensation.
   2. Facts: Petitioner Lucas purchased beachfront properties in 1986 for $975,000. Lucas owned two vacant oceanfront lots in Beachwood East Subdivision in South Carolina. Beachfront Management Act effectively deprived Lucas of his ability to erect anything on his properties
   3. PH: SC Supreme Court says law involved exercise of SC “police powers” to mitigate the harm to the public interest that petitioner’s use of his land might occasion.
   4. Holding (Scalia): South Carolina Supreme Court erred in holding that Beachfront Management Act was a valid exercise of the police power and did not constitute a taking.
      1. There is no way to distinguish regulation that "prevents a harmful use" and confers benefits on nearby property 🡪 so should not use harm test anymore
      2. A regulation that deprives an owner of ***all*** economically beneficial uses of land constitutes a taking ***unless*** the proscribed use interests were not part of the title to begin with.
         1. In other words, a law or decree with the effect of completely depriving all economically beneficial use must do no more than duplicate the result that could have been achieved in the courts under the law of nuisance.
         2. If what you wanted to do was going to be a nuisance anyways, then it’s not a taking if the government takes that right from you.
         3. Nuisance: You can still do it, but you can just pay someone else off
         4. Nuisance: Individual’s use may not be a nuisance but collective use may become a nuisance.
            1. So is this nuisance exception allow in the harm analysis that Scalia says he doesn’t want? Likely
      3. As a result, "total takings" analysis requires a consideration of
         1. (1) the degree of harm to public lands or adjacent property posed by the regulated activities,
         2. (2) the social value of such activities, and
         3. (3) the relative ease with which the alleged harms can be avoided through measures taken by either the claimant or the government..
      4. Deprivation of all economically beneficial use is, from the perspective of a property owner, deprivation of the property itself.
         1. But how do we value land? What is ownership? Is economic use the only one that counts?
         2. Regulations that restrict all economically beneficial use may often be a guise of pressing that land into public service.
            1. But they should’ve just said this.
      5. Contrary to Respondent South Carolina's assertion, title is not held subject to the limitation that the state may regulate away all the property's economically beneficial use.
   5. Kennedy, Concurring:
      1. Determination of no value must be considered with reference to the owner's reasonable, investment-backed expectations. Concern state regulation could go no further than duplicating common law of nuisance without exposing itself to challenge of categorical taking, as some fragile lands might prevent such public concern that state can go further in regulating development than the common law of nuisance might otherwise permit.
   6. Souter, J.
      1. Case should have been dismissed as improperly granted, as the decision of the trial court that a total taking had occurred is highly questionable on the basis of the facts presented.
   7. Blackmun, dissenting. Launches a missile to kill a mouse. Should not have granted certiorari to hear this case and it ignores its jurisdictional limits
      1. This Court repeatedly has recognized the ability of government, in certain circumstances, to regulate property without compensation no matter how adverse the financial effect on the owner may be. Institutional competence. Separation of powers.
      2. Remakes its traditional rules of review and created simultaneously a new categorical rule and an exception.
      3. There could never be a total loss because the owner can still enjoy other attributes of ownership such as right to exclude others, picnic, swim, camp in a tent or live on the property in a movable trailer
   8. Stevens, Dissenting: Categorical rule created by the court is unsound and an unwise addition to the law of takings.
      1. In the past court had worked at rejecting an absolute formula for determining a taking and have frequently in the past held a law that renders property valueless may not constitute a taking.
      2. New rule created by the court is arbitrary because a landowner whose property is diminished in value 95% recovers nothing while an owner whose property is diminished 100% recovers the land’s full value.
      3. Federalism concerns. States as laboratories and evolution of the common law

Questions!

* On remand, the South Carolina Supreme Court held that Lucas’s conduct would not constitute a nuisance under the state’s common law and that he was therefore entitled to compensation.
  + If the court had held that the extensive damage caused by construction on wetlands *cumulatively* would constitute a public nuisance under the state common law and Lucas again appealed to the Supreme Court, would the result be any different?
* Was *Miller v. Schoene* correctly decided?
  + Is it consistent with *Lucas*?
* A developer who owns 50 acres of property subdivides it and sells 45 single-family homes on single acre lots. One 5 acre parcel remains but is designated as wetlands; under state law, the owner is prohibited from building anything on it. The developer sues the state, arguing that the wetlands regulation deprives her of any economically viable use for the 5 acres of wetlands; the diminution in value for this parcel is 100 percent. The state claims that the parcel represents 10 percent of the total area that the developer had owned and that since the developer had sold 45 homes, she was not deprived of economically viable use for her property.
  + How should the court analyze this question? Is this a 100 percent taking of the 5 acres or a 10 percent taking of the 50 acres? Should the owner be entitled to compensation for her inability to develop the 5 acre parcel?
* Property is often damaged pursuant to police activities. Most courts hold that no compensation is required when such injuries occur. In *Eggleston v. Pierce County*, for example, the court did not find a taking when a home was rendered uninhabitable due to damage that occurred when police executed a search of the house pursuant to a valid search warrant. In contrast, in *Steele City of Houston*, the court found a taking when police burned down an innocent person’s home to eject suspects.
  + Which approach is correct under *Lucas*?
* Are governments liable for takings of property when they inadvertently or negligently cause damage to property?
  + If the homeowners in New Orleans could prove that the flooding which destroyed most of the property in the city would not have occurred if the flood control system had been designed, built, and maintained better, do they have a takings claim against the federal government which designed the flood control system in the city?

***Palazzolo v. Rhode Island (2001)***

1. Claimant does not waive his right to challenge a regulation as an uncompensated regulatory taking by purchasing property after the enactment of the regulation challenged.
2. Facts: P Palazzolo and business associates, as Shore Gardens, purchased 3 undeveloped parcels on Rhode Island coast. P became sole shareholder, and began efforts to develop land by submitting parcelling plans to the town. Land required significant filling, P submitted applications for permits -- all denied. P again attempted to develop land, submitting several permits, all rejected.
3. PH: P argued denial of a permit for filling by Respondent Council effects a taking without compensation under the total takings analysis of Lucas v. South Carolina Coastal Council because the denial deprives him of "all economically beneficial use" of the land.
   1. Rhode Island Supreme Court held
   2. (1) Petitioner Palazzolo had no right to challenge the permit denial as a total taking because he acquired the property after the enactment of the regulation under which the permit was denied, and therefore had sufficient notice of such regulation (safe haven);
   3. (2) the upland portions of the land were available for development, and therefore Palazzolo was not deprived of all economically beneficial use; and
   4. (3) Palazzolo cannot claim a taking under the more general balancing test of Penn Central Transportation Co. v. New York City.
   5. (4) Agency had not issued a final ruling, so not ripe for decision
4. Rule: Claimant does not waive his right to challenge a regulation as an uncompensated taking by purchasing property after the enactment of the regulation challenged.
5. Holding (Kennedy ,5-4):
   1. P has standing to sue though he acquired property after enactment of regulations.
   2. RI Supreme Court erred, Ripe for Decision
   3. Argument that claimant who acquires after enactment of regulation waives right to challenge as unconstitutional regulatory taking fails because
      1. (1) such a principle would make the constitutionality of a regulation a matter of the passage of time, thereby creating a "[statute of limitations]" on a constitutional right;
      2. (2) such a principle also prejudices owners at the time of regulation, whose ability to transfer the land has become seriously impaired; and
      3. (3) such a principle would create different and unequal rights between different classes of owners (old owners and new owners).
         1. "[w]ere we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land."
   4. PUNTED: Court did not fully address if Rhode Island Supreme Court correctly held that Petitioner did not endure a total taking because some of the parcel remains economically usable.
      1. Court did not err in finding that [Palazzolo] failed to establish a deprivation of all economic value, for it is undisputed that the parcel retains significant worth for construction of a residence.
      2. Remanded for consideration under the Penn Central analysis. On remand the court would need to make a determination of whether the regulations went too far so as to constitute taking, considering the owner’s investment backed expectations. Court would have to consider whether he has suffered a taking even though some use of the parcel remained viable and also considering the character of the government’s action and the economic interference with owner’s investment backed expectations.
      3. Affirms and continues **the *Lucas*** bright line rule, but says that the ***Penn Central*** factors must be evaluated in each case also to determine if the regulation went too far.
      4. Leaving an owner with a token interest should not allow the state to evade the duty to compensate. It is unclear how if it would differ factually from Lucas because here a more significant value does remain for the upper parcel of land.
      5. Be aware of investment-backed expectations consideration for a claim analyzed under ***Penn Central v. New York***, especially the reasonableness of the expectations. Although prior enactment of the wetlands act is not a bar to a claim, one must question how much the Petitioner could have reasonably expected to gain from the property, which he succeeded to, in light of the regulation
   5. Court expressed some sympathy for the argument that the upward parcel could be distinct and separate from the rest of the parcel. BUT Petitioner did not properly raise the argument at state court level so Supreme Court only considering entire parcel as a whole.
      1. However, the question of what was the proper denominator, i.e. whether the whole property or just a fraction of the property, must be considered was a question left open for the future.
6. Concurrence (O’Connor): The more difficult question is what role the temporal relationship between regulatory enactment and title acquisition plays in a proper Penn Central analysis. Today’s holding does not mean that the timing of the regulation’s enactment relative to the acquisition of title is immaterial to the Penn Central analysis.
   1. If investment-backed expectations are given exclusive significant in the Penn Central analysis and existing regulations dictate the reasonableness of those expectations in every instance, then the State wields far too much power to redefine property rights upon passage of title.

***Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency (2002)***

1. Facts:  Tahoe Regional Planning Agency issued moratoriums on virtually all residential development within the basin (first for 24 months, second for 8 months for adopting comprehensive land-use plan) to make sure algae to create clarity. Pls owned individual home sites, claimed moratoria takings under 5A/14A, want just compensation.
2. PH: District Court:  (1) Though land retained some value during moratoria landowners were completely deprived of any economic use of their land, so did constitute taking. Circuit Court: since moratoria only temporary, no taking occurred and no compensation needed.
3. Opinion (Stevens, 6-3): Held mere enactment of regulations implementing moratoria did not constitute per se taking of property. Whether taking occurred depended upon considerations of landowners' expectations, actual impact, public interest, and reasons for the moratoria.
   1. Discarded Ps’ assertion that enactment of moratorium deprived Plaintiffs of all economic use of property and required compensation.
   2. Held case law does not support and in fact rejects idea that a temporary moratorium invokes Just Compensation clause.
   3. Text of the 5A itself creates a distinction between physical takings and regulatory takings specifying that only physical takings of private property for public purposes require just compensation.
   4. Predicting that if all takings, physical and regulatory, were to require just compensation then the whole notion of government takings would be, “a luxury few governments could afford”. Dismissed precedent of Lucas saying that logically property at issue in present case cannot be considered to have lost all economic value since as soon as the moratorium is lifted it will recover all economic value. Fluctuations in property value cannot be considered constitutional takings.
   5. If governments are required to compensate landowners every time a moratorium is put into place in order to plan the development of an area, then officials will either rush through the planning process or skip it altogether fostering growth in the community that is either ill-conceived or inefficient.
4. **Exactions and Linkage Requirements, p. 1188-1205**

## Exactions and Linkage Requirements

* 1. Rule, Rough Proportionality [Dolan]
     1. Determine whether there is an *essential nexus* between the legitimate state interest asserted and the permit conditions exacted [Nolan]
     2. If so, determine whether there is ‘rough proportionality’
        1. Is there a legitimate state concern between the problem the state seeks to ameliorate and the amount of land dedicated to the solution
        2. Is the amount of land dedicated to the solution proportional to the problem that it seeks to ameliorate?
     3. Improvements [Town of Flower Mound]
        1. No distinction between improvements made to private property for public use or public property.
     4. Doctrine of unconstitutional condition – you cannot condition some benefit on the waiver of a constitutional right
     5. Linkage ordinance – an amendment to a zoning ordinance requiring a developer to provide something for the community
        1. Developers should have to account for the externalities/burdens/higher pries caused by their development
  2. Rule, Direct Proportionality
     1. Determine whether the government exaction is directly proportional to the specifically created need.
        1. Difficult to do this accurately.
  3. Policy
  4. Case
     1. Dolan v. City of Tigard
        1. Facts
        2. Holding
        3. Dissents
           1. Stevens – new standard does not help local governments with a usable standard to judge their actions and does not accurately capture the benefit the landowner receives
           2. Souter – the standard used by the majority makes exactions more confusing than necessary; also places the burden of proof on the gov’t rather than the usual presumption the gov’t has acted constitutionally

*Coercive Offers = Unconstitutional Taking*

1. Nollan v. California Coastal Commission, 483 U.S. 825 (1987)
2. California Coastal Commission required offer to dedicate a lateral public easement along Nollans' beachfront lot be recorded on the chain of title to the property as a condition of approval of a permit to demolish an existing bungalow and replace it with a three-bedroom house.
3. Coastal Commission asserted that public-easement condition was imposed to promote legitimate state interest of diminishing the "blockage of the view of the ocean" caused by construction of the larger house.
4. CCC has complete monopoly over giving permits.
5. Court held that in evaluating such claims, it must be determined whether an "essential nexus" exists between a legitimate state interest and the permit condition.
6. Facts: Nollans owned beachfront property, replace 504sqft bungalow which had fallen into disrepair with 2,500sqft house. As a condition for permits to do so, California Coastal Commission required Nollans dedicate for 20 years strip of land along the beach in front of their house to allow the public the right of pass and re-pass along the beach . CCC argued new house increase blockage of ocean view and contribute to a “wall of residential structures” which would prevent the public “psychologically from realizing a stretch of coastline exists nearby that they have every right to visit".
7. Article X, Section 4 of California Constitution guaranteed access to beaches, but a prospective beach-goer might have difficulty seeing the beach or finding public access to it. Walling-off effect created psychological impediment to public access ensuring that no members of the public would be able to utilize a public resource (guaranteed by constitution). Development pattern took public resource supposedly available to anyone and turned it into the private enclave of the wealthy property owners whose houses lined the beach.
8. Nollans' property did not present the same conditions found along beaches in Malibu, being less than 4% developed and having smaller, less-intensive development than that along the Malibu shoreline. The condition for approval of the Nollans' Coastal Development Permit was that the applicants record an offer to dedicate a strip of property (generally 25 feet (7.6 m) wide and located landward of the mean high tide)—or, more generally, from the actual edge of the water on any particular day during any given tide along the beach.
9. Opinion (Scalia, 5-4) : Requirement by CCC was a taking in violation of 5A and 14A
   1. “The lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was...Unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an out-and-out plan of extortion.”
   2. Derided the concept of psychological impediments to public access; he wrote that if a public agency wishes to place conditions of approval on a permit, that those conditions must bear some relation to the public-policy concerns purported to be resolved through the imposition of conditions of approval.
      1. Example, project eliminates 120 square feet of public parkland, appropriate condition would be to require replacement in-kind of 120 square feet to maintain size of public parkland.
   3. There had to be a nexus between the public-policy issue and the condition of approval which sought to address it.
   4. Public-access condition did not meet that nexus test by compensating for the slight loss of public view across the Nollans' property; if loss of public views across the Nollans' property was truly the issue, then an appropriate condition of approval would have been "construction of a public viewing platform on the roof of the Nollans' house.”
   5. Public had no right of passage with the existing bungalow in place, so it would be unaffected by the larger structure replacing it.
   6. Court specified that a “close nexus” must be shown between the regulatory condition imposed and the development impacts of concern, and that the regulatory action must “substantially advance legitimate state interests” (AADASDF p 53). Although the case appears to deal primarily with takings, the principles are applied to the exaction and impact-fee debate as well. The Court struck down California’s policy of “anything goes” for exaction requirements, and reaffirmed the rational-nexus standard for states across America.[1]
10. How changed under Dolan v. Tigard (1994): Evaluated further degree of connection required. Dolan: Court ruled city’s requirement taking if the city did not show that there was a reasonable relationship between the creation of the greenway and bike path and the impact of the development. "Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred", the Court held. “Such public access would deprive petitioner of the right to exclude others, one of the most essential sticks in the bundle of rights that are commonly characterized as property".

***Dolan v. City of Tigard (1994)***

1. Established limits on ability of cities and government agencies to use zoning and land-use regulations to compel property owners to make unrelated public improvements.
2. Facts: P Dolan, owner and operator of A-Boy Plumbing & Electrical Supply store in Tigard, Oregon, applied for permit to expand store and pave parking lot of her store. Commission conditioned approval on Dolan dedicating land to public greenway along adjacent creek, developing pedestrian and bicycle pathway to relieve traffic congestion. Appealed to State Land Use Board of Appeals, found reasonable relationship: larger building and paved lot would increase runoff into creek, impact of increased traffic justified requirement for pathway.
   1. Right to exclude being taken
3. Decision (Rehnquist, 5-4): Overturned lower courts
   1. When govt requires landowner to convey property to city as a condition to obtaining a permit, there must be a rough proportionality between burdens on public that would result from granting permit and benefit to public from conveyance of land.
   2. One purpose of the takings clause is to bar government from forcing people to bear public burdens that should be borne by public.
   3. Held doctrine of unconstitutional conditions, a government agency may not require a person to surrender constitutional rights in exchange for discretionary benefits, where the property sought has little or no relationship to the benefit conferred.
   4. Garden variety taking v. garden variety land use
      1. Taking: Coercion/conditioned on a permit
      2. Land use: Physical taking
      3. Unclear.
   5. Why not an easy Nolan case? Nexus required by Nolan is met here (legitimate state interest of floodplain – Nolan - and not inhibiting economic viability of land)
      1. Greenway and Floodplain = Nexus is preventing flooding
      2. Path/Bike/Pedestrian = Nexus is traffic congestion
   6. Two-prong test was applied:
      1. NATURE: Whether there is "***essential nexus***" between permit conditions and legitimate state interest, and
      2. DEGREE: Whether degree of exactions required by permit condition bears required reasonable relationship to projected impact of proposed development (***rough proportionality test***)
         1. City must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.
         2. No precise mathematical determination needed
         3. But there was a comprehensive plan!!!!!!!!
   7. Court held:
      1. Floodplain is fine, but requirement for public greenway (as opposed to a private one, to which Dolan would retain other rights of property owners, such as the right of exclusive access) was excessive.
         1. Petitioner lost ability to exclude, one of most essential sticks in bundle of property rights. Difficult to see why recreational visitors walking on land sufficiently related to city’s legitimate interest in reducing flooding problems along creek.
      2. City failed to meet its burden of establishing that pathway was necessary to offset increased traffic that would be caused by expansion.
         1. City did not give conclusive evidence. Said it MIGHT, not that it would.
   8. Dissent (Stevens):
      1. Rough proportionality test creates no manageable standard (not a rule)
      2. Rough proportionality test runs contrary to the traditional treatment of these cases and breaks considerable and unpropitious new ground.
      3. Petitioner’s acceptance of the permit, with its attached conditions, would provide her with benefits that may go beyond any advantage she gets from expanding her business.
      4. Analysis should focus on the impact of the city’s action on the entire parcel of private property. Should concentrate on whether required nexus is present and venture beyond considerations of a condition’s nature only if developer establishes that a concededly germane condition is so grossly disproportionate to the proposed development’s adverse effects that it manifests motives other than land use regulation on the part of the city.
   9. Dissent (Souter): Court places the burden of producing evidence of relationship on the city, despite the usual rule in cases involving the police power that the government is presumed to have acted constitutionally.

Questions:

* In recent years, many municipalities have enacted amendments to their zoning ordinances requiring certain developers of commercial property and/or residential housing either to directly provide low income housing or child care facilities or to pay a fee that is devoted to a fund for these purposes.
* Are these “linkage ordinances” constitutional under Nollan and Dolan?
* Hypothetical: Coy Koontz wants to build on a wetland, and seeks the appropriate permit, offering to mitigate by giving a conservation easement to nearly 75% of his property. The government rejected his proposal and said it would only be approved if he reduced the size or hired contractors to make improvements to wetlands several miles away. He files suit. The government responds that Nollan-Dolan analysis does not apply because, unlike in those cases, the permit here was rejected, rather than accepted with conditions. Is the government right?
  + Koontz, 9 justices agreed, arbitrary distinction. Nollan-Dolan applies.
* Grant permit, but need to pay impact fees for externalities:
  + Should be a per se rule
  + Impact fees are like a tax, so should be subject to taxing
* In Stafford, the town conditioned its approval of a subdivision development on the developer’s paying to rebuild an abutting road. The developer built the subdivision, rebuilt the road and then sued the town to recover the cost of the road construction.
  + The Texas Supreme Court found that “for purposes of determining whether an exaction as a condition of governmental approval of development is a compensable taking, we see no important distinction between a dedication of property to the public and a requirement that property already owned by the public be improved. The Dolan standard should apply to both.”
  + Was the case decided correctly?
* In Home Builders, the court upheld a city’s inclusionary zoning law against the claim that it violated the takings clause when it required ten percent of all newly constructed residential unity to be affordable.
  + What are the arguments on both sides and who should have won the case?
* What do you think of Justice Brown’s position?
  + Is she right?

Top of Form

|  |
| --- |
| I have a quick question about easements, specifically the burden running with the land with regards to easements implied from prior use, easements by estoppel, and easements by necessity.    As I understand it, you classify the easement as appurtenant or in gross, based upon the intention of the parties and the nature of the easement, in order to determine whether the benefit runs with the land.    For the burden to run with the land, I know express easements require the easement to be in writing, that the original grantor intended the easement to run with the land, and subsequent owners of the servient estate had notice at purchase. However, what is the test for determining whether the burden runs with the land for implied easements?  I have in my notes that they generally run with the land if they were intended to do so, and are reasonably necessary for the enjoyment of the dominant estate, but I'm not sure if this is referring to the burden or benefit (it seems like an early identical inquiry to determining appurtenant vs. in gross). |
| New! **[Re: Burdens Running With the Land w/r/t Implied Easements](https://sakai.duke.edu/portal/tool/63729023-d13d-4bda-87eb-366be78336fa/discussionForum/message/dfViewThread" \o " Re: Burdens Running With the Land w/r/t Implied Easements )**  **Joseph Blocher (eb116@duke.edu) (May 1, 2014 3:02 PM)**- Read by: 1ark as Read[[eply to This Message](https://sakai.duke.edu/portal/tool/63729023-d13d-4bda-87eb-366be78336fa/discussionForum/message/dfViewThread)Reply](https://sakai.duke.edu/portal/tool/63729023-d13d-4bda-87eb-366be78336fa/discussionForum/message/dfViewThread)  You've understood it correctly, it sounds like. Easements appurtenant are easements that run with the land; in gross easements benefit a particular person, and so do not. That's true for both express and implied easements. |

Bottom of Form

As a related question, which is preferred in an ambiguous conveyance: Fee Simple Determinable or Fee Simple Subject to Condition Subsequent? Latter

### What is the state of the title? O to A for life, then to B and his heirs, then to C and his heirs.

A has LE  
B has vested remainder in FS  
C has nothing



### What is the state of the title? O to A for life, then to B's heirs, then to C's heirs.

A has LE  
B's heirs have contingent remainder in FSA  
C's heirs have contingent remainder in FSA  
O has reversion in FSA



### What is the state of the title? O to A and her heirs as long as the land is used for educational purposes.

A has FS determinable  
O has possibility of reverter in FSA



### What is the state of the title? O to A for 10 years, then to B, but if B has not yet graduated from law school, then to C.

A has term of years  
B has vested remainder subject to divestment in FS subject to an executory limitation  
C has shifting executory interest in FSA



### What is the state of the title? O to A and her heirs as long as the land is used for educational purposes, but if the land is not used for educational purposes, then to B and his heirs.

A has FS determinable  
B has shifting executory interest in FSA



### What is the state of the title? T to A for 5 years, then to B, but if, after taking possession, B ever fails to place a red rose on T's grave on T's birthday, then to C.

A has term of years  
B has vested remainder in FS subject to an executory limitation  
C has shifting executory interest in FSA



### What is the state of the title? O to A and her heirs, but if she stops using the land for educational purposes, then to O.

A has FS subject to a condition subsequent  
O has right of entry in FSA



### What is the state of the title? O to A if she graduates from law school. (A has not yet graduated from law school.)

O has FS subject to an executory limitation  
A has springing executory interest in FSA.



### What is the state of the title? O to A for life, then to B if B survives A, but if B does not survive A, to C's children. (C has no child.)

A has LE  
B has [alternative] contingent remainder in FSA  
C's children have [alternative] contingent remainder in FSA  
O has reversion in FSA [if C has no kids]



### What is the state of the title? O to A for life, then to B if B survives A, but if B does not survive A, to C's children. (C has one child, X.)

A has LE  
B has contingent remainder in FSA  
X has contingent remainder subject to open in FSA



### What is the state of the title? O to A for life, then to B, but if B ever allows A to be moved into a nursing home, then to C.

A has LE  
B has vested remainder subject to divestment in FSA subject to an executory limitation  
C has shifting executory interest in FSA



### What is the state of the title? 1: O to A for life, then to B and her heirs. 2: A to C.

C has life estate pur autre vie, measuring life is A  
B has vested remainder in FSA



### What is the state of the title? O to A for life, then to the person who is then Dean of O's law school.

A has LE  
Dean has contingent remainder in FSA  
O retains reversion in FSA, if there is no Dean?



### What is the state of the title? O to A for life, then to B if B is then married to C. (B is married to C.)

A has LE  
B has contingent remainder in FSA  
O has reversion in FSA



### What is the state of the title? O to A for life, then to B, but if B does not serve as the executor of A's estate, then to C.

A has LE  
B has vested remainder in FS subject to an executory limitation  
C has shifting executory interest in FSA



### What is the state of the title? O to A for life, then to B if B adopts A's surviving children.

A has LE  
O has reversion in FS subject to an executory limitation  
B has springing executory interest in FSA



### What is the state of the title? O to A, but if A mines the property, then to B and her heirs.

A has FS subject to an executory limitation  
B has shifting executory interest in FSA

### If the future interest following a life estate is in the grantee, what is it called?

Remainder



### If the future interest following a term of years is in the grantee, what is it called?

Remainder



### If the future interest following a fee tail is in the grantee, what is it called?

Remainder



### What is the name of the grantee's future interest that "waits patiently" for the prior estate to "end naturally?"

Remainder



### How can you recognize a contingent remainder?

It is (1) given to an unascertained (unborn OR unidentified) person OR (2) it is subject to a condition precedent



### What two characteristics define a vested remainder?

It is (1) given to an ascertained (born AND identified) person AND (2) it is not subject to a condition precedent



### What two characteristics define an ascertained person?

(1) Born and (2) Identified



### What is a condition precedent?

An event that must occur (or not occur) in order for a contingent remainder to vest



### What are "alternative contingent remainders?"

Two remainders that depend on the same condition precedent. I.E. if the condition is met, one remainder vests, and if the condition is not met, the other vests. They are mutually exclusive of one another.



### Is a reversion deemed vested or contingent?

Vested



### Is a right of entry deemed vested or contingent?

Vested, but WHY? It's subject to a condition, no?



### Is a possibility of reverter deemed vested or contingent?

Vested



### To whom does a reversion belong?

The grantor



### To whom does a remainder belong?

A grantee



### Distinguish between a remainder and a reversion.

A grantor retains a reversion, a remainder is granted to a grantee.



### In column 2 on the chart, how do we decide whether to work above the line or below the line?

Above the line = next estate is in the grantor  
Below the line = next estate is in the grantee



### In column 3 on the chart, how do we decide whether to work above the line or below the line?

Above the line = next estate is in the grantor  
Below the line = next estate is in the grantee



### What words mark the remainder? Is the holder ascertained? O to A for life, then to B.

then to B  
ascertained, assuming B is born



### What words mark the remainder? Is the holder ascertained? O to A for life, then to A's first child (A has one child, B.)

then to A's first child  
ascertained



### What words mark the remainder? Is the holder ascertained? O to A for life, then to A's heirs. (A is alive and has one child, B.)

then to A's heirs  
Unascertained. A may have more heirs than 1.



### What words mark the remainder? Is the holder ascertained? O to A for life, then to B and her heirs. (B has no children.)

then to B and her heirs.  
Ascertained. B is the grantee.



### What words mark the remainder? Is the holder ascertained? O to A for life, then to A's widow.

then to A's widow.  
Unascertained. A's widow is unknown until A dies.



### What words mark the remainder? Is the holder ascertained? O to A for life, then to A's first child. (A has no children.)

then to A's first child.  
Unascertained. A's first child is not born.



### What words mark the remainder? Is the holder ascertained? O to A for life, then to this year's first-year law students at State University Law School who pass the bar.

then to this year's first-year law students at State University Law School who pass the bar.  
Unascertained. It is not certain which of the first-year law students will pass the bar.



### What words mark the remainder? Is the remainder subject to a condition precedent? O to A for life, then to B if B has refrained from drinking alcoholic beverages for the five years prior to A's death.

then to B if B has refrained from drinking alcoholic beverages for the five years prior to A's death.  
Yes.



### What words mark the remainder? Is the remainder subject to a condition precedent? O to A for life, then to B if B has reached 21. (At the time of the conveyance, B is 22.)

then to B if B has reached 21.  
No.



### What words mark the remainder? Is the remainder subject to a condition precedent? O to A for life, then to B; however, if B ever drills for oil on the land, then to C.

then to B  
No.



### What words mark the remainder? Is the remainder subject to a condition precedent? O to A for life, then to B, on condition that B has passed the bar.

then to B  
No.



### What words mark the remainder? Is the remainder vested or contingent? O to A for life, then to B, on condition that B has passed the bar. (B has been practicing law for 10 years.)

then to B  
Vested



### What words mark the remainder? Is the remainder vested or contingent? O to A for life, then to B, but if B uses the land for an insurance agency, then back to O.

then to B  
Vested



### What words mark the remainder? Is the remainder vested or contingent? O to A for life, then to B if B does not then own an insurance agency.

then to B if B does not then own an insurance agency.  
Contingent



### What words mark the remainder? Is the remainder vested or contingent? O to A for life, then to B if B is married.

then to B if B is married.  
Contingent



### What words mark the remainder? Is the remainder vested or contingent? O to A for life, then to B; however, if B divorces after A dies, then to O.

then to B  
Vested



### What words mark the remainder? Is the remainder vested or contingent? O to A for life, then to A's surviving cousins. (A has two cousins.)

then to A's surviving cousins.  
Contingent



### \*What words mark the remainder? Is the remainder vested or contingent? O to A for life, then to A's children (A has one child.)

then to A's children.  
Vested



### What words mark the remainder? Is the remainder vested or contingent? O to A for life, then to the 2001 graduates of O's law school class. (The conveyance was made in 2002.)

then to the 2001 graduates of O's law school class.  
Vested



### What words mark the remainder? Is the remainder vested or contingent? O to A for life, then to A's widow.

then to A's widow  
Contingent



### What words mark the remainder? Is the remainder vested or contingent?What words mark the remainder? Is the remainder vested or contingent? O to A for life, then to B's heirs. (B is alive.)

then to B's heirs.  
Contingent



### Do A's heirs have any property interest as a result of the following conveyance? If so, what is it? O to A for life, then to A's heirs.

Yes, they have a contingent remainder in FS.



### Do A's heirs have any property interest as a result of the following conveyance? If so, what is it? O to A and her heirs.

No, they will merely inherit A's estate?



### What is the state of the title? O to A for life, then to B.

A has a life estate. B has a vested remainder in FSA.



### What is the state of the title? O to A for life, then to O.

A has a life estate. O has a reversion in FSA.



### What is the state of the title? O to A and her heirs until B reaches 25 (B is 12.)

A has a fee simple determinable. O has a possibility of reverter in FSA.



### What is the state of the title? O to A and her heirs, but if A divorces, then to O.

A has FS subject to condition subsequent. O has a right of entry in FSA.



### What is the state of the title? O to A and her heirs so long as A never uses illegal drugs.

A has FS determinable. O has possibility of reverter in FSA.



### What is the state of the title? O to A and her heirs, but if B reaches 25, then to O. (B is 15.)

A has FS subject to condition subsequent. O has a right of entry in FSA.



### What is the state of the title? O to A for life, but if an interstate highway is built within one mile of the property, then to O.

A has life estate subject to a condition subsequent. O has a right of entry and a reversion in FSA.



### What is the state of the title? O to A for life or until A divorces, then to O.

A has life estate determinable. O has possibility of reverter and a reversion in FSA.



### Is B's remainder vested or contingent? O to A for life, then to B, but if B has not graduated from college, then to C.

Vested



### Is B's remainder vested or contingent? O to A for life, then to B if B has graduated from college, but if not, then to C.

Contingent



### Has O retained an interest? O to A for life, then to B, on condition that B has passed the bar.

Yes.



### Has O retained an interest? O to A for life, then to B.

No.



### Has O retained an interest? O to A for life, then to B if B does not then own an insurance agency.

Yes.



### Has O retained an interest? O to A for life, then to B if B has married. (B is presently married.)

No.



### Has O retained an interest? O to A for life, then to B; however, if B divorces, B's estate ends.

Yes.



### Has O retained an interest? O to A for life, then to A's surviving cousins. (A has two cousins.)

Yes.



### Has O retained an interest? O to A for 10 years, then to B for 10 years.

Yes.



### Has O retained an interest? O to A and the heirs of her body, then to B.

No.



### Is the remainder vested or contingent? O to A for life, then to B's oldest child who survives B. Then B dies with two children living.

Vested.



### Is the remainder vested or contingent? O to A for life, then to A's oldest surviving child who has attained the age of 21. Then A's oldest child attains the age of 21.

Contingent. The child has reached 21 but must survive A for the remainder to vest.



### Is the remainder vested or contingent? O to A for life, then to B if B marries. Then B gets married. Subsequently, B divorces.

Vested.



### Is the remainder vested or contingent? O to A for life, then if B has died childless, to whoever is the Dean of State University Law School at the time of A's death. Then B dies childless.

Contingent until A dies.