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# Property Outline

# Big Ideas

## **Property as a Bundle of Sticks: property rights can be disaggregated**

1. Possession/Occupancy of property
2. Right to exclude others
   * Exception: Necessity (remember Torts?)
3. Right to use property
   * Exception: Nuisance (hog farm which impacts neighbors)
   * Exception: Danger to others (Common Law: unreasonably dangerous rule; Statutes: zoning laws)
   * Exception: Landlord can have rules/terms for tenants (unless restricted by law)
4. Power to transfer title/conveyance
   * Exception: Statutes govern how conveyance may be done (no discrimination in transfer etc.)
5. B*ook also mentions: Protection against damage or removal of property*

Natural Law v. Positive Law (a theme thus far)

## **Course Overview**

1. Meanings, origins and acquisition (What is property? How do we get it? How do we lose it?)
2. System of real property estates (How do we disaggregate sticks in the bundle over time, space?)
3. Land use conflicts among neighbors (How is land use treated differently from possession?)
4. Private and public land use controls (Private servitudes, public land use planning)
5. Constitutional protections for private property (5th A)

## **Property law doctrines strive to balance three criteria**

1. Economic efficiency (advance specific economic policies)
2. Distributional fairness (facilitate equality of opportunities and access)
3. Sustainability (encourage the sustainable use of resources)

Ryan also articulated these as:

1. Administrability (efficiency and effectiveness)
2. Utility (what do we want to use the resource for? Social utility/econ efficiency. Best use for the most people.)
3. Fairness (individual rights based fairness)

## **Property law and remedy rules**

* Something is “yours” but can be protected in different ways:
  + Property rule: it’s yours and you can decide to sell, transfer or hold it
  + Inalienability rule: you are not free to sell or alienate it, even though it’s “yours” (ex. organs)
  + Liability rule: you don’t get to decide if it gets transferred, but you are entitled to compensation (ex. 5th A takings liability/eminent domain claims; ex. Tort liability—people take your right away but they must compensate you)
* Nutshell: can the parties bargain around the default rule? Who gets to decide?
* Policy arguments around transferring property types (such as intellectual property or land use) from the Property rule to the Liability rule

## **The Four Levels of Legal Reasoning**

1. Mechanical: Dealing with rules of procedure
2. Doctrinal: Applying black-letter law to the facts
3. Policy: Why this application advances the policy
4. Critical: Why we should really want a different policy

## **“Policy” vs. “Legal” Arguments**

* Policy: “Right result, b/c it serves compelling societal priorities (efficiency, fairness, administrability, sustainability…).”
  + Ex: “Punishing trespass protects security of investment in ownership.”
* Legal Argument: “Right result, because applicable doctrine requires it.”
  + Ex: “This is an unprivileged entry to property of another, ergo liability.”
* Blurred Boundary?
  + Understanding the policy basis for doctrine: “Why this rule? To serve this compelling social policy…”
  + When the doctrine provides ambiguous guidance to adjudicator: “Choose this interpretation, b/c it serves the underlying policy…”
  + When persuading the court or legislature to change the doctrine: “Consider how the old rule interferes w/this compelling policy…”

## **Competing Themes of Property Law**

* Occupancy
* Labor/Investment
* Social good/Utility

# Meaning and Origins of Property

## **Acquisition, Labor and Investment (Creation of Ownership)**

Ownership is created by acquisition (physical control), labor (work one did to acquire control) and investment (what one has put into the property to enhance, develop, improve it.

Eros Asteroid:

* NASA has physical occupancy, but US has signed treaty that no country claims ownership (the Moon Treaty). Does that mean all humanity owns things?
* Niemitz makes claim through common law claim that he has invested labor (such as collecting unpaid parking fees) in the asteroid, so he owns it

Moore v. Regents of University of California (1990) (California State Supreme Court)

* Moore is the “original owner” of the DNA sequence
* University staff invested labor and money in the development of the drug based on the DNA sequence
* Court upholds University staff ownership based on policy preference to enable scientific research
* Dissent has two prongs: bundle of sticks (maybe some of Moore’s rights disaggregated, but not all) and fundamental fairness. (A third prong, not discussed in class, is that the body is sacred and “ownership” doesn’t apply in the same way)

## **Possession**

What is “possession” anyway? It’s not necessarily clear what it means to “possess” something. How did you lay claim to it? How securely did you do so? How long did you “rightfully possess it” before someone else came along and “wrongfully took it”?

Pierson v. Post (1805) (fox hunt)

* Rule of Capture: it’s yours when you capture it (not yours just because you invested labor in the hunt)
* Wild animals are considered “unowned”
* Policy arguments for RoC: Easier to administer, creates certainty, promotes competition, efficient if it rewards success, dovetails with other property rights such as transfer of property when you have it in hand (integrative)
* Policy arguments for investment of labor: Seems more “fair,” rewards quality over haste (rewards more work), economically efficient because it rewards investment

Popov v. Hayashi (2002) (Barry Bonds baseball)

* Actual tactile contact with ball by Popov created pre-possessory interest in the ball
* Unlawful activity (the scrum) between Popov’s pursuit and Hayashi’s capture (not present in Pierson)
* Hayashi “had” the ball, but with a cloudy title
* Upshot: court ruled they had joint ownership—had to sell and split the money

## **Common Pool Resources**

* Where fugitive resource spans multiple owners, they own it “in severalty”—as a common pool (right of capture generally attaches, but not always as with water in the eastern US).
* Each has right to draw from pool via own land, but none owns actual resource until it is captured. Then, there is no liability to others for what you capture.
* Also known as Doctrine of Correlative Rights

Eliiff v. Texon Drilling (1948)

* Because the two parties were “joint” owners of the gas through a common pool, neither could object when the other “captured” the fugitive resource.
* LA: Naked Rule of Capture: Once you capture it, it is yours. If you don’t capture it then you have no ownership rights too it (additionally, under the naked rule, it does not matter if it is wasted)
* TX: Correlative Right in a common pool w/o waste: All owners over a common resource have a right to get that natural resource (i.e. they have an equal opportunity to capture) BUT it cannot be wasted
* But: this did not allow either party to waste the resource through negligence (the gas blowout). *Doctrine of waste*, exception to the rule of capture.

Water Resources

* In the East, where water is more plentiful, the rule allows each landowner adjacent to the water to take as much as they need as long as they are not “unreasonably” interfering with neighbors’ use. Called the “correlative rights doctrine.” AKA Riparian rule.
* In the West, where water is more scarce, the Rule of Capture applies to water. Whoever can get to it first can claim it. Called the “prior appropriations” doctrine. (Akin to naked law of capture.)
* Now, both parts of the country are moving to a regulatory middle-ground, based on permits.

The Tragedy of the Commons

* In the case of potentially sustainable resources (pasture), each party is incented to benefit by slight over-harvesting. But the cumulative load of everyone slightly overharvesting will tank the resource.
* Less applicable to non-sustainable resources (such as gas).
* Mid-range applicability to sustainable resources that move (wild herds, fisheries). Mid-range meaning that it’s harder to know how to enforce a different, non-capture model.
* Two theoretical models to address: privatization v. third party/government regulation (or points in-between)
  + Privatization: people have incentive to see that resource is well-used (own a chunk of the common pool). Easiest to enforce with land; harder with fisheries (which chunk do you own?); impossible with atmosphere
  + Regulation: requires consensus in a democracy; support a regulation/enforcement infrastructure

## **Ownership in People**

“Certain types of property interests are so crucial to individual dignity, self-fulfillment, the ability to form essential human relationships, and the ability to participate as a member of political society that they should be treated as person rights rather than as exchangeable interests in a market.”

* Property in the person of another
  + Dredd Scott Case (1857): Shows the concept of property can grow and change
    - 2 legal issues: Citizenship and Legality of MI Compromise
    - 3 constitutional clauses that protect slavery
    - Property law was brought into the constitution to deal w/a non-consensus in the framing and only resolved through the Civil War and 13th Amendment
  + The Antelope (1825)
    - Issue: to decide whose property the slaves stolen and found on the pirate ships belonged to
    - J. Marshall – “this is a case where the sacred rights of liberty and of property come in conflict with each other.”
    - Given a conflict between natural law and the positive law adopted by the nations of the world, the court held that the positive law must prevail
    - H – Free unless come has a claim to the property rights
  + In the Matter of Baby M (1988): In a surrogacy agreement, the birth mother refuses to give up the baby
    - Issues:
      * Are babies a form or property suitable for market transfer?
      * Is a woman’s labor of growing a baby commodifiable/able to be used for market transfer?
    - It is unconscionable to let a K where the person is forced to give up a baby
    - Sometimes these agreements are void and sometimes they are just voidable
    - Sometimes when the birth mother is not the biological parent, there is no issue
    - Policy concerns: Protect the mother vs. freedom of choice
  + Frozen Embryos
    - “They are not, strictly speaking, either “persons” or “property”, but occupy an interim category that entitles them to special respect because of their potential for human life.” – TN Supreme Court
    - When there is a conflict between the right of one party to procreate and the right of the other party not to be forced to become a parent against his or her will – the latter usually wins (maybe for economic reasons)
* Property in One’s Own Person
  + Moore v. Regent of UC
    - P had cells taken w/out permission
    - Court says no conversion
      * Patient does not expect to retain bits and pieces removed during surgery
      * No precedent
      * BUT there WAS duty to disclose and obtain consent
    - Interests of patient outweighed by social benefit of medical research
    - Legislation is proper remedy
    - Court does not want people selling their body parts

## **Gift/Trust, Find, Title (Property Previously Owned by Another)**

Gifts and Trusts

* Gift (3 requirements and need ALL 3) – a gift is a transfer of property from one person to another w/o payment. Inter vivos gifts are transfers from one living person to another, while testamentary transfers are those effectuated at death through a valid will or inheritance

1. Intent to transfer title
2. Delivery of the property
3. Acceptance of the gift by the done

* Trust – Gift w/an intermediary. A trustee, as holder of legal title, has the power to sell the property (the trust assets) and reinvest the proceeds in other assets if so doing is in the best interests of the beneficiaries, unless the settlor intended the property not to be sold
  + Settelor / Trustor picks a…
  + Trustee who manages the benefit for…
  + Beneficiary – may get the benefit at the end of the trust

Finds

* Law of finds: Common Law. Difference between lost/mislaid property and abandoned property. Can be abrogated by statutes, i.e. finders keepers statutes OR lost property belongs to the state
  + Finder: 1st person to take possession of lost or unclaimed property
  + Abandoned: 1st person to find is the owner, even if the owner wants it back
  + Lost/mislaid: find wins compared to 3rd party but loses to the true owner

Amory v. Delamirie. (Chimney sweeper finds a jewel in a chimney and takes it to a jeweler to look at. The jeweler tries to keep the diamond on a might makes right policy.) Court hold that finder’s claim of ownership is good against everyone in the world except the True Owner. Must prove: Who the TO is; AND the TO’s intention (abandonment or simply mislaid).

Carner v. Bell (1986) Would-be/Amateur archeologist discovered an Indian burial ground and attempted to take the artifacts and sell them to a museum. State stepped up to protect the Native Americans’ cultural artifacts.

P argued that the artifacts were abandoned (someone intended to relinquish title to the 1st person who finds it). Lost on that claim because court determined that burial sites are not abandoned property, purpose is to stay there forever; “can’t find what isn’t lost.” P’s Unjust Enrichment Claim: P loses on this too b/c the tribe was not enriched – they just got back what they already had, plus they were harmed by disturbing the graves.

* + Some interpretive work to decide what is abandoned, kind of like the reasonable person standard (ex. Newspaper left on a bus vs. diamond ring).

Relativity of Title

Title is a relative concept: doesn’t matter who is the best owner in the whole world, just matters who wins between two people. Ex: Finder’s claim is good against all except the True Owner – so for everyone else the finder is the TO.

Tapscott v. Cobbs (1854) (law of inheritance vs. actual possession) (Neither owner had a clear claim to the title). Cobbs: Heir to kind of owner who had some right to property, lived on it previously and made improvements. Tapscott: Using relativity of title, may not have the best but its better than yours AND he currently has possession

* “Law protects a peaceable possession against all except the True Owner and no other can rightfully disturb or intrude upon it. Generally, P gets ejected on the strength of her own title, not on the basis of defects in D’s title, except if the D ousts P by trespassing (estopped from questioning Plaintiff’s title).
* We probably wouldn’t like a world where the rule of relative title (my title is the stronger, so I win, even if there are flaws in it) because it would create victimization (shake downs) of people with weak titles.
* Bailment: when someone leaves their property w/someone but intent to return to keep it, ex. Jewelers cleaning my ring
* Bona Fide Purchaser rule: When you leave your property w/someone who deals in such goods, the purchaser would win over the True Owner
  + Why: Balancing PP concerns; mediating between the rights of bailee and the innocent bona fide purchaser
    - Rights of ownership vs. economic/commerce moving
    - BUT – True Owne would get damages
  + Note: If something is stolen and NOT bona fide purchaser, the True Owner usually wins and gets specific performance. If a merchant plainly steals w/o any affirmative action from the victim. Bona fide purchaser rule does not apply and True Owner prevails w/specific performance
* Least Cost Avoider: 2 innocents have to bear a loss – how to decide who? (2 ways)
  + Look Backward: Remedy who has the most harm
  + Look Forward: (ex. Bona Fide Purchaser Rule) to prevent these mistakes to begin with. Who can prevent the harm in a least costly way (precautions on the front end)

# Right to Exclude vs. Rights of Access

## **Trespass and Right to Exclude**

Trespass: unprivileged, intentional intrusion into property of another

* Strict liability—your intent to enter onto another’s land is irrelevant. All that matters is that you moved your body intentionally; that you weren’t thrown there by another. Strict liability reflects the value put on property rights. Right to exclude means that you have rights to hurt the interests of another (valuation of property rts)
* Defenses: consent; necessity (consent obtained fraudulently is not adequate)
  + Consent arguments can hinge on what the property owner consented to (ex: restaurant owners consent to people eating there (even anonymous critics) but not to people stealing trade secrets). Is trespasser a socially beneficial liar? The more an owner invites others on to lands, the more they diminish their rights to exclude.

State v. Shack

* “Property rights serve human values. They are recognized to that end, and are limited by it. Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises. Their well-being must remain the paramount concern of a system of law…. A man’s right in his P is not absolute. It was a maxim of the common law that one should so use his P as not to injure the rights of others [sic utero tuo maxim] [R]ights are relative, and there must be an accommodation when they meet.”
* Holding (doctrinally mushy, but heavy on policy) is that Farmer’s property rights (exclude others) cannot be used in a way to prevent his workers form access to social services, privacy and dignity to receive visitors that are common among citizens.
* *Sic utero tuo ut alienum non laedas* (Use your property in a way that does not harm others)

Desnick v. ABC, 1995. Pretend customers can enter business for expose, since business wants customers to come in. This was a Posner decision, with the attendant law and economics analysis.

Food Lion v. Capital Cities/ABC, 1999. Pretend employee who filmed things for expose was acting outside the scope of consent for employee.

Questions to Ask in Difficult Trespass cases

* What interest is Plaintiff invoking trespass to protect?
* What interest does Defendant argue should cause that to give way?
* What are the conflicting interests in exclusion and access that litigants want the legal system to protect?

Common Law Rights of Access

Inns and Common Carriers are subject to common law rights of reasonable access. People have a right of access unless disruptive or dangerous to operations (business can’t exclude randomly.) This is b/c they are monopolies (or much more likely to be so) and travelers need protection from elements. Now codified in a lot of statutes. For all other businesses, most states have retained an absolute right to exclude.

Uston v. Resorts International Hotel, 1982 (NJ)

* Card counting blackjack player—casino wanted to exclude. NJ court said no and expanded reasonable right of access to all businesses/places open to the public. NJ casinos now only offer bottomless deck blackjack.
* Nevada, by contrast, has retained an absolute right to exclude. And single deck blackjack.

## **Public Accommodations Statutes and the Public Commons**

Public Accommodations Statutes

* Civil Rights Act of 1964, Title II: Public accommodation in interstate commerce. Can’t exclude patrons on basis of race, color, religion, or national origin if a common carrier, restaurant, gas station, theater/stadium; can if private club. Can on basis of sex.
* Civil Rights Act of 1866, § 1981-82: Equal rights under law re: race. All in US may contract, sue, be punished, assert property rights—including right to purchase property—just like white people. § 1981 remedies for public and private action.
* NJ Law Against Discrimination: Cannot discriminate on basis of race, creed, color, national origin, ancestry, age, sex, orientation, marital status, family status, liability for service in Armed Forces, or nationality—or that of one’s friends, family, business partners, or customers. Broadly defines protected attributes.

Public Trust Doctrine

Common law doctrine: government holds some lands, waters in trust for the public. Acts as trustee, not owner. In the US, navigable waterways are held in trust for the public (but not other critical common resources such as air or fisheries). (Comes out of Justinian code.)

* Policy rationales: uniqueness of some lands; social utility (most benefit for everyone); concerns about monopoly on access; imagine what world would look like without this rule (navigation, commerce when shore or waterways not usable by everyone). Common law generally avoids concentrations of power.

Leading US case: Illinois Central Railroad v. Illinois, 1892.

* In 1869, state legislature gave Chicago Harbor to a private RR. Legislature then voted out of office and new legislature repealed the conveyance. RR sued (breach of K and takings claim). Court held that original conveyance was never valid—trustee did not have authority to give away the trust.
* States began to codify their own public trust doctrines—variety of forms. Florida kept it to navigable waterways; Pennsylvania “clean air, pure water… for all generations.” Nevada says that it doesn’t have a public trust doctrine.

Matthews v. Bay Head Improvement Association, 1984.

* Quasi-public association wanted to prevent access to the foreshore over the dry land (landward from mean high tide line). Dry land owned by private parties and the association, and restricted to use by members of the association.
* NJ already had ruled that a municipally owned beach could not be limited to exclusive use of municipal residents.
* Court said that membership in the association had to be open to all. (Plaintiffs had sought public access over dryland—something broader than they got.) Influenced by its determination that association was “quasi-public.” Refrained from comment on what would happen with purely privately held/controlled land.
* Other states (Massachusetts and Oregon were called out in class) take a different approach.

Audubon Society v. Alpine County Superior Court

* 20 years of litigation after water rights from Mono Lake were sold to LA for drinking water. Massive environmental impact and huge case record.
* 1994 court held that state cannot neglect trust duties, must reconsider licensing needs against environmental protection values. Calif law merged prior appropriation (of water) with public trust doctrine—balance both needs (no other state has taken this approach).
* In Calif: Public trust doctrine is an on-going duty, with continuing supervisory duty/responsibility attaching.

Homelessness

* Public has Right to Exclude the homeless from public areas? Certain acts (sit, lie, sleep, pee) in public?
* “One way of describing the plight of a homeless individual might be to say that there is no place governed by a private property rule where he is allowed to be.” --Jeremy Waldron

## **Adverse Possession**

Applies to whole parcels or portions of them. Range from squatters to boundary disputes to remedying defective deeds.

Elements (Standard of Proof is Clear and Convincing for all Elements, Brown v. Gobble):

1. **Actual Possession** that is
   * Living there (structure); maintaining it; fence area; gardening/cultivating; parking car there
   * Color of title satisfies “possession” because demonstrates attitude of possession; helps prove the boundaries of the parcel for which one claims possession
2. **Open and Notorious**,
   * Possessory acts have to be open enough that a reasonably diligent owner would know that adverse possessor was there.
   * Initial burden on adverse possessor to do something visible enough
   * Burden ultimately on the owner to keep eyes open
3. **Exclusive**,
   * Controlling, keeping others off to the degree that a true owner would
   * Not possessing “with” others (certainly not with the true owner)
4. **Continuous**, and
   * Have to have stable presence of possession, but can take customary vacation, etc., time off the property
   * See also “tacking,” below
5. **Adverse** (or **Hostile**)
   * Hostile to the interests of the true owner; cannot be there with permission of true owner
   * If True Owner doesn’t say anything one way or the other (no permission; no refusal): majority rule presumption is that use by another is non-permissive/hostile
     + Presumption does not help true owner in AP case because without it, if there were no communication, occupancy would always be permissive/non-hostile
     + But does help true owner in case of regular trespassing less than 10 years of trespass)
     + Reflects assumption that we value right to exclude as part of property ownership
   * If Court orders that access be granted, it is presumed to be non-adverse/permissive (Matthews)
   * *Adverse Possessor’s State of Mind:* Jurisdictional variation. Majority rule is objective test (state of mind irrelevant as long as they don’t have permission). Some minority rules: good faith (only get AP if you take possession thinking you are entitled); intentional dispossession (only get AP if you have deliberate intent to occupy and take over another’s land).
6. for the **Statutory Period**.
   * 10 years is the rule of thumb for us in this class
   * Variations by jurisdiction; can have exceptions/lower years for good faith/color of title possessors.

*Touchstone*: “ordinary use to which land is capable and such as an average owner would make of it.”

*Tacking doctrine:* Current adverse possessor can count the possession time of the previous adverse possessor, provided they intended to transfer the rights to the land adversely possessed. (Two Adverse Possessors need to be in privity.)

Brown v. Gobble, 1996. Tacking case. Gobbles thought they were buying land because it was within their fence line. (Privity with previous owners of their parcel.)

Color of Title Doctrine

If there is a deed, but it is defective in some way, it can, when coupled with adverse possession, describe the parcel for which adverse possession is claimed. It can also stand in for the actual possession element of Adverse Possession.

Title by Deed: Usual instrument for transferring interests in land, required by Statute of Frauds (except: Adverse Possession, wills, eminent domain). Must be delivered to take effect.

General requirements:

(1) Must be in writing,

(2) signed by grantor,

(3) identify grantor and grantee,

(4) describe property, and

(5) use words of conveyance.

* Some states impose other requirements by statute (ex: witness)
* Warranty deeds make promises about whether land encumbered, etc.
* Quitclaim deeds convey whatever interest A has to B; no promises.

Romero v. Garcia, 1976 hinged on Color of Title Doctrine. Fight over land “deeded” by parents-in-law to now widowed daughter-in-law.

Squatters

Nome 2000 v. Fagerstorm: rural parcel in Alaska; possession of north and south parcels of the land each reviewed separately. On remand, court leaves open possibility that the more accurate claim is for prescriptive easement.

* Issue raised by the decision: bar for “open and notorious” appears to be lowered in rural land cases because where an average user uses land in a low-intensity way, it’s harder for them to see occupancy by another. Also, in rural, remote lands, the owners come by less frequently.

Policy Reasons for Adverse Possession Doctrine

* Clarifies land ownership (espc. In settings where there are poor records kept and not all land is owned)
* Balance between Right to Exclude and Settled Expectations
* Efficiency in allocation of abandoned property
* Reinforce the responsibilities of ownership (can’t be absentee forever; incent speedy address of trespasses)

Note: there’s also a doctrine of adverse possession in chattels, but we won’t cover it.

## **Prescriptive Easement**

Prescriptive easement is about use where adverse possession is about occupancy. It is a “nonpossessory right to use land in the possession of another.” Easement won’t authorize putting in a structure (unlike the full title awarded under adverse possession). With an easement, can only use/do what you have historically done with the land.

Elements:

1. A pattern of **Use** that is
2. **Open** and **Notorious**,
3. **Continuous**, and
4. **Adverse** (or **Hostile**)
   * Majority rule: Use is presumed to be non-permissive; but substantial minority rule that if owner doesn’t object to use, it is permissive.
   * It’s easier for a private party to claim to have used land adversely to the interests of the true owner than for “the general public” to do so. When general public uses it, the presumption of hostility/non-permission is reversed. Harder for “the public” to get an easement.
5. for the **Statutory Period**.

(Note: no requirement of exclusivity); See also: Acquiesence by True Owner (ex: Vermont requires this as an element of a prescriptive easement claim.)

Positive easement: use land affirmatively

Negative easement: block landowner from doing something (generally disfavored, as in *Fountainbleau* case).

Community Feed Store case

## **Conquest and Government Grant**

The Property Clause (Article IV §3.2)

“Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”

Johnson v. M’Intosh, 1819 (title dispute going back to British land grant policies of 1763, based on their war with France)

* Marshall: Principles of “abstract justice” may seem offended, but “universal recognition” for rule that discovery gave U.S. exclusive rights to extinguish Indian title, by purchase or conquest.
* “Conquest gives a title which the courts of the conqueror cannot deny… It is not for the Courts of this country to question the validity of this title, or to sustain one which is incompatible with it.”
* “Discovery” confers right to acquisition by conquest.
* Court upholds U.S. title by conquest while condemning conquest as unjustifiable in modern age, limiting future injustice against Indian lands. Affirms three things:
  1. US holds title by conquest to former Indian lands,
  2. Indians hold occupancy rights to current lands, and
  3. Only legal means of ousting Indians is conquest, or federal purchase

Early on in US history, much land claimed by the Federal government was given to private parties (homesteaders, railroad companies, mining companies, etc.) Manifest Destiny and the westward expansion. Late 19th C this begins to change. Yellowstone established 1872. Forest Management Act 1897. National Parks established 1916.

Federal Land Policy Management Act of 1976 (The end of the era of public lands disbursement)

“The public lands [shall] be retained in Federal ownership, unless as the result of a land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest.” --43 USC 1701(a)

Policy questions about government role in land use regulation now….

* Property & Power: What is the significance of this history to our understanding of the justice or injustice of the current distribution of ownership in land?
* Redistribution: Does the prominent role of government redistribution over history justify more or less continuing redistribution today?

# The System of Estates

TERMS:

* Fee Simple (absolute): “to A”; “to A and her heirs”
  + Defeasible fee (must meet my conditions….)
* Life Estate: (inherently limited) “to A for life”; “to A for the life of B” (Life Estate pur autre vie)
  + Reversion or remainder afterwards
* Term of Years: (inherently limited) “to A for 3 years”; “to A through July 1 this year”
  + Reversion or remainder afterwards
* Fee Tail: (abolished in most states) “to A & the heirs of his body”
* Dead hand control: Control of people long dead over future interest of land/transfer
* Dying intestate: Everyone has heirs – if bottom of the line then it goes to the state

## **Present Estates and Future Interests**

**SEE CHART on p. 615 re: freehold interests.**

**[this is a reproduction of what Ryan had in her lecture slides]**

**The Four-Step Approach to Present Estates and Future Interests Analysis:**

**● Step 1: Is the PE *absolute* or *inherently limited***? **Who has it?**

Fee Simple = Absolute

Life Estate OR Term of Years = Inherently Limited

**● Step 2: Does the poss. estate terminate naturally or get cut off?**

**▶** IF **Cut Off**i.e., conditioncould ***divest it earlier*** than its inherent limitation, analyze PE & FI per“**Defeasibles**” list

Fee Simple: [always is cut off]:

Fee Simple Determinable

Fee Simple Subject to Condition Subsequent

Fee Simple Subject to Executory Limitation

**▶** IF **Natural** analyze PE & FI per“**Naturals**”list

Term of years AND Life Estate end naturally when the time is up

* + - 1. When the future interest is retained by the Grantor: Reversion (vested by definition)
      2. When the future interest is granted to a Third Party: Remainder
         1. ***Vested*** (grantee is ascertained and no conditions precedent) [does NOT mean absolutely gets possession]

Vested, and not Contingent, only if both

The grantee can be ascertained at time of conveyance, and

No condition in or priorto grantee’s grant *(exc. nat/term p.e.!).*

*“O to A for life, then to B.”*

*“O to A for life, then to A’s children.”*

*“O to A for life, then to B if B passes the bar exam.”*

“3 Degrees” of Remainder “Vestedness”

“Absolutely” Vested Remainder: *To A for life, then to B*

*all* grantees can be *ascertained* at time of conveyance,

no conditions in or prior to thatgrantee’s grant (exc…), and

*no conditions later in the conveyance can get in the way.*

VR “Subject to Open”: *To A for life, then to A’s children (has 1 now)*

*at least* *1 in grantee “class” is ascertained,* *but may be more*,

no conditions in or prior to thatgrantee’s grant (exc…).

Can be STO as well as STD

VR “Subject to Divestment”:  *A for life, then B, but if liquor, then D*

the grantee can be ascertained at time of conveyance, and

no conditions in or prior to thatgrantee’s grant (exc…), BUT

*condition later in cnvync could divest possess’n, even B4 P!*

Whether the subsequent limitation could divest the remainder holder after or *even before* her interest becomes possessory, we still describe the remainder as “vested but subject to divestment”: [*O to A for life, then to B, but if B divorces, then to C.]*

Heed order & punctuation! W/rmdrs, grammar trumps substance: [*O to A for life, then to B if she survies A, otherwise to C.] [O to A for life, then to B, but if B does not survive A, to C.]*

* + - * 1. ***Contingent*** (not ascertained, and/or conditions precedent)

“heir”: we don’t know who your heirs are until they are dead THUS the assertainment is probably missing AND it is probably contingent

**● Step 3: Who gets future interest—*grantor* or *grantee*?**

▶ **…the future interest is retained by the Grantor:**

▪ *Fee Simple Determinable* (with Possibility of Reverter): Magic Words (words of temporal limitation): as long as, while, during, until, unless

▪ *FS Subject to a Condition Subsequent* (with Right of Entry): Magic Words (words of express limitation): but if, provided that, on condition that, however

▶ **…the future interest granted to a Third Party**:

▪ FS Subject to an Executory Limitation (w/ Executory Interest)

▪ [Cf. *Remainders*, following end of “naturally terminating” estates]

\*\*Magic words are irrelevant\*\*

▶ ***N.B.: same concepts apply when LE or ToY “unnaturally terminates”***

**● Step 4: *Select from right list based on characteristics***.

**Optional: “Shifting” & “Springing” Executory Interests**

1. Like PoR and RoE, EI “unnaturally” cuts short a prior possessory estate (that could otherwise go on longer), but gives to a 3d party.
   1. Shifting: When if divests a grantee
      1. “O to A so long as A farms the land, then to B”
   2. Springing: when it divests the grantor
      1. “O to A when B graduated from law school.”
      2. “O to A for 25 years, then to B if she cleans up the mess A leaves behind.”

Cases:

* Cathedral of the Incarnation v. Garden City Co.
  + When present and/or future interest is held by a charity – the court is more relaxed and court is more free to interpret
  + Upshot – things are less clear when dealing with a charity
* Wood v. Board of County Commissioners
  + Court very clear that you have to use the magic words b/c there is a presumption against forfeitures – court not willing to change or expand this

Canons of Interpretation for Ambiguous Conveyances:

* Implement the grantor’s intent! *But…*
  + Rule Against Creation of New Estates (to avoid new feudalism, courts won’t allow new estate tools; everything must be made to fit with the closest of the existing forms of estate)
  + Presumption Against Forfeitures [Avoid finding FIs (“precatory”); FSCS vs. Fee Simple Defeasible]
* Unreasonable restraints on alienation disfavored
* Prohibition on waste of possessory estate
* Restraints on marriage, racially discriminatory conditions unenforceable
* More leniency for charitable donations (e.g., doctrine of *cy pres*)

**Merger, CR Destructibility, & VRSO Convenience**

1. **Merger:** If LE/ToY & Rdr/Rvn end up in same person—become FSA [E.g.: O to A for life, then to B; later, B quitclaims to A. Now?]
2. **We will follow the traditional rule of CR Destructibility:** 
   1. CR disappears if ≠ vest before end of preceding estate
   2. CR holders that satisfy contingency later = out of luck!
3. **FYI: VRSO Rule of Convenience *(but we won’t apply it)***
   1. VRSO class closes as soon as one member could demand possession
   2. E.g.: *O to A for life, then to A’s grandchildren* *(A has 1 GC, B)*

Rule Against Perpetuities

Invalidates future interests (FI) that may vest too far into the future, by striking them out of the grant.

* “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.”
* RAP only applies to Executory Interest, Contingent Remainder, and Vested Remainder Subject to Open. (That’s because when Future Interests are vested in grantor, they are known. Also true for Absolutely Vested Remainers & Vested Remainders Subject to Divestment.
* FI can’t stay contingent (unascertained, open, conditional) longer than the lifetime of someone alive at its creation + 21 years. Before then, must be certain either (1) to vest OR (2) to not vest.

The Object of the RAP Game: Future Interest fails at moment of creation if won’t vest within 21 years of a life then in being. But at creation we don’t yet know how long those lives will last. Object of game is NOT to figure out whether there’s any chance the FI will obey the Rule, but whether it’s at all possible that it won’t. If there’s any chance the FI won’t obey the Rule, it’s invalidated.

3 Questions:

1. “Any contingency or openness in grantee?”
2. “What will it take to resolve this contingency?”
3. “Any chance that won’t happen more than 21 years after all named people alive at creation have died?”

\*\*\*On Exam, answer questions 1 and 2, but not 3\*\*\*

Danger Signs that indicate RAP may come into play:

* Condition not personal to someone (“if the land is ever used as a tavern”)
* Identified age or time period more than 21 yrs (“A’s kids who reach 25”)
* Grants that skip a generation (“to A, then A’s grandkids”)
* Must survive someone described rather than named (“A’s widow”)
* Specific event that would normally happen within 21 yrs, but might not (“after probate of the will,” “local elections,” etc.) No favorable assumptions!
* Can’t identify holder until death of someone described but not named (“to A for life, then to A’s first child for life, then to sitting President”)

Savings Clause: if there’s any chance a future interest might stay contingent longer than the RAP would allow….

draft a savings clause that terminates the future interest on the expiration of the perpetuities period following a specified life in being: “…blahdeblabla, but no later than 21 years following death of [grantor / life estate holder / my youngest living child / etc.].”

Charitable Exemption: If both possessory estate and vulnerable FI are given to charitable organizations, RAP does not apply.

Modern Modifications:

* “Wait and See”: Rather than voiding any interest that might stay contingent beyond perpetuities period, wait and see if actually does! (Still need to understand the CL Rule.)
* Uniform Statutory Rule Against Perpetuities: Limits perpetuities period to 90 yrs, applies “wait & see,” reforms per cy pres. Exempts commercial transactions and some others. (Less CL Rule)
* Abolition: 15 states! (Don’t need the Common Law Rule.)

## **Concurrent Ownership**

Tenancy-in-Common

* Undivided interest to possess entire parcel
* Magic words: “A and B as tenants in common”
* Modern default: presumed if unspecified conveyance to two or more parties
* Shares divisible in varying fractions (“O to A, B, and C as tenants-in-common with 25% interest to A, 25% interest to B, and 50% interest to C”)
  + Why have %s if have undivided interest to possess entire parcel? Future interests of heirs of A, B, and C; sale/rents/burdens of land apportioned by %
  + Probably less important for decision-making about the property (courts don’t want to be involved in those fights; tenants need to work it out). Can partition the land by % if can’t agree.
  + Universal rule: co-owners can deduct the costs of necessary repairs from an accounting to other co-owners
  + Lots of jurisdictional variation on whether co-owner in possession can force non-possessory owners to provide cash upfront for repairs.
* One co-tenant can lease his interest without consent of the other co-tenant. And leasee steps into the shoes of the co-tenant from whom he leases (ex: Carr v. Deking)

Joint Tenancy

* Undivided interest to possess entire parcel PLUS right of survivorship
* Magic words: “A and B as joint tenants”
* Requires the “four unities” (common law approach)
  + Time: tenancy created at some moment in time
  + Title: by same title instrument
  + Interest: conveying equal undivided fractional interests
  + Possession: that give all joint tenants right to possess entire property
* Severance: can reduce from joint tenants to tenants-in-common by severing 1 of the unities. (Except that in some jurisdictions possession unity is hard to disrupt—by lease isn’t enough, sale might be.) Straw conveyance is a way to sever the unity.
* Historically English common law assumed joint tenancy; modern presumption is tenants-in-common
* Drafting a stronger joint tenancy (need a partition suit to break):
  + O to A and B as life tenants (concurrent life estate)
  + If A survives B, then A gets remainder
  + If B survives A, then B gets remainder (Alternative contingent remainders
* In a joint tenancy, where there is ambiguity about a grant/lease by one joint tenant (no clear severance), the courts would prefer to protect the other joint tenant (Tenhet v. Boswell). In that case, the lease is not enough to sever the joint tenancy because the core feature is right of survivorship. (Some jurisdictions would find differently.) General rule: you can only convey what you have (here: ownership for the duration of your own life—can’t transfer to the duration of the leasee’s life).

If want to assert adverse possession against other tenant-in-common or joint tenant, must forcibly oust in order to establish the adverse/hostile element. Ousted party can seek rental value. Ousters and Partitions handled the same way for Tenants-In-Common and Joint Tenants. (Ouster is forcible.)

New owners are bound when taking over with notice of prior encumbrance (Kresha v. Kresha). Holds for both tenants in common and joint tenants/

## **Marital Property**

Tenancy by Entirety

* Abolished in 30 states; remains in 20 (including Oregon)
* Undivided interest in the property with an indestructible survivorship
* Magic words: “As tenants by the entirety”
* Default: in states that retain it, ambiguous grants to married couples treated as tenancy by entirety
* Requires that holders are legally married, and then
  + Property can’t be portioned except by divorce
  + Right of survivorship can’t be unilaterally destroyed (even if interest transferred by other spouse)
  + Majority: no transfer or encumbrance without consent of other spouse
  + Majority: creditors can’t attach to satisfy the debt of one spouse
* Ouster applies here too. If 1 spouse ousts the other, the other can get “rents” ½ FMV (provided it exceeds the cost of property maintenance). (If actually rented out for more than FMV, ousted spouse gets half of actual.) Constructive ouster (intractable differences with spouse) v. voluntary departure (live with new girlfriend). No Rents for voluntary departure. Olivas v. Olivas.
  + One jurisdiction (MA) has a rebuttable presumption of ouster for spouse who moves out. (This is exceptional.)
  + Most courts/juris allow departing spouse to establish ouster.

Separate and Community Property

Separate Property (majority of states): Everything belongs to whoever received it, unless conveyed as joint property.

* Divorce: Common Law: if H earned wages & W not, H owns all (W gets dower); Modern statutes: equitable distribution (up to ½ on sliding scale).
* Death: some give spouse 1/3 to ½ of estate even if willed elsewhere.

Community Property (10 states): All acquired before the Marriage is separate prop; all acquired during the Marriage (including earnings!) is community property. (Exc.: gifts and inheritances to one spouse.) Ergo: both own undivided ½ of Community Property.

* Divorce: some: spouse gets ½ of Community Property, some: “equitable distribution.”
* Death: spouse gets ½ of Community Property even if willed away (b/c already owns it).

Case: O’Brien v. O’Brien(was husband’s medical license “community property”? NY said yes, in large part based on statute.)

## **Leaseholds**

The Leasehold Estate

* The lease sets: Location, parties, rent, duration (Statue of Frauds)
  + All else can be set either by K or legal defaults
* Creates entitlements:
  + Tenant to exclusive possession (even of Landlord)
  + Landlord to reversion, rent (if specified in lease)
* Creates implied duties as well:
  + Waste: Tenant promises no damage beyond normal wear and tear
  + Covenant of Quiet Enjoyment: Landlord promises not to disturb Tenant’s possession

Types of Tenancies:

* Term of Years: Lasts for any specified period of time
* Periodic: Automatically renews at specified intervals (Month-to-Month; Year-to-Year)unless statutory notice required by Landlord or Tenant; can be heritable (survive death of landlord or tenant); statutes in most states require 1 month notice to terminate a month-to-month.
* At Will: Informally created, mostly by mistake or in families; Less or no notice to terminate, ends at death of either Landlord or Tenant
* At Sufferance: Describes “holdover” Tenant, but not a real leasehold. (Holdover = 1 rung above trespasser with regard to eviction rights)

Conveyance vs. Contract

* Under old common law a lease was a conveyance of an estate (handled under property law)
  + Paying rent and providing estate/house as described in the lease were two independent covenants
* Under modern law (statute and common law) a lease is a contract (like for the provision of a service)
  + Now, paying rent and providing space/estate as agreed are seen as dependent covenants
* Transformational case was Sommer v. Kridel (1977). Marked significant shift in thinking/ruling on tenant law. Moved from Property model to Contract model.
  + Holding was that landlord has a responsibility to mitigate damages when tenant breaches.
  + Landlord is the least cost avoider (can mitigate more easily than the tenant by simply re-renting.)

Conflicts About Transfer

Landlord has a right of reversion (a future interest) which he can transfer

A Tenant may assign or sublet (unless lease prohibits)

* Assignment: conveys all of T’s interests; landlord can sue either T1 or T2; can sue for possession and evict T2
* Sublet: T1 has reversion rights after T2’s term; landlord can only sue T1

Kendall v. Ernest Pestana, 1985 (Commercial Transfer)

* Contract law allows analysis for “commercial reasonableness” in the context of good faith and fair dealing
* Property law focuses on dominion
* Holding: Commercial landlord may not unreasonable withhold assent to an assignment per the assignment clause of the lease. (Found for tenant.)

Slavins v. Rent Control Board of Brookline, 1990 (Residential Transfer)

* Although facts similar to Kendall, this court (different jurisdiction) found for the landlord that he could bar the tenant from subletting the apartment, even if it was “unreasonable” for him to do so.
* Court noted that commercial and residential contexts may be different.
* Here the apartment was covered by a rent control agreement, which I think was key.

## **Tenant’s Right to Habitable Property**

Types of Common Law Eviction:

1. Actual Eviction: Landlord bars actual possession by Tenant
   * Tenant completely relieved of rent obligations
2. Partial Actual: Landlord bars actual possession of part
   * Tenant completely relieved of rent obligations
3. Constructive: Landlord acts violate Covenant of Quiet Enjoyment, tantamount to eviction
   * Tenant has no duty to pay any rent
4. Partial Constructive: Landlord violates Covenant of Quiet Enjoyment for only part
   * Courts recognized this because of scarcity of housing (if it was so bad, why didn’t you leave? I left the portion I could, but had to stay in some part of it because no other options)
   * Tenant has to pay rent for usable portion (abated rent).

Implied Warranty of Habitability

Doctrine emerged as nature of landlord and tenant relationship changed over time

* Covenant of Quiet Enjoyment
* Constructive Eviction (Full or Partial)
* Covenant of Habitability
  + These often overlap

Blackett v. Olanoff 1976 (landlord rented space to a cocktail bar in a building adjacent to where he rented apartments)

* Tenants argue constructive eviction (they had vacated premises because of the noise)
* Saloon lease had a term about noise, which landlord did not enforce
* An “easy” constructive eviction case; one which also begins to impute more conditions to the landlord (3rd party noise)

Minjak Co. v. Randolph 1988 (NY) (work in building resulted in dust, debris in apartments; stairwells removed)

* Tenants didn’t vacate
* Succeeded with partial constructive eviction claim (A FIRST)

Javins v. First National Realty Corp. 1970 (DC Circuit) (tenants used housing code violations as a defense to a suit for back rent)

* Two big, important changes:

1. Court applied consumer protection/contract law instead of conveyance/property law
2. Just as there is an implied warranty of merchantability, there is an implied warrant of habitability (housing code statute sets standards) (THIS WAS A FIRST)
   * Means tenants don’t have to leave to have a remedy/basis to demand change
   * Imposes affirmative obligation on landlord to fix things
   * This was a novelty; now is nearly universal

Current Status

* Today: adopted in almost all states (by statute or common law) for residential leaseholders (not commercial).
* A TENANT CANNOT BARGAIN AWAY IMPLIED WARRANTY OF HABITIBILITY (it’s inalienable)
* When violated? Some: code violations that render space “unsafe, unsanitary, uninhabitable;” others: “community standards”
  + Common triggers: no heat/hot water, pest infestation, leaky roof
* At what point in time? Immediately, on notice, landlord grace period?

Tenant’s Remedies for Breach of Implied Warranty of Habitability (IWH)

* Withhold rent and stay (defend Landlord claim for rent on IWH)
* Rescission: repudiate lease before term (move out, cease rent)
* Repair and deduct if Tenant has skill and needed capital
* Sue for injunction commanding Landlord to repair as required by IWH
* Sue for rent abatement (but most withhold ‘til sued, defend on IWH)
* Administrative remedies under statute triggering gov’t intervention
* Criminal penalties in extreme cases (or make Landlord live in own slum!)
* Rare: Compensatory damages if Landlord breach led to other costs (hotel)

# Nuisance and Land Use Conflicts Among Neighbors

## **The Conceptual Architecture of Legal Rules: Understanding Legal Entitlements and Remedy Rules**

No longer looking at relationships between owners of the *same* property—now looking at relationships between owners of adjacent properties. Both parties own sticks. With regard to one property, owner and neighbor both have sticks (over time, sticks can move back and forth between neighbors.)

Owner has: occupancy, lease, conveyance, mortgage

Neighbor has: taxation rights, regulation of certain uses; access in emergency

“Stick Flux”: changes in property law

* Examples of sticks recently shifted between Owner & Neighbors include statutory protection for:
  + Quality of public air & water supply (new stick for neighbors)
  + Right to farm in existing locations (new stick for owner)
  + Endangered species habitat (new stick for neighbors)
  + Against tax increases for long-term Owners (new stick for owner)
  + Eminent Domain for Economic Development (new stick for neighbors)

Law and economics (Coase theorem—Law Review article by Ronald Coase, 1960). If there are no transaction costs, parties could bargain around anything and whoever valued the property more would end up with it. (But Coase didn’t think there were no transaction costs.)

* When we talk about stopping A from harming B we forget to look at both sides of the equation—we focus on B, but stopping A hurts A too. When is what A is doing “wrong” and should be stopped? Balancing A’s autonomy with B’s right to security.

Basic ways to solve conflicts

1. Priority in time: order of encumbrances; first in time, first in right; water rights/prior appropriation; common pool; right of capture
2. Privilege owner’s autonomy interest (always find for owner): regular trespass (able to use self-help); damnum absque injuria
3. Privilege neighbor’s security interest (always find for neighbor): like strict liability (ultra-hazardous activities, unduly dangerous, wild animals); easements are permanent on the land; necessity—emergency trespass
4. What seems fair under the circumstances? (reasonableness testing)

Restatement 2d. Torts: generic reasonableness factors:

* Fairness:
  + Character of harm to plaintiff?
  + Which use established first?
  + Any important rights implicated?
  + Motives of the parties?
* Utility:
  + Social utility of plaintiff’s harmed activity?
  + Social utility of defendant’s harmful activity?
  + What’s at stake for society regarding the loss?
  + Any means to avoid or mitigate harm (who is the least-cost avoider?)

Select between these four based on the policy origins of the legal rules (individual rights and/or societal good)

## **Common Law Nuisance**

This is the chief example of a “standard” (instead of a rule) in property law. It comes out of torts but has had a massive impact on property law. **(SEE CHARTS on pp. 412-421 for arguments about alleged nuisances—rights, utility, role of the courts, administrability)**

Nuisance

* Rest. of Torts (2d): “Nontrespassory invasion of another’s interest in the private use and enjoyment of land.”
* Private Nuisance: A use that creates a *substantial and unreasonable interference* with a neighbor’s enjoyment. 2 separate prongs of analysis.
* Public Nuisance: A use that interferes with the rights of the public in general, usually by threatening health or safety.
  + Nuisance v. Trespass: Trespass is invasion of possessory rights; Nusiance is an invasion of use rights
  + Nuisance v. Negligence: Negligence focuses on the act/actor’s conduct; Nuisance focuses on the results of the conduct

What is “unreasonable” for nuisance?

* Evaluate the Manner, Place, & Circumstances of the challenged use against “prevailing community standards” which generally incorporate
  + Community Standard yardstick: “normal persons in a particular locality” and
  + Torts R2d: Balance rights, utility of the harmful vs. harmed conduct (see the reasonableness factors above)

Hypersensitivity defense (applicable only to the reasonableness prong):

* Would D’s challenged activities cause this level of harm to most other similarly situated Ps? Is P’s harmed use so “unusually sensitive” that it would be wrong to curtail D’s otherwise non-harmful use on basis of P’s unusual harm?
  + Torts Eggshell skull rule: we take our victim as we find him, but…
  + Property: if our victim is too sensitive, too bad for him

Page County Appliance Center (1984)

Radioactive leaking computer terminal in adjacent business interfered with tv showroom reception. Was a nuisance. Substantial and unreasonable analysis. Defendant argued Plaintiff was “hyper sensitive.”

Land Use Conflicts & Remedy-Rules: (1) Can parties bargain around the default rule? (2) Who gets to decide if they can?

|  |  |  |
| --- | --- | --- |
| **Remedy** | **If Plaintiff wins, is entitled to…** | **If Defendant wins, is entitled to** |
| **Property Rule**  (Bargainable between the parties) | **Injunction**  But, D can try to get P to waive right to the injunction in exchange for cash (can bargain around the rule) | **Dismissal of complaint**  But, P can try to contract with D not to do the behavior any more (can bargain around the rule) |
| **Liability Rule (Boomer)**  (Parties can force the other to accept “bargain” if pay $ as court determines; 3rd party sets entitlement) | **Damages**  D can continue to commit the harmful behavior if is willing to keep paying damages judgments | **Purchased Injunction**  P can force a stop to D’s activities if pays court-determined amount to compensate D for loss of profits |
| **Inalienability Rule**  (No Bargaining Allowed) | **Cessation**; D cannot continue with activity & cannot negotiate a deal with P | **Continue**; D can continue with his activity and P cannot negotiate a stop |

Boomer v. Atlantic Cement, 1970 (Cement company in a residential area; residents sue for nuisance injunction based on ash spew and pounding noise).

* Court agrees is a nuisance (substantial and unreasonable)
* Factory’s benefits (employment) outweighed its costs, though, so court did not enjoin.
* Novel solution: the Liability Rule. Company can operate but must pay residents damages.
* Big break with precedent: allows/recognizes social beneficial but privately harmful activities. (Allow punch and pay when the punch has a lot of economic and social utility.)
* Big Questions after *Boomer* …
  + How could court determine that D’s conduct violates P’s rights, but then let that continue? (Isn’t entire purpose of common law nuisance to prevent nuisances from harming others?)
  + If factory so valuable, then why nuisance at all? (Wouldn’t the test suggest that, if it’s so socially beneficial, then the conduct is reasonable and thus not a nuisance?)

Special Circumstances with Special Rules

* **Diffuse Surface Water**

Reasonableness test for drainage (no automatic entitlement)

* + Social benefit of developing D’s property
  + Gravity of harm to P’s property
  + Cost-effective means to avoid or mitigate harm

Armstrong v. Francis, 1956 (water running across property)

* + Court considers:
    - Common enemy rule (landowner/Francis has the right to expel [the water]; privileges owner’s dominion)
    - Natural Flow/civil law rule (anything Francis does must mimic natural flow; privileges neighbors’)
  + Takes middle path:” possessor has a limited privilege to discharge surface water on other lands by artificial means in a non-natural manner.” Reasonableness test---judgment call about the legitimacy of conduct in a specific context.
  + This is now the majority rule (flexibility to consider other interests)
* **Subjacent Support** (see above)
* **Light and Air**

Fountainbleau, 1959

* + “Nuisance only if interferes with Plaintiff’s lawful rights” (P was Eden Roc Hotel next door)
  + No easement for light and air (becomes rule in most US jurisdictions)
    - P was seeking a prescriptive easement (barring D from doing something)
    - Most easement suits are positive easements (allowing P to do something)

# Private Land Use Controls

## **Terminology**

* Easements give access to an owner’s land to others.
  + If it’s an affirmative right for someone to do something on someone else’s land (ex., walk, drive, or dig on it…), it’s an easement
* Real Covenants and Equitable Servitudes (and negative easements) give others control over what an owner does on the owner’s land.
  + If it’s an obligation that either 1) restricts what Owner does on own land (no X-mas lights), or 2) requires Owner to do something in light of ownership (ex., pay dues, groom bushes, etc.), it’s a real covenant, or allowable negative easement.
* License: Owner’s revocable invitation to others for limited access to Property
* Servitude: Creates a right or obligation about the property that “runs with the land”
  + Easement: Right you give another to use your land in a certain way
    - Exception: Negative Easement (ex.: solar, historic, conservation); act like Real Covenants
  + Real Covenant: Obligates you to use/not-use your land certain way
    - Equitable Servitude: like Real Covenant; easier to create, remedy is injunction vs. damages

## **Easements and Licenses**

License creates a temporary right (revocable); Easements are intended to create a permanent right.

Easements generally covered by the Statute of Frauds, with a few exceptions (estoppel, necessity, prior use)

* Affirmative easements: (the vast majority) confer a right to someone else to do something affirmative on owner’s land
  + To pass over it (to get to the road or lake, etc.)
  + To dig under it (to get to buried power/sewer lines, etc.)
* Negative easements: (generally disfavored and unenforceable) give someone else rights to restrict what you can do on your own land. Permissible negative easements are:
  + For Lateral Support
  + For Light and Air (court may recognize it—depends on what you wanted it for: solar panels, etc.)
    - Ancient Lights doctrine allowed negative easement, but not accepted in US
    - Fountainbleau becomes US rule: No easement for light and air
  + To prevent interference with Flow of Water or Aqueduct
  + Historic preservation
  + Conservation
* The Benefit of an easement is the legal right to enforce performance of the obligation entailed in the easement (e.g., demand access). The benefitted estate is called the dominant estate.
* The Burden of an easement is the legal responsibility to perform on the obligation (e.g., provide access). The burdened estate is called the servient estate (because it services the other).

By Express Agreement

Made by a deed that complies with the Statute of Frauds:

* Grantor puts it in writing,
* Specify parties & what you’re conveying,
* Use words of conveyance,
* Grantor signs it.

You can “Grant” an Easement:

* Independently (Right-of-way across land for use as footpath)
* In larger conveyance (Sell rear lot with easement over front driveway)

You can “Reserve” an Easement when you convey land but keep right of access for yourself

* Sell land but reserve easement to continue using footpath
* Sell front lot and reserve easement over driveway to access main road
* Sell land and reserve Easement in a 3d party (Traditional rule was against this, but now most states allow it; the traditional rule was very easy to work around)

By Estoppel

Normally, licensor may revoke license at will, and if the Licensee presumes otherwise, they are out of luck.

* But, if with Licensor’s knowledge, Licensee invests as if license were perpetual, burden shifts to Licensor to clarify if license isn’t perpetual!
* Licensor must put a quick stop to Licensee’s investment or surrender the revocability of the license.
* Does not need to satisfy Statute of Frauds.

Case: Holbrook v. Taylor

By Necessity

* Arises only when:
  + an existing parcel is subdivided and
  + one parcel is left landlocked (no direct access to a public road)
* Can only be implied over remaining lands of grantor—not over neighboring lands that could also connect parcel to a public road
* Arises at partition; can lie dormant through multiple title changes
* Does not need to satisfy Statute of Frauds.

Case: Finn v. Williams

Implied By Prior Use

* If Owner of big tract (or 2 adjoining) sells part and keeps rest, easement by prior use exists if:

1. Two parcels previously owned by a common grantor,
2. one parcel previously used for benefit of other in an
3. obvious and continuous way, and
4. continued use is reasonably necessary for enjoyment of retained land

* Does not need to satisfy Statute of Frauds.

Case: Granite Properties v. Manns

Comparing Necessity with Prior Use

* Easement by Necessity focuses on importance of Easement to access landlocked parcel
* Easement by Prior Use focuses on importance of Easement to enjoyment of existing use on retained parcel
  + When prior use established, criterion is not strict necessity, but is instead reasonable necessity: use must be “important” or “highly convenient” to enjoyment of benefited lot
  + Reasonable Necessity Balancing Test: required necessity reduced by obviousness of prior use
    - The more notice the Servient Estate has, the less necessity the Dominant Estate needs to claim

## **Scope and Apportionment**

Running with the Land

* Some types of easements are presumed to run with the land, if the definitional criteria are met: By Estoppel, Necessity, Prior Use, Prescriptive Easement (see Adverse Possession section, above)
* Benefit of appurtenant easement presumed to run with the dominant estate.
* For a burden to bind successors on the servient estate, a few factors:

1. Must be conveyed in a writing that satisfies Statute of Frauds
2. Grantor must intend that it run with the land
3. Subsequent Owner of servient estate must have notice
   1. Actual notice: Heard, read, or was told about it. Buyer actually knew about it
   2. Inquiry notice: Might have seen a well-beaten footpath across property. A reasonable buyer follows up w/“inquiries” to find out if it means servitude.
   3. Constructive Notice: B/c deed recorded, she’s on constructive notice even if never bothers to check the chain of title. Even if she doesn’t really know about it, she should have known. A reasonable buyer researches chain of title before buying real property.

In Gross vs. Appurtenant

* Easement In Gross: Benefits a specific party; benefit doesn’t attach to land. Easement in gross burdens one parcel to benefit use by a specific person or group of persons. (E.g., Utility easement, Public trail easement)
* Appurtenant Easement: Benefits users of a specific parcel of land that has some relationship to the burdened parcel (usually proximity). Burdens one parcel to benefit use of another.

Case: Green v. Lupo

Scope and Apportionment

Scope Questions to Ask Oneself

The Kind of uses contemplated by the original grant

* Did Green easement allow for motorcycle racing, or just ingress/egress?
* Was Henley easement good for cable TV as well as telephone lines?

The Divisibility of uses contemplated by the original grant

* Was Cox easement expandable from use by 1 to use by 50 families?
* Could the utilities infinitely subdivide the benefit of the Henley easement?

When the right kind of use expands into an Unreasonable Burden

* Interpreted according to grantor’s intent, but if ambiguous, balances:
* Dominant Estate’s free development v. Servient Estate’s security from unanticipated overburden

Apportionment: Exclusive v. Non-exclusive easements

If Exclusive: then the easement is apportionable by grantee

* Can assign benefit to others without interfering with grantor’s rights
* Absent exception for wear and tear, grantor sustains no loss if Easement shared

If Non-Exclusive: Grantee shares the permitted use with the grantor

* Grantor retains continued rights to engage in use or further assign it
* Grantee can’t apportion benefit to others, because that might interfere with grantor’s exercise

Cases: Cox v. Glenbrook; Henley v. Continental Cablevision

Modifying and Terminating Easements

Terminating Easements

* By Written release by holder
* By Own terms (e.g., if stated to terminate on transfer/death)
* By Merger, if dominant & servient estates become held by same Owner
* By Adverse possession by Owner of servient estate (works like merger)
* By Abandonment, if holder’s conduct demonstrates clear intention
* For Frustration of purpose, if intended purpose becomes impossible
* Also: “Marketable Title” statutes require periodic re-recording

## **Real Covenants and Equitable Servitudes**

To run with the land:

|  |  |
| --- | --- |
| Real Covenants | Equitable Servitudes |
| (1) Must be in a writing that satisfies Statute of Frauds | (1) Usually in a SOF-writing (unless estoppel; writing requirement relaxed) |
| (2) Promisors must intend it to run to successors | (2) Promisors must intend it to run to successors |
| (3) Servient estate Owner must have notice | (3) Servient estate Owner must have notice |
| (4) Horizontal & vertical privity of estate must be present | No privity requirement |
| (5) Obligation must touch & concern both the Dominant and Servient Estates | (4) Obligation must touch & concern both the Dominant and Servient Estates |
| Must meet the “Touch and Concern” Test | |
| REMEDY: Damages | REMEDY: Injunction |
| If it meets the Real Covenants tests, and you want both damages and injunction, you can pursue both. | |

Touch and Concern Test

Summary: a pledge touches and concerns if it is really about the land, not the people.

To fully run, must Touch and Concern both servient and dominant estate

* Servient Estate: “if relates to use of servient land”
  + A pledge to do or not do something on land normally satisfies this part of test (exs.: to build a fence; to maintain a garden; to not build high-rise or dig open-pit mine)
  + A restriction on kinds of uses of land will also suffice(exs.: to use land only for compatible commercial development; to restrict structures to single-family residential homes)
* Dominant Estate: “improves enjoyment or market value”
  + Must benefit not just current Owner, but also future Owners of Dominant Estate
  + Think of it this way: if average purchaser would pay more for Dominant Estate because of the benefit conferred by pledge—it probably Touches & Concerns.
  + Or: Who will value the benefit more after transfer of the Dominant Estate—the original covenantor or the successor?

Case: Tulk v. Moxhay

Privity of Estate

Horizontal privity: relationship created btw parties to a real covenant in which one parcel is burdened for benefit of another. Allows the covenant to run with the land in general. Use the Instantaneous Test for Horizontal Privity:

* Satisfied whenever real covenant built into a transfer between one covenantor and the other of a property interest (beyond real covenant) relating to Servient Estate and Dominant Estate
* At the instant the new property interest passes from one to the other, both hold a fleeting, simultaneous interest in land (“instantaneously”)
* Ergo: Instantaneous Horizontal Privity is created any time a fee is sold, a leasehold rented, easement granted and the legal instrument contains an otherwise qualifying real covenant.

Vertical privity: relationship btw original covenantors and successors that allows Real Covenant obligation and benefit to run with the land *to qualifying successors*. Use the Strict Test for Vertical Privity:

* Satisfied whenever successor acquires everything original covenantor had in either the benefited or burdened estate.
* Strict Vertical Privity exists only when predecessor retains no kind of future interest in estate (eg, a reversion or right of entry); must be fully transferred to successor.
* Ergo: Strict Vertical Privity allows Real Covenant to run to successor whenever predecessor sells the relevant Property interest, but never when just leases it (because retains reversion).
* NOTE: some jurisdicton relax requirements on benefit side and just presume that it runs if it touches and concerns the land. For us, assume required for both burden and benefit to run.

Case: Whitinsville Plaza v. Kotseas

## **Modification and Termination**

Some justifications are the same as for easements; termination by:

* By written release of all parties;
* By own terms (ex: dated expiration)
* By merger, if Dominant Estate and Servient Estate become held by same Owner
* By prescription by Owner of servient estate (servient estate owner engages in/creates a prescriptive easement against the Real Covenant and thereby voids the covenant)
* By abandonment by Dominant Estate conduct
* “Marketable Title” statutes require periodic re-recording of convenants and servitudes

Additional Equitable Defenses

* Estoppel (rely on promise not to enforce)
* Unclean hands (hypocrite will lose in court)
* Laches (waited too long to enforce)
* Waiver/acquiesance (ignored your violation)
* Abandonment (tolerated others’ violations)

Equitable Doctrine of Changed Conditions

Focus: is the benefit still available? Allows termination or modification of RC/EQS if intended purpose can no longer be served because conditions inside restricted area are so changed that enforcement provides no substantial benefit to Dominant Estate even if it remains technically possible to perform on obligation.

Equitable Doctrine of Relative Hardship

Shifts focus from benefit to burden: is the burden still worth it? Where hardship to SE is really big, and benefit to DE is really small, the Real Covenant won’t be enforced if hardship to Owner of Servient Estate will be much greater than benefit to Owner of Dominant Estate.

* Huge hardship v. Original benefit (still substantial): Original Benefit wins
* Huge hardship v. Marginal remaining benefit: Huge Hardship wins

Case: El Di v. Bethany Beach

## **Restraints on Alienation, Public Policy, Ambiguous Language, and Racially Discriminatory Covenants**

* No unreasonable restraints on alienation: Oldest public policy constraint on private land use controls; avoid concentrating property rights and preventing others for acquiring
* Public Policy Considerations about servitudes
  + Equal Protection and prohibited forms of discrimination
  + Public health and safety, access to legal system
  + Restraints on alienation or competition
  + Interference w/personal liberties (speech, association, contract...)
  + Interference w/socially productive land uses (social utility calculus)
  + **Trend**: Reasonableness test balances covenantors’ autonomy against others’ security
* Ambiguous language

Canons of Interpretation for Real Covenants:

* + Traditional canons: Least burdensome to the free use of the land; Against drafter, usually grantor.
  + Modern preference: Effectuate grantor’s intended purpose.

Case: Blevins v. Barry-Lawrence County Assn.

* Racial Discrimination (Constitutional limits on enforcement of real covenants)

The State Action Doctrine

* + Supreme Court: Long settled that Judicial actions are as much “state action” as those by Legislature or Executive. Thus, bringing the power of the state to bear in enforcing a discriminatory Real Covenant would “hopelessly entangle the state” in violating the Constitution’s promise of Equal Protection of law.
  + State Action doctrine never overruled, but controversial for potentially slippery slope. Some read later caselaw to limit it to discriminatory Real Covenants; Restatement suggests doctrine prohibits enforcement of Real Covenants that burden fundamental Constitutional rights.
  + Shelley effectively ended era of commonplace racially restrictive Real Covenants; now have Fair Housing Acts

Cases: Shelley v. Kraemer; Evans v. Abney

## Implied Reciprocal Negative Servitudes

Enables Owner lacking privity to enforce burden of a Real Covenant as an Equitable Servitude (ie, get injunction) if deemed an Intended 3rd-Party Beneficiary of the original promise. Presumes early/all buyers were intended beneficiaries of later Real Covenants if the lots are all part of a common plan of development.

Can satisfy Equitable Servitude writing, intent, and even notice requirements by implying that all Owners in Common Plan development are burdened for the benefit of all other Owners and all should know it, regardless of privity (or even mistaken omissions). There’s a “common plan” when…

* There’s a recorded plat and declaration showing similar lots and mutual restrictions. Also, alternative factors include:
* Presence of RC on most deeds in area previously owned by grantor
* Recorded declaration that RCs intended to be mutually enforceable
* Representations to buyers that RCs would be mutually enforceable
* Conformance by similarly-situated landowners w/alleged restrictions
* Similarly situated nature of the parcels

## **Common Interest Communities**

Explosion in planned communities; most governed by Real Covenants under supervision of Homeowner Associations

HOA’s:

* Taken over a lot of public facilities traditionally associated with local government (roads, parks, sidewalks, policing, sanctioning)
* Voting rights are like shareholders
* Servitudes allow binding rules of the sort governments aren’t allowed to make

A CIC might be:

* Neighborhood of free-standing homes
  + Shared interests may be: common areas along streets; shared recreational areas; or even just the mutual Real Covenants that bind each parcel for the benefit of the others
* Condominiums or cooperatives
  + Own the space between the apartment walls; tenants in common for the other areas of the building (halls, stairs, etc)
  + Coops: apartment “owners” each own a piece of the corporate entity, which has the common mortgage
  + Condos: individually owned units (personal mortgage)
* Community Land Trust (ex: Dudley Neighborhood Initiative)

# Public Land Use Controls

## **Zoning, the Land Use Planning Process and The Police Power**

The Police Power is the foundational source of State authority to legislate to protect the public health, welfare, and safety. Ranges from public schools to criminal law… When drawn on to regulate land use, mostly wielded at the municipal level, delegated from the State (all States have conferred authority to control land use).

State adopts **Zoning Enabling Act** delegating to local governments authority to “zone” for the public welfare

Locality adopts a **General (or Comprehensive) Plan**  setting forth the goals of its land use planning effort

General Plan divides the jurisdiction into zones for different intensities of use; local legislature then promulgates **Zoning Ordinances** to effectuate the General Plan. Assisted by the executive branch: Planning Commission (hearings, recommendations) and Zoning Board or Board of Adjustment (administers zoning ordinances). (All accountable to judicial review.)

Zoning ordinances come in two varieties: Area (size of buildings, materials used) and Use (what can be done on it.) Owners can put lighter intensity uses on a property, but not uses heavier than zoned for. Ex: ok to put a house (light)in an industrial zone (heavy intensity), but not a factory (heavy) in a residential area (light intensity).

Local land use laws have some variety:

* Dillons Rule Approach (Virginia): Locality only has that power specifically conferred on it by the State
* Home Rule States (Oregon): Locality can do whatever it wants as long as the State hasn’t explicitly said they can’t
* Variation: California is a Dillons Rule State but allows localities to opt-in to Home Rule process

Developing case law:

* Mugler v. Kansas (1887): SCOTUS allowed a state statute to prohibit manufacture and sales of alcohol (brewery). Not a taking because law was a good faith intention to protect the public from harm. Since the title was not taken, nor possessory rights interfered with, there was no “taking.”
* Powell v. Pennsylvania (1888): SCOTUS ditto on ban on margarine, as long as low was for purpose of protecting the public health and preventing fraud.
* Hadacheck v. Sebastian (1915): SCOTUS allowed a statue to mandate closure of a brickyard, even though it had been built when it was legal. Although invested in reliance on the then-existing law, no-one “had a vested right to commit a nuisance” and things that weren’t before can become nuisances as circumstances change.
* Buchanan v. Warley (1917): SCOTUS struck down a “racially neutral” law that prohibited both whites and blacks from buying houses on streets that were already majority black or white. Ordinance denied people the right to sell their property… and the right to buy.
* Pennsylvania Coal v. Mahon (1922): Private agreement between homeowners and coal company allowed the company to interfere with the subjacent support for their homes. Statute passed to prohibit coal company’s conduct (no interference with possessory rights, but with profitable use). First case where a plaintiff won in challenging land use controls.
* “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone.”
* “We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change… the question at bottom is upon whom the loss of the changes desired should fall.”
* Overturned in 1987 (Keystone Bituminous Coal Assoc. v. DeBenedictus) but principle that when regulations “go too far” may become unconstitutional takings has lasted.
* Village of Euclid v. Amber Realty Co (1926): SCOTUS ruled that locality could regulate land use (zoning) to exclude industrial property in a residential zone. Even if property value was reduced by 75%. (No interference with possessory interest.) Gave rise to “Euclidean” zoning: residential separated from industrial (which in turn created urban sprawl). But since this type of zoning now had SCOTUS approval, it was “safe” for other localities to copy. Takings claim did not get to SCOTUS (b/c no interference with possessory right); instead 14th A due process claim went up (zoning itself exceed the police power of Ohio)—a facial challenge to zoning.

Court: State law is within the police power as longs as:

1. It bears a substantial relationship to the public welfare, AND
2. It is not clearly arbitrary or unreasonable

* “A court should not set aside the determination of public officers in such a matter unless it is clear that their action ‘has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety, or the public welfare in its proper sense.”

*Euclid* accomplished three notable things for zoning:

1. Ringing endorsement of the zoning enterprise, so long as zoning follows solid land use planning (i.e., a general plan)
2. Suggested that validity of a zoning ordinance could be measured by extent it seeks to prevent common-law-nusiance-like harms
3. Indicated that although upholding zoning as a general enterprise, would use flexible, case-by-case approach on particulars

* Nectow v. City of Cambridge (1928): SCOTUS allowed an “as applied” challenge to a local zoning law that would have made a parcel on the boundary between residential and industrial zones unusable—too small to be used for residential purposes. Allowed the owner to put it to industrial purposes, as with the adjacent industrial lands.

*UPSHOT: Nectow provided a counterbalance to Euclid in clarifying that although municipalities may zone to prevent nuisance-like harms (Euclid)… the zoning power remains limited by the rights of owners asked to bear too much private loss for too little public benefit (Nectow).*

Police power to zone really comes down to what is in the public welfare (personal harm to an owner comes to the fore in terms of remedy—is it a taking?)

## **Zoning Protections for Pre-existing Rights**

Prior Non-Conforming Use

Purpose of the doctrine is to validate reliance of owner’s pre-zoning expectations. Also: good strategy to avoid takings litigation.

* Zoning usually happens after many uses already in place; some will be inconsistent with the new restrictions
* Doctrine gives special permission to violate zoning law, so long as harm to public of doing so is not too great
* Rationale is to protect public w/o unduly burdening one Owner, in fairness to lawful investment before change in law
* Still: “Doubts are resolved against further change”: Reasonable repairs allowed, but no change/intensification of use

Town of Belleville v. Parillo’s (1980). Restaurant (grandfathered into a residential area) turned into a disco—not covered by prior non-conforming use.

Variance

Owners can request an exemption from a zoning code. Usually reviewed by Zoning Board; appealable to the courts.

Most jurisdictions allow variances only for “undue hardship,” a multi-element test:

1. Strict application of the zoning code leaves lot with no economically viable use
2. Hardship is not self-imposed
3. Variance not contrary to the public interest
4. *Minority of jurisdictions also require that:* hardship arises from unique physical characteristics that make lot different from surrounding lots

A minority of jurisdictions (example: Indiana) have a “practical difficulties” rule instead of “undue hardship”

In practical terms, very hard to get a variance officially blessed. But only likely to have a formal review if your neighbors don’t like what you are doing. (If do get a variance, will be on an area restriction, not use.)

If find that the ordinance denies all value to the land, but a variance would substantially harm the public… it’s probably a taking.

Vested Rights

Claimant wants to use Property in some way that was legal when started plans for use, but now is illegal due to a change in zoning law. Owners can claim vested rights in the prior zoning/use ordinance. Note that they have not yet lived in/applied those rights (or this would a be prior non-conforming use issue). Has relied so heavily, though, that wants to be treated essentially as a prior non-conforming use.

Lots of jurisdictional variation on what the threshold is for vested rights. Ex.: Colorado has vested rights from the moment you apply for the permit; Iowa has vested rights when you break ground.

Stone v. City of Wilton (1983). Plaintiff wanted to build subsidized multi-family housing and line up FHA funding, architects’ plans, etc. Then zoning regulations change. Court says no significant investment to date.

Exclusionary Zoning

Key element of exclusionary zoning is to keep land off the residential zone and not allow lower-intensity use of commercial zoned land (i.e., additional residences).

Southern Burlington County NAACP v. Township of Mount Laurel (1975). Claim was racial discrimination in violation of Federal constitution and non-discrim laws. NJ Supreme Court accepted that was not the case, but looked at the larger practice of exclusionary zoning as practiced by Mt. Laurel (keep out too many children because schools cost a lot—which the Township residents were fine with). Court said: because the State police power which allows zoning is vested in the State, not just this township, must look to the State-wide, regional welfare (interest in affordable housing).

When police power used municipally w/o effects elsewhere, OK to consider only residents. ut if externalities to other towns and state citizens, police power metric is entire state public. No state subdivision may ignore its fair share of responsibility for providing affordable housing; can’t exclude children, elderly, poor.

Minority rule is to require inclusionary zoning (provisions for affordable housing): MJ, CA, OR, MA, RI, FL only.

In NJ evidence is that inclusionary zoning has been good for elderly folks, but not really other poorer people.

## **Takings**

The three threads unifying property law intersect here: Efficiency; Fairness/Equal Access; Sustainability

5th A: “nor shall private property be taken for public use without just compensation.” (Incorporated to the states via 14th A DP clause.) Takings are ok with they are for a legitimate public use and just compensation is paid.

* Vocabulary:
  + “Eminent Domain”: a government take for public use with compensation to owner
  + “Inverse Condemnation” : plaintiff calls it this when a taking has occurred without compensation
* Two types:
  + Original meaning: a physical taking; State takes title and possession of land
  + Modern meaning includes: a regulatory taking; regulations that limit use

Takings are a bit like the purchased injunction remedy from torts. Someone can do something to you that you don’t like, but they have to pay you for it.

Historical case: Miller v. Schoene (1928). Cedar tree owner ordered (per statute) to destroy infected decorative cedar trees in order to protect apple orchards (commercial crop—broad industry in Virginia). Sought compensation under takings clause, but lost.

Court: When State is faced with two incompatable uses, it does not exceed its police powers when it choses one over the other. Especially true to protect against common-law nuisance. (Now: might apply purchased injunction that local owners pay for the loss? The larger the group of people who would pay for/benefit from the injunction, the more they look like “the public” and situation looks like a takings case.)

Historical bases to distinguish constitutional from unconstitutional takings:

* Efficiency (law and economics)
* Tradition (precedent)
* Distributive (rights-based fairness)

Regulatory Takings and the Ad-Hoc Balancing Test: as land use regulations proliferated and had an impact on profitable use of land, the term “regulatory taking” emerged to describe.

Penn Central Transportation Co. v. NYC (1978)

Penn Central corporation wanted to get an “as applied” exception to the NYC landmarks preservation ordinance that required that changes to designated landmarks (Grand Central terminal) be reviewed for fit with existing historical structure. Wanted to put a 50 (?) story office block on top of it.

Supreme Court “has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.” So developed the ad hoc balancing test in this case. In this case, the fight among the justices is on the 3rd factor. Scalia/majority say the third factor (harm-based distinction) is impossible to use because anything can be framed either way.

Ad Hoc Balancing Test has three factors:

1. Economic Impact of regulation on Owner?

* Diminish economic value of Property too much?
  + How much value taken? How much left?
  + Reasonable return on investment?
* Impact justified b/c “nuisance”? (see also: Character of the Government Action)
  + Strong public interest in preventing a harm?
  + Preventing use O never had right to engage in?

1. Owner’s Reasonable, Investment-Backed Expectations?

* “Vested rights” in the restricted use?
  + Does regulation interfere w/ existing use?
  + Interfere w/ primary expectation of use?
  + Interfere w/ opportunity for future use?
* Was Owner’s reliance on old law reasonable?
  + Investments made on notice of change?
  + Could or should Owner have foreseen change?

1. Character of the Government Action?

* Nature of the regulation:
  + More like a use restriction or an invasion (deprivation of right, physical intrusion)?
  + A choice between incompatible uses?
* Benefits and Burdens of the regulation:
  + Burden too individualized?
  + “Reciprocity of advantage”? (I.e., all parties benefit from restrictions on one another?)
* Purpose of the regulation:
  + To prevent a harm?
  + To extract a benefit?

## **Categorical Exceptions to the Takings Ad-Hoc Balancing Test**

Physical Invasions (Permanent Physical Occupations)

SCOTUS: If the “character of government action” is a permanent physical occupation of real property, then a taking to extent of occupation without regard to the Extent of economic impact on Owner, or Whether achieves important public benefits. Two criteria: (1) Physical Occupation; (2) Permanency. Rule came out of Loretto v. Teleprompter, below. Really only shows up in environmental regulation cases (and rare in those)—no wide application.

Pruneyard Shopping Center v. Robins (1980) Students gathering signatures in a privately owned shopping mall. Asked to leave. California Supreme Court held that Calif Constitution protects free speech more than US Constitution (US case Lloyd v Tanner said no right, under US Constitution, to protest in a mall). Subject to reasonable time, place, and manner restrictions, mall had to allow. Shopping center: if I have no right to exclude, this is a taking. US Supreme Court applied the 3 factor, ad-hoc test and determined not a taking. Doesn’t mean that a temporary physical invasion can never be a taking (chicken farm overflight case).

Loretto v. Teleprompter (1982) NYC ordinance that rental properties had to allow cable company to put in cables, including permanent mounting on the outside of the building. Total volume last was 1.5 cubic feet. NYS Supreme Court applied the 3 factor ad-hoc test and found no taking. SCOTUS reversed and created this bright line rule. Opinion focused on fact that the statute required a landlord to allow a *third party/stranger* to invade them (dignitary harm), as opposed to requiring the landlord to do something herself (under housing code). (Result: just compensation assessed by NY courts at $1.)

What does it mean to be “permanent”? Cables were permanent, but protestors were temporary. Courts are flexible about definition of permanent in *Loretto* (after all, if no longer a residential rental, the cables can come off) but not flexible enough to allow the “permanent” label to apply in *Pruneyard*. How thinly can we slice the sticks in the bundle?

“Conceptual Severance”: In Penn Central case, the owner said “government only took the airspace rights, but took all of them.” SCOTUS said: we don’t look at each right alone, we look at all of them together. But in Loretto, SCOTUS did a bit of conceptual severance (only took a small possessory right, but took it permanently).

Deprivations of Economic Use

In *Euclid*, Court held that a 75% diminution in property value due to regulation did not constitute a taking. New rule out of *Lucas*:

* if there is total economic loss, it is always a taking, regardless of extent of government interest, unless it prevents owner from a use he never had a right to in the first place (such as a common-law nuisance) per the “background principles” of state property law.

Lucas v. S.C. Coastal Council (1992) SC statute Beachfront Management Act designed to protect coast from erosion (cumulative effect of everyone building on coast). Trial court agreed with Lucas that he had 100% loss of value. State Supreme Court said it was a constitutional taking because of the enormous public interest. SCOTUS (Scalia opinion) said no. Majority opinion rejects the harm/benefit distinction of the 3rd factor. (This case was not a common law nuisance because that cause of action is based on identification of a discrete cause of harm, and here the impact is cumulative.)

* Scalia/Majority:
  + Bright line rule is good/certainty
  + Some predictability in Common Law Nuisance doctrine
  + Protects owner’s investment in property
  + Total wipe out is like expropriation
  + Limits role of the state in redefining property rights (limit on government authority)
  + Economic efficiency: incentivizes good land use policy (if State must pay)
* Kennedy Concurrence:
  + Concerned that common law nuisance isn’t broad enough (shouldn’t freeze it)
  + Concurred in judgment b/c in this case owner bought before regulatory changes
  + Concerned about factual determination of lower court
  + Wants reasonable investment backed reliance to remain a factor
* Blackmun Dissent:
  + Scalia’s history is wrong (lots of land use regs when 5th A passed; common law history doesn’t support State being limited in land use regulations)
  + Doesn’t believe Lucas was 100% wiped out (factual determination by trial court)
* Stevens Dissent:
  + Doesn’t believe Lucas was 100% wiped out (factual determination by trial court)
  + Concerned about fairness in application (100% = taking; 99% not necessarily)
  + Concerned about calculation/denominator (conceptual severance)
  + 100% wipe out of 2 acres of a lot or 10% wipe out of a 20 acre lot
  + Freezing common law is bad
  + Shift of power from legislature to the judiciary
* “Background principle” problem: what counts, if anything, other than a common law nuisance in 1789? Can continue to “grow” them by designating statutory nuisances? (If not, how should State deal with cumulative impacts problem?; If so, will claims based on reasonable investment backed expectation fail?)
* Denominator Problem: After Lucas how to measure extent of “wipeout”?
  + Horizontally? (Maybe/lower courts have been allowing it: 100% loss of a 2 acre [sub]plot or a 10% loss of a 20 acre plot?)
  + Vertically? (No per Penn Central airspace claim)
  + Over time? (No, as we see in Tahoe case, below)
  + Small Owner losing all vs. Big Owner losing some?
* Palazzolo v. Rhode Island Purchased land after wetlands regulations in place; claimed a takings because he couldn’t build on part of the parcel. SCOTUS agreed that a regulation before purchase could be a taking, since to hold otherwise would put an “expiration date” on the takings claim (only previous buyers could invoke). Remanded to RI Sup Ct which found that since his development would interfere with ground water filtration, it would be a common law nuisance, and so there was no taking in this case.
* Tahoe-Sierra Preservation Council Court resisted push for another bright line rule on regulatory takings. Stuck with the 3 factor ad-hoc test.

## **Eminent Domain and the Problem of Public Use**

Kelo v. New London, 2005 (Remains good Federal law, though most States changed their laws after this case)

* Looked at the “public use” clause of the 5th A takings clause. What constitutes a public use?
* City said “for the public benefit” was a “public use” even if not open to the public (economic development project). Succeeded on this claim.
* Court quite unwilling to get into assessing economic development plans and determining which was best. That’s left to the legislature.

State Constitutions and Statutes

US Constitution is the floor/minimum. States may set higher standards for government to meet in making a case to take private property. After Kelo, for example, many did.

* More stringent oversight
* Higher compensation
* Banning economic development as basis for a taking

## **Just Compensation**

This is the third factor to look at in a takings case

* Court holds that it is “fair market value” that is required by the Constitutional language
* Not replacement cost or intrinsic value
* Statues may supplement the Constitutional floor (ex: Fed statutes will reimburse for moving expenses)

Interest on Lawyer Trust Accounts:

* Interest is property per the Court
* But “just compensation” here is $0, because owners wouldn’t have had the interest if the money were not in the IOLTA account.
* Pin just compensation on what owner loses, not what government gains (unlike FMV, above)