**WHAT IS PROPERTY**

1. Jacque v. Steenberg Homes, Inc (Wisconsin 1997): No harm, automatic liability and punitive damages
2. Hinman v. Pacific Air Transport (9th Cir. 1936): Possible harm, no liability
3. Hendricks v. Stalnaker (WV 1989): Septic v. Well, Serious harm, no liability
4. Coase: The Problem of Social Cost: costless transactions = best bargains, transact. not costless
5. Historical Background: (division not legitimate)
	1. Courts of law: offers damages
	2. Courts of equity: injunctions (not mere trespass)
6. Baker v. Howard County Hunt (MD, 1936): hunter's dogs disrupt/injure farmers, duty to control after notice – sufficient to issue injunction
7. Pile v. Pedrick (PA 1895):Encroachment by a wall is a continuing permanent trespass which merits an injuction.
	1. This is a Property Right backed by an Injunction (quadrant 1).
8. Golden Press, Inc. v. Rylands (CO 1951): Golden Press builds a building that encroaches by 2 inches.
9. This is a Property Right backed by damages (quadrant 2)

**HOW DOES ONE ACQUIRE PROPERTY**

1. By Capture/Occupancy
	1. Wild Animals:
		1. Pierson v. Post (NY 1805): Occupancy required to possess ferae naturae/rule of capture. (law is out there – judge is finding it)
		2. Keeble v. Hickeringill (Queens Bench 1809): duck blinds, property right to be free from malicious interference (not property right to duck)
		3. Ghen v. Rich (MA 1881): whale harpoons, hunter req. to do what nature will allow – constructive possession.
		4. Possession Rights in order of claim value
			1. [True Owner] if it exists
			2. Land Owner (sometimes the same as the TO)
			3. Captor 1
			4. Captor 2
			5. Hunter
			6. Malicious Interferer
	2. Oil, Shipwrecks, & Baseballs
		1. Hammonds v. Central Kentucky Natural Gas (NY 1934): gas reservoir out of a hollowed out area. Gas returned to the wild (both ways)
		2. Eads v. Brazelton (AR 1861): ship wreck finders, finders rights are second only to TO but have to occupy.
		3. Papov v. Hayashi (Ca 2002): split property interest in baseball, "both men have a superior claim to the ball as against all the world." Court splits.
		4. Tragedy of the commons: when no one owns it then no one has an incentive to conserve or care. Incentive is to get as much good out of it as possible. That has essentially destroyed the oceans.
		5. General Principals:
			1. Title is relative. Who has the better claim is often unique to the item in question (whales v. foxes)
			2. Legislature can tailor rules and regulate industries when goals change.
2. By Creation
	1. Hot News & Right of Publicity
		1. INS v. AP (SCOTUS 1918): INS steals APs work. Trial Court injunction upheld. Quasi property interest in the material that they produce and that property right is enough to justify the injunction in equity.
			1. Positive Law approach - Holmes and Brandeis want the legislature to shape the rights people have regarding this quasi property.
	2. Inventions
		1. Midler v. Ford Motor Company (9th Cir. 1988: Midler impersonator, Court creates a quasi property right to her voice. Purpose of the imitation is key. When it's "informative or cultural" then there's no protection.
		2. Trenton Industries v. A.E. Peterson Manufacturing Co. (CA 1958): High chair design "stolen," court holds breach of confidence – entitled to royalties
	3. TRADE SECRETS: Questions of how to best protect trade secrets: CA has the best model which seems counterintuitive because they allow for the free flow of information - argument to be made that it encourages productivity.
3. By Accession, Ad Coelum & Find
	1. Accession: property that arises out of property that was already owned
	2. Ad Coelum: property that exists because it was above or below property that was already owned.
	3. Find: finders keepers
		1. **Rule:** Find entitles finder to property right against all but a rightful owner (*Armory* – chimneysweep finds jewel)
		2. **Rule:** Proof of prior possession may establish rightful ownership as against a finder (*Clark v. Maloney* – 10 white pine logs found in Delaware bay)
	4. **Terms**
		1. **Conversion:** common law action for the tort of using another’s property as one’s own
		2. **Replevin:** Action or remedy to recover the asset itself (plus money damages for injury to the asset)
		3. **Trover (def):** action or monetary compensation for conversion of personal property
	5. Wetherbee v. Green (MI 1871): barrel hoops, gets to keep the hoops – owner's entitlement protected with liability rule
	6. Edwards v. Sims (KY 1929): cave business, invasion to survey permitted to prevent permanent trespass.
	7. Armory v. Delamirie (Kings Bench 1722): Chimney sweet found a jewel, Court holds that a finder has a right against all the world except for the true owner.
	8. Clark v Maloney (DE 1840): 2 finders vying to possess ten logs found in the river, Rule says that finder 1's rights are higher than finder 2.
	9. Anderson v. Gouldberg (MN 1891): Plaintiffs cut down longs that they didn't have permission to take. Defendant took the logs from there on the authority of a landowner who erroneously said they were cut from his land. T.O. → Thief 1 → Thief 2 → Everyone else.
	10. Other situations:
		1. Thief v. Subsequent Finder: Technically, Thief wins – but courts find a way to give to the Finder.
		2. Abandoner vs. Finder: Finder wins against Prior Owner if can prove abandonment (question of intent).
		3. Seller vs. Buyer – Buyer wins à Non-derogation from grant: Seller may not derogate from grant by claiming prior possessory rts as against grantee.
		4. Seller vs. Subsequent Finder (e.g., A sells to B, who loses, C finds) – A sues C, best to treat as abandonment.
		5. Agent vs. Principal: If Agent possessed in course of work, possession never counted—goes to Principal
4. Competing Principles of Original Acquisition
	1. Fisher v. Steward (1804): Bee hive marked while trespassing; Rule: Land Owner has constructive possession of things on his land as against trespassers.
	2. Goddard v. Winchell (1892): Buried meteorite recovered by friend with permission from the tenant with grass rights. Court awards to the LO. D was never the finder because it was not lost or abandoned. It went straight into the P's land.
	3. Hannah v. Peel (King's Bench 1945): Tenant finds a brooch, LO tries to claim but never lived there.
	4. Finder requirements to win over LO (hard to walk this line): (1)Must be rightfully on property, (2)Not exceed license for being there (otherwise, trespass), (3)Not be considered as acting as agent (otherwise, goes to principal)
	5. **LO beats F if any of following** (exceptions to Finder rule almost swallow the rule—LO almost always wins):
		1. **Thing is mislaid – laid down intentionally then forgotten (or lost for short time?)**
		2. **F is dishonest or Trespasser or Agent**
		3. **Thing is underground or in private place in possession of LO.**
		4. **LO knew the object was there. (No “find” unless LO doesn’t know about it.)**
		5. **Note: LO always wins when object is *underground* (e.g., pool case, Elwes (buried boat case), Goddard).**
	6. Bridges case (discussed in Hannah): Banknotes found on floor in small shop: F beats LO.
		1. But, if notes had been in back office (more private): occupancy + general exclusion from public might rise to presumption of constructive possession, like a home.
		2. If locus in quo is public place – F wins; The more private locus in quo, more like LO wins.
	7. South Staffordshire Water (pool case discussed in Hannah)
		1. LO wins b/c Finder is mere agent of LO on LO’s property.
		2. Note: If Principal ≠ LO, goes to Principal if Agent acting w/in scope of license.
		3. Note: If agent exceeds license 🡪 Agent becomes Trespasser 🡪 LO wins on Trespasser rule.
5. Adverse Possession
	1. Ownership of Land is unique.
		1. Can trace perfect title back
		2. Successor in title is meant to protect transfers of land.
		3. Sellers can't claim prior possession against a buyer of their claim.
		4. Neimo Dot: Can't give what you can't sell.
		5. ONLY WHEN SUPERIOR TITLE CAN BE SHOWN CAN YOU MOVE TO ADVERSE POSSESSION – until then possessor assumed to have title.
	2. Adverse Possession: Every state as a statute of limitations for adverse possession.
	3. Lessee of Ewing v. Burnet (SCOTUS 1937): Burnet who has adversely possessed it for 21 years, Burnet was a good faith purchaser so court gives it to him.
	4. Carpenter v. Ruperto (1982): P fenced in 60 feet for neighbor's P lost because it was not a good faith claim. The good faith requirement is meant to discourage squatter's behavior.
	5. Howard v. Kunto (1970) NEED TO READ - only did a hypo in class relating to it.
		1. Description in deeds did not match the house.
		2. Something dealing with summer occupancy

P (Possessor) v. TO (True Owner:

Possessor typically present, TO one with superior title

1. Was TO (or predecessor in title ousted from poss'n > X [=SOL] years ago?

Ouster = adverse entry that is actionable trespass against TO or predecessors & resulted in actual poss'n

Yes:

No: TO Wins

3. Can P show privity w/ proper possessor(s) to fill in SOL?

2. Has P in poss'n >X years?

Yes:

No

Yes:

No

4. Was possession of character required for AP?

* Actual
* Exclusive
* Open & Notorious
* Continuous
* Under adverse/hostile claim of right/title

Yes: Adverse Possession

TO Wins

No

**VALUES SUBJECT TO OWNERSHIP (OR NOT)**

1. The Body: The body is typically not property because we don't want bodies/people to be commodities.
	1. Moore v. Regents of the University of California (CA 1990): Discarded spleen cells. Court protects with Inf. Con. not with property – protect research. Informed consent protection is weak - have to prove first
	2. Newman v. Sathyavaglswaran (9th Cir. 2002): dead child cornea – parents have property interest. State can't deprive of notice
	3. Hecht v, Superior Court (CA 1993): sperm for deceased's gf Sperm unique – property right.
	4. Bottom line on bodies: Moore: let the legislature define rights as they will (in this case because significant money is at stake), and then Newman and Hecht say that the legislature is not completely unconstrained, that the constitution plains a role.
2. Public Rights: Waterways & Airways
	1. Resources that are too valuable to parcel into private ownership.
	2. Navigational Servitude: From Federal law. Members of the public can sue for access to waterways.
		1. Navigable waters: from commerce clause, controlled by state
		2. Navigable airspace: fed gov't has control.
	3. Public Trust Doctrine
		1. Comes from state law.
		2. Tidal waters: part of public trust
		3. Non tidal: submerged = state, not submerged = subject to private ownership.
	4. Lake Michigan Federation v. Army Corps of Engineers (1990): Loyal expansion for public good. Court says for private land and nixes
		1. Courts ought to be critical of the state giving over public land to private entities without legislative oversight.
		2. Public trust is violated when the primary purpose is private interest
		3. Public trust is violated when the state relinquishes power over public resources.
	5. State of Oregon ex rel. Thornton v. Hay (OR 1969): Homeowner wants to fence in his dry sand waterfront land. Court holds that the public has a right to dry sand beach based on custom and affirms the injunction.
	6. Custom: such usage as by common consent and uniform practices
		1. Ancient (long and general)
		2. Without interruption (no assertion of paramount right in interim)
		3. Without dispute (peaceable)
		4. Reasonable (public's use has been appropriate to the land)
		5. Certain (defined by visible vegetation line, recognized uses)
		6. Obligatory ( like a claim of right, the public acted like they had a right, and it must be uniform across land owners.
		7. Not repugnant to laws/custom
	7. These customary provisions are in fact subject to the will of the legislature.

**OWNER SOVEREIGNTY AND ITS LIMITS**

1. Criminal and Civil Trespass Actions
	1. State v. Shack (NJ 1971): LO can't keep services from migrant workers. You bring your rights with you.
	2. Intel Corp. v. Hamidi (CA 2003): Hamidi sends emails, suit for Trespass to Chattel – no actual harm.
2. Self Help: property owner using reasonable force to defend their property.
	1. Berg v. Wiley (MN 1978): LL locks restaurant T out. MN says only remedy is through the courts because of potential for violence.
	2. Williams v. Ford Motor Credit Company (8th Cir. 1982): Repossession of car actually peaceful and lawful.
	3. Williams compared to Berg
		1. Both cases have a True Owner pitted against a present possessor
			1. MN: want parties to prevent a breach of peace
			2. AR: let parties figure things out until a line is crossed.
		2. Laws typically protect present possession:
			1. LL/Repossesser should have someone else adjudicate their right to reclaim.
			2. If the TO reclaims without a right, we charge them with the same tort as if they never had a legitimate title (wrongful eviction/conversion)
			3. Valuing possession is a way of avoiding violence.
		3. Perhaps the difference is real property v. a car. Cars are something that are more likely to be defaulted on and we want to give the sellers/leaseholders certain protections.
			1. Most states bar self help for LL's who seek eviction
			2. Most states do not bar self help for TO seeking repossession
3. Exceptions to the Right to Exclude
	1. Common Law Exceptions
		1. Ploof v. Putnam (VT 1908): necessity justifies trespass. Affirmative right.
		2. McConico v. Singleton (SC 1818): hunter on undev. land allowed
		3. Uston v. Resorts International Hotel (NJ 1982): casino can't bar unless breaking rules.
	2. Constitutional Trumps
		1. Test: (1) First ask if there's state action, (2) Then balance competing rights.
		2. Marsh v. Alabama (SCOTUS 1946): company town can't keep Jehovahs out.
		3. Shelley v. Kramer (SCOTUS 1948): enforcement of racially discrim covenant = state action and not allowed.
		4. Bell v. Maryland (SCOTUS 1964): Court bounces on deciding if a sit in protestor being removed is illegit.
		5. Moral of the story: enforcement of private rights of action that if done by state actor would be illegal, are the ones that are not permitted.



**FORMS OF OWNERSHIP**

1. The Anglo-American System of Estates
	1. Present Possessory Interests
		1. Fee Tail: not important anymore. Kept land within bloodlines and a major plot device in Victorian novels. Abolished early on in the United States.
		2. Fee Simple:
			1. Absolute: largest package of ownership rights from which others are carved. No natural end - "To A and his heirs" or "To A in fee simple" or "to A"
			2. Defeasible: subject to conditions that cuts short a potential FSA
				1. Fee Simple Determinable: O Grants "to A as long as limitation/contingency, then to O." (or "so long as," "while," and "until"). Adverse Possession begins to run immediately if A continues to use O's property and possibility of reverter
				2. Fee Simple Subject to Condition Subsequent: O Grants - "To A, but if it is not used X purpose, then O has the right to re-enter" (or "on condition that" "provided that" "provided however" and "if" )

A's interest does not automatically end but can be ended by some action (self help, suit)

Adverse possession does not begin to run until O exercises right to re-entry

Right of Entry/Power of Termination

* + - * 1. Fee Simple Subject to Executory Limitation: "To A as long as used for X purpose, then to B" or "To A, but if not used for X, then to B." A's interest = Fee Simple Subject to Executory Limitation. B's interest = Executor (Future) Interest
		1. Life Estate: duration of estate come to a natural end with the death of a named person. Life estate is alienable by gift or sale, but not by will. Can only give away what you have, so A can only give away her interest until her death
			1. O grants to A for life (life estate)
			2. O grants to A for life unless X (defeasible life estate)
			3. Duration of estate comes to an end with the death of a named person and must always be followed by a future interest.
			4. Can be conveyed, but not devised or inherited.(A conveys her life estate to C, C gets possession only until A dies)
	1. Future Interests
		1. Interest Retained by the Grantor (reversionary interests) - NOT subject to the Rule Against Perpetuities (RAP)
			1. Possibility of Reverter: Follows a Fee Simple Determinable; O automatically gets the property back if the condition occurs. O Grants - "To A as long as X, then to O" or "To A as long as X" (explicit or implicit)
			2. Right of Entry/Power of Termination: Follows a Fee Simple Subject to a Condition Subsequent. O Grants "to A, but if X, then O has right to reenter and take the premises"
				1. Condition is…

Condition subsequent to the preceding interest (A)

Condition precedent for the future interest (O)

* + - 1. Reversion: Follows a life estate and other contexts where the Grantor Hasn't disposed of the entire fee. O grants "to A for life" (O implicitly retains a reversion)
		1. Interests Created in the Grantee (Created in Third Parties)
			1. **Remainder** - follows a life estate (NEVER a fee simple). Different from a reversion because the remainder is in a party other than the grantor.
				1. Two requirements for a remainder:

Must be capable of becoming possessory immediately upon the end of an estate and

Cannot divest/cut off either (1) Possessory interest or (2) A prior vested interest. (If one or both of the above requirements are not met, the interest is not an executory interest)

* + - 1. **Vested Remainders**
				1. Indefeasibly Vested: "to A for life, then to B, C, and D and their Heirs"

Known persons and no contingencies.

No condition subsequent can cut short the remainder.

* + - * 1. Vested subject to complete divestment:

If occurrence of a condition can cause the interest to shift to someone else

"To A for life [life estate], then to B [remainder subject to complete divestment], but if B fails to graduate by 19 then to C [shifting executory interest].

* + - * 1. Vested subject to partial divestment (or subject to open)

To "A for life, then to his children and heirs" where B and C are children are already alive at the time of the grant.

Since the class is subject to open, B and C have vested remainders subject to partial divestment.

* + - 1. **Contingent remainders:** Condition precedent prevents the remainder form being vested. "To A for life, then to his children and heirs" or "To A for life, then to B if he graduates from high school by age 19"
				1. Some uncertainty remains as to the identity of the class of takers or the occurrence of a condition. When the uncertainty is resolved, the remainders vest in interest.
				2. The future interest can vest (by the condition being satisfied) without the possession vesting (A dying)
		1. Executory Interests: Any future interest that does not meet the requirements to be a remainder. Grants - "To A as long as land is used for farming, but if land is used for nonfarming purposes, then to B"
	1. Vesting
		1. Interests vest in possession when the interest becomes a present possessory one.
			1. Remainders may or may not be vested in interest upon creation, definitely are vested in possession under the preceding are terminated
			2. Reversionary interests (all three types) are vests in interest upon creation; whether or not the interest ever becomes possessory.
			3. Executory interests normally must vest in possession in order to vest in interest
		2. Interests can vest in interest when uncertainty about the interest has been resolved.
			1. Can be uncertain about who will take the interest (class subject to open) or about contingencies occurring (which children will graduate).
			2. Subject to Rule against Perpetuities.
	2. Conservation of Estates
		1. Williams v. Estate of Williams (TN 1993): Daughter Ethel gets a life estate subject to **reversion,** split between 30 heirs.
		2. City of Klamath Falls v. Bell (OR 1971): grant violates RAP so it falls out. Now the city gets a **fee simple determinable** - and if the future interest didn't go to anyone else it goes back to the grantor, that means we have to imply there's a **possibility of reverter.** End result is the same.
1. Mediating Conflicts Over Time:
	1. Waste: When a fee simple is divided between a life estate and a remainder there's an incentive for the life tenant to consume and the remainder interest holder to favor conservation.
		1. Brokaw v. Fairchild (NY 1929): Son wants to tear down mansion. His uncles, contingent remaindermen, objected to the razing of the mansion to build an apartment building. Court says can't deny them their interest
	2. Restraints on Alienation: Common law rule = no dead hand control. Complete restraints on a Fee are Void no matter what. Restraints on other estates (leases) are allowed more readily, partial restraints must be reasonable and even then are highly disfavored.
		1. Lauderbaugh v. Williams (PA 1962): covenant restricting alienation to members of the Lake Association. Court says that not all restrictions on alienation are wrong but they must be reasonable – this not reasonable because board and perpetual
		2. Mountain Brow Lodge v. Toscano (CA 1967): Court says that the provision restricting the use of the land to the fraternal lodge is a valid restriction on use. Valid to restrict the use of land even if that had the effect of a complete bar on alienation
	3. Rule Against Perpetuities
		1. Actual Rule: No interest is good unless it must vest, if at all, not later than two-one years after some life in being at the creation of the estate.
		2. Steps for Analysis
			1. **Identify all the interests created by the grant and bracket them off.**
			2. **As to future interests ascertain whether any of them are unvested at the time of creation and thus subject to RAP?**
				1. Future Interests that are VESTED and NOT subject to RAP:

Future interests created in/retained by the Grantor: reversion, possibility of reverter, rights of entry

* + - * 1. Future interests NOT VESTED and subject to RAP

Vested remainder subject to open (vest when the class closes and all members are identified)

Contingent remainders (vest when all beneficiaries are identified and all contingencies removed)

Executory interests (vest when they become possessory)

* + - 1. **Identify all lives in being at the time the interest was created**. Natural people and interest begins when the testator dies.
			2. **Imagine "what might happen" to make a vesting occur as late as possible:**
				1. Imagine birth of additional beneficiaries after creation of interest
				2. Imagine that all potential measuring lives cease (kill everyone off)
				3. Imagine that the interest of the afterborn beneficiary vests as late as possible after that point.
				4. Unless the term of the grant makes an event impossible, it is generally presumed possible. Everyone is presumed capable of having children from birth to death.
			3. **Is it possible for any interest to vest more than 21 years after the death of all potential measuring lives?**
				1. An interest that must either vest or be destroyed within the RAP period is VALID
				2. But if any interest could possible vest beyond the RAP period, then the entire clause granting that interest is VOID (not the entire grant)

**Repeat steps 1-5** for all non-vested future interests created by the grant. If any interest in the grant is void for to:

* + - 1. **Determine the effect on the remaining interests: cross out the clause(s) that describe the invalid interests and re-read the edited grant.**
		1. Symphony Space v. Pergolda Properties (NY 1996): Option agreement violated the RAP. The latest vesting point was 2003, 24 years after the interest was created (no measuring life because this is a contract).
1. Mediating Conflicts between Concurrent Owners
	1. Basic Co-Tenancies
		1. Tenancy in Common (T/C) - No right of survivorship - on death of each Tenant in Common her share passes to her heirs)
			1. Each tenants interest in the land is (1) Separate: independently descendible, conveyable, divisible, (2)Undivided: each tenant has the right to possess the whole
			2. 
			3. Modern common law favors T/C. Most co-ownerships are between siblings.
		2. Joint Tenancy (JT) - includes a right of survivorship
			1. 4 unities required at the time of creation: Time, Title, Interest, Possession
			2. 
			3. Each Joint Tenant has the power to unilaterally transfer his interest while living and doing so creates a T/C because the unities of time and title are broken.
		3. Tenancy by Entirety: marital property arrangement. Only available for married couples in a certain number of states. Like a JT except that you can't sell unilaterally.
		4. Community Property: For married couples all property that is purchased during the marriage becomes community property. Alienation requires consent of both.
	2. Severance: In a JT either tenant can sever the JT which converts it to a T/C. Currently you may be allowed to convey to yourself to destroy the JT if you want to eliminate right of survivorship.
		1. Harms v. Sprague (IL 1984): One brother in JT mortgaged without other knowing. Dies & court holds that the JT is not severed by one tenant mortgaging out his interest.
	3. Partition: Any cotenant can sue for partition for any or no reason. The court will grant it without inquiry into the reasonableness. This gives each cotenant the right to terminate the cotenancy at anytime. Available to both JT and t/c
		1. Delfino v. Vealencis (CT 1980): Definos own 2/3 and Vealencis owns 1/3 of a T/C. Delfinos want to develop the land so they seek partition by sale.
			1. **Partition by sale**: property sold and the proceeds are divided between the tenants
			2. **Partition in kind**: Property lines are split (the D preferred this)
		2. To get partition by sale: (1)Partition in kind must be impossible or impracticable under the circumstances, (2) Interests of BOTH tenants would be better served.
	4. Ouster: Courts won't get very involved when parties continue an ongoing relationship, but will get more involved when one party seeks partition or has "ousted" the other from possession
		1. Florence Gillmor v. Ed Gillmor (Utah 1984): Flo wants to graze, her cousins bar her. Court holds that while D was in his rights to use the whole property he was not able to exclude another T/C. When a cotenant out of possession makes a "clear unequivocal demand" to use land she has established an ouster claim if the tenant in possession does not accommodate the request.
			1. Adverse Possession Note: Once ouster has been established adverse possession starts running for the tenant in possession against the tenant out of possession.

|  |  |  |
| --- | --- | --- |
| **Severance** | **Partition** | **Ouster** |
| 1. An act (conveyance or whatever) severs a JT and turns it into a TIC.
2. Destroys Right of Survivorship in JT.
3. Each joint tenant has a unilateral right to sever.
 | 1. Legal action that ends the co-tenancy altogether (applies to both JT and TIC)
2. Partition in Kind
3. Partition by Sale
 | 1. Actionable wrong (denying co-tenant the benefits of ownership).
2. In other words, a co-tenant has committed an ouster when he wrongly excludes the other co-tenant.
 |

* 1. Marital Interests & Division of property upon Divorce
		1. O'Brien v. O'Brien (NY 1985): Med license as marital property, court says yes.
		2. Move to consider marriage as less of a status and more of a contract.
1. Transferring Ownership: An Intro to Real Estate Transactions
	1. Financing & Mortgages: Security Interests
		1. Mortgages are a type of security interest, in the event of default the mortgagee can foreclose on the mortgage. Mortgagor has an equity interest
		2. Two pieces of paper
			1. Promissory note: includes a promise to repay principle with interest, schedule of due dates and conditions.
			2. Mortgage secures the debt embodied in the promissory note, and grants lender a conditional property interest in the asset.
			3. Holder gets a property right and a priority right (when collateral is sold to satisfy debt, the secured debt is satisfied out of the proceeds in its order of seniority.
	2. Proving and Recording Title
		1. Recording system is a low cost of way of getting assurance that you're acquiring what you're told. (Nemo Dat you cannot convey what you don't have.)
	3. Versions of the recording system:
		1. Race Statutes: Based purely on the records. If C records first, C wins over B even if C was a bad faith purchaser
		2. Notice Statutes: C wins as long as C had no notice (actual, constructive, inquiry) of B's prior deed. All C needs is good faith
		3. Race-Notice Statutes: C has to do one more thing, not just look back and ask "is there a prior deed" but C must also record first. You have to not have notice AND win a "race to the courthouse" and record your deed first before B record's his deed.
	4. What can be recorded?
		1. Deeds
		2. Easements
		3. Covenants
		4. Mortgages
		5. Land received by devise
		6. Any other encumbrances/claims to use



**The Angle American System of Estates & Future Interests**

PRESENT INTERESTS

FREEHOLD ESTATES

NON-FREEHOLD ESTATES

Fee Simple

*(Fee Tail)*

Life Estate

Term of Years

Periodic Tenancy

Tenancy at Will

Absolute

Defeasible

In favor of Grantor

In favor of another Grantee

Determinable

(as long as…)

Subject to Condition Subsequent (but if)

Subject to Executory Limitation

Possibility of Reverter

Right of Entry/ Power of Termination

Reversion

FUTURE INTEREST

CREATED IN GRANTOR

CREATED IN GRANTEE

Executory Interest\*

Remainder

Contingent\*

Vested

Indefeasible

Subj to Divestment

Partial/Open\*

Complete

\* Subject to Rule Against Perpetuities

**Entity Property: Separating Management and Possession**

1. The Lease & Landlord Tenant Law
	1. Independent Covenants Model: all covenants must be performed by both parties without regard to whether the other covenants have been or can be performed
		1. Paradine v. Jane (King's Bench 1647): Court says that the duty to pay rent cannot be discharged even if T is no longer on the land. If LL evicted – not liable.
		2. Smith v. McEnany (MA 1897): 1ft. encroachment on T's leasehold. It does not interfere. Court holds that if the LL deliberately evicts the T from ANY portion of the leased land the T has a complete defense to rent
	2. Caveat Lessee: Buyer beware - First, no implied warranties (except implied warranty of quiet enjoyment) and second, independent covenants (except where landlord interferes with tenant's rights)
		1. Sutton v. Temple (Exchequer Division 1843): No implied warranty for grass lease. T is still required to pay rent. Court emphasizes that the LL didn't know of the defect with the land.
	3. Constructive Eviction: Requirements:
		1. Breach by the LL of some express or implied duty.
		2. Breach substantial and permanently deprives T of beneficial enjoyment or possession
		3. T has to abandon the premises in a reasonable time. (necessary, but not sufficient. Can put T at risk of paying double rent)
	4. Blackett v. Olanoff (MA 1977): LL leases to a club next door to T. LL did not enforce noise restrictions in the lease. Court says that the LL breached the covenant of quiet enjoyment because he had control over the noise problem
	5. Abandonment:
		1. Three LL remedies to Abandonment:
			1. Treat offer as a surrender and accept the offer
			2. Reenter and relet on the tenants behalf (the original lease still exists - LL collects rent from T2 on T1's behalf and T1 is responsible for the difference).
			3. Do nothing and sue for the rent as it comes due - no duty to mitigate. Consistent with the idea of a lease as a conveyance of an estate (it is the tenants estate)
		2. Sommer v. Kridel (NJ 1977): Landlord duty to mitigate.
			1. Lingering questions:
				1. Is the LL then obligated to take any alternate tenant?

LL must have a reasonable basis to reject that tenant

* + - * 1. What if the LL has no problem with second tenant but wants to argue lost volume - has 5 empty units and but for T1s breach he would have leased another one.

Depends on fungibility: old tenant can argue that the apartment at issue was not fungible.

* 1. Condition of the Premises:
		1. Javins v. First National Realty Corp. (DC Cir. 1970): housing violations. Court applies implied warranty of habitability for LL - and that failure may be a defense to paying rent, but not a complete defense. (Step away from caveat leasee (buyer beware) - modern tenant has a right to expect a habitable living space.)
		2. Court explicitly mentions the move from status to contract.

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| **Old Common Law** | **Modern Law** |
| No Warranty → | IWH (continuing warranty) |
| Independent Covenants → | Dependant CovenantsK-based: breaching party discharges other party of contractual obligations |
| Literal inhabitability → | Minimum Societal Standards |

* 1. Hypo: LL offers apartment for $600/mo. Tenant observes its defects and offers $400/mo. LL agrees; parties enter into an agreement *separate from the lease* stating that Tenant acknowledges defects and, in consideration of waiving LL’s obligation to repair them, gets rent at $400/mo. Tenant moves in and stops paying rent under IWH.
		1. If IWH is protecting a societal interest, then individual bargaining should not be allowed. But what if tenant can’t afford to pay any more than $400? He’s out of luck if no bargaining allowed.
		2. Assuming IWH applies, tenant’s remedy must be something other than market value of apartment with defective conditions (presumably the $400 he bargained for). Must compensate him with some fiction below $400.
	2. Rent Control: Economists agree – rent control will inevitably reduce the supply of low-income housing.
		1. Rent freezes: adopted in response to an anticipated surge in demand for rental housing, and are designed to prevent unexpected hardships to tenants and windfall profits for LLs. Usually only used for short term, emergency situations (e.g. war time).
	3. Rent stabilization: government sets a fair rent (maybe allowance of yearly % increase), or permits rent increases only when apartment is vacated. Periodic tenancies, not term of years.
1. Coops, Condos, & Common Interest Communities
	1. Overview: in all of these forms, the “owner” doesn’t require *all* the rights in bundle.
		1. Cooperatives (Co-ops): Title to the entire building is owned by a corporation. Each resident owns a proprietary lease (allowing for unlimited tenancy) and shares of this corporation. Mortgage financing is obtained by the corporation for the building as a whole. Co-op must approve the sale of individual units.
		2. Condominiums: Association owns the common areas. Residents own their individual units (and can sell without approval of the Association). Came second after co-ops. Have better risk-sharing properties since occupants don’t serve as sureties for each other.
		3. Common Interest Communities: Usually free-standing homes. Residency requires unusually detailed covenants and restrictions. Think gated community
	2. Governance Issues
		1. Nahrstedt v. Lakeside Village Condominium Association, Inc. (CA 1994): Restriction on cats in condos legit. Notice key.
		2. 40 W. 67th St. v. Pullman (NY 2003): Coop owner Pullman engages in "objectionable behavior" (harassment of upstairs neighbor, flyers) and Board votes to eject him.
			1. *Levandusky* is a case on the books that encourages courts to be deferential to business decision.
			2. Apply business standard legit*:* Co-op board relationship is distinct enough from traditional LL/T that the statute's "competent evidence" standard is satisfied by the "business judgment" rule.There is aGOOD FAITH requirement.

**THE LAW OF NEIGHBORS**

1. Nuisance: Problem of inconsistent land use
	1. Definition
		1. Substantial (not trivial)
		2. Non-trespassory
		3. Invasion, that
		4. Interferes with neighbor's right to use and enjoy his land (Passive or Active)
		5. **Always look to state law first**
	2. Adams v. Cleveland-Cliffs Iron Company (MI 1999): P's sue in trespass and nuisance for **dust, noise and vibrations** coming from the mining company neighbor. Court holds that trespass law can't cover particulate but law of nuisance does (u/e).
	3. Luensmann v. Zimmer-Zampese & Associates (TX 2003) Ps bring action against a racetrack saying that it's a nuisance per se. Court holds in favor of the D because there's no evidence that the nuisance is substantial or per se.
		1. Establishing Nuisance Per Se
			1. Activity is a nuisance at all times, under all circumstances, and in any location
			2. Violation of law that defines a nuisance: This is the right question to ask and in this case the race track was not illegal.
		2. Ordinary Nuisance:
			1. Unintentional left to tort law
			2. Intentional when you are reasonably certain that your activities are having an interfering effect.
	4. Restatement:
		1. Balancing test: balance of harms and utilities
		2. Threshold: harm can't just be substantial - has to cross the line into unreasonable.
	5. St. Helen's Smelting Co. v. Tipping (House of Lords 1865): Land near a copper smelting factory that emitted gasses that killed is crops and made his animals sick. Court holds that theoretically location matters but it's a jury question. P must show a reasonable inconvenience (decrease in property value, asthma don't count. Invoke the threshold test:
	6. Boomer v. Atlantic Cement Co. (NY 1970): Cement plant emanates dirt, smoke and vibrations that disturb the neighborhood. NY has a common law Threshold test that proscribes an automatic injunction when the harm is substantial.
		1. The D must compensate P for total economic lost (present and future) to their property.: Essentially amounts to the D to buy a servitude, a right to commit an nuisance.
		2. Damages allow the people to move if they choose to
	7. Spur Industries v. Del. E. Webb Developments (AZ 1972): Cow feed lot v. retirement community. Spur can be enjoined but DW has to compensate Spur
2. Servitudes: Alternative to nuisance law: resolve conflicts between neighbors by contract that commits to certain behavior regarding use of land.
	1. Easement: owner agrees to **waive his right to exclude** certain kinds of intrusions by another.
	2. Covenant: Owner agrees to **abide by certain restrictions** on the use of his land for the benefit of another.
	3. Easements Types

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| **Easements Appurtenant**Belongs to another parcel of land; “runs with the land”Benefit of the easement belongs to whoever owns the benefited piece of land (Dominant Tract).Burden of easement belongs to whatever owns the burdened land from which the benefit was carved (Servient Tract) | **Easements in Gross**Belongs to a particular grantee. If the grantee sells his land, he retains the easement in gross.**Profit a Prendre**Like a narrow easement in gross: gives Dominant Tenant right to enter Servient Tenant’s land to extract something of value (timber, fruit, fish, minerals, etc.) |
| **Affirmative Easement**Allows Dominant Tenant to make affirmative use of Servient Tenant’s land that would otherwise be a *legal wrong*. | **Negative Easement**Dominant Tenant has the right to stop Servient Tenant from doing something that would normally be within ST’s rights. |
| **Private Easement**Authorizes specific named parties (individuals, etc.) to use land for designated purposes. | **Public Easement**Authorizes the general public to use land for designated purposes.(Recall *Thornton*, Oregon beach case). |

* 1. Easement Creation
		1. Express: in writing
		2. Implied: Results from the severance of Dominant Tenant (DT) and Subservient Tenant (ST). **Requires prior common ownership**. WImplied by reservation, when O sold to A, O implicitly held an easement to maintain access to lot B.
		3. Prescription: Non permissive use
		4. Estoppel: Permissive use + detrimental reliance
	2. Schwab v. Timmons (WI 1999): Landlocked themselves. Court says that vehicular access is a convenience and that geographic barriers don't create a right to easement by implication or necessity.
	3. Warsaw v. Chicago Metallic Ceilings, Inc (CA 1984): Trucks turning around in D's land. **Prescriptive easement** require a showing of use of the property that has been open, notorious, continuous and adverse of an uninterrupted period equal to the statute of limitations. Also must show a definitive and certain line of travel. NO PAYMENT
	4. Holbrook v. Taylor (KY 1976): Road that DT used for a year and improved on. License (oral agreement between the parties) cannot be revoked when there is reliance and improvement
	5. Penn Bowling v. Hot Shoppes (DC Cir. 1949): Express easement used for a second purpose. PB is enjoined from misuse (but not from all use).
	6. Summary: These cases all feature a DT seeking a valuable property right without having bargained for it or without consideration. Should the court be rescuing DTs who failed to bargain ex ante?

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|  | **Property Rule** | **Liability Rule** |
| **Servient Tenant** | Injunction against Dominant Tenant’s use. | No injunction against DT, but DT will have to pay damages. |
| **Dominant Tenant** | Dominant Tenant gets easement. | ST has to pay for DT to be enjoined. |

* 1. Two attitudes:
		1. Schwab (landlocked) and Penn Bowling (misuse) = EX ANTE approach
		2. Warsaw (trucks) and Holbrook (road) = EX POST approach
	2. Notice Requirements and the Common Plan
		1. Sanborn v. McLean (MI 1925): gas station in a subdivision. Constructive notice or inquiry notice enough to uphold restriction.
	3. Termination of Servitude
		1. Bolotin v. Rindge (CA 1964): Land is restricted to single family residences (SFR). P owed a lot that was no good for a SFR but prime commercial territory. Owners stuck with land worthless for its only allowed use. FAIR because they bought the land knowing of the restriction; there was *notice*.
	4. Conservation Easements: A type of permanent easement - all property or some property can come to the owner subject to a limitation.

**I**

**PUBLIC REGULATION OF LAND USE AND REGULATORY TAKINGS**

1. Regulatory Takings: concerned with economic rights associated with property law.
	1. Fifth Amendment Takings Clause: “Nor shall private property be taken for public use without just compensation.” Applies directly to federal government and has been held to apply to states through the 14th Amendment, Due Process Clause.
	2. Four Questions
		1. What is Private Property?
			1. When dealing with things other than land this gets tricky
		2. A Taking?
			1. Taking = “inverse condemnation”
			2. “You have effectively condemned my property; you should have taken it through eminent domain.”
		3. Public Use?
			1. Kelo v. City of New London, CT (SCOTUS 2005): revitalizing area is enough of a public use to justify ED, even though it's going to a private party.
				1. It’s okay to use eminent domain to transfer property from people who have wayyyyy too much of it. (Hawaii case)
				2. Courts should just ensure that compensation is fair, procedures are fair, and that the legislature has approved the taking.
				3. Take away from Kelo: courts will police procedures not government ends.
			2. Just Compensation?
				1. Just compensation = market value (will often be under-compensatory)
				2. If government has to pay FMV anyway, why doesn’t it just buy the property? HOLD OUT ISSUES
				3. If owner is going to get FMV anyway, why wouldn’t he just sell? Recall: *Boomer*; some values tend to be lost in a FMV calculation (community connections, business goodwill, etc.)
	3. Foundations
		1. Pennsylvania Coal v. Mahon (SCOTUS 1922) p. 1259: Pennsylvania is coal-mining country; recognizes three distinct estates: (1) Surface Estate, (2) Mineral Estate – mineable portion of subsidence, (3) Support Estate – whatever amount of otherwise mineable cola that must be left in place.
			1. Penn Coal claims that state statute, which required certain structures to have subjacent support, constituted a taking of its property without just compensation. Denominator argument: took ALL of the support estate out of ALL the support estate = total taking.
			2. Holding: Legislature doesn’t get to absolutely define what constitutes public harm.
		2. Penn Central Transportation Co. v. City of New York (SCOTUS 1978) p.1269 [Restriction on Use] Penn not allowed to build on top. Holding: State regulations do not go too far so long as the existing use of the property is: (1)Unimpaired, and (2)Providing a reasonable return on the Owner’s investment.
			1. BALANCING TEST for “too far” Question:
				1. Economic Impact (Diminution in Value)
				2. Reasonable investment-backed expectations
				3. Character of government action
				4. Reciprocity of Advantage
		3. Keystone Bituminous Coal (SCOTUS 1987): Law requires coal co. to compensate. Support estate is a small fraction of the mineral rights, now a way for the court to disavow the use of the support estate as the denominator.
			1. Mahon is not overruled, but its holding had been narrowed to a sliver that can be avoided by decent legislative drafting even though it gives us the whole framework
			2. No Literal OR Constitutional Taking
	4. Physical Invasions
		1. Kaiser-Aetna v. US (SCOTUS 1979) Private pond made navigable. Literal Taking and use the Penn Central Balancing Test – physical invasion, so no ED
		2. Pruneyard Shopping Center v. Robins (SCOTUS 1980): Shopping mall had strong policy against flyer distribution. Students distributed flyers; stopped by security guard.
			1. CA state constitution can give broader free speech rights
				1. treats state court’s ruling as the equivalent of new legislation;
				2. Holding: Taking of right to exclude is subject to Penn Central’s balancing test.
		3. Kaiser A – owners invested in the property with a reliance on their right to exclude.
		4. Prune Y – the right to exclude doesn’t add economic value to the shopping center; its purpose is to be open to the public. No reasonable investment-backed expectations.
			1. Loretto v. Teleprompter Manhattan CATV Corp. (1982) p. 1286: Cable box, physical invasion. Holding: Permanent Physical Occupation → Automatic, Per Se Taking. But only worth $1.
			2. Nollan v. California Coastal Commission (SCOTUS 1987): Condition of building permit is allowing public easement. Classic Right of Way Easement = Permanent Physical Occupation → Per Se Taking

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| **Nollan** | **Kaiser-Aetna** |
| * 1. Classic Right of Way Easement
		+ Per se rule → Taking
		+ State imposed
	2. Easement over LAND (more traditionally bought/sold)
		+ Land closely associated with the home.
		+ More likely to interfere with multiple uses of property (water can only be used by boats)
 | * + - Navigational Servitude Easement
			* Subject to Balancing Test
			* Federally imposed
		- Easement over WATER (less conventionally bought/sold)
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1. Regulation of Use
	1. Lucas v. South Carolina Coastal Council (1992) p. 1299: Lucas kept from developing his coastal land because of "no-build" zone. Literal Taking and because Regulation eliminates all economically viable use of land → Per se Taking
		1. Nuisance Exception: If the only thing you can do to make economic use of your property is a nuisance, then it’s not a per se taking.
		2. Denominator = Fee Simple. Numerator = What is economically viable?
			1. Economically Viable Use = Development Rights
		3. *Lucas* apparently tells us that entitlements *can* be chopped up: Court says “If you thought that *Penn Central* and *Keystone* overturned *Mahon’s* denominator holding, you’re wrong.”
			1. Bottom Line: If activity is a nuisance within the *Lucas* meaning, the government DOES have a free pass
	2. Two categorical exclusions from Penn Central Balancing Test:
		1. Physical Invasion: Regulations compelling permanent physical occupations.
		2. Restrictions on Use: Regulations denying *all* economically beneficial or productive use of land
	3. Denominators (post-Lucas): Diminution in value (factor under Penn Central Balancing test, and Lucas total takings test) depends on the denominator you’re measuring against (value of property before regulation). Court has cautioned against conceptual severance (letting each stick be a ‘whole’).
		1. Palazzolo v. Rhode Island (SCOTUS 2001) Supp. 38: Palazzolo owned waterfront parcel, regulated as coastal wetlands prior to his ownership; submitted various development plans, all of which were rejected. Filed takings action relying on *Lucas* (Argument – State denied me of all economically beneficial use of land).
			1. Holding: “A Regulation that would otherwise be unconstitutional absent compensation is not transformed into a background principle of the State’s law by mere virtue of the passage of title.” Preserves future generations’ right to challenge unreasonable limitations on the use and value of land. Otherwise, for those current/older owners that can’t get around to bringing a takings claim, the state escapes having to pay compensation.
			2. Background principles: “common, shared understandings of permissible limitations derived from a state’s legal traditions; include reasonable restrictions.” Rooted in common law, not legislation: constrains legislature from overreaching on behalf of public majority views. Courts mostly insulted from majoritarian pressures.
				1. Nuisance law – deals well with confined externalities affecting few neighbors; less well with diffuse harms (on ecosystem, etc.), but that’s okay – the legislature can still fill gaps.
				2. Environmental legislation has picked up where nuisance law left off, but is constrained by what courts have done in nuisance cases.
				3. Too great/wrong kind of constraint on government to regulate land use for public interests?
			3. Value of regulated property = property value + opportunity to bring a takings claim challenging the regulation.
				1. Speculation: Buy land subject to restrictions that depress its value; challenge restrictions as takings. If struck, get windfall. ß Potentially a wide-open attack on state’s power to regulate land uses, especially to protect the environment.
			4. Decision: Landowner not deprived of all economically viable use; can still build “substantial residence” on 18-acre parcel. No total taking under *Lucas*.
			5. On appeal, brought up for the first time that the upland parcel is distinct from the wetland’s portion; total takings is with respect to the wetland’s area. Didn’t bring it up earlier, so π lost this claim; court based decision on whole parcel being the denominator.
			6. Two Lines of Argument
				1. Penn Central Balancing Test – π must show that the regulation took *too much* of land’s use/value/RIBEs.

O’Connor (s. 47): Regulatory regime in place at time the π acquired the property shapes reasonableness of expectations.

Scalia (s. 49): No, it doesn’t.

* + - * 1. Lucas Test – π must show that 100% of the land’s developmental value has been taken.
		1. *Lucas* vis a vis *Palazzolo*
			1. Together, the cases suggest an erosion of positivist view of property rights. Problem with positivism: if “property” as used in the Constitution means only rights that a legislature says one has, then the Takings Clause and the Due Process Clause offer little protection from overreaching legislatures.
		2. Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency (SCOTUS 2002) p. 1335
			1. Owner argued that the moratorium on development (lasting 32 months) amounted to a total taking of her “leasehold” equivalent to the duration of the moratorium.
			2. Background Information on Temporary Takings
				1. Traditionally, if a land use restriction was held to be a taking, the state could withdraw the regulation and avoid paying compensation.
				2. *First English* – Even if the regulation is withdrawn, the state still must pay just compensation during the period the unconstitutional regulation was in place. ß Temporary Taking (what owner here is arguing).
			3. Holding: NO CONCEPTUAL SEVERANCE. Denominator is the parcel as a whole. Distinguished from *First English* because this moratorium was explicitly temporary from the very beginning.
			4. Geographically measures by “metes and bounds.” Temporally measures by owner’s total term of years.

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| LUCAS | PENN CENTRAL |
| ALL economically viable use refers to the WHOLE PARCEL. | If only PART of the parcel is taken, apply the Penn Central Balancing Test. |

## TAKINGS AFTER *LUCAS*

Was anything taken? Did gov’t action “take”/impair a private property right that O had under [state] law?

 No taking No Yes

 Character of gov’t action

 Physical Invasion No physical invasion/

 Restr. on Rt. to Exclude Regulation of Use

Perm. Phys. Occupation (PPO) No PPO Econ. viable use remains No econ. viable use remains

(*Loretto,Nollan*) (*K-A, Pruneyard* ) (*Penn.Centr., Keystone*) (*Mahon*?, *Lucas*)

Same Question

#

*Per se* Taking Balance (w/ thumb Balance (w/ thumb *Per se* Taking

 on scale for O) on scale for gov't)

 Factors in Balance:

**∙** Open to public **∙** Gov’t purpose (public harm)

 **∙** Econ. impact: Interference

 w/ use, value, Reas.Inv.BackExps

 **∙** State vs. Federal?

 **∙** Generality/recipr. ben.

 vs. singling out

 *Unless limitation inheres in title under background principles of [state] property law:*

Easements, privileges Statutes? Nuisance, covenants

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| **Basic Property Rights** | **Action/Remedy for Private Interference** | **Built in/Inherent Limits** | **Interest if severed and conveyed/Additional limits based on consent/rela.** | **Public limits/Interference by government** | **Taking?** |
| **Right to Possess** | Ejectment (injunction) | < adverse possession?> | Lease: sets up new property rights and limitations on title (LL/T law) | Full Appropriation-->  Permanent Physical Occupation --> | Eminent domain/Taking Per se test (unless…) (Lorretto) |
| **Right to Exclude** | Trespass: Continuous/repeated or InjunctionOne-time/Occasional | Public trust, custom?←Prescription →Common Law Privilege (Shack?)  | Affirmative Easement←Prescription→License? | Physical invasion:1. Easement like access (K--A?) can go back up to per se test -->
2. Occasional access (Pruneyard)
 |  1. Balance test with thumb on scale for O
 |
| **Right to Use** **and Enjoy:** Active | ? | Nuisance | Negative Easement; restrictive covenant/equitable servitude (conditional fees) | Regulation of Uses:1. Elimination of viable use (Mahon, Lucas) →

 1. Viable use remains (Keystone, Penn Central) →
 | Per se Test (unless inherent limit)Balance Test (with thumb on scale for gov't) |
| Use and enjoy: Passive | Nuisance (injunction/damages) | Neighbor's right to use and enjoy (up to nuisance) | Affirmative easement (to commit nuisance) | Gov't "nuisance"? | ??? |
| **Right to Convey** |   | System of estates and Future Interests, RAP, etc…Numerus clausus | Restrictive covenant/Restraints on alienation (Conditional Fees) | New legal limits on right to convey | (Can be Taking) |

PROPERTY: A SEAMLESS WEB