Property

Ernst

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ATTACK OUTLINE

**Nuisance**

* Is there a nuisance?
  + Define:
    - Restatement §822 defines a private nuisance as a **substantial** **non-trespassory** invasion of another’s interest in the **private use and enjoyment of land** and is either **intentional and unreasonable** or **unintentional and the result of negligence, reckless conduct, or ultrahazardous behavior.**
    - Public nuisance:
      * RST: significantly interferes with public health, safety, peace, comfort, and convenience
      * Also consider:
        + Whether proscribed by statute or ordinance
        + Whether continuing nature or has produced a permanent or long-lasting efect
        + Considerations of gravity and utility
      * Used to be that could sue for pub nuisance only if can show special injury; law now liberalized
  + Meets reqs?
    - What is a substantial invasion?
      * ***Jost*****substantiality** test: low threshhold; obvious injury to the tangible property of the complaintants of more than a nominal value
        + Suffered only $100 in damages
      * Restatement **3 factor test**:
        + (1) Continuous and repeated harm
        + (2) Significant financial loss
        + (3) Physical change in property
      * *Morgan v. High Penn* defines substantial injury as **obvious injury to tangible property of a more than nominal nature**
      * Stigma damages only where has sustained physical injury as result
      * Abnormally sensitive land uses (ie light at drive in movie theater)
      * Ppite fence found to be substantial
      * Unsightliness alone not a nuisance, but maybe if unreasonably operated, unduly offensive, or hazardous
      * Declining property values (say bc criminals in area) alone not substantial, but some courts say apprehension of criminal activity could count
    - Is it nontrespassory? Rule of thumb: nontrespassory if **can stand on the land** where the invasion occurs
    - Def of intentional: Restatement §825 “when the person acts for the purpose of causing it or knows that the effect will result from his/her conduct of knows it is substantially certain to result”
    - Note: Landlord as owner of a reversion has property rights and privileges in respect to the use or enjoyment of land
  + Then two approaches:
    - 1) RST balancing of gravity of harm vs utility of D’s conduct
      * **§827 Gravity of harm** factors:
        + Extent of harm involved
        + Character of harm invovled
        + Social value which law ataches to type of use or enjoyment invaded
        + Suitability of use or enjoyment invaded to char of locality
        + Burden on person harmed of avoiding the harm
      * **§828 Utility of conduct** factors
        + Social value which law attaches to primary purpose of conduct
        + Suitability of conduct to char of the locality
        + Impracticability of preventing or avoiding invasion
        + Note: residential use traditionally highly respected
      * So will find no nuisance when:
        + D’s conduct is causes more social good to harm and it’s not unfair to impose costs of D’s activity on P
        + Imp of damages would put D out of business and avoiding result is more important than preventing harm to P
    - 2) Plaintiff centered threshold test of ***Jost***
      * **Unreasonableness** test: is it reasonable for the nuisance receiver to suffer the nuisance without compensation in light of the suitability of the conduct to the neighborhood and how it affects the land?
        + so consider particular geographic context etc
      * Will not say that because a great and socially useful enterprise will be liable an injury small by comparison shall go unaddressed
      * Not ok to deprive others of their enjoyment of property (aka ***Jost* unneighborliness**)
* What is the remedy?
  + **Restatement** balancing of the equities
    - Consider the **injury** which may result **to the nuisance creator** and the **public** by **granting** the injunction
    - Consider the injury to be **sustained by the nuisance receiver** if the injunction be **denied**
  + ***Estancias*** view: only damages in lieu of injunction by stern rule of necessity (essential **public** need)
  + Types
    - **Property rules** fix an absolute entitelment either to engage in conduct (no liab) or be secure from the harm (injunctive relif ordering D to stop committing harm)
    - **Liability rulres** prohibit from interfering with interst of other party is willing to pay damages
    - **Inalienability rule**s assign entitlements and prohibit those entitlements from being sold or exchanged (justified in scarce resource contexts
  + A. P may obtain an injunction against D’s conduct when
    - D’s conduct is **unreasonable** (more social harm than good) and causes substantial harm to P (ie Estancias)
  + B. P may obtain damages but no injunction if
    - D’s conduct is **reasonable** (more social good than harm) but harm to be is substnatial so **unfair to burden P** with costs of D’s socially useful conduct (ie Boomer)
  + C. P entitled to a purchased injunction if

|  |  |  |
| --- | --- | --- |
|  | Nusiance | No Nuisance |
| Property Rule / Injunction (hightened protection of prop) | P can enjoin D to stop polluting; natural rights view (***Jost***) or D’s conduct unreasonable (***Estancias***) | D can pollute at will; harm to P not substantial or D’s conduct more good than harm and not unfair to impose costs of D’s activity on P |
| Liability Rule / Damages  (no subjective value of prop) | D may pollute but must pay damages; D’s conduct reasonable (more good than harm) but harm to P is substantial (***Boomer***) | P can enjoin D but must pay damages; D’s conduct more harm than good but fair to impose cost of shutting down on P (***Spur Cities***) |
| Inalienability Rule | D has no right to commit harm; can’t purchase right to do so | D has right to engage in protected activity; cant give up that right |

* + - D’s conduct is unreasonable (more harm than good) but is fair to impose cost of shutting down activity on P (ie Spur)
* Coasian Bargaining

Box of 4: Who has the entitlement and what kind of remedy?

|  |  |  |
| --- | --- | --- |
|  | Property | Liability |
| Nuisance Receiver | 1 | 2 |
| Nuisance Creator | 3 | 4 |

* + Theory is that when transactions are costless and individuals act cooperatively, any assignment of legal rights will lead to efficient outcome after bargaining
  + Checklist for going figuring out where most efficient to place entitlement:
    - 1) Who is the least cost avoider? (inherently – not taking into account particulars of these parties?)
      * who most easily make do with interference
      * the person best able to avoid the harm
    - 2) Transaction costs / bargaining problems – large number problems?
      * Hold-outs – wont cooperate/ask for too much money
      * Free-riders / collective action problem
      * Made worse if dealing with heterogeneous population
      * Possible place to bring in **Ostrom**: where parties worked together to come up wth a fair solution because was a monitor of the resource, an effective forum for the resolution of conflicts.
    - 3) What is practical?
      * “ideal use of liability rules is when the Court can clearly value both sides of the issue” – if “court is unable to calculate the relative values” go for an injunction
      * if common good resource, would the cost of exclusion (issue passes, hire guards) outwigh benefits from exclusion
    - 4) Gains from trade
      * Makes marketable
      * Makes consequences of transactions predictabile
      * Makes able to contract clearly
      * Promotes availability of information
      * Makes easy to internalize costs
    - 5) What is more beneficial to society?
    - 6) What shows respect for property rights?
      * First in time principle / historical rights
      * **Blackstone** on absoluteness of property rights
        + vs. **Bentham** who says property is a matter of legitimate expectations
    - 7) What is generally in the interests of fairness and justice?
      * Equity?
      * Valueing landowners and those with interest in property?
    - 8) Add in how will continue the benefit of the activity done by party that gets easement
  + *Ex-ante*
    - look to the possible incentives created by the legal rule
    - look for situation where number of easements would equal the demand for them from the public
    - want to be able to factor in costs of easements to the purchase price

**Present Estates and Future Interests**

*System of Estates and Future Interests*

|  |  |  |  |
| --- | --- | --- | --- |
| Present Interest | Words to create | Future interest in grantor | Future interest in third party |
| Fee simple absolute | “to A”  “to A and her heirs” |  |  |
| Fee simple determinable | “as long as”  “while”  “during”  “until” | Possibility of reverter |  |
| Fee simple subject to condition subsequent | “but if, then right of entry…” | Right of entry (for condition broken) or power of termination |  |
| Fee simple subject to executory limitation | “until (or unless)…, then to…”; “but if…, then to…” |  | Executory interest in FS |
| Life estate | “for life”  “for life, unless commercial use”  “for life, then to B”  “for life, then to children” (none at time)  “for life, then to B if graduates law school”  “for life, then to children of B” (1 born)  “for life, then to B, but if B drops out revert to O”  “for life, then to B if survives A, if not C”  “for life” then A sells to B  “for life, then to B for life”  “for life or until she remarries” | (Auto)Reversion  Executory interest  Reversion  Reversion  (may 🡪 FS subject to executory limitation aka Reversion subject to an executory limitation)  Possibility of Reverter  Reversion  Reversion  Reversion  Reversion & Possibility of Reverter | Remainder (vested absolutely)  Contingent remainder  Contingent remainder (may 🡪 executory interest)  Vested remainder subject to open  Vested remainder subject to divestment  B has contingent remainder; C has alternate contingent remainder  B gets life estate for the life of another; per autre vie  B gets indefeasibily vested remainder for life  Determinable life estate |

* “to A for life, then to A’s children and their heirs, but if at A’s death he is not survived by any children, then to B and her heirs”
  + A is alive and has no children:
    - A: Life estate
    - Unborn children: contingent remainder in FSA
    - B: Contingent remainder in FSA
    - O: Reversion
  + Twins C & D are born to A:
    - A: life estate
    - C & D: vested remainders in FSA subject to divestment
    - B: Executory interest in FSA
    - O: No reversion
  + If C dies during A’s lifetime, then A dies, survived by D and B, who gets it?
    - C’s heirs and D
* “to A for life, then to such of A’s children as survive him, but if noen of A’s children survive him, to B and her heirs.” A is alive and has two children, C & D
  + A: life estate
  + C&D: contingent remainders
  + B: contingent remainders
  + O: Reversion
* To A for 10 years 🡪 a “term of years”
* Has a present estate holder committed waste?
  + Rule: A cannot use property in a manner that **unreasonably interferes with expectations** of B (concurrent owner or future interest holder)
  + Can be **affirmative** (from voluntary acts) or **permissive** (failure to act, negligence)
  + Factors:
    - Nature of property interest
    - Conduct in question
    - Remedy sought

Who has entitlement and what kind of injury?

|  |  |  |
| --- | --- | --- |
|  | Property | Liability |
| Remainderman | 1 | 2 |
| Life Tenant | 3 | 4 |

* + - ***Browkaw*** in Box 1: **Remaindermen** have the entitlement to keep the mansion as is, and they get an **injunction** (property rule) protecting the original house on the property

**Landlord and Tenant**

* Is it a lease or license?
  + **License**: a personal privilege to use the land of another in some specific way or for some particular purpose or act
  + **Lease**: grant of exclusive possession to use the land for any lawful purpose; conveys present possessoru estate in land – a **leasehold** – which includes right to exclude others and right to use land; also creates future interest in land – a **reversion** – retianed by the landlord
  + Fact specifiy inquiry to **divine the intent**; standard, not a rule; factors:
    - 1) **Language** of document – use words of demise like landlord, tenant, lease, rent?
    - 2) Has the doc conveyed **possession** – right to use is any number of ways, or limited? (as opposed to mere **right to use** like hotel)
    - 3) Did the doc convey **exclusive** **possession** or does owner retain rights for self and others to enter?
    - 4) Can the owner **otherwise** **control** property by limiting the occupants’ or their agents’ access to the premises?
    - 5) Does the occupant receive **incidental services** from the owner like board or cleaning?
  + RST emphasizes 2 & 3: Right to possession normally transferred if arrangement contemplates that the transferee will assume a physical relationship to the leased property which gives him **control over and the power to exclude** others from the property
  + If dealing with an employee-occupant – might just be a **license incidental to employment**; ask:
    - 1) Does the emp pay a **separate charge for rent**?
    - 2) Is the emp’s occupancy **coterminous** with the period of employment?
    - 3) Is residence by the emp **necessary** for the performance of duties?
    - 4) may emp **come and go as pleases**?
* What kind of leasehold?
  + **(1) Term of years** - lasts for fixed period of time or period computable that results in fixing calendar dates; “definite ascertainment”
    - Notice req:
      * Can’t just get out of with notice
      * Can be made terminable earlier upon happening of event or condition
  + **(2) Periodic tenancy** – for a period of some fixed duration that continues for succeeding periods until either landlord or tenant gives notice of termination
    - Notice req: Common law said half a year’s notice required to terminate a year-to-year tenancy; for month to month, at least 30 days notice
  + **(3) The tenancy at will** – at no fixed period and endures as long as both landlord and tennant desire; at least 30 days notice
    - If lease provides can be terminated by one party, is necessarily at the will of the other as well *if* a tenancy at will has been created
  + Steps:
    - Fit into one of principal leaseholds if can
      * Imply a period from rent payment terms – but **cannot do** if express intent is for a more lengthy relationship
      * If no regular rent (ie percentage lease) is at will
      * Usually courts will at the least say is a at will rather than void – ***Kalis*** *–* doctrine of ***numerus clausus***
    - If can’t and intent of parties clear, then enforce on own terms as a contract (ie ***Garner v Gerrish*** deemed to be a terminable life tenancy)
    - Also might be a **tenancy at sufference** if T holds over – LL can consent to creation of new tenancy for term set by statute or new periodic month to month
    - Maybe sometimes just a life estate
* Has the tenant fulfilled his duties?
  + **Duty to pay rent**
    - Eliminated when property is destroyed (even if brought on by negligence of tenant)
    - contract doc of **impossiblity**: impracticability bc of extreme unreasonable difficulty
  + **Duty to not commit waste**: tenant may not make substantial changes that affect vital portions of the premises to change characteristics/appearance, etc
    - Consider use and value of leased premises and the length of term remaining at time of changes
    - Often written into rental agreements – ie “maintain plumbing, heating, septic, and electrical systems in good order” (can resemble duty to repair)
    - **Pross** (p.136):
      * affect vital and substantial portion of premises
      * change characteristic appearance
      * change the fundamental purpose of the erection
      * or the uses contempalced
      * of such a nature as would affect the very realty itself, extraordianry in scope and effect, or unusual in expenditure
  + **Duty to repair**
    - Default is LL has, but T’s can accept it via lease agreement
    - Common provision that says return in same condition except fair ware and tear **does not** create a duty to repair
      * URLTA 3.101: only have “modest duties of tenants consistent with public health and safety”
      * Vs. something that sounds more like something a landlord is suited to do
    - Some courts distinguish btw repair and **rebuild** (then no duty)
  + Note: for a breach, the T must be afforded some time to correct the problem (under URLTA
* If not, what are the LL’s rights and remedies?
  + T fails to pay rent or otherwise breaches by violating **material covenant** 🡪 LL sue for possession and back rent (and terminate lease and get a new tenant if is a **right of re-entry**) or sue for damages
    - **Right of re-entry clause**: if T fails to pay rent or otherwise violates, LL’s or agents can terminate at their option
  + T wrongfully holds over and continues to pay rent 🡪 LL can:
    - Evict (plus damages)
    - Consent (excpress or implied to the creation of new tenancy)
      * If LL cashes check gives rise to periodic tenancy for either term specified by law or month to month, subject to same terms
      * LL can cash checks and avoid consent by immediately suing for possession and writing on checks that not agreeing, just using to cover value
    - LL can not use self-help, must go through courts
  + T fails to pay rent and moves out (aka surrenders) 🡪 LL can:
    - Accept the tenant’s surrender (still possibly liable for back rent)
      * Surrender can be express or implied (must abandon: (1) vacate without justification, (2) without intention of returning, and (3) default on rent)
      * Acceptance can be express or implied (not implied if LL acts in manner inconsistent with contunuation of original lease)
    - Sue immediately for damages equal to agreed-upon rental price minus fair market price
    - Get new T and re-let on former T’s account, then sue former T for difference in rent (amt must be reasonable); must give notice that reletting and refuse to accept surrender
    - LL can not wait and sue at end of lease term (common law ok, now gotta mitigate damages by re-letting on tenant’s account or at least making reasonable efforts to re-let property)
      * Did LL offer or show apt to prospective tenants or advertise?
      * T can rebut by showing suitable T’s that were rejected
* Has the LL fulfilled his duties?
  + **Implied covenant of quiet enjoyment**: T will be able to possess premises in peace, without disturbance by hostile claimants? Q: WHY CLAIMANTS?
    - Must not be **substantially unsuitable for the purpose** leased or **severly interfere with the beneficial enjoyment** thereof
  + Implied warranty of habitability: property must be suitable to be lived in, measured by standards set out in housing regulations; validity of every housing contract depends on **substantial compliance w/ housing code**
    - **Hilder**: Property must be safe, clean, and fit for habilitability
    - Does not apply to commercial leases
    - Does not cover damamges that tenants create themselves
* If not, what are T’s rights and remedies?
  + If implied covenant of quiet enjoyment is breached, T may invoke the **constructive eviction doctrine**:
    - 4 elements:
      * (1) the conditions must result (a) from some conduct by the landlord or his agents or (b) from some duty that the landlord was already expressly or impliedly obligated to perfrom under the lease; includes:
        + latent defects of which landlord know or should have know and as to which tenant could not be said to have notice
        + defects in common areas used by all residents
        + defects that *arise* bc of landlords failure to perfrom promised repairs carefully
        + defects about which the landlord made fruaduelent representations
        + defects that arise as a result of immoral conduct on the premises
      * (2) landlord’s interference with tenant’s possession must be so substantial that it dramtically impairs the value of the right to possess
      * (3) the tenant must give her landlord notice of the defect and a reasonable opp to correct it
      * (4) must **vacate** in reasonable fashion if wants to terminate lease; may remain in possession if keeps paying rent and sues for damages
    - Remedy:
      * Vacate and stop paying rent, obligations excused
      * In some juris don’t have to vacate, can stay, pay rent, and sue for damages
    - Examples
      * ***Reste***: persistent flodding interfered with core use
      * ***Hunter***: landowner held responsible for noise caused by students partying enough
  + If implied warranty of habitability is breached:
    - T’s remedies are:
      * **Recission**: move out and stop performance of obligations
      * **Rent withholding**: stop paying rent and continue living there; imp warranty of habit will be used as defense to suit for rent owed or possession; advisable to keep $ in escrow
      * **Rent abatement**: tenant entitled to reduction in rent; Can sue and ask court to reimburse for rent paid during period of violation, but usually tenant withholds rent, waits to be sued, then argues for abatement; determination based on fair market or % reflecting seriousness of violation
      * **Repair and reduct**: tenant pays for repairs and then deducts costs from rent
      * **Injunctive relief / specific performance**: injunction ordering landlord compliance
      * **Administrative remedies**: local inspectors look for violations, can order repairs or bring cout action for injunctive relief or damages
      * **Criminal penalties**: for egregrious, dangerous violations
      * **Compensatory damages**: ordinarily not for more than amt of rent
    - T is protected from **retaliatory eviction**: presumption that is retaliatory if landlord seeks to termiante a tenancy, increase rent, or decrease services within some period (90-180 days) after **good-faith complaint** or other action by tenant based on **condition of premises**; tenant has burden if beyond period
    - Note: Courts split on whether violated moment condition occurs or landlord gets opp to fix
* Themes that could come into play
  + Modern view lease conveys much more – goods, services, etc; now seen as bilateral contract involving continuing exchange of promises and perfromances; more like a **contract**
  + Liberalism / Carolene Products / Skelly Wright: tip scale in favor of discrete and insular minorities
  + L&E, Posner: IWH and other regs 🡪 costs for LL’s 🡪 reduce resources LL’s devote to improving quality & raises rents 🡪 marginal tenants find harder to rent; lower quality and more costly 🡪 only beneficial to middle class home buyers (as LL’s convert rental to owner property

**Servitudes**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | Easement Burden | Easement Benefit | Covenant Burden (Equitable Servitude) | Covenant Benefit  (Equitable Servitude) |
| Running Requirements | * intent * notice | * intent | * intent * notice * §5.2 privity * §3.1 public policy / touch and concern * [Horizontal Privity] | * intent * §5.2 privity * §3.1 public policy / touch and concern |

* Steps
  + 1) Locate a servitude
  + 2) What kind?
  + 3) ID benefits and burdnens
  + 4) What are running requirements?
* Tip
  + **How to tell if covenant/servitude is affirmative or negative:**
    - If holder does nother, is she liable under the covenant?
      * If yes 🡪 affirmative
      * If no 🡪 negative
  + Always check the scope – ie covenant not to have “pets” may not cover a service dog
* Easements
  + **Affirmative easement**: permit holder to use land of another in a way that otherwise would be trespass or nuisance
    - ie cross a road, using a swimming pool
  + **Negative easement**: prohibit an otherwise lawful use of land (ie convey away right to build building of certain height)
    - Ie convey away a right to build building of certain height
    - Eng courts (and US followed) only recognized four:
      * 1) blocking your windows
      * 2) interfering with air flowing to your land in a defined channel
      * 3) removing the support of your building
      * 4) interfering with the flow of water ina n artificial stream
    - Now have conservation easements to preserve scenic and historic areas in return for tax benefits; also easements to prevent historic places from alteration and restricting using house as vacation home
  + Created by: agreement, estoppel, implication, prescription
  + Scope:
    - **Cox**: Owner can prepare, maintain, improve, or repair so as to promote the purpsoe for which it was created, as long as undue burden is not caused on servient estate and doesn’t cause an unwarranted interference with the indpdt rights of others who have a similar right of use
    - Look to language first
    - Then extrinsic evidence
    - easement to be construed in light of facts and circumstances existing at creation
    - **original intent** of parties key
    - plain meaning, purposive, and functional approaches
  + Default rule: if not clear whether easement is **appurtenant** or **in gross** 🡪 default is **appurtenant**
  + Running requirements
    - Burden: intent, notice
    - Benefit: intent
* Covenants
  + **Affirmative covenant**: promise that a landowner will do something otherwise not obligated to do
    - ie promise to pay annual HOA’s duties
  + **Negative covenant**: promise that landowner will not do something that is otherwise free to do
    - ie promise to use land for residential purposes only
      * but **ancillary uses** are ok – ie painting contractor’s office and nursery mentioned in ***Western Land v. Truskolaski***
  + Creation:
    - never by estoppel, implication, or prescription
    - can be **implied reciprocal servitude** from a general plan: a **reciprocal negative easement** is created in all real property conveyed by a **common grantor** even if the restrictions are explicitly contained on some but not all lots
      * geography and other features can make area a distinctive subset of the subdivision with its own plan,
    - (could also just be an **express** reciprocal servitude like in ***McQuade***)
  + Running requirements
    - Burden: intent, notice, §5.2 privity, §3.1 public policy / touch and concern
    - Benefit: intent, §5.2 privity, §3.1 public policy / touch and concern
  + Can be terminated by:
    - 1) **merger** on basis of unity of ownership of the benefit and burden by same person
    - 2) a formal **release**, which is normally written and recorded
    - 3) **acquiescense**, which arises when the P has failed to enforce against other breaches and then seeks to enforce against the D
    - 4) **abandonment**, like acquiescence but makes the servitude unenforceable as to the entire parcel rather than only as to the P immediately involved
    - 5) equitable doctrine of **unclean hands**; court will refuse to enjoin a violation of a servitude that the P previously violated
    - 6) equitable doctrine of **laches**, which involves an unreasonable delay by the P to enforce a servitude against the D causing prejudice to the D (doesn’t extinguish, just bars enforcement)
    - 7) **estoppel**, if the D has relied upon the P’s conduct making it inequitable to allow the P to enforce the servitude
  + Can be modified or terminated on the basis of changed conditions
    - ***Western Land v. Truskolaski***: Property must be **entirely unsuitable and undesireable for its original use** and have **no suitable economic value**
    - RST:
      * Court may modify servitude when change has taken place that **makes it impossible to accomplish the purpose for which the servitude was created**
      * if purpose of servitude can be accomplished but bc of changed conditions th servient estate is no longer suitable for uses permitted, a court may modify the servitude to permit other uses under conditions designed to preserve the benefits of the original servitude
* Intent:
  + look for use of **“magic words”** like “heirs” and “assignes” in the deed
  + imply intent from the circumstances
* Notice
  + Notice is implied through public recording
  + Landowners required to look at the deed from a common grantor to see if there’s a general plan, as stated in ***McQuade*** and followed in ***Sanborn* (inquiry notice)**
  + Can have constructive notice of an reciprocal negative easement through observing common plan
    - But make sure to ID evidence of common neighborhood plan
* §5.2 Privity
  + First, remember that the language of a covenant can always provide othewise
  + Presumption that an appurtant benefit or burden of all covenants runs to all subsequent owners and possessors
  + For **affirmative** covenants only, there are separate rules for lessees and life tenants
    - For **lessees**
      * **Benefits** that run:
        + Covenants to repair, maintain, or render services

Ie covenant to maintain a bridge that provides access to tenant’s property

* + - * + **Benefits** that the lessee may enjoy w/o diminishing the benefit’s value to the lessor and without materially increasing the burden of performance on the person obligated

ie covenants to have neighbors keep trees trimmed or to provide heat to building

Would **not** run: right to vote for election of directors of HOA or access to golf course etc. (right to vote would diminish its value to lessor)

* + - * **Burdens** that run: only those that can more reasonably be performed by a person in possession (T) than by the holder of the reversion (LL)
        + ie covenant obligating residents to deposit trash and recycle newspapers etc
        + Would **not** run: maintaining a façade, pay HOA fee (though remember still can be written in)
  + Note: Landlord remains liable to homeowner’s association if tenant fails to perform burden of affirmative covenant; would be unexpressed intention of the creators of the original promisors and promisees
    - But for the burdnen of a negative covenant, the preferred remedy would be an injunction against the party in possession (the T)
    - And LLs can enforce benfits that run to tenants
* §3.1 public policy
  + Default rule that covenant is valid unless it is invalid at its inception because it’s illegal, unconstitutional, or against public policy grounds
    - Includes (won’t run if):
      * Spiteful or capricious
      * Imposes an unreasonable **restraint on alienation**
      * Imposes an unreasonable restraint on trade/competition
      * Unconscionable
      * Can be later held invalid if open-ended, especially involving financial obligations
  + ***Crane Neck Assoc.* –** *Covenant restricting to single family residences cannot be enforced to exclude home for metal patients b/c would be against public policy*
    - Reading the covenant
      * Both **architecturally** and **functionally**
      * Look to **plain meaning, purposive, functional approaches**
      * **Modern definition** of “family”
    - Pulbic policy
      * Longstanding pub pol favoring estab of such residences
      * Look to rationale of statues etc.
* Touch and concern
  + **Negative covenants always pass** touch and concern
  + Exs:
    - Covenant to build a wall did touch and concern in ***Spencer’s Case***
    - HOA fees do touch and concern land
  + Held so in ***Neponsit*** ok that fee was for use in connection with, but not upon, the land; test (Professor Bigelow’s):
    - Must affect the **legal relations** – the advantages and burdens – of the parties to the covenant, as owners of a particular parcels of land and **not merely as members of the community in general**, such as taxpayers or owners of other land
      * ie have to pay for **public library** would not T&C
    - If the **covenantor’s** legal interest in land is **rended less valuable** by the covenant’s performance, then the burden of the covenant satisfies the requirement that the covenant touch and concern land.
    - If, on the other hand, the **covenantee’s** legal interst in land is rendered **more valuable** by the covenant’s performance, then the benefit of the covenant satisfies the requirment that touch and concern
    - Eds. say is circular
  + **Gordley test**: which is more likely – that if the arrangement doesn’t run with the land, the successors will want to **remake** it? Or that if it does, they will want to **undo** it?
* Old rule that in gross benefits don’t run is no more, but RST does say that if has become impossible or impracticable to locate benefiticaries then can be modified; person who holds benefit of a covenant may enforce it so long as estab’s a legitimate interest in enforcement (need not own land)
* Modern rule is damages or an injunction may be given
* Old stuff:
  + **Vertical privity**: btw one of the covenanting parties and a successor in interest; No longer exists, but under common law:
    - On the **burden** side: covenant enforceable **only against someone who has succeeded to the same estate** as that of the original promisor
      * Hence, does not run to an adverse possessor bc take new title by operation of law
    - On **benefit** side: enforceable **by a person who succeeds to the original promisee’s estate or to a lesser interest** carved out of that estate; includes lessee; more relaxed standard
  + **Horizontal privity**: btw the original covenanting parties; found if, at the time the parties entered into an agreement, those parties shared some interest in the subject land independent of the covenant (ie landlord and tenant, mortgagee and mortgagor, holders of mutual easements)
    - No longer exists, but under common law needed for burden to run, not for benefit
  + Equitable servitude
    - Covenant; remedy sought for is injunction, not damages (as given in common law for covenants)
    - running reqs:
      * parties **intend** the promise to run
      * subsequent purchaser have **notice** of the covenant
      * covenant **touch and concern** the land
      * **No need for horizontal privity**
* Themes that come into play
  + **Private/Public**: Look at private intentions of parties, but covenants can have important social consequences (public)
  + **Unnceccessary Complexity**
    - *Grantor sovereignty* (if people want to create crazy negative rights let em)
      * Factors into elimination of touch and concern and vertical and horizonal privity reqs
    - *Future marketability* (if property’s tied up with crazy negative rights, it won’t be **marketable**)
      * Factors into hesitancy to create negative easements (plus don’t want showing up through prescription)
      * Factors into creation of reciprocal negative covenants / low notice threshhold because residential subdivisions **are** marketable, concern deminished
      * Factors into courts not finding touch and concern as a way of protecting future buyers
      * Making covenants terminable

**Takings**

* Is it a taking under the eminent domain power? 🡪 State **can’t take private property for public use without just compensation**
  + Did it meet public use req?
    - SC doctine: Must effectuate a legitimate public purpose
    - **Armstrong:** Q of whether cost should be born by public or couple people
    - Varieties of public use
      * (1) **Public ownership** (least controversial) – roads, prisons, schools, etc – state is taking **title**
      * (2) **Use by the public** (ie **common carriers**) – railroads, etc (private, but everyone can use it)
      * (3) **Public benefit**
      * (4) Preventing **public harm** (O’Connor)
        + ie **Midkiff** – preventing harm of **oligarchical control of Hawaiian real estate**

**But problem in Kelo** – no one could really claim that Ms. Kelo’s **well-maintained house** (which just happened to be in Pfizer’s way) represented a social harm

* + - Midkiff**:** is use **“rationally related”** to a **“conceivable”** public purpose?
      * Narrow and broad views of public purpose
    - Berman: court should **defer** to legislature’s decision (stated purpose) on public use/benefit unless find it be an **impossibility**
    - Kelo: economic development qualifies as public purpose if **sufficiently economically distressed** to justify and plan **on the whole** serves a public purpose
      * Potential wages and property tax revenues
    - **Kennedy** Kelo concurrance: pub benefits and chars of intended use **substantially predominate** over the private nature of that use
      * more stringent test when some going to other private owners
      * want to make sure don’t favor/cater to a particular private party, with only incidental or pretextual benefits
      * avoid “end run” on negotiating
      * think **Casino Reinvestment Development Authority v. Coking**: taking was held not to serve a public purpose when Donald Trump or a subsequent owner would have been able to use to property for purposes beyond the propsed public ones
    - **O’Connor** Kelo dissent: propety cannot be taken and transferred to another private unless nature of **peropty itsleft justifies** the taking
      * Doesn’t count if the public harm cured is not the result of an activity of the party whose land was taken
    - **Thomas** Kelo dissent: pub use means **either pub ownership or use**
      * Use example: has **common carrier** obligation to take all customers or is a **utility**
    - **Two views of Kelo**
      * (1) **Broad**
        + Under banner of econ development all private property now vulnerable to being taken and transferred to another private owner if used more efficiently
      * (2) **Narrow**
        + City had already approved comprehensive development plan before any private beneficiaries were known
      * When looks more like **Donald Trump** case (p.343) (mostly private benefit) 🡪 courts reluctant to grant eminent domain (Kelo involved parks, marina, etc.)
    - State statute alternatives:
      * Must be justified in sense that pub purpose could not be achieved in any other way than thru a taking of one owners property and transfer to another
      * Institute better public notice / hearing reqs
      * MI: (1) necessity of the extreme sort, (2) public oversight, (3) property not selected to help a private entity
  + Provided just compensation?
    - SC: fair market value
    - Some state, federal statutes give more: replacement cost, moving costs & business goodwill
    - **Almota Farmers** anomally: compensated more to put in same position as would have been if property not taken (but see **Acres of Land**)
* Is it a regulatory taking?
  + Is it a legitimate excersize of the police power in the first place?
    - (A) **Sic Utere** **maxim** – if all reg does is keep people from using property so as to injure another, it’s **fine** bc it only limits what you otherwise **cannot do**
    - (B) **Public Nuisance** – state can **always** abolish a public nuisance
    - (C) **Nuisances Per Se –** things that are **intrinsicially** – by their nature – nuisances (anywhere they are); ok for state to proceed by general ordinance
    - (D) **Nuisances per accidens** – only a nuisance based on **how conducted / where located**
      * ie cemetaries, taverns, horse stables
      * if **per accidens**, state **cannot** proceed by **general** ordinance; can only proceed by individual prosecutions)
    - (E) **Three-Prong Ends-Means Test:**
      * **(1) Ends** – legitmate?
        + To be valid, police power must be for a **legit public purpose** (ie health/safety of public)
      * **(2) Means** – legitimate?
        + If legit end 🡪 how closely are selected means tailored to achieve that end?
      * (3) **Application in particular case** – arbitrary/capricious?
        + In **this** case 🡪 are means being used in an **oppressive** way?
    - Apply with deference to the legislature
    - **Euclid:** purely residential only zoning districts **are constitutional**
  + Is it a taking?
    - Does it fit into per se exception?
      * 1) Permanent physical occupations always takings (**Loretto**)
      * 2) Does act deprive owner of all value and thus taking?
        + **Lucas** been interperted in **Tahoe-Sierra** as deprive of all value, not just all economincally beneficial activity
        + **Tahoe-Sierra**: cannot conceptually sever property into temporal segments
        + **First English p 411**

Approve d right to obtain DON’T KNOW

* + - * 3?)Is it to protect the public / stop harmful use, so not taking?
        + This one’s iffy – support with Hadacheck, but Lucas suggests better understood as just making reasonably related to public use
        + Hard to distinguish btw preventing harm and conferring benefit
    - If it doesn’t, ad hoc balancing ala **Penn Central**; 3 factors
      * 1) Economic impact of the regulation
      * 2) Interference with reasonable investment backed expectations
        + **Palazzo** dealt with issue of whether possible unconst reg pre-invest counts; issue not decided

Kennedy: careful bc would absolve state of obligation to defend

O’Connor: gotta consider bc would be unfair windfalls to opportunistic investors

Scalia: irrelevant; laws that might be unconst shouldn’t figure into expectations

* + - * 3) Character of government action
      * Nondoctrinal factors:
        + Noxious use
        + Reciprocity of advantage