**Nature of Property**

1. **Basic rights in property**
   1. **Right to possess and exclude**
      1. *Jacque*: Mobile home across property
      2. *Hinman*: superjacent air, only if occupied
         1. *Ad coelum et ad inferos* doctrine
         2. Collective action problem
   2. **Right to use and enjoy**
      1. *Hendricks*: well v. septic tank, policy judgment
   3. **Right to convey and destroy**
2. **Essentialist** and **skeptical** views of property
   1. **Essentialism**, Penner and Blackstone
      1. Rights inherent in an object
      2. Right to exclude functions to allow use
   2. **Skeptical**, Grey
      1. Entitlements are the essence of property
      2. Entitlements can be traded
         1. Encourage unusual cases to contract
         2. Coase Theory: If eliminate transaction costs, entitlements flow to most efficient
3. Resolving scarce-resource disputes
   1. Exclusion: absolute rights of property owners
   2. Governance: predictable government rules
4. **Property and liability rights**

|  |  |  |
| --- | --- | --- |
| **Calabresi-Melamed matrix** | | |
|  | Property | Liability |
| Invadee | Right to exclude | Invader pays damages |
| Invader | Right to invade | Pay invader to stop |

* 1. **Repeated trespasses**
     1. *Baker*: injunction against hunting dogs
        1. Preserve gen hunting rts, exclude these
        2. Universality creates great liability
        3. Injunctions better enforce exclusion
     2. Building encroachments, *Pile*, *Golden Press*
        + 1. Invasion innocent, slight, harmless; cost to remove unconscionable
          2. *Ex ante* incentive, owner or neighbor?
          3. *Pile* better *ex ante*, more efficient?, *G.P.* *ex post*, bargaining issues

**Acquisition of Property**

1. Capture and occupancy: **First possession**
   1. **Relativity of title**
      1. True owner, land owner, first captor, second captor, pursuer, malicious interferer
      2. Rule of capture: get w/o trespass, yours
   2. **Constructive poss**./pre-possessory interest
      1. Discourage free-riding, promote investment
      2. Animal cases
         1. *Pierson*: Mere pursuit insufficient
         2. *Ghen*: Harpooning suffices, tradition
         3. *Keeble*: Duck decoy suffices; quasi-prop interest in ducks, no unfair competition
      3. Mineral and abandoned property cases
         1. *Eads*: Boat above wreck does not suffice
            1. Not enough investment for possession
         2. *Hammonds*: Gas underground released
            1. Like wild animal, could be recaptured
         3. *Popov*: Split baseball, “equal claim”, usual policy against continued ct involvement
   3. Open-access exploitation problems
      1. Historical motivation to create race to exploit
      2. Prop entitlements solve, state must regulate
2. **Creation**
   1. **Common law intellectual property**
      1. *INS v. AP*: INS stealing uncopyrighted news
         1. General rule of free flow of information
         2. Quasi-property, analogous to *Keeble*
         3. Protection v competitor, reap-sow
         4. Holmes and Brandeis dissents: positivism
            1. No rule to infer property rights, prop rts should be created by legis
      2. *Midler*: Ford uses imitator in advertisement
         1. Personal rt to voice, personal autonomy
      3. *White*: Robot imitation of Vanna White
         1. Kozinski dissent: IP imposed at expense of future creators and public at large
   2. **Statutory intellectual property**
      1. Spur creative impulses, Constitution
      2. *Eldred*: copyright extensions
   3. **Other theories**
      1. *Trenton Industries*: high-chair legs
         1. Patent invalid bc not novel enough
         2. Unjust enrichment as implied duty to compensate, business partners
      2. Trade secrets: Protect, promote innovation?
         1. Non-competition clauses limit free flow of info, technology industry shows this
3. **Accession**
   1. *Wetherbee*: barrel hoops
      1. **Good faith** conversion (must have)
      2. Lots of value added, keep, pay pre-labor value
         1. Value or investment doing the work?
   2. *Edwards*, cave for tourism, might be trespass
      1. Another trespass ordered to survey cave
      2. Contract, no collective action problem although there is a bilateral monopoly
      3. Dissent: Cannot use cave, No *ad inferos* rts

**Doctrine of present and prior possession**

1. **The rule** “Present possession is good against all the worldexcept a prior possessor or their successor or someone with better title.”
2. **The policies** behind the rule
   1. Social order, avoid wasteful self-help
   2. Encourage productive use of resources
   3. Simple adjudication, avoid errors
   4. Prior possession a good proxy for TO
      1. Returns objects closer to true owner
3. **The cases** that establish the rule
   1. *Armory*: jeweler, finder wins v all but owner
   2. *Clark*: logs, 2 finders, prior poss. defeats present
   3. *Anderson*: logs, 2 thieves, jus tertii
4. Other unusual circumstances
   1. Nonderogation from grant
      1. Seller cannot assert vs. buyer
      2. But can assert vs. thief from buyer
         1. Did not give up vs. world, only buyer
   2. Transferees have constructive possession
   3. Thief v. subsequent finder, courts give to finder but thief wins under jus tertii
   4. **OLQ v. Finder**, *Hannah*
      1. Owner LQ has constructive possession if…
         1. Mislaid v. “lost in the ordinary sense”
         2. In the ground (*Goddard*)
         3. In pvt, occupied place (not *Bridges*)
         4. Finder is trespasser (*Fisher*), agent (*Sharman*) or lessee (*Elwes*)
      2. Otherwise, finder wins, as in *Hannah*

**Adverse Possession**

1. Establishing true owner
   1. Whose title is first in time?*Nemo dat*
   2. Is there a flaw in that chain of title?
2. Ouster of true owner
   1. Was TO ousted >X years ago?
   2. Has PP been in possession for >X years?
      1. *Howard*: privies, reasonable connection
3. **Character of the possession**
   1. Actual (occupying the land)
   2. Exclusive (TO or others not occupying)
   3. Open and notorious (sufficient to notify)
   4. Continuous (no series of discrete periods)
      1. *Howard*: summer home counts
   5. Hostile/adverse under a claim of right
      1. Good faith requirement?
         1. *Carpenter*: Think you own land, min
         2. *Ewing*: Only need act as if own, maj
         3. Maine Rule, *only* bad faith, disused
         4. Cts do not award to bad faith occupiers
   6. Note: real q is whether acting like owner
4. **Policy rationales**
   1. Encourage productive use of land
   2. Ordinary statute of limitations issues
   3. Incentivize exploitation
   4. Simplify process of determining title

**Values Subject to Ownership**

1. **Personhood**
   1. Self-ownership: fundamental, inalienable
   2. Three-step test
      1. Statute or c.l. property rt
      2. Prop rt substantial w/ regard to rt asserted
      3. Policy in recognizing property rt
   3. *Moore*: no conversion of spleen cells
      1. Cells abandoned once outside of body
         1. But was there intent to abandon?
            1. Not for research purposes
         2. No informed consent, after all
      2. Punt to legislature; action unlikely
      3. Policy arguments
         1. Conversion a strict liability tort
         2. Incentivize labor, like *Eads*
         3. Moral policy, avoid exploitation
   4. *Newman*: no due process in taking corneas
      1. Deprivation w/o due process for taking of corneas w/o alerting next of kin
      2. Despite statute authorizing this taking
      3. Different from *Moore*, *Moore* might win on due process; *Newman* loses on conversion
   5. *Hecht*: sperm property for probate
      1. No moral concerns; sperm can be sold
      2. Probate rather than conversion
         1. No massive economic impact
         2. Fact-specific inquiry
      3. No diff. btwn preg before and after death
   6. Property rights at fringes vary on area of law
2. **Public Rights**
   1. **Navigational servitude** (federal law)
      1. All waters navigable-in-fact are public
      2. Even when land under them is private
      3. *Causby*, *Hinman*: applies to air as well
         1. *Causby*: Taking when affect ground
   2. **Public trust doctrine**
      1. State law version of nav servitude
      2. Applies to land under/near nav water
         1. Usually to Mean High Tide (MHT)
         2. Can include other property
      3. Must be kept for the public interest
      4. *Lake Michigan Federation*
         1. Sell public trust for public interest
         2. Here, publ. does not retain use/title
         3. Cannot be public interest if no access
         4. Distrust of legislature—why?
            1. Might not speak for public
            2. Might not consider future gens.
      5. *Thornton*: public access to dry beach
         1. Customary access to sand by public
         2. Note: apply rule to entire coast
            1. Policy: democracy, thoroughfare
            2. Related issue: can application of old, surprising right be a taking?
         3. Compare *Matthews*, public needs access to dry sand to use wet sand

**The Right to Exclude**

1. **Court action against trespass**
   1. *Hamidi*: harm required for trespass to chattels
      1. Similar to *Moore*, really all policy
      2. Policy
         1. Chattels easily moved
         2. Nonviolent self-help promoted
         3. Too much liability, v. frequent
         4. Worries about owning employees’ time
   2. *Shack*: migrants get medical/legal services
      1. Could have relied on tenant law, but did not
      2. Interests of migrants trump right to exclude
      3. *Sic utero* principle, use land w/o injuring
         1. “Property rights serve human values” and are created and bound by them
2. **Self-help**
   1. General rule: value present poss. strongly, protect w/ due process, *Fuentes*; adjud. avoids errors & violence, self-help when violence/error unlikely
   2. *Berg*: Self-help evictions disallowed
      1. No self-help eviction, minority, unusual to MN
      2. Policy, promote adjudication of disputes
      3. *Ex ante* whether there *might be* violence
   3. *Williams*: Late-night repo of car
      1. High standard for “non-peaceable”
      2. To not be peaceable, have threat of violence
      3. V. high threshold, prob. too high as creates strong self-help incentives on both sides
      4. *Ex post*, whether there *was* violence
3. **Exceptions to the right to exclude**
   1. Common law exceptions
      1. Necessity (*Ploof*)
         1. Choice, distinguish *Jacque*
            1. But what if no other route in *Jacque*?
         2. Urgency, distinguish *Shack*
            1. *Shack* would fit if medical emerg.
      2. Recovery of own property
      3. License (consent, revocable at will)
      4. Easements, incl. prescriptive easements
      5. Landlord/tenant law
      6. State intervention/regulation
      7. Other common law reasons
         1. *McConico*: hunting a basic right
            1. Policies prefer excl.: preservation
            2. Rare example of expanding excl rt
         2. *Uston*: Card-counter in casino
            1. Public place, need good reason, old c.l.
            2. Turns presump. to favor trespasser
            3. Plausible reading w/ *Shack* is broader as more public until flipping
         3. *Schmid*: state constitutional free speech
   2. **Constitutional trumps**
      1. *Marsh*: 1A trump in company town
         1. Behaves like public prop although pvt
         2. Need state action: crim. trespass arrest?
      2. *Shelley*: racial covenant not enforced
         1. State action in legal recog of covenant
         2. State cannot condone 14A violation
      3. *Bell*: ct fails to decide if enforcing discriminatory exclusion is state action
         1. Majority goes to technical grounds
         2. Dissent distinguishing prior cases
            1. *Marsh*: company acting like state
            2. *Shelley*: de facto zoning laws
         3. Look at strength of rts at stake, balance
      4. Subsequent cases on 1A access (not 14A)
         1. *Logan Valley*: cannot exclude from malls
         2. *Tanner*: can exclude as long as reasons unrelated to mall (not unions as *Logan*)
         3. *Hudgens*: overturn *Logan*, can exclude
         4. *PruneYard*: state const. like *Logan* in CA

**Estates and Future Interests**

1. **Freehold estates**: Not held for a term of years
   1. **Life estate**: Terminates at death
   2. **Fee simple**: No time of termination
      1. Absolute: No qualifications
      2. Defeasible: Qualifications
         1. Subject to executory limitation

Executory interest in third party

* + - 1. Subject to condition subsequent

Right of entry for grantor

* + - 1. Determinable

Possibility of reverter in grantor

1. **Future interests**
   1. **Executory interest**, anything not a remainder
   2. **Remainder**, test (generally follow life estate)
      1. Capable of becoming possessory immediately on the end of preceding estate
      2. Incapable of divesting a preceding estate or vested future interest
2. Relevant **cases**
   1. *Williams*: three unmarried daughters
      1. Presumption against partial intestacy
      2. Will creates joint tenancy life estate
      3. Language in will suggests only life estate
      4. Reversion implied, creates partial intestacy
   2. *Klamath Falls*: library to city while a library
      1. Literally a fee simple subj. to exec. lim.
         1. Fails under Rule Against Perpetuities
         2. Maintain intent through other means
      2. Fee simple determinable, poss. of reverter
         1. But cannot in OR convey reverter
         2. City argues this destroys reverter, fails
         3. Reverter went to owner-heirs when corp. dissolved, and then to heirs: same result
   3. *Brokaw*: granted mansion as life estate
      1. Relatives resist, waste despite profit
      2. Court rules grantor intent was to convey mansion, cannot alter status as mansion
      3. **Waste Rule**: All parties w/ future interests may veto actions of present interests if do not comport w/ intent of grantor
3. **Restrictions on alienability**
   1. Absolute restrictions rejected
   2. Strong **presumption against** partial restrictions
   3. *Lauderbaugh*: Only sell to Lake Watauga Assoc
      1. Restriction is infinite, no standards
      2. Could discriminate, ct does not uphold
   4. *Toscano*: charitable donation to lodge
      1. Finds **restriction on use**, not restriction on alienability, use as a lodge in general
      2. Contortion **for charities**
4. **Rule Against Perpetuities**
   1. “An interest must vest within 21 yrs of the death of all persons alive at creation of the interest”
   2. *Symphony Space*: opt. to repurch. after >21 yrs
      1. No “wait & see”, NY ref. to cut ages >21 to 21
      2. Not mutual mistake, would eliminate RAP
         1. RAP *exists* to foil intents of drafters
5. **Concurrent interests**
   1. Two types of concurrent interests
      1. **Tenancy in common**
      2. **Joint tenancy**
         1. Right of survivorship
            1. *Harms*: Others’ interests disappear
         2. Needs four unities
            1. Time (received at same time)
            2. Title (received in same instrument)
            3. Interest (identical estate)
            4. Possession (rt to possess whole)
         3. Presumption against, need precise lang.
         4. **Severance**, transform into TIC
            1. Conveyance, break unities
            2. *Harms*: Mortgages do not sever
            3. Leasing similarly likely does not
   2. **Ouster**: One cotenant denies rights of another
      1. A few relevant terms
         1. Contribution: Seek $ to maintain land
         2. Accounting: Seek rental value of land
      2. *Gillmor*: One ouster accounting standard
         1. Default, A gives share of actual income
         2. If B makes “clear, unequivocal claim” to use, A denies, share of market value
         3. Have not objected, consent to actual rent
      3. **A.P.**: *Gillmor* footnote says standard higher
         1. A actually owns, so AP is odd
         2. But could if clear denial of B’s title
   3. **Partition**: Splitting interests of cotenants
      1. Partition in kind: physical split
         1. *Delfino*: Preferred if a cotenant wants
         2. But not always physically possible
         3. Pro rata split in value
      2. Partition in sale: sell, split proceeds
      3. Look for any legal impossibilities
6. **Marital Property**
   1. Two different systems
      1. **Community property** (8 states, TX and CA)
         1. All property earned during marriage presumed community property
         2. Split evenly on divorce, wills easier
      2. **Common law marital property**
         1. Maintain separate title, can create separate titles during marriage
         2. Joint prop split evenly, other prop not
         3. Elective share, spouse can claim 1/3
   2. *O’Brien*: Medical degree marital property
      1. Bc degree counts for property for due process
      2. Split value with spouse on divorce
      3. Based on contrib, age, duration of marriage
      4. Alternative solutions
         1. Rehabilitation maintenance; pay costs to get equivalent degree
         2. Reimbursement maintenance; pay for costs incurred to get degree

**Real estate transactions**

1. **Summary of a real estate transaction**
   1. **Contract**: Buyer has interest, seller has title
   2. **Closing**, simultaneous transfers
      1. Seller gives deed to buyer, who uses deed to secure mortgage from mortgagor, who provides money to buyer to pay seller
      2. Mortgagor may get the deed itself (title theory) or a lien on the deed (lien theory)
      3. Either way, security interest in property
2. **Recording System**
   1. **Goals**
      1. Protect markets
      2. Protect good-faith purchasers
   2. **What can be recorded?**
      1. Deeds, mortgages, devises, contracts for sale
      2. Easements, covenants and other encumbrances
   3. **Types** of recording statutes
      1. Notice: If sale not recorded, void when another sale made, even if not recorded
         1. Except if there is actual or constructive notice, e.g. if B occupied land
      2. Race-notice: First sale to be recorded wins if did not have notice of prior sale
      3. Race: First sale to be recorded wins

**Landlord-Tenant Law**

1. **Common law rules**: lease as conveyance
   1. **Caveat lessee**
      1. *Paradine*: Prince Rupert’s invasion
         1. T gets windfalls, suffers losses
         2. Different result if agent of the LL
      2. *Sutton*: Paint chips and dead cows
         1. Twin principles of caveat lessee
            1. No implied warranties
            2. Independence of covenants
         2. Different if LL knew, T could not know
         3. Distinguish from *Marrable*, furnishings
            1. Less inspection for short-term lease
            2. Preserve caveat lessee
   2. **Covenants of quiet enjoyment**
      1. *Only* c.l. exception to caveat lessee
      2. Show either actual or constructive eviction
      3. Constructive eviction
         1. *McEnany*: Wall intrudes one foot
            1. Rent goes to whole prop, T released
            2. De minimis, maybe only good faith
            3. Evict or rewrite lease excluding wall
         2. *Blackett*: Noisy club
            1. Denied quiet enjoyment by failing to force club to abate nuisance
            2. Three factors for constr eviction

Substantial interference w/ CQE

That lasts for a substantial time

Such that the tenant moves out

Demonstr total deprivation

But big risk for tenant

1. **Modern rules**: lease as contract
   1. **Abandonment**
      1. Three c.l. landlord remedies
         1. Accept offer of surrender
         2. Re-enter and re-lease on behalf of T
         3. Sue tenant for rent as due
            1. Under c.l., no duty to mitigate
      2. *Sommer*: Wedding called off, back out
         1. Court creates LL **duty to mitigate**
         2. Similar to contract law, no waiver
         3. Lost volume, T can argue uniqueness
   2. **Implied warrant of habitability**
      1. Traditionally would fail on caveat lessee
      2. *Javins*: Code vios arising after occupancy
         1. Warrant of habitability implied in leases
            1. Really LL duty to repair & maintain
            2. Reverses c.l. duty, which went to T
            3. Not waivable, mandatory warrant
         2. Still owe rent unless constructively evicted, but can sue for vio of warranty
         3. Code vios before lease void lease, *Brown*
            1. Could have drawn from *Marrable*

Too high a burden to inspect

LL specialized, best position

* + - * 1. But bc of *Brown*, does not apply; later extended to overrule *Brown*
      1. Only urban, residential leases; comm. Ts sophisticated, rural leases simpler
      2. Policy concerns
         1. Drives low-income out of market?

Public housing, subsidies

Housing a fixed market, adjusts

* + - * 1. Freedom of contract

Want to ensure no manip of Ts, but want freedom of contract

Should be waivable?

Negative externalities, fires

Societal minimum from code

**Co-ops and Condos**

1. The three different models
   1. **Condos:** Owners hold interior in fee simple, Condo assoc holds walls and public spaces
   2. **Co-ops**: Title held in coop, owners hold shares and proprietary lease; not freely alienable
   3. **Common Interest Communities**:Homes in fee simple, subject to in-lease and HOA restrictions
2. **Cases**
   1. *Pullman*: Crazy guy in co-op
      1. *Levandusky* applies business judgment rule
         1. Acting in good faith for purposes of co-op as a whole within the scope of authority
      2. Policy concerns
         1. Democratic board, consent
         2. Co-op owners are generally wealthy
         3. Freedom to share ownership
         4. Concerns about discrimination
            1. Good faith rule and statutes
            2. But practically a real problem
      3. Hypo: Rejecting a *buyer*
         1. Good faith concerns
         2. Restraints on alienation, *Lauderbaugh*
   2. *Nahrstedt*: Cats in a condo
      1. Ct adopts standard from *Hidden Harbour*
         1. If **contained in declaration**/master deed, strong presumption of validity
            1. Arbitrary or violate policy/Const.
            2. Under *Nahrstedt* but not *HH*, if burden “substantially outweighs” benefits
         2. If a **rule promulgated later**, reasonable
      2. Finds restrictions on pets not arbitrary
   3. Hypo on sign restrictions
      1. If the sign restriction were in declaration
         1. Show arbitrary, against public policy
         2. Or show unconstitutional
         3. State action concerns
            1. Under *Shelley*, enforcement

*Bell* dissent argued against

Generally disfavored

* + - * 1. Under *Marsh*, nature of owners

Democracy, not dictatorial corp

* + 1. If the sign restriction were adopted later
       1. Show unreasonable rule
       2. Relatively minimal restrictions
       3. But maybe concerned about restrictions on democratic nature of the board itself
       4. Fairness of the procedures

**Nuisance**

1. **Nature of nuisance**
   1. Substantial, non-trespassory invasion of another’s interest in use and enjoyment of land
   2. Three themes to nuisance
      1. What are the baseline rts of owners?
      2. How can rts be reallocated among neighbors?
      3. How can rts be limited/redistrib’d by state?
   3. More sensitive than trespass, balances interests
   4. Owners and occupants, including tenants, have standing; workers and guests do not
   5. *Adams*: Oily dust from mine
      1. Not considered a trespass
      2. Policy reasons, injunction would be automatic, destroy economic activities
      3. Ex ante bargaining easier w/ trespass
2. **Forms of nuisance**
   1. Public nuisance v. private nuisance
      1. Public nuisance: affects general rights
      2. Private nuisance: affects certain land
   2. Ordinary nuisance v. nuisance *per se*
      1. Nuisance *per se*: derived from statute
         1. *Luensmann*: Not illegal to race horses, cannot be nuisance *per se*
      2. Ordinary nuisance: c.l. action
3. **Elements of ordinary nuisance**
   1. **Intentional** (know it’s happening)
   2. “**Unreasonable**”
      1. Common law, loosely defined
         1. Threshold test, *St. Helen’s*
         2. Balancing test
      2. 2nd Restatement of Torts
         1. **Balancing test**
            1. In favor of P

Extent of harm

Social value of P’s use

Suit of P’s use to locale

Burden on P to avoid

* + - * 1. In favor of D

Social value of D’s use

Suit of D’s use ot locale

Burden on D/impractical to avoid

* + - 1. **Serious harm** and burden of comp will **not destroy activity**
      2. **Severe harm** P should not bear
         1. Escape clause for nonprofits
  1. *St. Helen’s*: Coming to nuisance not a defense

1. **Remedies for nuisance**
   1. Traditionally, injunctions awarded
   2. *St. Helen’s*: Damages can be awarded
   3. *Boomer*: Cement plant and houses
      1. Threshold test, finds a nuisance
      2. Allows D to dissolve inj by paying; forced sale of servitude, market value damages
      3. Uses Restatement logic for damages
   4. *Del Webb*: Feedlot and old people
      1. Problem of coming to nuisance
      2. P bears costs; P must pay for injunction
      3. Rare example of type 4 in C-M chart
2. Policy on over- and underenjoining
   1. **Overenjoining**, threshold test
      1. Precautionary Principle
      2. But costly for economy
   2. **Underenjoining**, Restatement
      1. Let statute and regulation do the heavy lifting
      2. Legis cannot dissolve mistaken injunctions

**Easements, Servitudes and Covenants**

|  |  |  |
| --- | --- | --- |
| **Rights** | **Remedies** | **Conveyance** |
| Possession | Ejectment | Lease |
| Exclude | Trespass | Affirmative easement |
| Use and enjoy:  Active  Passive | ?  Nuisance | Negative easement  Affirmative easement |

1. Easements
   1. Characteristics of easements
      1. Not revocable at will
      2. Protected against interference
      3. Capable of creation by conveyance
      4. Not a possessory or exclusory right
      5. Dominant tenant & servient tenant
   2. Types of easements
      1. **Affirmative or negative**
      2. **Public or private**
      3. **Appurtenant or in gross**
         1. In gross disfavored by law, be explicit
   3. Creating an easement
      1. **Express**: Written down, strong deference
      2. **Implied**: Implied to be included in prior written deed w/o express provision
         1. Implied in grant or reservation, but avoid reservations due to derogation of grant
         2. Prior unity of title, implied at severance
         3. By necessity
            1. Strict necessity, i.e. landlocked
            2. Necessity at severance and also now
         4. By prior use
            1. Prior use, suggests intent to convey
            2. Reasonable necessity, i.e. difficult
            3. More than mere convenience
         5. When necessity ends, so does easement
         6. *Schwab*: lakefront w/ bluffs
            1. No necessity bc none at severance
            2. No prior use bc none at severance
            3. No necessity up bluffs bc reluctant to imply derogation of grant, no use
      3. **Prescription**: Like AP, same SOL
         1. Open, notorious and adverse under claim of right for uninterrupted period
            1. Reasonably definite path
            2. Do not need to be exclusive
            3. Forces owners to “use it or lose it”
         2. *Warsaw*: Structure built on pathway
            1. Prescriptive easement, no just comp
            2. No payment to remove structure
            3. Policy, encourage owner to assert rts
         3. *Holbrook*: permission, no prescription
            1. Might consider acquiescence
      4. **By estoppel**, *Holbrook*
         1. Get license, reasonably rely on license
         2. Reliance includes improving easement itself or building structure on own land
   4. Other easement-related miscellany
      1. Misuse, *Penn Bowling*: Cannot use easement appurtenant for non-dominant tenement
         1. If you do, enjoined until separate the uses
      2. Compensation for easements? No
         1. Prescriptive: Owner shows low value
         2. Estoppel: Owner to blame
         3. Implied: In contract, price in orig sale
      3. Easements **binding successors**, two factors
         1. Intent to bind (includes use/reliance)
         2. Notice: actual, constructive or record
   5. Negative easements (strong c.l. resistance)
      1. Non-express negative easements
         1. No prescription; maybe implied, estoppel
         2. Problem of notice, records solve
      2. Conservation easements, statute, not c.l., infinite control of land use
2. **Covenants**: Promises about use of land
   1. *Tulk*: Enforceable at equity when not at law
   2. Requirements for burdens to follow land
      1. **Horizontal privity** btwn parcels at law
      2. **Intent** to bind successors
      3. **Notice** of the burden, *Sanborn* inquiry notice
      4. “**Touch and concern**” the land
   3. Implied reciprocal restrictive covenants: Reasonable expectations of first purchasers, inquiry notice to later purchasers

**Takings**

1. **Constitutional backdrop**: 5th Am: “Nor shall pvt prop be taken for public use w/o just comp.”
2. **Just compensation**
   1. Fair market value (FMV), appraisal
   2. Same as *Boomer*, higher than FMV if not selling
   3. Hard to calc idiosyncrasies, many add percentage
3. **Public use**: eminent domain
   1. Use by public is public use; transferring to pvt to benefit pvt actor is not public use
   2. Cases in between
      1. *Berman*: DC urban renewal, some pvt use
      2. *Midkiff*: land redistrib in Hawaii
   3. *Kelo*: New London redevelopment
      1. Transfer to developer for econ development
      2. Benefit to community, taxes and jobs
      3. Dissent: standard of means rather than ends? Uniquely suited for purpose? Often will bar any redevelopment
   4. Eminent domain is self-regulating
      1. Highly costly, used only against holdouts
      2. Role of cts to ensure compensation
4. **Taken**: regulatory takings
   1. *Mahon*: anti-subsidence PA legislation
      1. If state acts w/ police power to abate public nuisance, not taking; no rt to commit
         1. Holmes: pvt nuisances only
         2. Brandeis: defer to govt determination
      2. Then look to see if regulation went too far
         1. Holmes: Separate estates, total depriv.
         2. Brandeis: Whole property considered
   2. **Regulations of use**
      1. *Penn Central*: landmarking of Grand Central
         1. Look to whole property, air not much
         2. Still can use for all prior purposes
         3. Transferable dev rts mitigate loss
         4. Reasonable return on investments
         5. Average reciprocity of advantage
      2. *Keystone Bituminous*: *Mahon* v.2.0
         1. Nuisance abatement, not going to consider support estate separately
      3. *Lucas*: S.C. beach, waterfront dev restrictions
         1. Eliminate all economic use, taking *per se*
         2. Back to *Mahon*, separate prop interests, different from *Penn Centr* and *Keystone*
   3. **Physical invasions of property**
      1. **Temporary physical invasions**
         1. *Kaiser-Aetna*: marina created from lake
            1. Reward investing; permit, expectation
         2. *PruneYard*: free speech in mall
            1. Owner opened up property to public
            2. No loss of value/interference w/ use
            3. State, not fed gov, defines property
      2. **Permanent physical occupations**
         1. *Loretto*: cable wires on apartment
            1. Perm phys occupation = taking *per se*
            2. Strong right to exclusion, entire rt lost
         2. *Nollan*: Public easement, dry sand beach
            1. Public path is PPO, taking *per se*
            2. Scalia wants strong bright line rule
            3. Distinct from *PruneYard*, not public
            4. But no clear distinction from *KA*

Land v water? Defined path v wandering? Easement v navserv? More commonly bought & sold?

* 1. **Limitations in title**
     1. *Lucas* dicta, if “limitation inheres in title”
     2. *Palazzolo*: Wetlands takings claim
        1. Statutes do not always inhere in title; must comport w/ state legal tradition
           1. O’Connor’s test, meet reasonable investment-backed expectations?
           2. Scalia’s test, taking at time of reg?
        2. Purchase property and takings claim
        3. Decline of positivism
           1. Conservative: use of property
           2. Liberal: personal autonomy
  2. **Denominator**, *Tahoe-Sierra*: Moratorium
     1. Rejection of conceptual severance
     2. Defined by “metes & bounds” & time
     3. Contrast *First English*, permanent taking lifted
     4. What if only own part of m&b or time?
     5. What if acquire later? M&b at severance?