

PROPERTY – PROF. HULSEBOSCH, SPRING 2009

Theorists

Locke: product of labor
Hegel: extension of will
Bentham: settled expectations
Marx: foundation of class conflict

State law: most adopted common law of England: fed courts apply law of state

Jacque v. Steenberg Homes (1997) p1: mobile home delivery across land, despite owners

Jury awards large punitive damages, despite nominal damages (remanded to dist for reinstatement)

Nominal damages may support punitive damages in action for intentional trespass

Incentives: prevent ∂ from repeat trespass if damages are high

Policy: right to exclude has social benefits

Sovereignty over property, goal of home ownership

Promotes civic responsibility, care for property

Avoid violence/self-help

Hinman v. Pacific Air Transport (1936) p9: Ad coelum, fly over, no actual damages (only own that space that you occupy or make use of, must reclaim)

Actual damages in *Causby*, where flyover harmed chickens

Can't charge for use of airspace: too ripe for holdouts

Epstein: save the theory of ad coelum by admitting that these are trespasses, but implicit in kind compensation (get to fly over every else's land)—injury to each is small but transaction costs are high

Penner: skeptical

Grey: more regulable, don't worry about privilege

Trespass/Nuisance Divide

Trespass protects interest in possession, nuisance protects use and enjoyment

Hendricks v. Stalaker (1989) p23: balance septic tank versus well: well = nuisance overturned

Balanced interests of landowners, septic system more invasive

Interference unreasonable when gravity of harm > social value of activity

Idiosyncratic case...race to be first (first to sue, juries tend to find for π)

Exclusion versus governance

Exclusion gives owners discretion over use

Governance: regulators determine property use

Coase Theorem p31: assuming zero transaction costs, the highest productive use will win out (winner will pay loser for costly use) (see attached sheet)

- Parties should negotiate and come to agreement with the highest net gain (w/o help/intervention of government)
- Upshot: the delineation of rights and liabilities affects the type of market transaction (who's paying whom) but not the ultimate result. Value maximization is *independent of* the legal position. Assumption: pricing system works without transaction costs.
- Transaction costs increase when one building is done before the other, so costs create differences between ex ante and ex post positions

Property & Equity

Baker v. Howard County Hunt (1936) p42: Hunt Club Dog trespass

dog's history, single versus pack, specific activity (nature of collateral damages)

repeated trespass, threat of future trespass, π wants *injunction*

Getting equitable relief

Legal remedy inadequate, (i.e., risk/cost of repeated suits)

Clean hands doctrine: must have acted in good faith (here, π shooting the dogs calls good faith into question)

Inapplicability of Coase: less able to calculate value of activities if noncommercial, trespass unpredictable

Undesirable for ∂ , even though no money costs: if all neighbors get injunctions, nowhere to hunt; if violate injunction, face steeper criminal penalties

Building Encroachments:

Permanent trespass (even if good faith mistake about property line)

Remedies are damages or injunction (i.e., pay or remove)

Here, hard rule: injunction unless *de minimus*

How to define d.m.? When does hardship become so great that injunction necessary?

Pile v. Pedrick (1895) p51: foundation built by mistake into neighbor's land, <2 inches. Must remove wall.

Golden Press (1951) p51: 2 inches encroachment, where in good faith, court should weigh balance of hardships

Property & Liability Rules: **Calabresi & Melamed** p57 (see attached sheet)

Property: owners in voluntary transactions determine value of entitlement

Liability: more state intervention, agency determination of value should a party encroach.

	Property	Liability
Assignment to π	Rule 1 Property to π —set price or exclude (can insist on injunction)	Rule 2 Liability to π —get paid damages by set objective (market) price
Assignment to ∂	Rule 3 Property to ∂ —can't exclude, π must let encroachment happen	Rule 4 Liability to ∂ —can't exclude, but can bargain with ∂ to stop behavior or make payment (π can pay to opt-out)

Problem of economic irrationality: owner doesn't respond to market prices. *Bilateral monopoly problem*.

One buyer/seller can be a holdout.

Behavioral factors: animosity, subjective value (esp where noncommercial), multiple bargaining partners

Original Acquisition

Personal/fixtures/real...(trees &c are real until cut, then personal)

Tangible/intangible (patents, stocks, &c)

Possession

Possession: intent to possess, and control/holding (need BOTH)

Relativity of title: no perfect, but better/worse than others

First in time: chrono establishing priority of rights

First Possession

Wild Animals

Pierson v. Post (NY 1805) p81: requirement of possession, not just pursuit, to claim property

∂ in pursuit, π shoots and takes fox, ∂ loses (didn't physically seize, no control): really a first in time rule

Rule: Physical control (commonsense) + intent (notice to others)

Majority: wounding and close pursuit is sufficient, prevents self-help (dueling), superior to another's intervention

This is *constructive possession*: example: resources beneath land, like ad coelum

Dissent: reasonable prospect of taking the animal enables property

Consequentialist reasoning: encourage fox hunting by granting strong property rights

Custom: Ghen v. Rich (1881) p88: whale case, first in time. Mortal wounding without abandoning pursuit (specifics of the pursuit matter) Flagging with harpoon count?

Role of *custom* in determining what constitutes physical control: tagging

Custom: practice long adopted by acquiescence has force of law (specific to market/locale)

Conditions for honoring custom:

- Application limited to industry/members

- Recognized by whole industry
- Requires that the possessor take the only action of appropriation that is possible
- Necessary to survival of industry
- Works well in practice

Courts generally suspicious of custom

Can harm society

Dangerous to employee members of industry

Wasteful

Overinvest in competitive technology

Custom giving access—requirement of antiquity, e.g., from beginning of states, custom prior to state power

Customary actions can inform what legal importance to attach to certain actions, where there is general community acquiescence

- Contained within specific industry
- Universally known within the industry
- Can't conflict with other laws/rules

Here, finder's knowledge: knew or should have known that whale was killed with π 's harpoon, and that the custom dictated that he turn it in

Actionable Interference: *Keeble v. Hickeringill* (Eng 1707) p92: duck decoy interference with business of attracting ducks

∂ disturbs economic activity of π 's taking possession, ability to use land for intended purpose

π using pond lawfully in trade, ∂ as competitor acted illegally, general welfare served by promoting duck hunting

unfair competition, scaring ducks away (fair competition would not be malicious interference)

Owner of land has sufficient possession of wild animals thereon to start the hunt: type of constructive possession

Carving out the commons...

More efficient use of resources by private stewardship

First to possess is a race to extract resources from nature

Pure open access is a race to exploit, quick depletion

Cf., regulated commons: national parks, regulations, land use

Or, private property: owner control

ITQs and Fisheries (p1119)

Auctioning rights: benefits wealthy at expense of those who historically fished freely

Tradable quotas: *Alliance against IFQs v. Brown*: cites *Pierson*

PRO:

- Intuition about fugitive resources...when unregulated, can vest in first possessor (but tragedy of commons)
- Quotas might be better than limiting the catch (race to first possession, spend more money to get fish out quickly)
- If no capacity to fish, then quota is tradable, sell to the person who can efficiently fish (don't overinvest)

CON

- Throwing back overquota (kills fish, waste)
- Who gets the quotas? Favors established industry, creates barrier to entry
- Expectations: taking away expectation in right to fish the commons is like a taking

Shipwrecks & Baseballs: Other Applications of First Possession

Eads v. Brazelton (1861) p102: first to possess shipwreck

Finding, marking, preparing, place boat over it...attempt at physical possession did not ripen, left for extended period of time

Signal that you've invested capital and equipment in project of hoisting (not just mere marking), have to put others on notice that you have tech capacity to hoist

Popov v. Hayashi (2002) p108: killjoy judge sells the ball and divides between litigants

Discovery

Johnson v. M'Intosh (1823) p110: inhabited lands (Native Americans), not constructive possession in traditional manner

Chain of title: π bought land from Nat.Amers. prior to Rev War

- Land then went from Brit to Amer control, then to ∂

- First in time did NOT win on theory that Nat.Amers. could not sell (had right of possession, maybe only occupancy, but definitely not title)—not prohibited from trading to other tribes, but no title recognized in US courts
- Source of law: European law of sovereignty: US has exclusive title, ultimate source of authority
 - Conquest and rights of conquered peoples: assimilated into conquering community, and property rights are largely protected
 - Nat.Amers. and cultural difference: this might be post hoc explanation that empires use against indigenous peoples to assert federal control (result: tribes can sell, but for less b/c they are restricted by gov't, but protection/paternal, protect tribes from sneaky bargaining partners)

Discovery Doctrine: underused, unused land

Rules of engagement apply horizontally among competing empires

Indigenous persons on discovered lands, however:

Title goes to conquerers

Attempt to extinguish occupancy rights of natives

Purchase (unfair bargains, usually)

Conquest (imperial, but less common)

Automatic conquest, some formality of purchase for custom, at gov'ts discretion

State grants property ownership to citizens, sometimes by legitimate use of force

Realist approach, unfortunate history (esp for indigenous persons) but any conquered

European community was treated similarly

Public Domain, contra privatized section of domain

Degree of exclusion varies with type of right

IP: by federal statute

Rivalrous/nonrivalrous and Excludable/nonexcludable

	Rivalrous	Non-rivalrous
Excludable	Private good	Club good
Non-excludable	Common good	Public good

Ideas generally nonR and NonE.

But you can prevent access, and create club goods

Counter-intuitive and complicated regimes of IP to propertize the commons, in order to provide incentives for creation/innovation (increase size of public domain overall)

Creation

News and Publicity

INS v. Assoc Press (1918) p135: property right in gathering and distribution of news (facts)

Π has by substantial investment created intangible thing of value, and θ with little investment appropriates such that π is injured, & π is injured, π 's use is jeopardized
Once printed, publicly available, but other news orgs can't republish AP's bulletins
(more like unfair competition tort)

Majority: tort like, but use quasi-property language

Dissent (Brandeis): majority improperly creating a property right

Policy: if we remove news/fact protection, and the big guys go out of business, then we don't get news from hard to reach places—work goes into news collection
(should be rewarded/protected?)

Midler v. Ford Motor Co. (1988) p147: sound-alike in car commercial

Not imitation, but trying to precisely replicate

Midler's autonomy rights or consumer confusion...

Latter is a tort

Pearl Oyster Bar: look/feel of restaurant: flattery or a rip-off?

Copyright

Eldred v. Ashcroft (2003) p1089: copyright extension (Lessig versus Mickey Mouse)

Eldred engaged in GoogleBooks type project with public domain books

IP clause in Const gives Congress power to create IP rights for limited times.

Argued, extensions don't promote progress

- As long as there is *some* time limit, not province of Court to decide what the time limit should be.
- Increasing incentives: authors take probability of extension of copyright into account

Reasons to extend copyright term

- Harmonization with EU (though we also make EU catch up with us)
- Fair compensation for selves AND heirs is incentive to innovate

Not to extend...

- Access costs are higher for copyright works
- Do incentives work this way, for creative authors?
- Propertizing too much such that public has not access AND creator loses benefit of public seeing his work

YouTube complaint: take down notices, as means of avoiding ISP liability

DMCA compliance by YouTube...should Viacom have more protection? Can't go after end users, hard to find?

Novel Inventions

Trenton Industries v. A.E. Peterson Manu. Co. (1958) p154: folding highchair patent

PTO granting lots of patents: too many? Not all are profitable, so need monopoly windfall incentive?

Obviousness: prior art, improvements that are within the ability of the average person familiar with the art.

Here, subjective knowledge of the device came from π .

Propertizing (inventor can assert right against potential users) is more efficient than inventor having to contract with all users

Accession

Addition of labor to another's chattel such that title is transferred to laborer

Arose as defense to replevin (can't remove w/o ruining value)

Title awarded to claimant who contributed most to the value (FMV)

Claimant can't get replevin, but still has action for trover/conversion

Confusion: mingling such that no longer distinguishable, entitled to pro rata share of the whole (used sparingly)

Increase: offspring of our cattle...

Accession: natural growth on land belongs to landowner (cow owner gets the calf)

Fruits of our garden belong to us (Hume)

Incentives to promote land, grow crops b/c they will belong to you

Wetherbee v. Green (1871) p166: barrel hoops are property, but timber liability rule

No liability of ∂ acts in good faith.

Relative value: logs to boards is not a huge multiplier in value, but barrel hoops add lots of value (ratio of contribution)

Look to amount of labor put in (not just appropriation followed by increase in market value, but value increase b/c of transformation)

Not perfect, i.e., beam in a roof hasn't been transformed, but its role in construction is of high value

e.g., canvas is part of a painting. But is parchment part of poem? The poem goes to the parchment owner, the painting to the painter.

Ad Coelum

Edwards v. Sims (1929) p175: cave entrance on E's property, probably extends under neighbor's land

Ad coelum rule, compared to mines, neighbor can get a survey (E denied injunction)

Blocked off to tourists, so economic harm to π

Dissent: π has put in effort to develop the cave, labor theory of transformation and increase in value

Accretion:

Nebraska v. Iowa (1892) p183: property lines changing b/c of change in channel of river
Avulsion: sudden and rapid change of channel. No matter which side it adds ground to, leaves the boundary at the center of the channel
Accretion: slow creep. No effect on boundary, leave it in the center of the OLD channel

Fixtures

So connected to real property, considered part of it

Annexation* most important, attachment

- Constructive annexation is annex. Plus adaptation for use as essential for functioning, economic unit
- Adaptation for particular use
- Intention to annex: factors = nature of chattel, relation of annexor, method of annex, purpose/use of chattel.
 - Objective intent of reasonable person, not subjective state of mind

Absent agreement to contrary, transferred to next grantee

Advice: expressly bargain about things that purchase might consider fixtures

Liens: chattel necessary to provide security or attract purchasers will be treated as fixture

Strain v. Green (1946) p188: when personal property becomes a fixture to real estate, not chattel: commonsense (don't take bathtubs, do take wall hangings when you sell)

- Physically connected
- Use tied to property
- Intention to make it attached to property

Adverse Possession

Use for statutorily determined period becomes owner

- Successor to statute of limitations for action in ejectment
- Adverse possessor gets original title
- Time period might depend on jurisdiction, or whether AP has color of title (i.e., a faulty deed)

Policy:

- Encourages owners to monitor property, abandoning owners: better for property to be used, no waste
- Rewards person who improves property over time
- Evidence of ownership decays over time, AP cleans up records, possession as substitute for (faulty) records
- Efficient transfer of property, quiet titles, reinforce reliability of records, lower cost transfer
- Preserves status quo, more loss to AP ejected than TO restored would gain: give to AP

Date of entry: when TO first had cause of action in trespass/ejectment

AP must meet ALL CL elements: possession is

- Actual
 - Actual occupancy, unless AP can show color of title, to give constructive possession of all
 - No constructive possession if TO is actually occupying part of tract: then AP can only claim the part she occupies
 - Notice to TO
- Open & notorious
 - Would give notice to reasonably attentive owner (no actual notice requirement)
 - Fences, crops, &c can be required by statute, but otherwise signal open and notorious
 - Notorious is a notice requirement: a reasonable owner could know that you were in possession. Must do something/live on/use (i.e., pay taxes on) the land.
- Exclusive
 - To exclusion of TO, not 2 APs unless one has superior right like color of title
- Hostile or adverse
 - Most states: enter or remain w/o permission & inconsistent with TO's rights
 - Hostility claim for tenants remaining must be unequivocal

- Bad Faith: AP's subjective intent: mistake NOT hostile
 - Good faith: opposite...
- Continuous
 - Entire limitations period: (seasonal use okay, use as a TO would)
 - i.e., one AP leaves, another AP enters...limitation period begins again
- Others: some courts add claim of title/right, good faith, improvement/enclosure/cultivation, property taxes paid)...selling/mortgaging might count
 - Good faith: (some states incl, such as FL requires payment of taxes)
 - Judges tend to reward good faith (or, at least, show good faith to justify their decision in favor of AP)
 - Actions that perform a claim of right, show intent
 - No good faith for squatters. Differentiates the kinds of connections that people have to land
- AP may exclude others/sell before end of limitations period, add time to 2nd possessor (tacking) if done in Privity (contract, sale, gift, will, inheritance)
 - SOLs don't run against Disabled TOs (i.e. minors, sol not tolled until 21)
 - Must have disability when AP takes possession

Severance

Temporal: SOL runs once future interest of TO becomes possessory: but if AP starts at time where TO has FSA, then no future interest can dispossess

Future owners can't be penalized, b/c they are not the sleeping owner
i.e., *First English*, gov't liable (but compare *Tahoe*): fact-based analysis

Physical: i.e., AP only gets surface rights if mining rights already sold—and AP's SOL for mine starts when AP starts mining

Portion of lot, or surface/subterranean

i.e., cave case...AP → owner of surface and subsurface

if AP only in cave, then AP for cave only

i.e., *Tahoe Sierra*, denominator is parcel as a whole for regulatory taking

***Lessee of Ewing v. Burnet* (1837)** p194: sold twice, first buyer is true owner, second buyer is adverse possessor...refused to others, sold gravel digging rights to others

- Good faith: (some states incl FL require payment of taxes)
 - Judges tend to reward good faith (or, at least, show good faith to justify their decision in favor of AP)
 - Actions that perform a claim of right, show intent
 - No good faith for squatters. Differentiates the kinds of connections that people have to land

*Note: No adverse possession of government property

Purposes:

Utilitarian function in clearing title, don't have to trace records that may be incorrect/conflicting

Invest title in industrious adverse possession

Reliance interest of possessor develops over long term

Anti-speculation: prevent owners from letting land go to waste

Special for land: rivalrous, scarce, cultural notions about property/land ownership

European law: AP violates ECHR

Giving land to squatters in AP violated Convention

Compensation payments to true owner (a liability rule of AP), or else give true owner actual notice of potential AP claim and opportunity to reassert ownership

No AP against government

***Carpenter v. Ruperto* (1982)** p203:

Cleared extra land, claimed AP: court holds good faith essential to AP (here, she knew the land wasn't hers (knowledge of lack of title was accompanied by knowledge of no basis for claiming an interest in the property)

***Howard v. Kunto* (1970)** p208: everyone's on the wrong land, acc. deeds

Actual and exclusive possession for the statutory period established

- Summer occupancy only: this IS continuous

- Continuity rule and tacking consecutive possessors together, ONLY when they are in privity, voluntary transactional relationship (i.e., serial squatters don't count)

Sequential Possession

Finder/prior possessors

Goal of law is to facilitate return of lost property to true owner

General rule: finder has greater rights than all but true owner

Ex., finder2's argument that finder1 is not true owner carries no weight

Conversion: action for tort of using another's property as one's own

REPLEVIN: action/remedy to recover the asset (plus damages) *property

TROVER: action for monetary compensation for conversion (forced sale) *liability

Armory v. Delamirie (Eng 1722): boy finds jewel, brings to appraiser who takes gems...Trover action

- θ loses, even if π is thief, still has stronger title than θ
- Subrogation: acquisition of true owner's rights: succession to another's right/claim
- Focus on possession: "first" possession after true owner
- Land: adverse possession doesn't take hold until there is notice through notorious possession...harder to accomplish with small item, when does the time period start running?
- Finder 1 closer to original owner, easier for owner to track down. Holding for "the benefit of the true owner" (fictitious bailee)
- Unfair to restrict sale of object by finder 1? Removes object from economic use

Exceptions to general rule of finder keeping property

Employers and owners of locus in quo (disfavors trespassers, unless trespass is trivial)

Finder who is on real property for *limited purpose*

No right to find, must return to owner of land

Ex: employees must give to employers (only if found in nonpublic areas)

Ex: visitors also, if found in private place of premises

Clark v. Maloney (1840) p222: action in trover to recover value of logs

All but the true owner can assert title, so need to have policy principle to favor finder 1 (to thus favor the original)

Anderson v. Gouldberg (1892) p224: logging, claims that θ owes money for logs cut w/o authority

θ considered second converter. No split/salvage for good Samaritan second finder.

Fisher v. Steward (1804) p227: beehive on property, told owner.

Local custom gives salvage to finder

Court does not recognize custom, full value to owner

Discoverer was trespassing at the time

Natural growth on land belongs to landowner under accession

Same reasoning as soil principle, meteorite though of as a stone, part of the soil

Objects embedded in soil go to property owner, not finder, even if foreign to native soil

Goddard v. Winchell (Iowa 1892) p229: meteorite

~~[**Alfred v. Biegel** (Mo. 1949): canoe]~~

Objects found on surface go to finder, subject to other rules/exceptions

Hannah v. Peel (Eng 1945) p234: brooch in old house

π finds while stationed in military annex, turns it in

owner of house loses, not the original owner

Finder prevails b/c owner and renter had never used as residents

item NOT a fixture, was not ad coelum, not natural element of land, not embedded

turned on behavior? House owner was absent, π did the right thing to turn it into authorities

Lost Goods

Elwes: land owner doesn't know about boat buried, found by water company, goes to landowner

Water Co.: Rings found in pool, go to landowner

Bridges: sack of cash on floor of shop goes to finder, not shop owner (not part of property...cf. *Elwes* and *Water Co.*)

Looted goods, Met Museum: chain of title is murky, only know where ancient items originated geographically (lots of theft)

Lost property:

- *Lost*: belongs to finder unless true owner appears
- *Mislaid property*: intentionally left with intent to return, belongs to owner of real estate
 - In better position to return to the owner, attempt to preserve TO's rights

- But, only TO knows if property was lost or mislaid
- *Abandonment*:
 - Must have intent and act of abandonment (must be proved, no presumption)
 - Belongs to finder with no reserved right of TO
- *Treasure Trove*: so long concealed that presume TO is dead.
 - In US, goes to finder
 - In UK, goes to crown

Instrumental: rules should facilitate return to owner, encourage finder's disclosure. Acquiring from thief gives that possessor no rights.

Values Subject to Ownership

Personhood

Anticommodification principle: autonomous persons are not objects

Slavery: highly regulated industry, collateral, insurance, doctrine of increase

Newman v. Sathyavaglswaran (2002) p244: deceased child's corneas

- Next of kin have exclusive right to possess bodies of deceased family members: is this a property interest according due process?
- 6th Cir has allowed next of kin to bring suits for cornea removal, quasi-property (stick in the bundle)
- Just b/c you can't SELL doesn't mean there aren't other property interests...remand, gov't justification for taking must be scrutinized
- Dissent: duty toward deceased, not a right in his body

Moore v. Regents of Univ. California (1990) p255: patient has no right to patent his cells, but right to the raw materials? Similar to accession (doctor develops line of cells from π 's lymphocytes)

- Lucrative medical research w/o permission of cell owner
- No precedent for conversion, would then require too much of doctors using human cells in research
- RULE: must first show possession before you can prove conversion. No property in removed cells, so no conversion.
- Policy:
 - Balance of public interest in useful research
 - Legislative domain, not judicial
 - Patient's rights have other non-property protections (like publicity, fiduciary duty, medical procedures w/o consent)
 - Concurrence: morally abhorrent to "own" body parts
- Dissent: can sell for research, just not for transplantation, so why is there no property interest when this is something that can have economic value

Hecht v. Superior Court (1993) p268: order to destroy sperm was in error, surviving children want to preserve existing family unit

- Special category of property b/c sperm holds potential for human life, held for specific purpose
- Property to the extent that deceased had decision-making authority over it.
- Usually party wishing to avoid procreation prevails when parties are potential parents, but here, they are his other children (their family integrity argument fails)

Academic Perspectives:

Demetz:

- Property right if there is a firm expectation about your ability to derive gain from it.
- Economic view: value and expectation interest

Radin:

- Fetishistic, commoditization
- Fungible property distinct from personhood property, warrant different treatment

Moral conceptions/opposition

- Historical fear of slavery
- Utilitarian, better for medical research NOT to propertize

Economic value in personal info, i.e., Facebook, targeted ads, network effects (little value w/o many users)

Public rights

- Navigable waters: right to travel, Commerce Clause regulation
- Navigation servitude: no state or private entity can obstruct or interfere with public's right to free use of waterways for transportation
 - Airspace is a public highway, but if it causes actual damage, then it constitutes a taking, *US v. Causby*
- **Lake Michigan Federation v. US Army Corps of Engineers** (1990) p324: can't privatize land beneath navigable waterways
 - Violates *public trust doctrine* for state to grant the right to construct a lakefill
 - Critical of state attempts to surrender public resources
 - See *Ill. Central RR Co. v. Illinois* (1892) p314, SCOTUS invalidates transfer of submerged land b/c state holds title in trust for people to enjoy
 - Public Trust violated when purpose of legis grant is a private interest (but here, public...)
 - Any attempt by state to relinquish power over public resource is invalid
 - Preserve ability of free travel (but if that is not restricted, then why police the grant so tightly?)
 - E.g., public could still benefit from different use
 - Prevent egregious capture, effective lobbying...
- **Rose, The Comedy of the Commons**: shift in policy of public trust doctrine.
 - Theoretical bases for public right: public trust, dedicatory (implied gift from owners) or custom
 - From commercial explanation, trade expansion...not about preventing capture and keeping networks free for *doux commerce*
 - Rather post-1960s the public trust doctrine is about *recreation and conservation*.
- **Oregon ex rel Thornton v. Hay** (1969) p333: land between high and low tide marks, state owned (common law legacy)
 - Custom, acc. Blackstone
 - Ancient use
 - But state of Oregon isn't ancient. And beaches didn't use to be as valuable
 - Exercised w/o interruption
 - Peaceable, free from dispute
 - Reasonableness
 - Visible boundaries
 - Obligatory
 - Not repugnant or inconsistent with other law/customs
 - Custom met on all counts by *public use of tidal land*
 - Can't prove adverse possession
 - Unearned increment.

Limitations on Owner Sovereignty

Necessity, Custom, Public Accommodation, Anti-discrimination

Protecting the Right to Exclude

- **Criminal and Civil Trespass**
 - Utilize police as enforcement agency, reinforce civil penalties
 - **State v. Shack** (1971) p401: housing migrant workers, doesn't let social worker on land
 - Constitutional challenge to trespass statute: ownership does not include right to bar access to government services
 - Owners should be aware of social policies affecting land
 - Relative insulation of migrant population matters
 - Welfare decision, don't subjugate other legal concerns to property
 - Does not address tenancy rights, simply can't block affirmative steps of social workers to reach an insulated community
 - Criminal trespass
 - Involve police to prevent self-help from escalating to violence
 - **Intel Corp. v. Hamidi** (2003) p412: civil trespass action against emailer to IBM employees
 - No actual damages to email system, not spam, didn't interfere
 - Lessig trumps Epstein: costs to society in the loss of network benefits of cyberspace, NOT like real space.
 - Epstein: negotiate each time with server owner

- Lessig: individual sites can't impose their own rules of exclusion
 - Better as a nuisance claim: nonphysical disturbance
- *Self Help / Repossession*
 - Termination by LL: self-help option, but can't use excessive force
 - Must be peaceable, trend is to restrict SH
 - Must have right to repossess (i.e., tenant in breach w/o remedy in reasonable amt of time)
 - Can't threaten violence, but can enter when T isn't there
 - Alternative: suit of ejectment: may take a long time, T may be judgment proof: L loses \$ in process, would rather have back to lease to another T
 - L sues for possession and damages due to withholding of possession
 - Another alternative: summary possession statutes (eviction hearings streamlined)
 - **Berg v. Wiley** (1978) p428: self-help diminishing in residential context
 - Tenant wins: only lawful means to dispossess a tenant who has not abandoned or voluntarily surrendered (claims adverse possession to landlord's claim of breach of lease) is by *judicial process*, NOT *self help*
 - Tenant contests breach of lease claim, in possession, history of animosity (self-help would likely lead to violence)
 - **Williams v. Ford** (1982) p434: breach of peace only avoided b/c individual did not engage with repossessor
 - Policy options: SH of personal property w/o breach of peace but no SH for real property, or SH w/o breach of peace for both?
 - UCC is not state action: other forms of repo, with security interests outside of UCC, must go through courts
- *Termination by Tenant*
 - Surrender: T relieved of oblig, transfers lease back (by law, if LL acts as such)
 - Abandonment: T leaves, LL doesn't agree
 - LL can: sue T for rent (risk T leaving/judgment proof), relet for T's acct, reserve right to sue for unpaid balance, accept surrender, or sue for damages or for unpaid future rent (less common)
- *Total actual eviction/partial actual eviction (even de minimus)*
 - Cf. constructive eviction: premises disturbed, unfit for habitation (affirmative defense)
 - After LL has notice and reasonable opportunity to cure (i.e., other tenant is a noisy bar)
 - Elements
 - Intentional act of LL breaching duty to T
 - Cause substantial interference w/T's enjoyment, render unfit for leased purpose
 - T vacates premises
 - w/in reasonable amt of time after LL's actions
 - should look as much like actual eviction, tenant must find somewhere else to live
 - i.e., when LL fails to provide basic services
 - partial: part of the premises (rarely used)
 - Partial *actual eviction: portion of premises crucial to use of the whole, total failure of consideration for lease: after notice to LL, T can move out

Exceptions to the Right to Exclude

- *Public Accommodations and Antidiscrimination Laws*
 - General duty of non-discrimination
 - Blackstone: common law imposed on persons who hold themselves forth to the public as engaged in "common calling" ...innkeepers and common carriers
 - Can't refuse w/o reason
 - Charge reasonable prices without price differential
 - **Uston v. Resorts International Hotel** (1982) p448: casino case (card counters)
 - General common law of right to exclude, but limited by right of reasonable access to public places
 - The more private property is devoted to public use, the more it must accommodate the rights inherent in individuals members of the public who use that property
 - Need fact specific, justified reasons for excluding
 - Courts gradually moving entertainment venues into public accommodations category

- Here, Court transferring right to exclude from private owner to a regulatory agency
- Chicago school: market forces will eradicate need for antidiscrimination statutes (economic interest not to discriminate)
 - With increased common law antidiscrimination, eventually, will all commercial entities fall into the “common carrier” category?
 - But, don’t use category, but balancing between public/private interests
- **Shelley v. Kramer** (1948) p456: covenants not to sell to minorities, binding all subsequent purchasers
 - Court: this requires state action to enforce it, so it requires 14A analysis...can’t deny EP, but 14A doesn’t cover private discrimination (here, private covenants)
 - Right to acquire and enjoy property
 - No individual has the right to demand state action (enforcement in court) that results in denial of equal protection
 - Covenants can be made, but can only be voluntarily enforced (state cannot enforce)
 - Later, Fair Housing Act: couched in the Commerce power
- **Bell v. Maryland** (1964) p465: sit-in demonstrators, refusal to serve non-white customers
 - Prosecution for criminal trespass IS state action, regardless of law or prejudice.
 - Allowing discrimination, by having police and courts enforce the preference, makes private discrimination a state action, thus impermissible under 14A
- **Fair Housing Act:**
 - Steps
 - Disparate impact, π ’s burden of proof
 - ∂ ’s burden of proof to show reasonable, neutral and justifiable business interest
 - burden shifts back to π to show that this interest is false and pretextual, and that true reasons are discriminatory (hard to prove)
 - Hypo: income level requirement for rental, which disparately affects men and women.
 - NOT violation, because there is a good reason
 - No discrim for race, color, religion, sex, handicap, familial status, national origin
 - Exclusionary zoning based on suspect class can trigger 14A
- **Dorsey** (1950): Stuyvesant Town excluding blacks, not subject to 14A, state aid insufficient to transmute conduct into state action
 - Legislative intent to leave private enterprise free to select tenants, encourage private venture,
 - Private groups subject to constitutional constraints when they perform functions of a governmental character
 - Tax exemptions, forming a large community w/in the city, but not yet held that these powers make the companies subject to 14A
 - Institutions created to meet social necessities: balance company’s rights and rights of π s to equality of treatment
- **Attorney General v. Desilets** (1994) p471: no discrimination by landlords based on FHA categories (landlord’s religious beliefs against cohabitation by unmarried couples)
 - Statute requires no discrimination based on marital status
 - Reject LL’s arg that this is based on conduct not status
 - 1A balancing test
 - does prohibition substantially burden exercise of religion?
 - Does state have important gov’t interest that is sufficiently compelling (here, marital status has lower standard than race/creed)...remand on this question
 - Dissent: forcing to choose between religion and commercial enterprise is unjustified
 - Familial status: protects people with children (where there is no neutral reason)
 - Marital status: protects unmarried couples (NOT in FHA)

Forms of Ownership

Common Law Estates

Estate measures interest in land in terms of duration

- Freehold: FS, LE, Defeasible Fees
- Nonfreehold: Lease
- 1066 Norman invasion: military/feudal tenures
 - hierarchy of landholding
 - hierarchy and segmentation of time are holdovers

Interests (see p559)

- Retained by grantor
 - Reversion
 - Possibility of reverter (reserve power to grantor, if limitation occurs)
 - Right of entry/power of termination (gives grantor a right of reentry, but not automatic reversion)
- Retained by grantee
 - Remainder (after an event goes to 3rd party)
 - Indefeasibly vested: can't be cut short
 - Contingent: can be cut short
 - Vested subject to complete defeasance: can be partial
 - Vest subject to partial defeasance: open class of successors
- Executory
 - Divests or cuts short another interest on a condition, goes to 3rd party

Types of Freeholds

- FEE SIMPLE ABSOLUTE (FSA): until death, to heirs or heirs apparent
- LIFE ESTATE (LE): until death, then transfers to another
- FEE TAIL
- DEFEASIBLE FEES: until condition occurs

Fee Simple Absolute

- Fee = heritable interest
- Simple = infinite: no limit on succession
- Absolute = no restriction on use or transfer
- Example: O to Mary and her heirs
 - O = grantor
 - "to Mary" = words of purchase, identify grantee
 - "and her heirs" = words of limitation
 - define quality of estate that grantor gives to grantee
 - time/condition restrictions
 - tells how grantee holds the property
 - "And heirs" is code for Fee Simple Absolute

Life Estate

- For life only, profits to life tenant
- Can not "waste"
- May transfer for duration of tenant's life only (LEPAV)
- Code = "for life"
- Example: O to Mary for life
 - O = grantor
 - "to Mary" = purchase
 - For Life = code for LE
- Property reverts to O after grantee dies

Fee Tail

- Lineal heirs of the body (direct heirs)
- Example: O to A and the heirs of his body
- Code = and the heirs of h. body"

Defeasible Fees (present possessory estates subject to conditions)

Or, Fee Simple, (no absolute)

- Fee simple determinable, FSD (reversionary): ends on named event
 - Grantor to grantee, with condition
 - Grantor retains reversionary future interest
 - E.g., O to N, so long as N uses for library
 - N = FSD
 - O = possibility of reverter in FSA
- Fee simple subject to a condition subsequent, FSSCS (reversionary): can be ended by action
 - Grantor to grantee, with condition subsequent
 - Grantor retains reversionary future interest
 - E.g., O to N, but not if N uses as parking lot
 - N = FSSCS
 - O = right of entry, aka, power of termination
 - O must make affirmative step to reclaim right of entry, power of termination
 - FSD v. FSSCS
 - Grantor's intent v. magic words
 - Duration v. divesting
 - Automatic v. voluntary
 - Condition precedent v. condition subsequent
- Fee simple subject to an executory limitation (executory): power to end granted to 3rd party
 - Grantor to grantee, with any sort of condition on user
 - Future interest goes to 3rd party
 - E.g., O to N on condition that land be used as soccer field, if not, then to C
 - N = FSSEL (SEE PPT ON THIS)
 - C has executory interest

City of Klamath Falls v. Bell (1971) p568: granted to city for use as library. If not, revert to grantor?

- Company had fee simple absolute, divided into FSSEL (to city) and Exec interest (shareholders)
 - Exec interest voided under RAP... court has two options
 - Expand city's interest to FSA
 - Revert to grantor (shareholders)...reverter is alienable
- "so long as" → fee simple determinable (qualified)
- Revert to grantor company's shareholders and heirs...shareholders had *executory interest*
- Rule against future interests that linger for eternity: executory interests are suspect, see Rule Against Perpetuities
 - Don't create indefeasible estate in first grantee when subsequent executory interest is void under RAP
- Possibility of reverter, instead of executory interest: court rules there is still a condition precedent on a defeasible fee, transforms to FSD

Reversion: what O has after "O to Mary for Life" (grantor retains reversion)

Future Interests (Present interest in future possession)

- Vested Reminders: no condition precedent to possession, grantee is ascertained
 - Vested Remainder
 - Grantee is ascertained and no conditions precedent
 - E.g., John, in "O to Mary for life then to John"
 - Vested Remainder Subject to Open (VRSO)
 - Grantee ascertained, but class of grantees might expand
 - E.g., "then to Art's Children" and A has 1 child
 - Vested Remainder Subject to Divestment (VRSD)
 - Grantee ascertained, but condition subsequent
 - E.g., "then to Art but not if he fails to graduate law school"
- Contingent Reminders: condition precedent and/or grantee is unascertained
 - Grantee unascertained, e.g., "then to Anne's children" and at present, Anne has not children
 - Condition precedent, e.g., "then to Anne if she has graduated law school"

- Condition precedent v. subsequent
 - Analytical: sequence of grant
 - Precedent: grantee can't receive until satisfaction of condition
 - *Keywords: if, while, during, until, so long as*
 - Subsequent: grantee receives but will be dispossessed if condition fails
 - *Keywords: provided that, but if, upon condition that*

Williams v. Estate of Williams (1993) p563: ambiguity in the will. Assume that deceased has successfully expressed will in the document

- When ambiguous: frequently when homemade, w/o lawyer
- 3 daughters inherit farm, not to be sold during their lifetime, interest ceases if they marry
- One daughter thinks she has FSA, others think they have fractional interest in estate. Daughter really has life estate defeasible
- Intention was to compensate daughters for foregoing marriage... can lose interest if marry, NOT an absolute gift

Axioms of estates

- Account for all parts (present a future interests of the FSA)
 - Who has it now
 - Who will get it later
 - Interest retained in reversion or possessory interest, last in chain must be FS, or else chain would end with no one to take possession
- Future interest always has a present value
 - Legally protected present interest in possible of definite future possession
 - Can be traded
- Once a reversion, always a reversion
 - O to Mary for life → M = LE and O = reversion in FSA
 - O gives reversion to B, B has reversion in FSA
- Living persons have no heirs
 - They have "heirs apparent," but heirs are determined at moment of death
 - Heirs = intestate succession (where there is no will)
 - Grantees in the will are *devisees* for land and *legatees* for personal property

Maintaining the System: Waste & Restraints on Alienation

- **Brokaw v. Fairchild** (1929) p596: 5th Ave mansion, better use as residential development (says holder of LE) but heirs apparent (those with contingent remainders) don't want mansion razed
 - Doctrine of waste, interpreted strictly to prevent ∂ from wealth-maximizing plan
 - LE tenant may generally use and enjoy...but here, strict rule, even ameliorative waste prohibited
 - Any act by life tenant that does injury: enjoy estate in reasonable manner such that it will pass unimpaired to those holding remainder
 - Most state courts moving toward allowing *ameliorative* waste (permitting improvements that increase estate's value)
- **Mountain Brow Lodge v. Toscano**: Lodge wants to quiet title acquired from ∂ , restrictions against alienation: has to be a club
 - Restraints on use generally don't trigger policy against restraints on alienation
 - ∂ wants land back, FSSCS allowing reversion
 - personal use restriction upheld
 - when is a restriction on *use* actually a restriction on *transfer*?

TRUSTS (SEE PPT)

- Seisin
- Statute of Frauds, 1677: abolished seisin
- Equitable uses/trust
 - Trusts: Key terms
 - Settlor = creates trust
 - Trustee = administrator
 - Beneficiary = benefits from property
 - Fiduciary Duty = "highest degree of honesty and loyalty"

- Active (strawman trustee) and Dry (managerial trustee)...degree of T's discretion
- Why use trusts?
 - Avoid primogeniture, O can devise property
 - Avoid feudal incidents (taxes), i.e., give to T during O's life, avoid taxes to lord at death of O
 - Tax advantages
- Property law revolution:
 - Statute of Uses, 1536
 - Common law enforces uses, pro/retrospectively
 - Equitable interests executed immediately upon grant, made legal interests
 - Statute of Wills, 1540
 - Common law courts can recognize devises/wills
 - No more requirement of primogeniture (remains default)
- Executory Interest
 - Divests a present vested interests
 - Does not simply follow termination of prior estate, follows a VRSD or a FSSEL
 - VRSD becomes FSSEL upon possession, until condition is satisfied
 - Springing
 - In grantor, delayed conditional grants
 - Shifting
 - Divests a vested interest in another grantee
 - 3rd party's interest following defeasible fee:
 - O to A as long as land is farmed, then to B
 - A = FSSEL
 - B = EI

Merger

- Two successive vested interests are owned by the same person
 - O to A for life, O transfers reversion to A
 - A has LE + reversion = FSA
- Destructibility of contingent remainders, aggressive merger: now we no longer destroy intervening contingent remainders

Rule in Shelley's Case

- If an instrument creates life estate in A, and remainder in A's heirs, while both are legal/equitable interests, then A holds remainder himself (possible merger)

Rule Against Perpetuities, problems p617

- Can control use of property through *one generation plus the next up to age of 21*
 - No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest
 - The measured life need not be the life of the grantor (i.e., can be life of child, even if grant is to grandchild)
- Unvested, future interests: CR, EI, VRSD
 - CR: must ascertain identity of taker and satisfaction of all conditions
 - EI: person with EI must take possession
 - VRSD: closing the class
 - Lack of vesting, b/c identity is indeterminate or unrealized contingency
- Applications
 - Temporally indefinite conditions + EI in third party
 - Remainder over the 2nd generation beyond the one living and closed at the time of transfer
 - No future interest is valid unless it must vest, if at all, 21 years after some life in being at the creation of the interest
- RAP Test
 - Measure any remote contingencies against perpetuities period (life + 21)
 - Strike those that don't necessarily vest or fail to vest in time
 - Determine what the remnant estate is and who gets it
 - Validating life
 - Ascertain the party alive at the time of transfer

- Who affects the vesting of the suspect future interest
 - Don't pick unascertained parties OR members of expanding classes
 - Example: O to A for life, then to A's children when they turn 21
 - A = LD
 - A's children = CR (FSA). If already 21, then VRSO (FSA)
 - O = reversion
 - BUT change to "A's children when they turn 22"
 - We don't know w/in 21 years of A's death whether the class has reached (technical rule)
 - NO LIMIT on time restrictions when grantor retains future interest
- ***Symphony Space v. Pergola Properties*** (1996) p620: hard and fast RAP, don't know if/when they would exercise the right
 - Options to purchase are NOT exempt from RAP
 - Broadwest realty owned the building, no permanent tenant
 - SymSpace rented, then bought at low price, leased back for \$1/year
 - Sale and Leaseback: SymSpace gets tax exemption, Realtor gets lower taxes...allowed Realtor to postpone sale until property value increased
 - Common law rule seeks to prevent control over future disposition of property
 - States doing away with RAP?
 - Ideological, don't restrict bequeathment
 - Attract trusts (can be taxed)
 - Lobby from banks/lawyers

Interaction with Estate Tax

- Life Estates are not part of decedent's estate, shift automatically to remaindermen
- Settlor could avoid estate tax through successive life estates
- Feds closed this loophole, no successive LEs to avoid tax, tax LEs every few generations (see notes for rates)
 - RAP: new estate would form every 2 generations
 - As states abolish RAP, successive life estates aren't taxed

Co-ownership and Conflicts between Co-owners

- Tenancy in common
- Joint tenant
- T by Entirety

Partition

Delfino v. Vealencis (1980) p637: π wants partition by sale, but get partition in kind

- Π wants to develop, ∂ wants to run garbage business; trial court ordered land sold at auction and proceeds divided
- Partition by sale only if
 - Physical attributes of land as such that partition in kind is impracticable or inequitable, and
 - The interest of the owners would better be promoted by a partition by sale
- ∂ has to pay owelty (for nuisance of her garbage hauling business), but vindicates her desire to remain on land and continue business

Contribution/Accounting

- If tenant in possession rents to 3rd party, then non-possessing tenant is due her share of rent.
- If tenant in possession is using land fully, then not require to pay rent to the non-possessing cotenant
- If cotenant in sole possession makes improvements w/o consent of others, then there is no right of contribution
- Pro rata share is required, if cotenant acted in good faith with bona fide belief that he was the sole owner, or where repairs were essential to preserve the estate.

Gillmor v. Gillmor (1984) p645: sole user wants to remain on land to graze livestock, gave notice to cotenant, who files for partition (trial court found ouster)

- Cotenant can sue for share of rents/profits if he has been ousted from possession
- Mere exclusive use is not enough to prove ouster: must *necessarily exclude* the other cotenant

- “when a cotenant out of possession makes a clear, unequivocal demand to use land that is in the exclusive possession of another cotenant, and that cotenant refuses to accommodate the other cotenant’s right to use the land, the tenant out of possession has established a claim for relief”
 - Ousted tenant must show that she’s prevented from exercising right to use land
- Note: once there is an ouster, clock starts ticking on Adverse Possession

Severance

- Either joint owner can sever joint tenancy, becomes tenancy in common
- **Harms v. Sprague** (1984) p650: dividing a mortgage, transfer of mortgage by mortgagor seen as transfer of title to creditor
 - One JT mortgages, then dies. Survivor is not successor, but b/c of JT, gets full title and lien disappears (if the non-mortgagee JT had died first, the lien would remain)
 - Lien interest might sever the tenancy, and change it to tenancy in common
 - Does NOT effectuate a severance of joint tenancy: If bank had been more sophisticated here, it would have required both JTs to sign
- Secret severance: no notice required to sever joint tenancy

Joint Accounts

Marital Interests

O’Brien v. O’Brien (1985) p665: are professional licenses equitable property? YES

- Marriage as economic partnership
- She supported him while he got his medical degree
- Maintenance: determining value, how much on average does he earn MORE than an average college graduate (this constrains his choices, he must keep making this much to afford payments to her)

Entity Property

Landlord/tenant

Lease need not be based in consideration: but typically for limited duration in exchange for rent

Lessor retains reversion

FORMS:

- Term for years
 - Expires at end of defined period, non-freehold: expiration is automatic and self-executing
 - Landlord “demises” or “lets” his interest
 - Must recited the length of term, 1st and last days
 - Generally inheritable, unless requires tenant to perform personal services
 - Absent agreement, alienable (but generally restricted in lease)
- Periodic tenancy
 - Indefinite term w/periodic rent (e.g., month-to-month)
 - Term is tied to frequency of payment (unless otherwise noted)
 - Terminated only by notice effective at end of period (either party)
 - Most states statutorily shorten notice periods
 - Can be created by implication, i.e., when term for years expires and tenancy relationship continues (terms and conditions are then carried over)
- Tenancy at will
 - Continues by mutual agreement, not inheritable
 - Where landlord/tenant relationship is informal, where it’s clear that you have TatW, can’t assume it’s a P.T. or TforY by having notice to tenant or payment at intervals
 - Can find by process of elimination: if no term or period, then TatW
 - Rarely used in business context b/c of uncertainty
 - Many states: all unwritten/oral leases are TatW, most still require 30 days notice for LL to terminate
- Tenancy at sufferance
 - Type of wrongful occupancy: enters in valid lease, then holds over
 - LL can either evict (holdover must be wrongful and nontrivial), i.e., voluntary, in his control
 - i.e., delay in vacating b/c of LL’s failure to provide services, no eviction
 - or LL can consent & hold T liable for a similar term

- holdover as trespass: LL needs not give notice, any time
- renewing lease: same term, or term of rent payment?, depends on juris, but never > 1 year
- e.g., staying after sale, after foreclosure: wrongful occupation
- Holdover: not imposed for trivial (keeping keys, leaving some furniture) if doesn't interfere with LL's repossession

LL's duty to deliver possession: i.e., ousting previous tenant, duty on LL (Eng), on tenant (Amer rule)

- Covenant to pay rent is independent covenant
- Eng rule better for residence
- American for long term lease, farm/comm.: tenant responsible for ousting those who enter after lease in effect
- Holdover: no imposed for

POSSESSORY RIGHTS

- *Covenant of quiet enjoyment, pay rent (independent)*
 - Traditionally only damages for breach, still owe rent
 - But now, breach is basis for constructive eviction
 - If moves out, and court finds no const. evict., then T still owes rent
 - Some jurisdictions, T seeks declaratory judgment
 - Scope of quiet enjoyment: usually when landlord has a duty
 - Basis for holding assignee liable for rent
 - Intent
 - Privity of estate
 - Touch and concern the land
 - Silent consent provision: most jurisdictions, sublease contract → LL must have commercially reasonable basis to withhold consent
 - Transfer of LL's reversion is subject to outstanding leases (new LL in privity of estate, but old LL has privity of K)
- *Tenant: duty not to waste (same condition minus wear and tear)*
 - If fixture attaches, T can't remove at end of lease
 - Intention to annex important, can't be removed w/o damages
 - Residential: minor repairs duty of tenant, L must meet minimum standards, warrant of habitability (major repairs, generally)
 - Duty to pay rent independent, T gets shortchanged but also windfalls
- *Leasehold...independent covenants (duty to pay rent and duty of landlord)*
 - **Paradine v. Jane** (1647) p691: must pay rent, even during military invasion (unfair, but tenant also gets windfall advantages of the land)
 - **Smith** (1897) p694: landlord sues for rent, though he hasn't done repairs
 - Interference with tenant's ability to possess part of the land is an interference with covenant of quiet enjoyment
 - Negates corresponding (and now dependent) covenant to pay rent
 - *De minimus* exception: any interference is breach of covenant of quiet enjoyment, but de minimus is Really small...prevent landlord from occupying part of the leasehold. Here, no de minimus exception, even though wall encroached only a foot.
 - **Sutton v. Temple** (1843) p696: lease land for grazing, poison kills animals. Tenant still has to pay rent (again, would get to enjoy windfall)
 - *Cf. Smith v. Marrable*: mixed real and personal property (furnished home)
 - Latent defect: goes to who bore the risk to investigate
 - **Blackett v. Olanoff** (1977) p703: mixed use, residence and (loud) bar, tenants leave and use constructive eviction as defense to landlord's suit
 - Constructive eviction: landlord has performed some act with the intent of depriving the tenant of the enjoyment and occupation of the whole or part of the leased premises
 - Landlord could have foreseen the conflict of use
 - Agreement between landlord and commercial tenant to keep noise down, aggrieved tenant tried to get landlord to use his power to stop the noise
 - Classically, defense after the fact, after tenant leaves
 - Should rule require tenant to actually move out
 - Risk losing case and having to pay rent anyway
 - Can be partial: don't pay for part of leasehold that you can't use

- **In re Kerr** (1939) 707: Great Depression, bankrupt tenants
 - Landlord releases for less rent, thought he would still collect from original tenants
 - Easier for landlord to get money from new tenants
 - Court: reletting could only be during term of original lease
- Abandonment/Surrender
 - If landlord releases, changes lock, then don't have to pay rent
 - **Sommer v. Kridel** (1977) p735: here, landlord left apartment empty for duration of leasehold, then sued tenant who had never moved in
- *Dependent Covenants, Note on Transfers*
 - **Medico-Dental v. Horton & Converse** (1942) p712: pharmacy tenant wants no other pharms, problem when doctor starts running a pharmacy basically, out of his office
 - Landlord considers covenants independent, tenant argues landlord is in breach of K
 - Covenants are mutual and dependent: restrictive covenant of θ 's lease was dependent
 - Was the restrictive covenant breached by leasing for the prohibited purpose, or by lessor's acquiescence in conduct of another lessee...court affirms finding that π did lease for that purpose, and was in breach
 - Transfer: right of reentry on default
 - Privity of estate between lessee and sublessee: landlord can sue sublessor because of privity, though no agreement between landlord and tenant 2.
- *Implied Warranty of Habitability*
 - Exception to rule that covenants are independent
 - Is also covenant for LL to maintain condition
 - Usually found in local housing codes
 - Breach: LL must have notice of defect, defect must be substantial, LL had reasonable time to repair & has not
 - Some jurisdictions have implied warrant of suitability for purpose in commercial context
 - LL can't evict T who sues for damages or withholds rent for breach of this covenant, when eviction comes shortly after T reports violation, see as retaliatory
 - Frustration of purpose: commercial: supervening and unforeseeable events
 - LLs liable for T's injuries in specific areas (common areas, repairs, negligent repairs); negligence probably not strict liability
 - Protect against foreseeable crimes
 - Usually for residence, exculpatory clauses in leases are void as public policy
 - **Javins v. First National Realty** (1970) p719: judicial creativity on part of DC Circuit judge. Racial turmoil, urban slums
 - Tenant's arg for not paying rent: uninhabitability.
 - Implied warranty under common law for all residences, court finds that duty to pay rent is dependent on landlord's provision of habitable conditions
 - If not satisfied, gives rise to usual remedies for breach of contract
- *Privity*
 - Of K: b/c of lease
 - Of estate: mutual interest in the leased premises
 - Allows LL to collect from an assignee (but not sublessee) w/o express K
 - Assignment: whole of unexpired term (new tenant liable to LL)
 - If assignee doesn't pay, T can be Surety: bound to perform if another who is primarily liable does not
 - Subrogation principle: T = LL for purposes: burden to enforce the obligation
 - Sublease: partial transfer if < full remaining term (creates new LL/T relationship between sublessor/ee)
 - If T has right of reentry, then sublease, not assignment
 - LL's consent to transfer does NOT implicitly void privity of K
- *Rent Control*
 - Judges put a floor on conditions, and legislature puts a ceiling on rent
 - Prevents landlords from charging higher prices for upkept apartments
- *Co-ops and Condos*
 - **Nahrstedt v. Lakeside Village Condo Assoc.** (1994) p782: one owner has cats, no pet policy
 - Reasonableness—doesn't attach to objecting homeowner, but in view of purposes and aims of collective unit
 - Pet owners have other housing options

- Difference between lease provisions, and by-laws that are created by co-op: latter gets reasonableness standard
- Intrusiveness of associations: condo ass'n takes away some property rights, glorified tenancy
- **40 West 67th St. v. Pullman** (2003) p793: most shareholders wanted troublemaker tenant out
 - landlord has burden of proof in landlord/tenant case, but burden shifted in this case

Law of Neighbors / Private Land Use Controls

SPECTRUM

Private
 Grantor Restrictions
 Servitude Restrictions (present owner has encumbered the property)
 Common Law Restrictions (RAP, nuisance)
 Legislative Regulation
 Eminent Domain
 Public

Nuisance: substantially and unreasonably interferes with π 's use and enjoyment of land

Predates covenants/zoning as self-regulation of communities

Intangible (tangible is usually trespass)

Some states require actual invasion, some just the prospect of future harm

Interference with enjoyment (i.e., crackhouse, fuel tanks) can be reflected in decline in fair market value of π 's land

Tests

- Historically, no interference allowed
- Balancing utilities: harm to π against social utility of ∂ 's actions
 - Incompatible uses: generally, nuisance is the one either:
 - Less suited to the general locale, or
 - The last in time (first/existing use prevails)
- Favor finding of some relief but not injunctions, as 'nuisance' often caused by major economic entities (move from property to liability)

Substantial interference: person of normal sensitivities would consider it substantially and unreasonable if either:

- Gravity of harm outweighs social utility
- Harm to π is grave and greater than π should bear w/o compensation
- Grave harm, and ∂ 's financial compensation would not make ∂ 's conduct unfeasible
- Grave harm, and ∂ could avoid w/o undue hardship
- Grave harm, and π 's use is well suited to locale, and ∂ 's is not (i.e., zoning)

Intentional and unreasonable OR negligent, reckless, or ultrahazardous activity (Restmt §821)

"Unreasonable": gravity of harm > utility of ∂ 's conduct (Restmt §826)

if utility > harm, can ∂ pay compensation and continue activity?

Balance utilities to find injunction, balance equities to find relief

i.e., monetary damages where ∂ provides social benefit and can't avoid the nuisance

Rights and Duties

Adams v. Cleveland-Cliffs Iron Company (1999) p938: aesthetic harm, subjective, context and location matter

Social value of competing uses, monetizing suburban living style and existence of factory (easier for latter)

Intrusions of dust, noise, vibrations are nuisance, not trespass

St. Helen's Smelting Co. v. Tipping (1865) p948: damages to crops from smelting

Not a suitable place for this trade (locality rule)

Rule 1: property rule

Luensmann v. Zimmer-Zampese (2003) p953: racetrack case

Noise and vibrations from racetrack:

But new development is not the only source, already in a noisy area

Rule 3: δ 's right, property rule

Not a nuisance per se (hasn't been deemed inappropriate by statute)

Remedies

Boomer v. Atlantic Cement Co. (1970) p956: switch from property to liability rule, but subjective values difficult to monetize

Got damages, but no injunction (economic consequences of injunction, disparity)

Rule 2: π has right, liability

Spur v. Del E. Webb Devel. Co. (1972) p964: cattle feedlot near residential area

Public nuisance: affects a large number of persons

Rule 4: δ 's right, but force sale to π

δ came to the nuisance: no relief if you knew you were coming to a nuisance

Servitudes

Right to use/control another's land

Private land use regulation

Most, unlike contracts, bind people who are NOT party to the deal

"Dead Hand" binds successors to title

Functions:

- Gives A right to use B's land
 - Easements, profits, license
- Gives A right to restrict B's use of B's land
 - Negative easements, covenants
- Gives A right to impose obligation on B to use land in a certain way
 - Equitable servitude?

Five Types:

Licenses

Profits

Easements

Real Covenants

Equitable Servitudes

License: privilege to use property possessed by another: revocable at will

Baseball Publishing v. Bruton (1938) p972: not a lease b/c no possession.

Lease conveys an interest in land, but license only excuses what would otherwise be trespass (no interest, need not be in writing)

- Licenses are revocable at will by grantor
- Contracts are not revocable at will w/o damages (but no specific enforcement or injunction)
- Such as invitation, ticketing

Profit: right to enter w/o trespass liability and remove items in nature (fish, e.g.), no notable difference from easement (right to take profit from land: harvest, forest, minerals)

Easements:

- Irrevocable right to use another's land for a specific purpose
- Protects against 3rd party interference
- Easement is an irrevocable property right, however. Π can get specific performance or injunction to force grantor to honor the grant
- Not a normal incident of possession of any land owned by the possessor of the easement

*property owners should identify easements as such so that user doesn't try to seel as FSA or FSD

Examples: driveway, path, utilities poles, railroad tracks

TYPES

- Easement in gross: Individual Person Benefits

- regardless of whether person owns property (unless assignable, ends w/death)
- i.e., most profits and licenses are in gross, owned by an individual who may not reside nearby
- Easement appurtenant: benefits owner of a particular parcel of land (Dominant Estate)
 - Relationship between two plots of land
 - Use is incident/annexed to ownership of the dominant estate
 - Courts prefer E.A.
 - Dominant is the estate *benefitting* from the easement
 - Servient is the estate *burdened* by the easement

Affirmative Easement: right to go on land for specific purpose

Negative easement: right to prevent possessor of servient estate from doing some act

- Airflow, light, channeled water flow, lateral support
- View, access to solar energy, *conservation*
- Most others not recognized, dealt with in restrictive covenants and equitable servitudes

EASEMENT LIFECYCLE

Creation: express, implication, prescription

Scope: limited by use and identity of user

Termination: merger, abandonment, prescription, e.g.

EXPRESS

- Reservation: grant property to grant; regrant of easement to original grantor
- Exception: statement that property might be subject to easement, need separate deed
- Reservation to a stranger to the deed: usually invalid, reserve easement for 3rd party

Statute of Frauds requires in writing (otherwise, just a license)

But, easement by estoppel if servient estate owner changes his behavior in expectation of E, and claimant acts in reasonable reliance (i.e., improves)

Past performance exception to S.of Frauds

Court might also find an irrevocable license

IMPLICATION

Prior existing use

Use is in place at the time land was divided (i.e., oversight not to include easement, likely intent)

Requires:

- Unity of title is severed
- Use was in place before severance
- Use was visible/apparent at time of severance
 - Discoverable by a reasonable inspection
- Apparent continuous use
- Reasonably necessary for enjoyment of dominant estate
 - Reasonably necessary (strict necessity is for "necessity")

Necessity

Egress/ingress, right-of-way, esp. for landlocked property, where landlocking destroys use such that parties MUST have intended an easement

Servient estate owner has first opportunity to locate the easement

Once located reasonably, only moved by consent

Requires:

- Unity of title severed
- Necessity existed at time of severance
- Easement is strictly necessary (great necessity)

Implied easement doctrine: why favor subdivided grantees? Grantor KNEW he was landlocking himself

Schwab v. Timmons (1999) p979: requested easement for landlocked land (necessity)

Easement by necessity only exists where an owner sells a landlocked parcel to another;

Then grantee gets right of way over grantor's land

Here, πs became landlocked because they sold off their access to a public road

PRESCRIPTIVE

By long term adverse use (similar to Adverse Possession)

Requirements

- Actual use (physical presence, NOT for negative easements)
- Open and notorious use (such that landowner would know)
- Hostile use (adverse, claim of right...w/o permission, NO acquiescence: if act as licensee you lose the claim; also, friends/family seen as having permission)
- Continuous and uninterrupted use (changing location of easement starts a new one, statutory time starts over)
- Exclusive use (most juris don't require, but some see it as permissive if same use as landowner)
- Statutory prescriptive period runs (usually same for adverse possession)
- (some juris require color of title)

Warsaw v. Chicago Metallic Ceilings (1984) p986: driving delivery trucks across *d*'s land

- actual use
- not exclusive use (but exclusive of 3rd parties)
- continuous: takes different route each time, but that's too formalistic of a rule, says court
- open and notorious, since both sides know
- Court grants prescriptive easement
 - Alternative would have been license to use land: revocable, but destroys adverse use element

Downsides of liability rule

- Π gets use cheaper, incentives for adverse use
- Discourages bargaining beforehand, just use
- Might lose easement if you don't bring a suit

Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five (1959) p1001: bad faith

- Former partners, rivals of adjacent plots: spite wall casts shadow on pool
- No legal right to free flow of light and air, market value decreased (complaint dismissed)
- Not typical nuisance case, allow reasonable interference, shadows not invasive enough?

Penn Bowling Recreation Center v. Hot Shoppes (1949) p1009:

- Can't use easement to benefit an adjacent nonspecified parcel (only for the dominant estate, even if owned by same entity)

Assignability:

Commercial Easements in gross are assignable

Personal Easements in gross are generally not, unless expressly stipulated

Divisibility:

- Easement appurtenant divided as dominant estate is divided (if it doesn't overwhelm servient estate)
- Easement in gross
 - Exclusive, may authorize others to use
 - Nonexclusive, may not (though servient estate owner may allow others to use)
- All multiple owners sharing an easement have a veto action

SCOPE OF EASEMENTS

Location

- Express grant must identify
- Prior use and prescription: apparent from use
- Necessity: located after recognized, servient owner has first opportunity
- Can only be changed with both parties' agreement, otherwise misuse

Intensity

- Don't overburden servient estate, original intent and reasonable
- Foreseeable changes in surrounding area and society

Non-dominant parties

- Can only benefit the dominant estate, not adjoining property
- Even if owner of dominant estate also owns adjacent property

Maintenance

- Can make improvements w/in scope of use, do not burden servient estate
- May enter servient estate to repair, but don't damage

TERMINATION OF EASEMENTS

- By terms of grant (time limit/conditions)

- Purpose for easement ends (esp. if implied by necessity)
- Merger (one owner purchases both dominant and servient estate)
- Egregious misuse (more than regular misuse, that gets injunction)
- Release (in writing to release easement back to servient owner)
- Abandonment (requires proof of INTENT, difficult to prove, non-use alone insufficient)
- Estoppel (easement owner consents to conflicting use by servient owner, estate owner changes position in reliance, and easement owner knows/should know that estate owner would do so)
- Prescription (servient estate owner has adverse use, inconsistent with existence of easement)
- Recording acts (i.e., risk sellers/buyers w/o constructive notice of easement)
- Eminent domain (gov't must compensate easement owner)

Real Covenants and Equitable Servitudes

Promisor agrees to use land in a certain way that benefits the promisee (usually homeowners associations, both promisor/ee)

Affirmative: require owner to act/pay/maintain

Negative/restrictive: prohibit uses

Real Covenants run with estate (monetary or injunctive relief)

Equitable Servitudes run with land (ES easier to enforce, injunctive relief only)

Burden/benefits:

For RC to run on burdened estate

Intent

Notice

Touch and concern the land

For RC to run on the benefited estate

Intent

Touch and concern

Vertical privity (weak, some duration)

No notice (though usually there will be)

For ES to run on the burdened estate

Intent

Notice

Touch and concern

No need for either vertical or horizontal privity

For ES to run on benefited estate

Intent

Touch and concern, except when in gross

In gross: basically, conservation easements

Intent: intent to bind and benefit successors

"heirs and assignees" language

"covenant runs with the land, is appurtenant to the land"

Touch and concern: reasonableness of binding successors

Generally, payment of money doesn't not T&C, (ex, water delivery, promising to support zoning regs)

But dues to homeowners assoc. usually does satisfy T&C

T&C both burdened and benefited property

E.g., right of first refusal is collateral to the land, no T&C (can't continue indefinitely, esp. b/c violates RAP).

Personal, not appurtenant.

Courts generally:

Courts are wary of affirmative covenants as compared to negative

Dislike open ended covenants (original parties may not foresee longterm consequences)

Courts disfavor unreasonable restraints on trade

If benefit is personal, original signatory may still enforce covenant after sale

If benefit it to the estate, new owner can enforce covenant

Approaches:

- Burden runs if benefit is personal or T&C benefited property
- Burden does NOT run unless T&C both benefit/burdened property

- Burden does NOT run as RC unless T&C both, but ES can run even if benefit is personal and T&C burdened land
- Burden does NOT run as RC unless T&C both, but ES can run even if benefit is personal and T&C burdened land, and either of the original parties is in the lawsuit

Privity

Negative covenants: neither privity required

Affirmative covenants: obligation, vertical privity required

Horizontal: (between original promisors)

*only if original party transfers an interest in land to another
easements, leases, and freehold estates

*Transfer of property and creation of covenant must be simultaneous

i.e., no RC where both already own the property, no H.Priv.

but, Mass. only, no HP for fee simple, only easement/lease

States are dropping HP requirement, just notice to burdened party (merge with ES)

Some states require HP for burden to run but not benefit

Original promisor burdened regardless, but HP required to enforce against subsequent owners

Simultaneous/successive interests

Landlord/tenant

Easement holder (dominant/subservient estate)

Present interest-future interest (life tenant and vested remainder)

Grantor-grantee in granting instrument

Most cases are grantor/ee: instantaneously successive, not simultaneous interest

Vertical: (between original promisor and subsequent owners)

Same estate as original covenantor/ee

Distinguish holder/owners and possessors (burden only runs for entire ownership, not for leases &c)

Adverse possession starts a new chain of title and breaks vertical privity

Hypo: Neighbors A & B, A agrees to use land for residential only, runs with land

Record the agreement

A sells to C, who builds starbucks

Can B sue for damages?

Same facts, benefit side

B sells to C, A builds starbucks

C can enforce real covenant (no need for horizontal privity)

Notice (ES)

Actual, constructive (deed records) or inquiry (viewing surrounding properties)

Only burdened parties need notice (but benefitted parties usually know anyway)

CREATION: like easements, express or implication

EXPRESS

RC can't be implied, must be in writing

Subject to statute of frauds

IMPLICATION

ES only (i.e., subdivision)

Key is "general plan"

Implied reciprocal servitudes are ES, not RC

COMMON RC/ES SCHEMES

Subdivisions: common owner initially subdivides

Incorporates covenants that purchases find desirable

Courts impose requirements, often need common scheme or general plan of development

Gives all subdivision owners *standing* to enforce (entire tract is benefitted/burdened)

Implied reciprocal negative restrictions (usually have constructive and inquiry notice)

A recorded subdivision plat constitutes notice

Inquiry notice by uniform neighborhood characteristics

Such that reasonable person would have inquired

High percentage of lots are subject to same cov't

Lots sold prior to common scheme are not bound

Only burdens lands that are geographically part of tract

*Note: compare consequence of violating a condition (reversion) and covenant (damages/injunction)...most restrictions are covenants, not conditions.

No privity requirement for ES, so easier to get injunctive relief but not money damages.

Covenants Cases

Tulk v. Moxhay (1848) p1014: negative servitude not to build, affirmative servitude to maintain land, easement to permit use in park

Negative servitude not enforceable as real covenant: NO horizontal privity: requires simultaneous interests

Enforces as equity, can create equitable servitude w/o horizontal privity

Only need vertical privity (i.e., third parties can't enforce)

Neponsit v. Emigrant Industrial Savings Bank (1938) p1019: touch and concern the land: easy case is residential purpose only, but here is a tough case, paying maintenance fees

Touches the land because it affects the property value (much of the law in this area is about subdivisions)

Economic value test may be overinclusive

Here, owner is foreclosing bank, owns lots of these properties and doesn't want to pay the fees

Eagle Enterprises v. Gross (1976) p1030: seasonal water supply, but when residents move in year round they dig a well

Water delivery doesn't T&C the landowners' concerns: water purchase is contractual, not attached to property

Sanborn v. McLean (1925) p1034: residential restrictions, predates zoning (*Common Plan*)

Developer forgot to put real covenants on some plots

Court enforces: ∂ should have known from the neighborhood that all the plots were subject to reciprocal negative easement

Notice was constructive, not formal (decades of compliance by all neighbors)

Private zoning CAN be more restrictive than public zoning

Bolotin v. Rindge (1964) p1042: boulevard going commercial, so border plot wants free of covenant (*Termination of Covenant*)

No negative economic impact on other plots; insufficient

Non-pecuniary benefits to residential are

Discount on property because it was under covenant, got the benefit of the bargain

Peckham v. Milroy (2001) p1046: can't use zoning to prohibit day care centers, even in residential areas (public policy)

Should court have extended this zoning policy into the private covenant? Like a reasonableness test (that is used in condo association cases)

Conservative easements: get tax deduction to dedicate property as conservancy: but this benefits golf courses...

*NOTE Third Restatement (merger of ES and RC, do away with privity, more like K than property)
valid unless illegal, unconst, violates public policy, restraint on alienation or trade

TERMINATION OF RC/ES

- By terms
- Merger
- Release (all benefited owners must sign)
- Rescission (all persons with standing, covenant void from ALL)
- Unclean hands (π can't enforce if he has violated cov't himself, minor infractions don't count)
- Acquiescence (π endures multiple violations by many lots, estopped from enforcing)

- Abandonment (high number of landowners endure violations, substantial neighborhood change such that original covenant is subverted)
- Laches (waited too long to bring suit and ∂ harmed by delay)
- Changed conditions (no longer serves purpose, internal NOT external change, i.e., border lots become unsuitable b/c of external change, no effect on cov't)
- Relative hardship (balance benefit with harm of maintaining burden, usually applied to release a border lot from restriction)
- Recording acts (if no actual, constructive, or inquiry notice)
- Eminent domain (gov't usually has to compensate benefitted lots, but sometimes not if against public policy)

*Note: landowners are subject to BOTH private and public restrictions (covenants and zoning)
What one permits but the other disallows is still disallowed.

Zoning

Nonconforming Uses, Policy

Euclid zoning (U-1, U-2), aka, cumulative zoning. Cf. exclusive zoning (no family houses in commercial areas, either)

Village of Euclid v. Ambler Realty (1926) p1052: legalized discrimination, keep poor (black) residents out

Size of housing on lots regulated, no apartment buildings

Vector of development out of city into suburb, diversion into natural course of development

Ordinance is a nuisance b/c it blocks course of development

Legislature can prevent a nuisance via regulation, but can't create one

Nuisance prevention is at core of land use police power

Nonconforming use: runs with land, but once abandoned, no return

Can't increase n.c. use by expansion (though volume of business growth okay)

Some states tolerate amortization of n.c. use (taking in others)

Might be able to switch to other, more restrictive, n.c. uses.

Exclusionary Zoning, ELUIPA

Southern Burlington County NAACP v. Township of Mount Laurel (1975) p1066: presumptive invalidity if zoning ordinance creates situation where there is NO low income housing

Permit adequate housing within the means of the employees who work in the zones for industry/commerce

Remedy: gave municipality time to act w/o judicial supervision (at least a moral obligation...)

Urban sprawl fears, made minimum lot sizes to exclude poor: NOT general welfare

Sts. Constantine and Helen Greek Orthodox Church v. City of New Berlin (2005) p1077: religious land use, need least restrictive means and compelling government interest

Can't put substantial burden on churches, city didn't want to give exemption from residential use, as church might sell the land and someone could build other than church. No permanent variance

Variances

Use or Area/Dimensional (the former less common)

Elements:

Not substantially incompatible

Unique hardship b/c of zoning

Unnecessary hardship if variance denied

(and not self-imposed, i.e., you subdivided and now your plot's too small)

Grant of variance is not detrimental to public welfare

Judicial review thereof

Clearly erroneous/arbitrary and capricious

Require opportunity to be heard, present evidence, written record, A&C

Courts strike down spot zoning, amending for private benefit, where:

Similarly situated lands are not rezoned

Rezoning is incompatible with comprehensive plan

Takings

Eminent Domain

Public Use: government function → public purpose under SubDP analysis, legit gov't purpose

***Kelo v. City of New London* (2005) p1224:**

- Legitimate state purpose = promoting economic development and increasing tax revenues, even if property is not blighted
 - Blight is a legislative determination
 - Likely to disproportionately affect poor/minority communities
- Here, legit interest in developing waterfront
- Federalism: majority says the constitution provides only limited protection: states are free to enact harsher rules, or amend their conditions
- Economic development satisfied public use requirement
 - Can't give private benefit to private party
 - Can't use pretext of public purpose to give private benefit
 - CAN use carefully considered development plan, not benefitting a particular class, but public
- Resident petitioners want brightline rule that econ devel is never public use
 - Where does it end? More productive use will increase tax revenue...
 - But, also, on the other hand, allows hold-outs to prevent devel
- O'Connor dissent would allow eminent domain for public use:
 - Public ownership (school, &c)
 - Private ownership but public use (common carrier, utility, stadium)
 - Private ownership, but with public purpose (curing negative externality or affirmative harm)
- Implied rational basis: deference to legislature
 - Kennedy: careful inquiry by New London and developers is enough to pass rational basis
 - Cf. O'Connor, need bright lines outside of which legislature will not be entitled to deference
- After *Kelo*, several states pass laws banning this kind of taking

Just Compensation = Fair Market Value

- Accounting problem
 - Once a taking is determined, then calculating just compensation is calculating the FMV
 - Recent purchase price, highest opportunity cost?
 - Problem: often the property appreciates in value after the public investment

Regulatory Takings

Balancing Tests

***Penn Coal v. Mahon* (1922) p1259: is it a taking to take right of access to the coal**

- Fact based inquiry of harm (made subsurface coal rights = 0): if regulation goes too far it will be a taking (no short cut to public interest w/o paying compensation)
- Not entire company, just one pillar taken. Surface landowners had already bargained away the interest (can't claim nuisance)
- Holmes: 3 principles to see if regulation crosses line into taking
 - Diminution
 - Public/private balancing
 - Reciprocity
- Brandeis is more bright line. Not a property interest, just one column of coal (only infringes on some use and enjoyment)
- See also *Keystone Coal*, similar PA statute, making companies liable for damage from mining. Upheld statute against a takings claim (public/private balance)

***Penn Central v. City of New York* (1978) p1269: ordinances allow Penn Central to develop but not demolish Grand Central. NOT a taking**

- Factors:
 - i. Character of government action
 - ii. Economic impact on landowner, extent to which regulation has interfered with investment-backed expectations
 - iii. Are there reasonable uses remaining?: No Economic Viability standard
- Investment-backed expectations: purchased land to develop for certain, now restricted uses (add to Holmes' principles)
- Court: π can still use as a train station, the primary expectation is not being interfered with
- Rehnquist: don't smuggle investment-back expectations into takings analysis: first determine if there is a taking, THEN you can use expectations to calculate just compensation

Bright Line Rules

Loretto v. Teleprompter Manhattan CATV (1982) p1286: any permanent physical occupation or invasion is a taking (Scalia)

- Permanent physical invasion = per se taking, regardless of size, either a taking or not, no de minimus, so just compensation required
- Gov't has by statute allowed cable company to trespass
- Trivial, but trespass if no authorization
- Damages? Want to discourage trespasses, but no punitive damages for eminent domain actions
- Dissent: fear unlimited application to other run-of-the-mill landlord/tenant regulations
 - Permanence: blurs the bright line rule

Lucas v. South Carolina Coastal Council (1992) p1299: vacant lots on island, beach homes can't be built b/c of land use regulation

- Partial taking: Scalia, where state seeks to deprive of use, no compensation if prescribed use interests were not part of π 's title to begin with
- Missile/mouse, acc. Blackmun: tiny taking, huge redefinition of nuisance/police power
- Wipe-out = taking
 - Where fair market value is reduced to zero
 - Where all productive use of land is reduced to zero
 - Land can still have some value
 - Similar to investment-back expectations
 - Exceptions:
 - For ends similar to nuisance control
 - For restrictions in background state law
- Social welfare calculation: shouldn't public pay for conservancy?
- If property owner can show reduction in FMV, then gov't must compensate, or waive regulation or permit owner's uses that were permissible at the time the owner acquired the property

Extensions and Applications

Scope of Police Power

Miller v. Schoene (1928) p1324: Cedar/Apple trees. Fair enough to let cedar tree owners retain ownership in wood, but make them cut trees

- No taking, apples are more valuable land use
- Price makes right doctrine, huge generalization

Denominator Problem

Philips v. Washington Legal Foundation (1998) p1331: interest follows principle rule (similar to accession)

- Interest bearing bank accounts, separate property interest subject to a taking
- Denominator problem: conceptual severance pushed to the limit, willing to entertain severance of interest from principle

Palazzolo v. Rhode Island (2001) p1334: timing issue, coastal regulations changed nature of property (state argues π didn't get property til after the regulations)

- Purchase or successive title holder is NOT barred from challenging a regulation as a taking
 - Prevent state from windfall during long litigation
 - Passing of title doesn't turn a reg. into a background principle of law
- Court rejects logic that π can't bring takings claim based on regulations passed before purchase
- Hobbesian stick: give up freedoms to get security from gov't
- Lockean bundle: personal freedom prior to government, gov't helps enforce private property
- O'Connor/Scalia debate:
 - O'Connor: after some time, broad cultural sense of the regulation results in a new determination that ordinance is a background principle, not a taking (muddy)

- Scalia: either it is inherent in title or not, and can't become inherent just b/c of a gov't regulation. *Lucas* exception gets strength as a baseline for Scalia of the dividing line between regulations and takings
- Epstein road: limiting regulation just to nuisance prevention

***Tahoe Sierra Preservation Council v. Tahoe Regional Planning Agency* (2002) p1335:**

bistate moratorium for 32 months: no taking claim

- Property NOT separable into periods of time (reductio ad absurdum: how small can the increments get?)
- Temporary takings historically like taking over factories in war time
 - Fact-based analysis, nature of action and impact on landowner and his investment-backed expectations
- But, if ownership is temporary, then entirety of leasehold is "taken"
 - Though, if make exception, creative leasing would happen to get around this
- After *Penn Central*, very hard to find severable takings

Cf. *US v. Causby*, taking of easement by physical invasion

Exactions

***Nollan v. CA* (1987): CA coast access: CA strongly supports public ocean views**

- Essential Nexus between means and ends must be close enough to Substantially Advance the interest
 - Here, failed to further the end of ocean "views"
- Π can't buy unless the redevelop, and can't redevelop w/o permit
 - State requires an easement as condition on permit, for beach access walkway
 - Is this related to gov't purpose?
- Scalia: access to coast is goal, not closely related to gov't purpose of ocean views
 - Looks like elevating property rights to heightened scrutiny (similar to pre New Deal)
 - State can deny redevelopment, but can't condition redevelopment on something unrelated to gov't concern (fear of gov't leveraging all permits for exactions, increases bargaining power of state)
- Dissent: private owners are the interlopers in CA tradition of ocean access
- Construction *Permit*, conditioned on *Easement*
 - Danger in this trading process: stringent zoning rules (see above)
 - Government should not force people to barter away their rights

***Dolan v. City of Tigard* (1994) p1339: adds Rough Proportionality to *Nollan* test**

- Essential nexus + rough proportionality
 - Individualized determination of nature and extent of exaction
- Here, no building is fine for flood prevention, but bike path isn't closely enough related to purpose (even of congestion)
 - Gov't trying to add on favors, get π to build city parkspace
 - City hasn't met burden of showing that more bike trips reasonably related to dedication of pathway, only that it is possible that some of the traffic could be alleviated...a pleading game
- Unconstitutional conditions that affect property rights
 - Like welfare benefits: government can grant, but once given, can't force forbearance to exercise other rights
 - E.g., getting tax exemption for swear not to advocate sedition
 - E.g., firing w/o tenure b/c of state criticism
 - Hasn't spread to non-fundamental rights...*Nollan* and *Dolan* spread to property
 - No case since *Dolan*, question of limits on exactions sent to states.
 - Regional variation as to how rigid the analysis is for rough proportionality, likely
 - Exaction if asking for money: consider this a tax?
 - Not necessarily legal (though perhaps if tax were earmarked for proportional/related use?), but not prohibited outright.

- Trading zoning variances are the bread and butter of zoning boards, but how much is too far?
- Not in *Dolan* territory if condition is a restriction on construction, then *Penn Central* controls.

Temporary Takings

Remedial rights as takee

Substantive: are these compensable?

First English Evangelical Lutheran Church v. County of LA (1987) p1349: post fire moratorium

Interim flood protection ordinance prevents operation of church retreat center

temporary taking is not a taking

- But if this had been a taking, the church would have gotten damages from the regulation to present
- *If it's a taking, then compensation runs for the entire litigation period*
 - Nothing in Takings Clause requires that taking be permanent and irrevocable
- Does not address whether temporary denial of building rights figures into takings analysis (purely about remedy)

Tahoe Sierra (p1355) = *First English* + *Lucas*:

compensate for all economic value lost during the 32 month period

Compensable, unless principles of state property law prevent it from being a taking

Text of 5A is basis for distinguishing reg. (prohibiting private use) and physical takings

Transforming all into takings would cripple gov't

Part of parcel requires compensation as much as whole parcel (diff in amt only)

But temporary taking might not be same, b/c of -safety regs, -different questions of delay

Temporariness does not *preclude* finding that it is a taking, but is not dispositive either way

Skeptical if moratorium lasts > 1 year, but here, 32 months NOT unreasonable

Remedies:

Options:

- Remove statute
- Keep statute and pay compensation in monetary damages
- Keep statute but transform into an eminent domain statute
 - AND pay for the associated loss resulting from the temporary taking in the meantime