**WHAT IS PROPERTY?**

***Penner/Blackstone***: A ***right to a thing*** ***good against the whole world***

* Exclusion thesis: rt to exclude, grounded in interest in use, widely protect
* Productive use (reap what you sow); privacy, liberty (insulation); safety, security

***GREY*:** A ***bundle of rights*** with regard to a thing (skeptic/realist theory)

* rts can be split up/transferred, no set def. for why diff from other legal rts
* Right to exclusive possession is merely another stick in the bundle

*“Bundle” includes*: Right to exclusive possession [right to possess + right to exclude]; Right to use & enjoy [Active + passive]; Right to convey/transfer; Right to destroy

* Governance model favored where uses conflict, gov’t determines best use

*\*\*General shift over time: exclusion (Penner) → governance (Grey)\*\**

**COASE THEOREM:** w/o transaction cost, higher value use wins, other compensated

BUT limitations/assumptions of Coase Theorem

* Frictionless bargaining (0 transaction costs) is a myth
* Placement of legal entitlements may produce inefficient outcomes (eg ***Jacque*s**)
* limited available info; limited time to decide → inefficient outcome

**NATURAL RIGHTS V. POSITIVISM**: what is the source of property rights?

* 30s/40s - ***INS v. AP*** (natural rights theory – associated w/ judicial power, ancient principles out there, natural connection b/w person and labor)
* Positivism has basically won (Holmes/Brandeis)- look to state law

|  |  |  |
| --- | --- | --- |
|  | **Property Rule (injunction)** | **Liability Rule (damages)** |
| Plaintiff (excluder) | **1)** P can stop D (or set price to allow D to continue) ***Jacques, Pile*** | **2)** D must pay P’s damages to continue ***Golden Press*** |
| Def. (entrant) | **3)** D can continue w/o liability ***Hinman, Hendricks*** | **4)** P can stop D if it pays D’s damages/losses |

**Tragedy of the Commons** no caring for/maximizing use of lands open to all

* **Anti-commons**: where too many have rt to exclude; no one able to use

*~hold out*: if too many permissions required, rts to larger resource never assembled

* **Semi-commons**: when given resource is subject to private exclusion rights in some uses/dimensions but commons for other uses/dimensions
* Governance structure can stabilize both anti-commons & semi-commons

**Demsetz**:

* changes in tech/**economy** alter CBA of enforcing particular prop regime (***Moore***). property rights emerge or change when economic or technological changes alter the costs and benefits of any particular property regime.

**Radin**:

* Moral basis for treating certain things as property. **Anti-commodification:** some prop so tied up w/ personhood not even you can sell it (Arabian dissent, ***Moore***): Grant inalienable right over this

**ACQUISITION OF PROPERTY**

**KEY:** Who put in effort? What conduct do we want to incentivize/protect? Context?

**By Capture or Conquest**

***Pierson:* RULE OF CAPTURE** Post in pursuit of fox, Pierson seized fox & killed it.

* Fox = *ferae naturae* (wild); prop in such animals is acquired by “**occupancy**” only
* = taking for 1st time, something that previously did not belong to anybody
* Majority RoC - mere pursuit is not enough

Capture is required (can be less than literal and physical possession),

* Within “certain control,” e.g.: Limiting liberty of animal (net/traps, wounding); Manifest clear intent to capture OR actual capture: bodily seizure etc.

***Ghen v. Rich*** (whale case): *CUSTOM* dictates meaning of w/in certain control

* “constructive possession” enough such that whaler wins over the subsequent finder (who has “actual” possession). Did all he could in context to bring under control. Protect industry/investments.

***Keeble*** (duck case): D, from own land, fired guns near P’s decoy duck pond

* Eve mere pursuit (as part of lawful, profitable, useful trade is protected against violent/malicious interference. 🡪P awarded damages, though no actual poss’n.

***Eads v. Brazelton*** (sunken ship) - possession requires > mere notice of intent

* D found ship (discovery), formed intention to go back & signified by marking with trees 🡪 not enough, must use due diligence to get control

***Popov*** (baseball case) P had ball first, but can’t show actual possession. Unusual.

* held P had a “pre-possessory interest”; baseball sold & profits split

***Hammonds***: (gas reinjected into ground) – held no trespass

* LO says gas company taking her gas out from under property
* “Found” oil & gas governed by RoC: whoever acquires actual poss’n gets it, regardless of whose land it’s under

→ **First possession** - who had it first?

* One may establish a “root of title” to property by being first to possess something that is unclaimed by anyone else at the time
* What counts under circumstances? Nature of thing possessed, local/industry custom, what is possible/usual in context, intent

~Title is relative! Who had it first as bw two parties; 3rd party claims irrelevant - *jus tertii*

**By Creation** - property in the form of **information** (IP)

* Information - *non-rivalrous good*: use by x doesn’t diminish use by y
* Why create prop rights in info: incentivize people to produce, not to ensure that it is allocated efficiently (But too much - monopoly, limit supply, stop free-flow info)

***Eldred*** (2003): Congress extended Disney copyright, Ct deferred ~positivism~

***INS v. AP*** - INS cannot copy AP stories until value of news expires; a

* quasi-property rts (as against a particular actor/practice) to protect from unfair comp
* news itself is public/common prop; particular “form” (exact words) IS protected
* **natural** rights idea (“you shall not reap where you have not sown”)
* ***Why?*** Ex ante - maintain financial incentives/investments in news; Ex post: unfair/wrong for INS to take AP’s hard work and profit

**By Find, Accession, Ad Coelum**

* First in time (prior possession) generally > subsequent possession

***M’Intosh:* Discoverers** have unique right to possess. Tribe has right to occupy but not right to convey. Since D can trace title back to U.S., he has superior title to the land.

***Haslem*** (manure): finder acq’d prop int by enhancing value (gathering up) & did not abandon (intent reqd to abandon). Later guy loses.

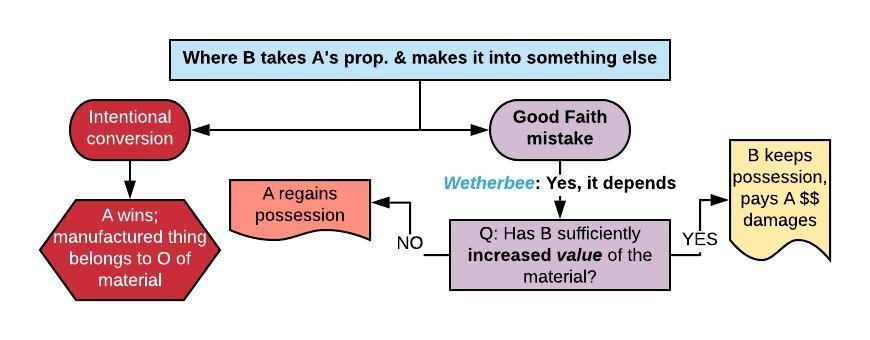
***Armory*** (chimney sweep finds jewel, stolen) – finder 1 > thief 2

***Clark v. Maloney*** (logs after flood) – finder 1 > finder 2 (discourage theft)

***Anderson*** (trespasser takes logs, sues) – thief 1 > thief 2

*Accession* - Title for some things follow title to other things; constructive prior poss’n

* Offspring of livestock belong to owner of livestock (increase)
* LO owns all plants/minerals (non-fugitive; *cf*. oil or wild animals)
* Transformation of property (***Wetherbee*** – wooden hoops, keep bc increased value but pay orig owner cost of wood. Good faith!).



* Ad coelum: ***Edwards***: D owns part of cave w/in prop line, trespass for survey OK

***Fisher v. Stewart*** - Accession > capture+Trespass (P finds bee hive on D’s land, told D; D gets honey; P sues) 🡪 *Ratione soli:* wild animals on land belong to LO. Disc trespass.

***Hannah v. Peel*** - First possession > Accession (brooch case)

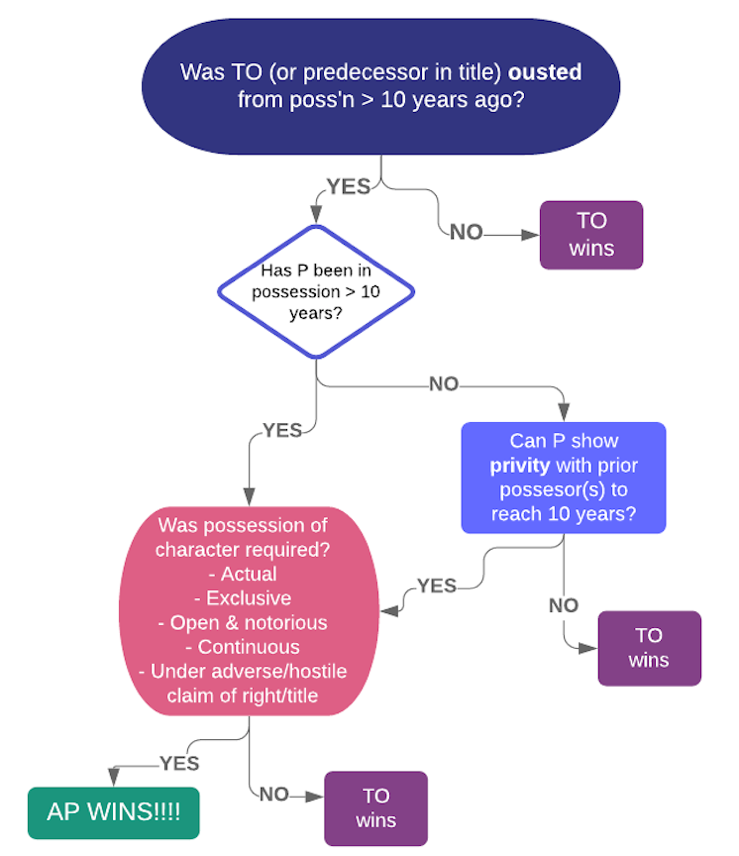
* Consider: Lost in ordinary sense (v. mislaid); State of object (dusty windowsill); “For a considerable time” (v. short); F’s conduct commendable (v. dishonest/ trespasser); LO never physically in poss’n of premises (v. prior/current occupant)

***Rule***: Finder > LO generally, but LO > finder if:

* LO knew of thing’s existence before “found” - constructive poss’n
* Thing "mislaid“/intentionally placed there & accidentally left behind
* Finder = trespasser or agent/employee or licensee of LO

**ADVERSE POSSESSION:** *Did they act like an owner of* ***that*** *particular property would?*

* **Ouster** = Adverse entry that: 1) Was actionable as trespass v. TO or predecessors in title & 2) Resulted in actual possession, to start SOL clock
* **Privity** = “rsble connection” (valid transfer) from previous possessor; shared interest.
* **Actual**: would TO know? Neighbors? **Exclusive**: not literal (can give permission)
* **Adverse/hostile claim of right**: cannot have permission
  + Maj rule = state of mind irrelevant, conduct asserts claim of right (***Scott***)
  + Min rule = good faith req, must believe you own land (faulty deed/color of title) (Carpenter)
* Taxes: not standard element, relevant to show bona fide claim



***Scott*** –paint fence blue, gave hunting licenses, harvest. **Majority** rule 🡪 yes AP

***Carpenter:* Minority** rule: good faith (NY stat) – P knew she had no legal right 🡪 no AP

***Howard v. Kunto***: summer home; erroneous deed 🡪 yes AP

* **Continuous**? seasonal use of summer home counts (that’s how TO would use it)
* SOL? **Privity** w prior owner bc of common erroneous belief they owned the land

***Ewing v. Burnett***: lot for digging sand/gravel 🡪 majority rule 🡪 yes AP

* Character of prop; he periodically removed gravel & that’s what land was for. Sued those who entered w/out permission. Had no permission, color of title.

**Why** allow AP claims? Penalty for sleeping on your rights; reward productive use (resource exploitation); connex w land, reliance & invstmts; clear up errors in conveyance

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

***Moore*** (1990) - Suit for conversion - cells used to make patented cell line

* No conversion; cells ceased being his prop. once left his body. Yes informed consent claim; this enough to protect patients’ rts & interests in ed research.
* Protect docs/med research from massive expansion of liability; would stunt research.
* *Dissent*? So intimately tied to personhood 🡪 can’t market (Radin), Q for leg.

***Hecht*** (Frozen sperm, probate ct): sperm cells are property; strong indiv interest (reproductive autonomy), public interest weak.

***Newman*** (Corneas of dead kinds = prop for purposes of DP claim by parents.)

Rights of Publicity

***Midler*** (Ford hires singer to mimic) - tort b/c appropriation of core aspect of identity (voice as distinctive & personal as a face).

***White***: absurd extension of *Midler* 🡪 robot evoked aura, implicated rights

* *Dissent*: not evoking anything particularly distinctive about her identity, only evoking role she played in a context. IP rights are not free.

Notes: rt of publicity usually protects mostly celebs seeking to protect/maximize $ on their identity/brand; refusal to treat body as prop & protect its use arguably has adverse distrib effects on low income people bc more likely to sell body parts/be taken advantage of.

Public Rights

***Causby*** - surface-O’s claim: flights too low, lowered value of chicken farm.

* Navigable **airways** basically = navigable waterways – fed govt controls
* Overhead flights = taking only if flights “are *so low & so frequent as to be a direct & immediate interference with the enjoyment & use of the land*.”
* Here: U.S. had taken an easement 🡪 $2,000 in damages

**Navigational Servitude:** public has right of access to navigable bodies of H20

* Public can sue to enforce; structures that interfere with public’s use of waterways may be enjoined under servitude (docks, bridges, dams,)

***Illinois Central RR*** 🡪 state can’t give public trust land away, so state gets it back

* Grant void, RR can still probably get $ damages (based on reliance)
* ***exception*** to *non-derogation doctrine* (once you’ve sold property, can’t get back)

*Legal source* of public trust doctrine?

* Decided in era of federal CL (*Swift*) but then *Erie* 🡪 state law doctrine

*Boundaries* of the public trust:

* non-tidal bodies of H20: land below mean high-water mark w/in public trust
* tidal bodies of H20: land below mean high-tide line (incl. wet beach, which is land between mean high-tide and low-tide lines) w/in public trust

***LMF*** – sought injunction 🡪 granted b/c open water cannot be taken away

* primary purpose must be public & benefit must be direct – Loyola’s use (private)
* protect for future generations – cant let people of today vote away tomorrow’s land

***Matthews*** (NJ 1984) (before - public had normal right to use wet sand beach)

* *HELD*: to get adequate reasonable use of access to wet sand beach, need access to dry sand beach - subject to public rt of access (below vegetation line)

***State of Oregon ex rel. Thornton***: wanted to limit strip of beach to customers

* HELD: still own up until MHTL, but can’t exclude from dry sand beach
  + Legislation: “priority” to give public access to dry sand beach where such use has been sufficient to create easements (~custom~)

Test for **Customary Rights**: (how case was actually decided)

* Ancient/Long use + Continuous + free from disputes + reasonable + certainty – visible boundaries (vegetation line is a clear boundary) + Obligatory/as of right: Public’s use never questioned (like no interruption); Public acted as if they own right to use beach, no one asking for permission from Los + Not repugnant to other laws/customs

**WHY**: Confirm expectations of parties/public; social value of recreational use/enjoyment of natural space (Rose); right to use wet “meaningless” w/o dry sand

* Rose: social benefits that society gets (normative justification)
  + Democratic need to come together, important in urbanized world
* *Demsetz* – Public now more able to access beaches (tech- tourism, cars)
  + Benefits >costs: value of explicitly-defined public spaces has risen

**OWNER SOVEREIGNTY (RT TO EXCLUDE) & ITS LIMITS**

🡪 “that sole & despotic dominion which one man claims & exercises over external things of world, in total exclusion of the rights of any other individual”

Trespass - Both criminal & civil actions maybe be brought

***Jacques*** - intentional trespass, Ps repeatedly refused D's request to cross

* + Punitive damages award granted though *no actual harm*
  + 🡪 Categorical/absolute right to exclude
  + \*Bright line rule- baseline entitlements against which to contract

***Hinman*** - P trying to rely on “ad coelum” trespass for airplane above property; loses.

* No liability absent serious interference w use & enjoyment.
* Bargaining with each owner of air rights would be dif. Public benefits from air travel. Fewer productive uses of airspace so less need to protect owners’ rt to excl
* rt to exclude limited to land’s surface area and subjacent space; for superjacent trespasses - balancing (not absolute exclusion) approach.

***Hamidi*** - Intel claims trespass to chattels (computer servers), loses

* actual harm required; $ of self help attempts don’t count as harm. no trespass to land b/c intangible intrusions.
* *Dissent*s - Brown: Intel’s substantial investment in system. Mosk: Intel has no recourse, exercised all reasonable self-help efforts

*Building encroachments*: bright line rule or balancing test? (shift over time to balance)

***Pile***: absolute rule: D must remove minor encroachment underground by tearing down wall because P’s right to exclusion=baseline legal right, P not willing to sell the right

***Golden Press***: balance harm to owner v cost of taking down encroaching structure. slight, unintentional, good faith encroachment fine as long as not actually interfering w/ P’s use of land & removal would be unconscionably costly.

*Considerations*: incentivize precaution taking vs. unfairness

Self-Help

* Utilized more than legal rems. Controversial if force, generally can use rsble force.
* Most jxs allow self help repo if legal right + peaceable; some only for commercial; some never allow (***Wiley***).
* Note: no DP claims bc no state axn.

***Berg v. Wiley*** - T violated lease, remodeled & violated health code; lease gave W (LL) right to retake if breach; B left. W changed locks w/ police escort.

* LL may use s-h to retake leased premises from T in poss’n if:
  + legally entitled to poss’n & means of reentry are *peaceable*.
* High standard for “peaceable” → Ct required W to pay treble damages
  + if T doesn't voluntarily leave, LL cannot use self-help!

***Williams v. Ford*** Action in conversion, took car in night; P was in default

* Similar rule as *Berg*→ but Ct says NO breach of peace b/c no actual violence

**WHY** these standards: discourage violence; endowment effect. More tolerant of self-help repossession of personal prop. than real prop (greater risk of violence, more risk of absconding w prop/damage.

EXCEPTIONS:

Necessity: to avoid serious injury to self or others

***Ploof*** - Storm, asshole’s servant unties ship 🡪 necessity.

* need sudden, not pre-planned circumstances making bargaining impossible
* affirmative right—asshole had to pay damages for impeding that right.

***Vincent*** - D stay docked in storm; damage to dock → liable for damages but OK to stay.

* privilege of necessity allows to stay on dock BUT priv incomplete (pay $)

🡪 2 ideas: shifts rt to exclude from LO to person entering under necessity (prop rule) vs. LO still has rt, but can only vindicate by seeking $ (liability rule)

Custom

***McConico*** - P warned D not to hunt on his land; D still rode over, hunted deer.

* Customary right to hunt on unenclosed & uncultivated lands never disputed; OK.
* Still good law - undeveloped & unfenced areas are still open to hunting and fishing unless posted (“No Trespassing sign”)

Public Accommodations – owners have ***duty of nondiscrimination*** - NJ law:

* ***Shack*** - no trespass 🡪 “property rights serve human values”
  + When you open property to others *for your economic advantage* (ex., workers, tenants, customers) → sovereignty limited to the extent needed to protect other people to whom you have opened
  + Here: migrant workers, super isolated – live and work on land
* ***Uston*** - hotel kicks out card-counter 🡪 if open to pub + for own $ benefit, *flips presumption:* Casino has burden to justify excluding him and didn’t here

Constitutional trumps

* *Lochner* era (~1900s-30s): broad, nearly absolute rt to exclude BUT racist
* 1937/New Deal era – slightly less racist, EP/free speech rights expanded
  + authority to define prop rights put more in hands of the states
  + Property rights/economic liberties narrowed in scope, weakened
* Balancing test: weigh CL rt to excl against Const rts/interest. Rt to excl strongest in home, weakest in pub places. If no state axn, no const argument.

***Marsh v. AL*** - Marsh distributing leaflets in company-owned town; no trespass

* Owner has **diluted interest** in exclusion b/c: opened up to general public for own $ benefit, functionally same as other towns, can’t “pick and choose” who can come in/out. Public has strong interest bc vulnerable/isolated/dominion.
* State action: enforcing trespass-police carried out, criminal sanctions

***Shelley v. Kramer*** – whites sued to enforce racially restrictive covenant. Injunction = sufficient state action tro trigger const scrutiny.

* state action? injunction that would enforce covenant -14th Amend scrutiny

***Bell v. Maryland*** - 12 Black students convicted of criminal trespass for sit-in

* supervening change in state law → Court vacated judgment of MD CoA, remanded BUT Black *dissent* defended trespass, social order argument

🡪 Civil Rights Act of 1964: Title II protected these trespasses, never resolved

*State Action*: Deny discrimination in public vs. not in homes by defining this

**FORMS OF OWNERSHIP**

* Convey: Grant (sale/gift) during life of grantor ("Inter vivos“), Devise: leave by will
* Inheritance = acquisition by heirs if O dies intestate (w/o a will) or fails to leave all

O → A [& his heirs] =A has *Fee Simple Absolute* (all property rights)

O → A & his heirs as long as land used for farming = A has Defeasible Fee

O → A as long as land used for farming but if land ever used for nonfarming purposes, revert to O = A has FS Determinable, O has Right of Reverter

O → A but if land ever used for nonfarming purposes then O shall have right to reenter = A has FS Subject to Condition Subsequent; O has Right of Entry

O → A as long as land used for farming, but if land ever used for nonfarming purposes, then to B = A - FS Subject to Executory Limitation; B - Executory Interest

O → A for life = *Life Estate*: all rts til A dies, then reverter to O or remainder to 3rdP

* Defeasible = automatic reversion, subc cond subsq = reversion at discretion of O
* **Remainder:** must be capable of becoming possessory immediately upon end of LE + incapable of divesting prior possessory interest or vested future interest

Conflicts over time

*Waste* -act by life T that does permanent injury to inheritance (future interests)

* ***Affirmative***: “misfeasance;” unreasonable act, causes “excess” damage to future interests (beyond normal wear/tear); defined re: normal use
* ***Permissive***: “nonfeasance;” unreasonably fails to take some action w/r/t property, which causes “excess” damage to future interests (Ex: failure to repair roof, not paying taxes, allowing an adverse possessor to remain)
* ***Ameliorative***: substantially changes prop but 🡪 increase in market value
  + E.g., ***Brokaw*** (grantor’s interests (“my residence”), future interests
  + Distinguish from *Melms* (brewery) b/c there not suitable for residence.
  + 🡪some jurisdictions won’t view that as waste; some modern courts might be more willing (Brokaw ct)

*Restraints on Alienation* – Cts take dim view, dead hand control

* BUT typically uphold restraints for a limited period of time if they appear to be reasonably related to some family estate planning objective
* ***Why*** we care - autonomy, efficiency (want in hands of who values most)
* ***Toscano –*** conveyed lodge w restrict. Court strikes down restraint on sale but upholds use restrictions (even though **same practical effect** as retrix on sale).
  + OK to limit how lodge can use property (common!), esp. for organizations w/ articulated purpose eg school, charity (burden worth it)
  + Dissent: both restrix have same effect, should be treated alike/struck down.
* \*\*\*Restraints on use presumptively valid (unlike restraints on alienation)

*Rule Against Perpetuities*: No interest is good unless it must vest, if at all, no later than 21 years after some life in being at the creation of the interest

1. Bracket clauses & identify all interests created
2. Figure out which future interests, if any, are subject to RAP & as to those:
   1. Identify “lives in being” at time of grant,
   2. & imagine “what might happen” to cause vesting to occur as remotely as possible after death of “lives in being”;
   3. if >21 yrs after “lives in being,” invalidate clause creating it

***Symphony Space***🡪 RAP applies to commercial properties

* Buy-back option invalid: b/c no measuring life, limit is a flat 21 years from date of the grant, interest could vest 21 years after this (2003)
* Crossed out entirely (instead of severing) - no rescue for sloppy drafting.

*Proposed Reforms:*

* “Wait and see:” wait for CL RAP period, see if interest in fact vests remotely
* Interpretation & implication: add savings clause/otherwise reform interest
* perpetuities savings clauses – refer to invalidation under RAP, specify backup plan

Transferring Ownership/Real Estate

Proving & Recording Title:

* ***Why***? protect markets/good faith purchasers vs. title defects in seller’s chain of title
* **Nemo Dat** - “one cannot give that which one does not have”
  + Owners must be able to trace ownership back in time through series of legitimate transfers to legitimate original acquisition

Recording statutes: (O 🡪 A (T1), then O 🡪 B (T2). A never recorded. B has no idea)

* *Notice*: subsequent bona fide purchaser wins unless he has ***notice*** - recorded interests give “record notice” (B > A, regardless of when records)
  + *Notice*: Actual (you actually know); Record (it’s been recorded); Constructive (should have known for some reason)
* *Race-notice*: a subsequent bona fide purchaser wins only if she has no notice and records first (B > A, but only if he records transaction before A)
* *(pure) Race*: whoever records 1st wins (small minority of jurisdictions)

LIMITS: If recording act fails to apply (nemo dat); need for surveying and physical inspection; ***Mugaas v. Smith***- AP claim wins over recording!

Conflicts between concurrent owners

* **Tenancy in common** (TC): each T has *separate* (independently descendible, conveyable, devisable) but *undivided* interest - no *(RoS)*
* **Joint tenancy** (JT): the same as TC except that there ***IS a RoS***:
* **4 unities**: **Time**: vested/acquired at same time; **Title**: acquired by same instrument (or AP); **Interest**: legally same (e.g. all FS/life estates) but don’t have to be proportionally =; **Poss’n**: each has rt to possess whole
* personal friction b/n co-Ts (usually siblings), but law provides background rules

**Severance** - Dividing one of 4 unities turns a JT → T/C

* Each co-T may sever unilaterally (w/o other T(s)’ permission)
* Can a **mortgage** sever a JT? ***Harms*** - **NO**: mortgage = lien, disappears if JT dies
* Can a **lease** sever? Lease = convey prop interest, or lease = mortaage/lien/K?
* If > 2 co-Ts & one severs = “destroying” T has only destroyed JT as to their interest - remaining interests remain as JT until also destroyed

**Partition**:  Ends co-tenancy completely by dividing prop or its value;

* does not require any reason or justification; an absolute right
* “In kind:” physical division- default, avoid forcible dispossession of T(s) in poss’n
* By sale: if in kind is impracticable or all parties’ interests better served
  + E.g., property fully occupied by single house; use being made of one part of property is nuisance to rest; many co-Ts

***Delfino*** – (trash biz and home): presumption is partition in kind

* Division of land feasible here & D lived + has biz on land. Don’t like forced sales esp if someone is living on property (unless they could buy person out??)
* BUT presumption softening as land less unique, more fungible
  + by sale - advantages of sending land toward highest/best use

**Ouster**:   one co-T absolutely denies other co-T’s rights of ownership & poss’n

* Exclusive use not enough, Co-T(s) must necessarily exclude others:
  + Act of exclusion OR use of such a nature that it necessarily prevents other co-T(s) from exercising their rights
  + Might lead to AP, but requires overt repudiation to start clock
  + almost at level of one co-T saying explicitly to other(s): “you have no interest in this property, it’s all mine”

***Gillmor***: Acting in a way that **necessarily excludes** co-T sufficient for ouster

* D&P owned equal shares of land for cattle grazing, D in exclusive poss’n
* P requested D alter use to allow her use, D continued use of land at max capacity which made her use impossible; mere exclusive possession isn’t sufficient for ouster
* can sue for **share of rent/profits** if ousted

PAYMENTS

* Rent (3Ps): if one co-T rents, must share evenly w/ co-Ts (proportional to interest)
* In general, no obligation for co-T in exclusive poss’n to pay rent to co-Ts
  + BUT, if co-T ousts other co-Ts, ousting co-T may have to pay ousted a proportion of FMW
* Repairs/improvements: co-Ts in exclusive poss’n who make repairs or improvements have no right of contribution from other tenants, except:
  + If co-Ts stood by and let improver proceed to his detriment.
  + If co-T acted in good faith, believing himself to be the sole owner.
  + If repairs were essential to preserve/protect common property.

**ENTITY PROPERTY: Separating Management & Possession**

* permit mgmt of resources to be separated from use/enjoyment

The Lease & Landlord-Tenant Law 🡪 Lease =

1. **financing** device (like loans)
2. **risk-spreading** (T: minimize risk of over-investing, LL: if Ts defaults, easier to retake than foreclose on a mortgage, advs > when multiple Ts)
3. **entity** [managing complexes of assets (apt bldgs, office bldgs, malls)]

* **Term of years -** Fixed time at which lease terminates or ends
  + SoF: in writing if > 1 yr; no notice req before terminating lease
* **Periodic tenancy** - Automatically rolls over for stated period of time
  + Requires notice for termination
* **Tenancy at will –** LL/T can terminate at any time for any reason (notice req.)
* **Tenancy at sufferance -** When T holds over after right ended (***Berg***)

~STATUS → CONTRACT~

**Old CL**: “T” = **status**.  Rights/responsibilities largely determined by law.

* T: right of possession in exchange for payment of rent.
* LL: has FSA subject to term of years (rights of lease + rights of T)
* Tenancy: *Defeasible* (could end on occurrence of some condition), usually on condition subsequent giving LL a right to reenter (***Berg***)
* Leases: short and simple, background rules (agricultural land)

**Newer CL**: Rise of market economy → **freedom of contract (K)**.  Focus on

* *Intent* (expectations/agreement) → what lease says that parties agreed to
* Diff rules of interpretation, default rules, substantive rules, remedies
* **(+)** lets people make decisions for themselves, bargain for what they want; **(-)** Unequal bargaining power, especially for urban, multi-unit dwellings.

→ \*\*\*COMMERCIAL LEASES

**TODAY**: CL reforms 🡪 protecting T > lease → \*\*\*RESIDENTIAL LEASES

***Paradine*** – **independent covenants** (Prince Rupert seizes land, expelling T)

* Do we care *who* ejected tenant? → YES, defense if LL or LL’s agent responsible for evicting T (implied obligation not to throw T out)
* **Indep covs -** all covenants must be performed w/o regard to whether other covenants have been/can be performed; frustration of purpose no excuse.

**🡪**T’s covenant to pay rent *generally independent* of actual enjoyment of poss’n *unless* LL/agent evicts T from all or part of the premises

***Smith***: – if no actual eviction, can still have **constructive eviction.**

* LL builds wall encroaching on leased premises; doesn’t interfere w/ T’s use; T stops paying rent altogether; LL sues for rent. 🡪 Ct finds for T.
* rent charged for whole of land. Constructive eviction 🡪 duty to pay excused.
* **covenant of quiet enjoyment** (CQE)– at a minimum, I the LL won’t evict you; if I do evict you, suspends your obligation to pay rent.

🡪What happens if squatter/holdover in poss’n when new T’s leases begins?

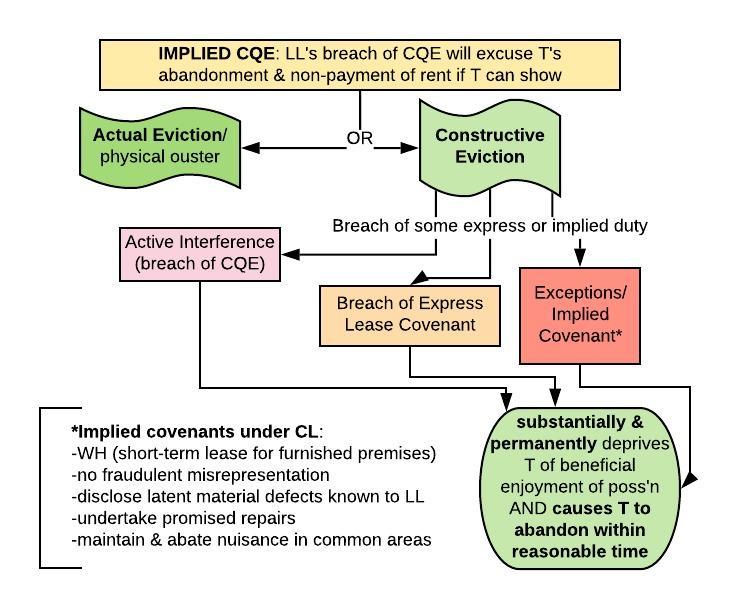
* + English rule: LL responsible; American rule – T responsible
  + ^can be modified by parties in contract

***Blackett***: noise = constructive eviction.

* LL sues T for rent; T claims constructive eviction (noise from lounge)
* LL (as LL of lounge too) had power → ***duty*** to do something (breach of CQE)

***Sutton*** (Lead from paint in grass → dead cows) – **CAVEAT LESSEE**

* Buyer beware! CQE implicit; otherwise *no implied warranties* land suitable for purposes which T rented, even if LL aware. (Could make express warranties in K, but even then, remedy for breach is damages not excused from rent).
* Dist. ***Smith v. Marrable*** [short-term, furnished home (personal v real)]



***Implied Warranty of Habitability* 🡪** duty to pay rent dependent on L’s IWH

* Shift from market to **societal standard** for housing conditions
* Allow T to stay while claiming uninhabitable (bc market) – no more abandonment req
* Allow patent defects as breach for IWH
  + Or LL will just be upfront & T will feel like they can’t leave
* IWH cannot be waived (otherwise LLs would put in Ks in reintroduce market forces)
* improve housing supply w/ public intervention (vouchers, public housing)

***Javins*** - housing code violations, Ts withheld rent; LL sued to eject; Ts win

* ***Brown***: if serious housing code violations @ time of lease, void, T evicted
* **IWH** - for leases of urban dwelling units covered by code
  + must be material departure from std of habitability as set by code
* **Public policy**: too concerned re unequal bargaining power to leave this to K/market

🡪Allow waiver when consideration given? **(-)** LL bargaining power/paternalism; protect 3rd parties, **(+)** freedom of K, may price out low-income people

**Abandonment** *🡪* Q - How long is T on the hook?

1. Treat as offer to surrender leasehold, and accept surrender.
   * Lease ends, T off hook for rent, not damages (Leased rent - FMV)
   * \*best option for LL if value of property has gone up
2. Reenter & re-let as T’s agent (at least if lease allows):
   * LL can re-let premises on T’s behalf; T still on hook (for lease rent - any rent that LL collects on T’s behalf & LL owes T any surplus)
   * \*best option for LL if value has gone down/difficult to find new T
3. Do nothing & sue T for rent as it comes due under the lease (Sommer shuts this

***Sommer*** – duty to mitigate, option 3 dead

* D said he couldn’t pay rent, 3rd party wanted D’s unit; LL denied; LL sued D for rent
* LL had **duty to mitigate** damages by making reasonable effort to re-let
* LL has burden of proving reasonable diligence, consider whether LL showed or advertised (T may rebut by showing suitable Ts were rejected)
* Generally, duty to mitigate ***non-waivable*** (like stipulated damages)
* 🡪ex of shift to K law

~**Lost volume principle:** if by re-letting T’s abandoned apt, LL can’t rent another available apt, T might still owe damages; BUT T: “my apt unique”

***Kendall v. Pestana:*** SJC airport hangar

* Lease said needed written consent before lessee could transfer, failure would render lease void at option of lessor.
* Held: Consent to **transfer commercial lease** may only be withheld for **commercially reasonable objection** 
  + financial stability of assignee; whether proposed use suitable; whether use will require alterations to property; the legality of the enterprise
* Unclear if you can K around this. Also unclear if applies to residential leases (discrimination bigger problem in that context?)

Coops, Condos & Common Interest Communities: ownership >T in LL/T context

* Managing entity is a body of the residents → more democratic
* Rules/restrictions in all 3: Can be included in original title document; might come up later through rules promulgated by governing body 🡪 Owners don’t have all sticks of bundle → Governance strategy of mgmt
  + give up autonomy, liberty in favor of collective self-governance

**Condo**: Residents own interior spaces (FSA)

* Condo Ass’n (all resident/O’s) owns exterior, walls, common spaces
* Res/O pays maintenance fees, is constrained by rules of Ass’n
* Typically free alienability, no Board approval of sales

***Nahrstedt*** - Whether cat restriction was unreasonable since only inside

* Restrictions from declaration or master deed of condo: strong presumption of validity 🡪 cat restriction falls here, upheld bc rationally related to health, sanitation concerns
* Whereas rules promulgated not entitled to presumptive validity
  + Subject to reasonableness, fetter discretion of board
* *Dissent* (Arabian): pet ownership has substantial benefits, confined to unit

**Cooperative** (esp in NY) - Title in whole bldg held by a coop/corporation

* Corp = residents, govern thru elected Bd; own: (1) shares (2) long-term lease in unit
* “maintenance” fees & rules., Coop Board must approve sale of indiv units

***40 W 67th St v. Pullman*** - man acting crazy, harassing old couple

* *business judgment rule*: defer to Coop Board decision so long as Bd acts: (1) for purposes of the coop, (2) w/in scope of its authority, (3) in good faith. If competent evi reqd, decision of Bd can serve as competent ev.
* approach to co-op disputes: (1) Look at rules that would apply in LL/T law (here, it was the RPAPL) (2) Give a little extra deference to the Board as long as BJR is met.

***Why*** is standard to evict coops lower than to evict reg Ts? Ts more vulnerable than co-op owners (w/ share in governing board, power in rulemaking, $)

**Common interest communities**: Homes owned in FSA, subject to covenants, enforced by Homeowners’/Neighborhood Ass’n.

* e.g., use restrictions, lot setbacks, requirement or prohibition of fencing, aesthetic regs, payment of fees for maintenance of common areas

**THE LAW OF NEIGHBORS**

Nuisance → defines scope of right to use/enjoy property

* O1's active right to use/enjoy ends where O2's passive right begins
* Who can claim? Owners/occupants, anyone in poss’n - Ts/adverse p

**WHY** a different, more relative std than trespass?

* Physical invasions generally avoidable, can be bargained over
* Hard-edged rule more difficult (noise, smells, dust → diffuse harms)
* Would hinder some socially valuable uses of property!
* **Threshold** test: if harm crosses threshold → nuisance (***Campbell***)
  + D’s utility is basically irrelevant, presumptive right to injunction
  + Gives some strong protection for use and enjoyment of land
    - But net effect - some useful activities shut down
  + **Over-enjoinment** problem? – can’t undo an injunction
* **Balancing** of harm and utility (Restatement, ***Del Webb***, ***Boomer***)
  + **Under-enjoinment**: D isn’t forced to internalize externalities
  + But can use regulation which considers full range of harms

***Hendricks*** - well on one prop 🡪 can’t have a septic field on other

* Harm reciprocal - only one use can win, Court says no nuisance
* Having well reasonable; 1st in time principle; sewage more “invasive”?

***Adams*** - IRON MINE - non-trespassory invasion (dust) → NUISANCE

***Campbell*** (burning bricks) P mansion, D neighbor w/ brickyard – **threshold** test

* D there first but started burning bricks after, gas killed plants and trees but only entered when wind carried (not continuously). Protex for luxury.
* Meets threshold – nuisance (w/o valuing brickmaking)
* But q of whether damages or injunction? here, mischief was substantial and irreparable → *injunction*

***Boomer*** - pollution from cement plant’ threshold test = NUISANCE but remedy balancing

* remedial discretion → permanent damages awarded (Rule 2)
* **Social cost**: jobs; tax revenues; huge investments, avoid **holdout** problem
* P’s lands will be subject to a servitude (easement to commit a nuisance)
* Value = difference in market value of affected lands
* **Doesn’t capture**: value LOs ascribe, health effects, harm to 3rd parties → So systematically tilted against Ps

***Del Webb*** - retirement community v. cattle lot; harm > utility, but P must pay D

* public nuisance, when 1st in time not defense, seems unfair
* Balancing test – harm outweighs benefits in the area 🡪 injunction.
* BUT developer bought land for cheap and getting the windfall. He created the incompatibility, so should pay.

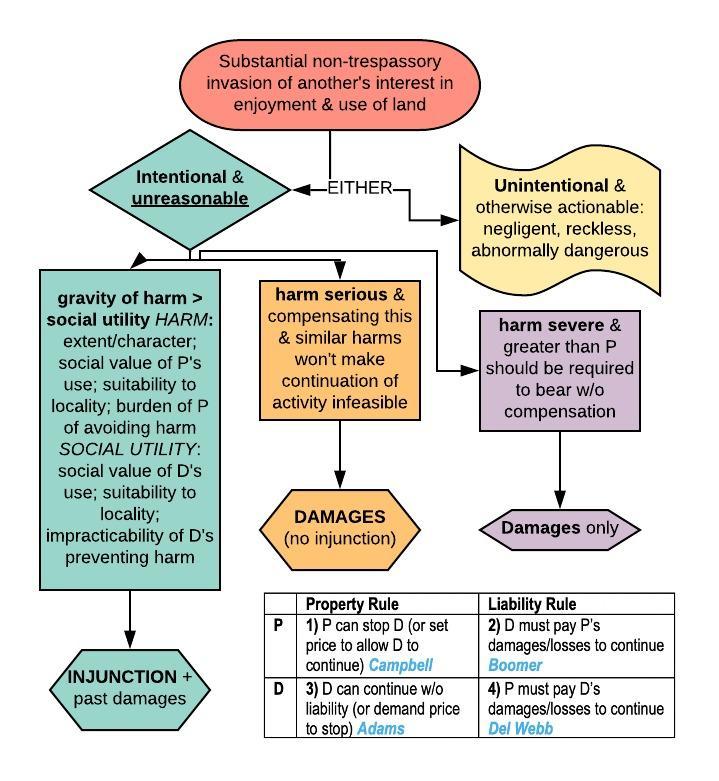
\*\*ASK in enjoinable nuisance: Should P pay b/c P created incompatibility?

🡪 When we ask what property rights someone has w/r/t land → state law.

🡪 When it comes to the right to U&E → issue of state *nuisance* law

**Remedies:** remedial discretion, injunction default but Ds often want damages

* Injunctions can spur innovation
* Under-enjoining more fixable than over enjoining (leg, zoning, other regs can shut down incompatible uses –even if not enjoined – but cant undo an injunction, though can sell/buy it)
* Institutional competency – who should decide uses? Leg better positioned?



Servitudes → Owner waives right to exclude certain kinds of intrusions by another and gives other a right to use (*not revocable at will*)

1. Easements appurtenant - Belongs to another parcel of land
2. In gross - Belongs to a particular grantee
3. Profit à prendre - Rt to enter land in order to extract something of value
4. Affirmative - permit some affirmative act on ST (\*virtually all easements\*)
5. Negative - permit to demand owner of ST desist from certain actions (rare)

*Creation (Grant: granted in sale.* *Reservation*: *I sell this to you, but I retain the right.)*

* **Express grant/reservation –**explicitly, separate doc or as clause in sale
* **Implied grant/reservation** –severance of DT & ST at some point in past
  + Based on **prior use** OR **necessity:** Unity of title/common O followed by severance of DT/ST under … circumstances (apparent prior use &/or necessity) AT TIME of severance
  + Courts reluctant re: implied *reservations* bc seems like derogation of grant
  + **Prescription** - requirements/theory similar to AP
    - Requirements: 10 yrs, use open, notorious, continuous, no permission, act as if right to use (BUT *exclusive* use not reqd)
  + **Estoppel** – permission/assurance + reliance

**To bind successors (easement runs w land):** notice (actual or constructive) + intent to run (not for prescription or estoppel)

**Right of way**: most common; right to cross someone’s prop to get to yours

**Policy**: enforce encourage bargaining ex ante, but potential for extortionate power/unfair

Exs: Boomer (dust), Thornton (public access to dry beach)

***Baseball Publ.*** - wall sign = easement not lease (no possession) nor license (irrevocable)

***Schwab*** - Implied grant/reservation? → NO

* No. P sold portion w public road access (created necessity)
* Not truly landlocked; water access

***Holbrook*** - **Estoppel** - YES (road for construction to home, spent $) 🡪 HIGH STD

***Warsaw*** - **Prescription** - YES (driveway for truck access) 🡪 EASIER STD for DT

* Where valid prescriptive easement, **not required to compensate FMV** of easement or costs of removing/relocating encroaching structures which interfere w/ use of easement (prop right backed w/ liability right).
* ST can’t interfere w DT’s rt of access (had to tear down)

**Misuse**: ***Penn Bowling*** - Express easement, new DT builds building serving DT + adjacent land, using easement to service both → changed nature of use

* Bright line rule: when easement appurtenant to one lot, aren’t allowed to use if for non-appurtenant lot that you later or separately acquire
  + Gray area: expanding scope - reasonableness determination of whether use has changed so much no longer w/in original scope
* Misuse insufficient to constitute forfeiture, waiver, abandonment
* Injunction appropriate when cant tell whether using for DT or other (remanded)

**Covenants**: O agrees to certain restrictions on use of land for benefit of other(s)

* ASK: Circumstances giving rise to a restriction? Who can enforce the restriction? Against whom? \*\*Existence of **common plan** relevant at each stage!
* **Enforceable reqs**: **intent, notice, “touch & concern”**
  + **defenses**: pub pol; equitable defenses (laches, estoppel, unclean hands, waiver, abandonment (***Peckham***), changed conditions (***Bolotin***), Const
* **Reciprocal restriction**? Implicit promise, pattern/expectations, common plan, maps.

***Tulk*** (Eng): expanded category of equitable servitudes beyond CL easement

* square garden covenant, had notice of it

***Sanborn*** - gas station - Ps sued to enjoin. ~reciprocal negative easement~

* When O of related lands conveys part of land to another w/ restrictions intended to benefit retained land, same restrictions apply to retained land
* **Inquiry notice**
* enforceable v each successor w/ knowledge until easement expires, or outdated
  + 🡪 Should have noticed plot of land traced back to O, related parcels conveyed w/ strict use limitations, observe lots surrounding

*Conservation* easements: *Negative*: ST can’t do x & *in gross*: enforced by gvm’t/trust

* + **(-)** perpetual nature, use of tax subsidies, lack of public oversight

***Bolotin*** - Owner of undeveloped lots off Wilshire wants to go to commercial; can’t

* explicitly restricted to single-family residential use, but useless for this purpose
* DTs paid for right to stop neighbors from using land inconsistently w/ covenant
* Changed conditions - require changes w/in neighborhood; not just at border

🡪 NOW Q: Have “changed conditions rendered the purpose of restrictions obsolete,” such that “enforcement of restrictions … will no longer benefit the [DTs]”?

***Peckham*** - daycare, covenant against home businesses upheld

* Court shoots down 4 diff possible reasons for not enforcing covenant
  + Abandonment: need proof violations have eroded general plan, when covenant “habitually and substantially violated” → not true here
  + Laches: need (1) knowledge/reasonable opp. to discover cause of actions, (2) unreasonable delay, (3) damage to D resulting from delay
  + Equitable estoppel: need (1) admission, statement, act inconsistent with claim, (2) action in reasonable reliance (3) injury
  + Public policy: Q for legislature to decide

**Zoning**

* State/local law; democratic; reflect local prefs; rational planning/governance
* Zoning def **state action**; constitutional constraints (DP, Takings, EP, 1st amend)
* Nuisance law AKA “judicial zoning”, covenants AKA “private zoning”
* Preexisting non-conforming uses usually grandfathered in (prevent Takings claims)

***Euclid***: Rational core of zoning: separate incompat uses. Class/de facto race segreg OK.

* Use restrixs (“Euclidean zoning”); P wants to use land for industrial but cant.
* P argues SDP (econ liberty) (facial challenge); city argues police powers/nuisance.
* Held: Zoning valid exercise of police pow (like nuisance law), reg for general good.
  + SFR <-> indust – OK, nuisance. [Purely res dx usually sustained: prev fire & accident, reduce noise]
  + SFR <-> MFR? Apts/class = proxy for race. Ct: OK bc MFR basically a nuisance in context: block sun/light/air, traffic, commercial (?), destroy character of ‘hood.

***Mount Laurel (NJ):*** state constitutional protection vs. exclusionary zoning

* Zoning restrix made MFR basically impossible 🡪 Class & de facto race segregation.
* Held: zoning unlawful; under state const, must promote general welfare (incl of people who don’t live there now but would want to).
* If zoning makes afdbl housing imposs, burden shifts to govt to show reason. Tax rev/$ burden of more kids, purely local prefs don’t cut it (bc must promote gen welfare).
* Note: govt didn’t have to *create* afdbl housing, just couldn’t make it imposs

**Eminent Domain**

5th Amend: “nor shall private prop be taken for public use w/o just compensation”

* Just compensation = fair market value (FMV)

***Kelo*** (2005) - economic dev project for depressed town

* Private A 🡪 private B: Not OK if sole purpose is B’s benefit; OK if for use by the public/public benefit.
* part of integrated economic development plan; tax rev + jobs = public benefit

***Berman***: urban renewal in blighted area; ED 🡪 private B OK

* Thomas wants to overturn; concern re impact on poor coms + no comp for subjtv value/displacement

***Midkiff***: Ct upholds state process for land redistribution - forcing big LOs to sell land (ED)

* Legislature came up with the plan; part of comprehensive econ development plan (one-to-on transfers raise susp of purpose to benefit private B).
* *Incidental* (even if significant) benefit to private B OK, as long as *primary* benefit & purpose is to benefit the public

🡪**holdouts**: pub doesn’t benefit if one LO blocks valuable devel; ED aims to prevent.

🡪deference to leg here bc courts not good at guessing leg’s purposes

**Takings: Literal taking? Rise to level of constitutional Taking?**

Inhere in title:

* Background principles of state’s prop & nuisance law (***Lucas***; police pows not determ)
* Actual necessity, easements, preexisting servitude, limit on title that run w land. ***Lucas***
* Statutory restrictions – not necessarily (***Palazzolo***)
* Acting in police power; prevent serious pub harm/pub nuisance (***Mahon***) (cf Lucas)

Balancing:

* Singling out v comprehensive plan (***Penn***); extent $ harm; RIBES/prior statutes (***Murr***)
* Reciprocity of advantage (height restrix: burdened, but benefited in form of light/air)

Physical Invasions

Factors: Open to public; extent of econ impact, state v. fed (cf KA & Pruneyard)? Perm?

***Kaiser-Aetna***: invested in pond to create marina; gov’t claimed navigational servitude

* Literal taking? YES, rt to exclude (inherent limitation?); Taking? YES
* Huge RIBEs, severely impacted by govt limiting their right to excl. Not open to pub.
* State law said pond was private prop, subj to navig servitude after made navigable
* Unclear if holding is *this* phys govt servitude, or *all* phys govt servitudes = taking

***Pruneyard*** - Literal taking? YES, rt to exclude. Constitutional Taking? NO

bc no impact on use/value, no harm to RIBEs; open to public; state auth to define prop rights so OK to impose this limit (distinguished from *KA* - federal gov’t). Judicial taking.

* *Conc*. (Marshall): States’ power to redefine prop rights not unlimited; “sphere of private autonomy” secured/ protected by prop rights (from Substantive DP)
* *Cf*. *Marsh –* no fed const rt, but CA free speech rights go farther

***Loretto*** - gov’t required cable to be installed. Literal taking? YES, phys invasion; Constitutional Taking? YES, *per se*.

* permanent physical invasion – takes rts to excl, possess, use, dispose of prop
* even tho no harm to value or use; no privacy issues

***Nollan*** - Conditioned house permit on pub easement for beach access. Taking if imposed outright bc PPO, so taking here too.

* PPO bc pub gets permanent, continuous right to cross prop 🡪 per se taking.
* Dist. *KA* (classic rt of way easement v nav serv); dist *Pruneyard* (closed to pub)

Regulation of Use

***Mahon*** – state law regulating mining subsidence = taking? → YES

* State law: mining cos must leave in place enough coal to not affect surface
* All ct agrees: if state acting w/in **police power** (esp. prevent serious harm to public/abate public nuisance), no Taking
* Holmes/majority: Subsidence not a pub nuisance; denom = supt estate 🡪 Taking
* Dissent/Brandeis): Subsidence is pub nuisance, state can regulate bc broad police power; denom = all of mining co’s rights.

***Miller*** - VA law → destruction of all cedars w/in 2 miles of apple orchards

* Literal taking? YES; Constitutional Taking? NO
* defer to legislature; taking of 1 of bundle of rts = taking of prop (conceptual severance)

***Penn Central*** - Grand Central; building barred by NY Landmarks Preservation Law

* Literal taking? YES; Constitutional Taking? NO → **BALANCING** **TEST**
* RIBEs based on use as railroad terminal; can continue current uses & make $$$
* Character of gov’t axn: phys invasion more readily a taking; not phys here but reg.
* Is the owner being singled out (arbitrarily)? Majority: Not here; comprehensive plan & nothing arbitrary about singling out Grand Central as an iconic NY landmark.
* Denominator? No conceptual severance → focus on the parcel as a whole.

***Keystone*** - PA law bars mining under occupied land if risk of collapse/subsidence

* Unlike Mahon, denom = parcel as whole; reg only limits mining in supt estate but can still mine all mineral estate; econ burden not big enough 🡪 no Taking.

***Lucas*** – Reg bars new structures on beach; prevent coastal erosion.

* **Limits inhere in title**? background principles of state prop & nuisance law
  + leg gets little deference in deciding whether something is a nuisance – it must have reference to the existing CL
  + remanded to decide based on state nuisance CL -- probably no
* **Elim all econ viable use** 🡪 **per se** **taking** (Denom = whole parcel)
* Other limitations inherent in title: Actual necessity, easements, pre-existing servitude, limit on title that runs w/ land. Statutory restrictions?

***Palazzolo*** - RI regs designate certain waterfront land wetlands; makes it hard to build on most of land. Literal taking? Yes. Taking? Remand to *Penn Central*; probably loses.

* **Statutory regulation doesn’t inhere in title**; new owners can challenge as takings
* *Hobbesian stick* (positivism!) in *Lockean bundle* (natural rights conception of prop rights) → gives State too much power to redefine property rights prospectively
* price = value as restricted + prob\*value if prevail on Takings (Stevens - windfall)
* O’Connor: existing stat restrix should be in balancing test in RIBE. Scalia: nope, just bringing it through the back door.

***Tahoe-Sierra*** - moratorium on land use (32 mths) – not taking

* **Denominator** = **parcel as a whole** = geographic & temporal dimensions of O’s interest in the land –> conceptual severance is dead. (Good ruling for regulators.)
* But how to handle if not FSA (lease, life estate, etc)? Open q.

***Murr***: denominator test if 2+ parcels - Adjacent lots merged as denominator.

* WI law bars devel/sale of riverfront lots w <1 acre buildable land.
* P has two lots & cant build on one. State law treats lots at merged. P sues for taking and says denom = lot 1. Govt says denom is both lots together. Court sides w govt.
* NEW **3-part test to determine denominator** when 2+ parcels:
  + Treatment of land under state & local law
    - Incl. lot lines and merger clause
  + Physical characteristics of the land (& likelihood of future regulation)
    - skinny lots; on steep cliff; scenic lake - could expect regs
  + Prospective value of regulated land (preserve nat beauty; increased priv & rec space; if adjacent lots, possible offsetting gains to value of other lot)
* Remanded to Penn Central; probs no taking – **no RIBEs bc restrix reg predates acquisition of property** (answers debate raised in ***Palazzolo***), no severe $ impact.
* *Dissent*: mushes up one Q… Formalism better (look to how state law defines prop)
* Note: if D owns parcel, splits it into two lots, then sues for a taking of one claiming that one lot as the entire denominator (to increase $ impact), courts probably treat as **opportunistic manipulation of denominator**/selling off econ. viable portion.

Implications of ***Lucas*** and ***Palazzolo***:

* Constrain legs by tying regulatory capabilities to CL of nuisance; deregulatory ethos.
* Nuisance does well w neighbors & confined externalities. Does poorly w harms that are diffuse, extend beyond parties in lit, latent, or result from aggregate effect. Tends to under-enjoin; allow harms to continue.
* Legal system had decided 2-party nuisance disputes weren’t adequate to deal w harms, so used regs to fill the gaps. But now court is limiting reg possibilities.
* Wildcard: pub nuisance statutes. Palaz implies some stats sufficiently conventional to inhere (eg pub nuisance, as long as applied in predictable way eg ordinary zoning)
* Also show erosion of positivism; suggest quasi-natural rights constraints on how far state can go in regulating property.

Exactions

***Nollan***-***Dolan***: 1. Would the exaction/condition be a Taking if imposed outright?

2. If so, the condition is a Taking, **unless both**:

* it serves same govt purpose as development ban/adequate **nexus** (*Nollan*);
* roughly proportional to costs/burdens of permitted development (*Dolan*)

***Koontz*** – applied to develop portion of property zoned as wetlands 🡪 denial = TAKING

* Where gov’t denies permit unless O fulfills “condition precedent → *Nollan*/*Dolan* test
* District denied b/c Koontz refused to either:
  + (1) reduce the size of his development area and deed an easement to the government on the rest of the property, or
  + (2) fund improvements to District-owned land miles away.

🡪Assuming gov’t could constitutionally deny permit altogether - ***why*** not give Os choice?

* Doctrine of unconstitutional conditions: just b/c Gov can deny you access to X, doesn't mean can condition access to X on anything they want 🡪 potential extortion

Judicial Takings

***Stop the Beach Renourishment*** (2010): Fixed O’s property line at what had been MHTL

* O: State Ct “took” my littoral rights of contact w/ water & future accretions to beach
* Erosion control line = prior MHTL = new permanent boundary 🡪 nothing was taken
* Pre-existing state law - basis for understanding that any avulsion is now state’s prop
  + 🡪 Not a taking if it had been done by the legislature
* But they still ask ~Constitutional Taking?~ (hypothetical counter-factual analysis)
  + What’s relevant prop right/denominator? Littoral rights vs. parcel as whole
  + Split 4-4: Scalia idea of judicial takings/test that should apply → no holding

*Potential implications:* ***Pruneyard***: state constitutional rt of access; ***Thornton***: customary rt to access*,* public trust that expand scope, eg above MHTL rulings (***Mathews****;* NJ). Are these limits that inhere or taking an existing rt (to excl)? If it takes “established property right,” arguably judicial taking (though justices disagree whether this exists at all).