Table of Contents

[I. Dueling Conceptions of Property 1](#_Toc26022210)

[II. Acquisition of Property 5](#_Toc26022211)

[A. By Capture or Conquest (“Discovery”) 5](#_Toc26022212)

[B. By Creation 8](#_Toc26022213)

[C. By Find, Accession, *Ad Coelum* 9](#_Toc26022214)

[D. Adverse Possession 12](#_Toc26022215)

[E. Competing Principles of Original Acquisition 16](#_Toc26022216)

[III. Values Subject to Ownership 17](#_Toc26022217)

[A. Personhood 17](#_Toc26022218)

[B. Public Rights: Waterways and Airspace 21](#_Toc26022219)

[IV. Owner Sovereignty & Its Limits 24](#_Toc26022220)

[A. Trespass Actions 24](#_Toc26022221)

[B. Self-Help 26](#_Toc26022222)

[C. Exceptions to Right to Exclude 27](#_Toc26022223)

[1. Common Law 27](#_Toc26022224)

[2. Constitutional Trumps 28](#_Toc26022225)

[3. Property and Equity 30](#_Toc26022226)

[V. Forms of Ownership 30](#_Toc26022227)

[A. Estates 30](#_Toc26022228)

[B. Mediating Conflicts between Owners: Conflicts Over Time 32](#_Toc26022229)

[1. Waste 32](#_Toc26022230)

[2. Restraints on Alienation 33](#_Toc26022231)

[3. Rules Against Perpetuities 33](#_Toc26022232)

[C. Mediating Conflicts between Concurrent Owners 34](#_Toc26022233)

[1. Basic Co-Tenancies and Severance 35](#_Toc26022234)

[2. Partition 36](#_Toc26022235)

[3. Ouster 37](#_Toc26022236)

[VI. Entity Property – Separating Management and Possession 38](#_Toc26022237)

[A. Lease and Landlord Tenant Law 38](#_Toc26022238)

[1. Condition of Premise 42](#_Toc26022239)

[2. Abandonment 44](#_Toc26022240)

[3. Transfer 45](#_Toc26022241)

[B. Coops, Condos & Common Interests Communities 46](#_Toc26022242)

[VII. Law of Neighbors 49](#_Toc26022243)

[A. Nuisance 49](#_Toc26022244)

[B. Servitudes 53](#_Toc26022245)

[1. Easements 53](#_Toc26022246)

[2. Covenants/Conservation Easements 58](#_Toc26022247)

[VIII. Public Regulation of Land Use and Regulatory Takings 60](#_Toc26022248)

[A. Eminent Domain 60](#_Toc26022249)

[B. Regulatory Takings 62](#_Toc26022250)

[1. Foundations/Theory 62](#_Toc26022251)

[2. Balancing 63](#_Toc26022252)

[3. Physical Invasions 64](#_Toc26022253)

[4. Regulation of Use 66](#_Toc26022254)

[5. Denominators 67](#_Toc26022255)

[6. Judicial takings 70](#_Toc26022256)

# I. Dueling Conceptions of Property

1. **Two dueling conceptions of property:**
   1. **1) right to a thing good against all the world**
      1. Penner/Blackstone, essentialist
      2. Core: use of property, grounded in right to exclude
      3. Why protect right to exclude?
         1. Safety, security of persons and chattels on land
         2. Privacy, liberty, autonomy
         3. Allows you to make wide variety of uses of your property
         4. Protects productive use of property
            1. Investments in property insulated from invasion
            2. Owners more willing to invest in prop/productive uses of prop if they are protected w strong rule.
         5. Theoretically avoidance of violent self-help
      4. Exceptions right to exclude
         1. Government-related (search-warrants, inspections)
         2. Necessity
         3. Public accommodation/anti-discrimination
         4. Consent
         5. Licensing
   2. **2) bundle of sticks** 
      1. Grey, skeptics
      2. Bundle of rights can be split up/transferred. Right to exclude just one stick in the bundle.
      3. Not a fixed relation, relation among person w/ things that depend on particular circumstances and balance of social and individual interests
      4. Rights incl:
         1. Right to exclusive possession [rt to possess, right to excl]
            1. Protected by absolute exclusionary rule (trespass law)
         2. Right to use and enjoy
            1. Protected by case-by-case balancing of particulars of situation
         3. Right to convey/transfer
         4. Right to destroy
      5. Governance model favored where uses conflict, want govt to determine best use
   3. Shift over time: EXCLUSION 🡪 GOVERNANCE
2. **Trespass to Land** 
   1. ***Jacque v. Steenberg* (WI 1997) – absolute right to exclude**
      1. FACTS: ∆ plowed path thru π’s land to deliver mobile home in snow; π had refused permission already (other route – costly, extra time). No actual harm to property.
      2. HELD: Intentional trespass. Nominal damage of $1, huge punitive damages - $100k.
         1. Absolute, categorical right to exclude
         2. Deter intentional trespass, bolsters landowner’s discretion, security, safety, privacy, investment.
         3. Detersself-help
      3. Bright line rule – law sets baseline entitlements against which parties bargain
   2. ***Hinman v. Pacific Air Transport* (9th Cir. 1936) – balancing approach (not absolute exclusion right) for superjacent air space.** 
      1. FACTS: ∆s flies planes < 100 ft above P’s land. P sues for trespass under *ad coleum*theory (column of space, whoever owns the soil owns to the sky and to the depths of the earth).
      2. HELD: absolute right to exclude limited to land’s surface area and subjacent space; here, apply a balancing test.
         1. Airlines have high public value.
         2. Bargaining with each owner of air rights would be impracticable for airlines/other cos making use of air (prohibitive transaction costs)
         3. Air space not used a frequently as surface/subjacent, not as many productive possible uses for indiv owners.
         4. Balance weighs in favor of airlines 🡪 no trespass.
      3. Might work better as nuisance suit
3. **Trespass/Nuisance Divide** 
   1. Trespass: protects interest in possession of land
   2. Nuisance: protects use and enjoyment of land
      1. Nuisance = interference with the use and enjoyment of land that causes “significant harm” and is “unreasonable.” Unreasonableness = gravity of the harms outweighs the utility of the actor’s conduct. (Restatement Torts)
   3. ***Hendricks v. Stalnaker* (VA 1989) – significant harm but no nuisance liability** 
      1. FACTS: S puts well on own land, proximity of well prevents H from putting septic tank on own property (regulation). H sues S for nuisance.
      2. HELD: not a nuisance
         1. Reasonableness inquiry; balancing of interests (not strict rule like in trespass)
         2. Should be used Building well on land is reasonable
         3. First in time played big role
         4. Seeping sewage more “invasive” than well
      3. Harm reciprocal – only one side can win
   4. Trespass and nuisance can exemplify 2 different strategies for resolving disputes about how scarce resource used
      1. **Exclusion**: owner acts as manager/gatekeeper of resources
      2. **Governance**: focus on particular uses of resources and prescribes particular rules about permitted and prohibited uses w/o regard to other attributes of resources
         1. More legal intervention, not hard and fast rule
4. **Coases Theorem**
   1. Re: Incompatible land uses
   2. Theorem
      1. When two activities come into conflict, the law assigns an entitlement to one party or the other through a legal rule (property or liability)
      2. Parties can reallocate entitlements through private transactions
      3. In a world with no transaction costs, efficient allocation of resources (more valuable activity) will prevail
   3. Assumptions
      1. All losses & gains from both activities are to P and A - no positive or negative externalities
      2. All parties are economically rational (self-interested) actors
      3. No wealth effects – can afford to buy entitlements
      4. No transaction costs
   4. Limitations

|  |  |  |  |
| --- | --- | --- | --- |
|  |  | **How is the entitlement protected?** | |
|  |  | **Property rule** | **Liability rule** |
| **Who gets the entitlement?** | **P** | **Rule 1:** P can stop D (or set price to allow D to enter/use) – *Jacque, Pile* | **Rule 2:** D must pay P’s damages (as set by ct) to enter/use P’s land – *Golden Press* |
| **D** | **Rule 3:** D can enter/use land w/out liability (or demand own price to stay out) –*Hinman, Hendricks* | **Rule 4:** P can stop D if it pays D’s damages/losses (set by ct) |

* + 1. IRL, there areoften high transaction costs.
    2. Placement of legal entitlements can produce inefficient outcomes
       1. Eg *Jacque* – bilateral monopoly. But somewhere bw $1-499 (cost of alt route) would be more efficient outcome.
    3. Bounded rationality – non-economic value
    4. Limited, inaccurate, asymmetrical information
    5. Bilateral monopoly
    6. Externalities
    7. Strength and enforcement of laws backing up entitlement
    8. 🡪 all can lead to inefficient outcomes.
  1. Types of entitlements
     1. Property rule:
        1. Injunction
        2. one party sets the prices
     2. Liability rule:
        1. Compensatory damages
        2. court sets price (objective)

1. **Building encroachments** 
   1. Bilateral monopoly situations arise from minor building encroachments
      1. If knowing and deliberate encroachment, courts have no prob enjoining.
      2. Issue is if encroachment is accidental/good faith.
   2. ***Pile v. Pedrick* (PA 1895) – bright line absolute rule** 
      1. FACTS: D builds wall on D’s own property; unintentionally intrudes on P’s property under the ground by ~1.5 inches (subjacent property right). D acted in good faith (cf Jacques).
      2. HELD: trespass 🡪 injunction on Ds.
         1. Ad inferos (down to center of earth): sub-surface can be useful while sky is hard to make use of and hard to define.
         2. Blackstonian view of P’s property right: no cost-benefit or weighing of social utility
         3. P won’t let D on the land to come onto land at all, so D has to take whole thing down – high cost.
      3. Rule 1: P has entitlement and wall must be removed (or parties can bargain, P sets price and bc bilateral monopoly can set it very high or refuse).
   3. ***Golden Press* (∆) *v. Rylands* (π) (Co. 1951) – balancing test** 
      1. FACTS: Very small encroachment by D’s building (just blocking view); P wants it torn down entirely. Court assumes good faith.
      2. HELD: liability rule – damages (which are trivial here).
         1. Encroachment unintentional and slight. P’s use not affected.
         2. On other side, cost of tearing down entire building is huge and way out of proportion with the actual harm.
         3. Court thought exertion of power here was unconscionable, declined to issue injunction and instead gave damages (trivial).
      3. Rule 2: P can stop D (or set price to allow D to continue) but actual awards would be trivial
   4. Reconciling *Pile* and *Golden Press*
      1. *Pile* was decided years before *Golden Press*
      2. Bright-line
         1. Predictable; precautionary incentives for encroachers, deter violations.
         2. BUT unfair outcomes
      3. Balancing
         1. Precautionary incentives for encroaches; fairness; avoidance of extortion/bargaining power and social waste.
         2. BUT insufficient incentive to avoid encroaching – its permissible as long as it isn’t proved to be intentional or
         3. Looks better ex post
      4. What is considered fair depends on whether you analyze the impact ex-ante or ex-post:
         1. Ex-ante
            1. bright line rules deter violations and encourage precautions, due diligence
            2. balancing leads to uncertainty
         2. Ex-post
            1. bright line rules do not take into account situation-specific variations that can indicate something like extortion (like in *Golden Press*); give Ps extortionate potential

# II. Acquisition of Property

1. **Summary of principles** 
   1. First possession: based on being 1st to possess unclaimed thing
   2. Discovery: being first to discover some thing and hence having unique claim to possess it
   3. Creation: first to possess some new or novel thing
   4. Accession: in many applications, involves perception that 1 things bears such prominent relationship to another thing that possession of 1st thing is also possession of the other thing
   5. AP: based on someone possessing thing for such a long period of time that rights of original owners are distinguished

## A. By Capture or Conquest (“Discovery”)

1. **Wild Animals + Other Applications of First Possession**
   1. Vocab
      1. Res nullius: property of nobody until captured
      2. Manucaption = actual capture
      3. Ferae naturae (wild animal): property acquired by “occupancy” only
      4. Constructive possession if wild animal on your land
   2. ***Pierson* *v. Post* (NY 1805) – Rule of Capture: mere pursuit isn’t sufficient for occupancy** 
      1. FACTS: Post pursuing fox w hounds; Pierson, knowing of Post’s pursuit, seizes fox and kills it. Post sues Pierson.
      2. HELD: Post had not captured fox, so reject his suit.
         1. Fox = ferae naturae/wild animal. Property in such animals acquired by “occupancy” only.
         2. Capture is required. Mere pursuit not enough.
         3. Requirements for “capture”:
            1. Manifested your intention to appropriate it
            2. Deprive animal of natural liberty
            3. Brought within certain control
            4. [or actual capture, bodily seizure etc]
      3. DISSENT:
         1. Emphasizes proximity b/w hunter and prey
         2. Knowing and nasty nature of ∆’s interference
         3. Pursuit + reasonable prospect of capture/inevitable pursuit
         4. Social objective to kill as many foxes as possible and want to encourage this
         5. People invest time and resources in hunting – want to protect investments from others swooping in.
         6. Law as an instrument for governance of society – shaped and revised as time changes
   3. ***Ghen v. Rich* (Ma. 1881) – P had constructive possession of whale, did all possible to bring under control, protect biz interests**
      1. FACTS: P shoots whale in hopes to kill; does kill. Custom was killed whales wash to shore, whaler called and owns the whale. Whale washes up, finder of whale took and sold it. P sues.
      2. HELD: P had constructive possession of whale
         1. There is nothing else whaler could realistically do to bring whale under his control – P did all possible under circumstances to take possession/occupy.
         2. Enough to est “constructive possession” such that whaler wins over subsequent finder (who has “actual” possession).
         3. Whaling industry would collapse otherwise. Want to protect investments in pursuing and capturing the whale (echoing Pierson dissent).
         4. Custom dictates what brings whale within “certain control”
   4. ***Keeble v. Hickeringill* (Eng. 1707) – even mere pursuit protected from *malicious* interference**
      1. FACTS: P had decoy pond to get ducks to come, D purposefully shot at pond to drive ducks away (and towards his own property). P sues arguing ducks were his.
      2. HELD: mere pursuit (as part of trade that is lawful, profitable, useful) is protected against violent or malicious interference.
         1. No need to show certain control or something amount to capture
         2. Knowing and last-minute nature of intervention
         3. Prevent unfair profit
         4. Protecting useful pursuit -- Property owner should be free to use own land w/o malicious interference
         5. Unclear what malicious is – courts decide
   5. ***Eads v. Brazelton* (Ark. 1861) – shipwreck – possession requires more than mere notice of intent** 
      1. FACTS: P finds shipwreck and claimed as his; marks it up and leaves. D comes along and claims it. P sues.
      2. HELD: possession requires more than notice of intent
         1. Marking isn’t enough: must maintain “hot pursuit”
         2. Continue due diligence, doing what it takes to bring goods into your possession/under your control
         3. Intent and notice necessary but not sufficient
      3. What counts as possession depends on the nature of the thing that is possessed and (sometimes) the nature of industry or activity surrounding that thing
   6. ***Popov v. Hayashi* - Barry Bonds baseball** 
      1. FACTS: Popov had baseball first, but due to interference cant show actual possession. Hayashi then grabs it, and is first to unambiguously establish possession. (Baseballs are home team’s property until out of the field, then res nullius). P sues.
      2. HELD: both parties have legitimate property interest in ball. Court orders ball sold and proceeds split in half.
         1. Popov cant show actual possession; normally this would end the matter bc burden on him to overcome D’s actual/present possession.
         2. But court instead says Popov had “pre-possessory interest”
         3. Hayashi has actual possession
         4. Unusual outcome – prof thinks error.
   7. ***Hammonds v. Central Kentucky Natural Gas* (KY 1934)**
      1. FACTS: landowner sues gas co for extracting “her” gas out from under her property. Gas co didn’t physically invade her land to get it, they owned neighboring parcels and there were common sources under ground.
      2. HELD: oil and gas subject to Rule of Capture, and she didn’t capture the gas.
         1. Natural gas is fugitive resource/res nullius
         2. Whoever acquires actual possession gets the gas; doesn’t matter whose land it’s under.
      3. May have had a case for trespass if slant drilling, but no slant drilling.
      4. Under pure rule of capture, have tragedy of commons
         1. Race to capture the oil/gas
         2. Waste of resources – everyone operating own drilling rigs
         3. Might destroy oil field if too many people drilling. Incentives to over-capture, over-exploit.
         4. Resolution: designate 1 actor to extract, then share benefits (Coasean bargaining)
            1. *Spindletop*: incentives for equipment over-investment/redundancy, pollution, and destruction of land

Parties better off agreeing on centralized system which could be achieved thru cooperation/voluntary agreement or regulation

Each individual has incentive to hold-out and try to maximize self-interest

* + - 1. Doesn’t work so oil and gas uniformly adopt regulations/ voluntary agreements (treaties)
         1. Exceptions: oil field under Iraq and Kuwait – rule of capture and Kuwait has better oil capture technology
  1. **Considerations under capture/first possession rules**
     1. It only matters which of two parties in a suit had it first. Third parties not relevant.
     2. What counts as “having it first”?
        1. What practices, investments, activities do we want to encourage and reward?
        2. What counts under these specific circumstances? Unique customs, problems? Did the party do the most they could have done to establish control?
        3. Nature of thing being possess, elements of intent
     3. Policy considerations
        1. First in time/first possessor rules can lead to wasteful competition and races to be first (tragedy of the commons)
           1. Rule works best when a clear winner will emerge quickly
        2. Why protect constructive (rather than only actual) possession?
           1. Incentivizes efforts to capture, continuing the chase shows manifestation of intent to control.

1. **Tragedy of the Commons**
   1. Lands are open to everybody but nobody is taking care of /maximizing them
   2. Free-rider problems
   3. Wild animals – only tragedy if living foxes are a good thing
   4. **Anticommons**: where too many have right to exclude and consequently no one is able to use a resource
      1. Example of traditional hold out problems
      2. If too many permissions are required, rights to larger resource may never be assembled
   5. **Semicommons**: when given resource is subject to private exclusion rights in some uses/dimensions but is commons or open access for other uses/dimensions
   6. Governance structure can stabilize both anticommons and semicommons
2. **Discovery** 
   1. **Whereas first** possession requires that one be the first *actually to possess* an unclaimed thing, **discovery** **established a unique *right to possess* a thing**.
   2. ***Johnson v. M’Intosh* (SCOTUS 1823)** 
      1. FACTS: P’s father granted land by Indians prior to American Revolution. After revolution, land was conveyed by Congress to the US govt. ~35 years later, govt sold a portion of the land to D. P brought action to eject D from the land, claiming it is his because he has superior title. 2 competing chains of title:
         1. Piankeshaw 🡪 TJ (1775) 🡪 J/π (1819)
         2. Piankesahw 🡪 U.S. (1795) 🡪 M/∆ (1818)
      2. HELD: Indian tribe has a right to occupy but that did not include the right to convey – since D can trace their title back to the U.S., he has superior title to the land. Discoverers have unique right to possess.
         1. Supreme Court = bunch of racist colonizers.
         2. Under normal rules, question is which party can chase chain of title back farther (would be P), but this doesn’t apply here.
         3. Discovery of land -> right to either purchase or conquest that land (title to land gained through conquering)
         4. Bc Europeans “found” America, got the right to take all the land. Indians retain right of occupancy, but no right of transfer/sale. Can prevent settlers from displacing them, but not US.
         5. So Piankeshaw’s property rights were extinguished upon conquest by European of nations
   3. *City of Sherrill,*
   4. *Oneida Nation*

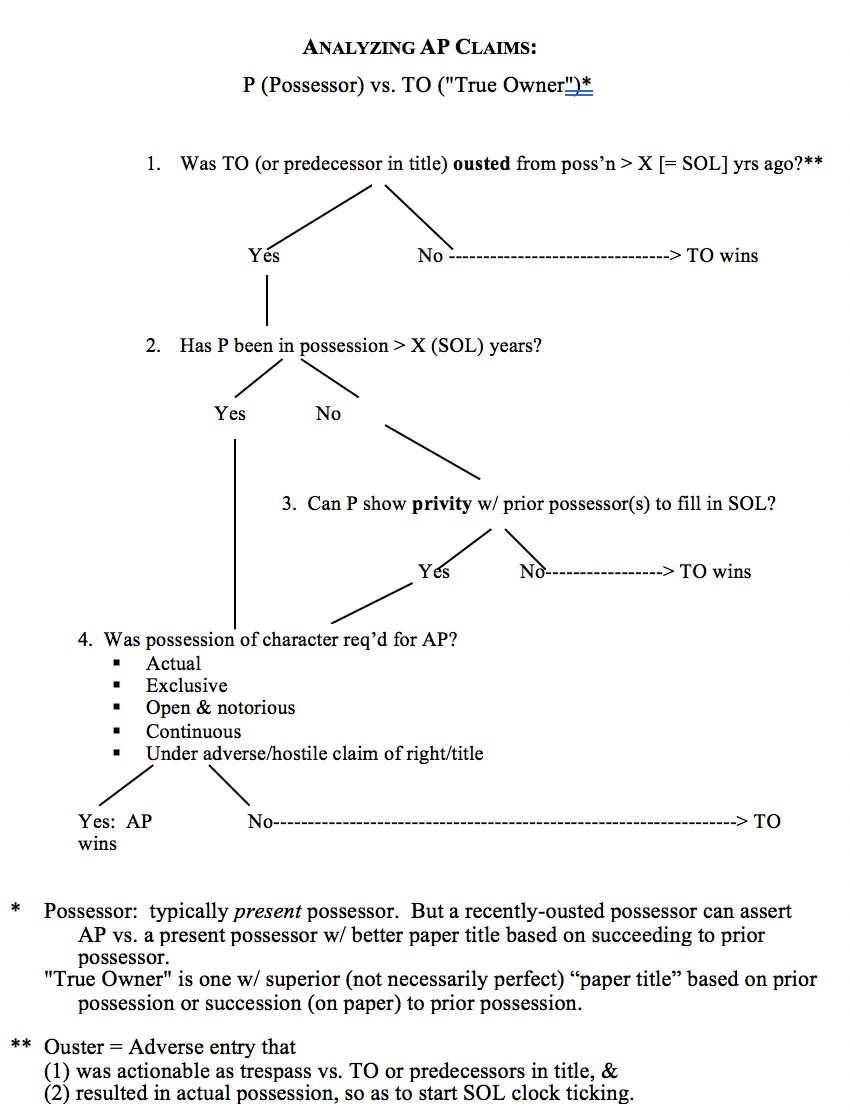
## B. By Creation

1. **Intro**
   1. Creation: another way of est original ownership, typically applies to property in form of info
   2. Property rights in info differ from rights in tangible goods
      1. Info is non-rivalrous good: use by one does not diminish use by another.
      2. Primary reason for creating prop rights in info: incentivize people to produce more (not ensure it is allocated efficiently)
      3. Info might be costly to produce originally, but marginal post-production cost of copying/reproducing is very low.
2. **Intellectual Property Rights**
   1. Too little protection 🡪 insufficient incentive to create and invest
   2. Too much protection 🡪 effectively create a monopoly which will stifle competition, limit supply, stop free-flow info, raise prices
      1. IP rights imposed at expense of future creators and public
   3. Solution = give limited property right
   4. ***Eldridge* (2003):** 
      1. Congress extended new and existing copyright from 50 to 70 years after creator’s death (spurred by desire to protect Disney heirs’ rights to Mickey Mouse)
      2. Critics argued:
         1. Congress taking away from public w/o accomplishing anything in terms of spurring innovation – no need to incentivize those who have already created
         2. 1st amendment argument: congress has taken away people’s rights to express themselves
      3. Court rejected both and deferred to Congress
3. ***INS v. AP --*** INS cannot copy AP stories until the value of the news is expired; awards AP “quasi-property rights” to protect against unfair competition.
   1. FACTS: AP sues INS for pirating their news publications; AP writes them, INS takes and sells to own customers.
   2. HELD: INS cannot copy AP stories until the value of the news is expired; awards “quasi-property rights.”
      1. Describes rights awarded as “quasi-property”
         1. Property right as against particular actor and practice, not against all the world
         2. While there is no continuing property right against the *public* in un-copyrighted news after it is initially published, a commercial news source does retain rights to the material against *other news sources*
      2. Court is protecting AP’s investment by creating limited property right to prevent unfair competition -- Holding based on “desert” and unfair competition; Court wants protect very expensive business of news-gathering .
      3. “dual nature” of property in news matter:
         1. content (the news item itself) is public/common property 🡪 not protected
         2. literary property (the particular form of the news presented, exact words/expression) 🡪 is protected
      4. AP’s public posting is not abandonment
         1. Abandonment is a matter of intent; AP didn’t intend to allow info to be used in this way by INS
   3. CONCURRENCE (Holmes):
      1. supports narrow cause of action of misrepresentation of INS for pawning off as their own
      2. but property is creature of law, not based on values or facts
   4. DISSENT (Brandeis):
      1. Court should not be creating new property rights. This should be done by leg.
      2. Legislature has tools of investigation that courts don’t. Also better at balancing interests (property v free speech concerns).
      3. This is contested matter of importance so should be left to democratically-elected bodies to handle
      4. The dissent’s view has prevailed – courts now defer to the legislature before turning to the common law to create property rights
   5. We saw this notion of a quasi-property right in *Keeble* – where the court found P was protected not against all the world, but against the neighbor that was maliciously interfering
   6. Justifications for the “quasi-property” rights:
      1. Ex ante: maintain financial incentives in the news reporting biz
      2. Ex post: unfair/wrong for INS to take AP’s hard work and profit

## C. By Find, Accession, *Ad Coelum*

1. **Rights to Possess**
   1. ***Haslem v. Lockwood* (CT. 1871) – P acquired property interest by enhancing value and had not abandoned**
      1. FACTS: manure dumped; P gathered it and left to get supplies to pick it up; D took it.
      2. HELD: Manure is P’s property: he acquired property interest by enhancing value, and did not abandon it.
         1. Do enough to acquire property interest?
            1. Court says yes: reward labor expense, enhanced its value by lowering cost to use
            2. About what you want to incentivize
            3. Took possession and got property rights
         2. Even if yes, did he abandon them?
            1. Didn’t leave it for so long to be abandoned
            2. Abandonment is about intent
            3. Heap shows investment and logical inference (according to court) is that he did it for reason
      3. 🡪 In situations where property rights are unclear, we think about investments – if someone enhances the value of something, he can create a property interest in it via possession.
      4. 🡪 One acquires a property interest in abandoned property if they legally (i.e. not via trespass) enhance its value (i.e. by lowering the cost of getting it to someone who can make use of it)
      5. 🡪 If a party finds property comparatively worthless and greatly increases its value by his labor and expense, he does not lose his right if he leaves it a reasonable time to procure the means to take it away when such means are necessary for its removal
      6. 🡪 Abandonment is a matter of intent and the burden is on the party claiming abandonment to prove that the other party’s behavior signaled an intent to abandon the property
2. **Sequential Possession** 
   1. Possession gives title good against all the world except for prior possessor or the successor in title
      1. Applies to land disputes as well
      2. EXCEPT abandonment – some jx make it legally impossible to abandon your interest in land, and generally difficult in most jx
   2. **Jus tertii**: can’t point to the rights of a 3rd party unless get your rights from them somehow – only Q is which of these two parties has superior claim.
      1. Finder v. thief (finder wins)
      2. Finder 1 v. finder 2 (Finder 1 wins)
      3. Thief 1 v. Thief 2 (Thief 1 wins)
      4. Thief 1 v. Innocent Finder (who comes later) (Thief 1 wins because innocent finder cannot sustain claim by pointing to a wrong that thief committed against some third party)
   3. **Bailment**: when transfer to someone else but expecting to retain title
   4. Dropping v. abandonment
      1. A drops piece of property, B finds – abandoned?
      2. A can satisfy burden by showing A had it first
      3. B has burden to show abandoned – significant chance A will win – abandoned is matter of intent.
   5. Possession gives presumption of title
      1. Can only rebut by showing superior title in herself. Can show with either:
         1. Connection with someone who has title; OR
         2. Prior possession; UNLESS
            1. Abandonment
            2. Transferee – seller can’t claim superior title
            3. Principal/agent (master/servant)
   6. Why protect possession
      1. Prevent theft
      2. Increase chance true owner will find lost object
      3. Encourage productive use of property
      4. If courts won’t protect unless you have title, more likely to use self-help
      5. Efficiency and predictability: comparatively easy to prove who had prior possession
   7. Why let thieves win at all
      1. Difficult to prove theft and relatively easy to claim one is a finder so ruling otherwise could actually increase theft
      2. Complicate and introduce risk of error to make rule that prior possessor wins except in cases of thief followed by blameless finder
      3. But if courts convinced prior possessor is a thief and current possessor is blameless, may try to find a way – but hard under rule that cant point to 3rd party’s rights to supt your own.
   8. ***Armory v. Delamirie* (1722) – finder > thief** 
      1. FACTS: Chimney sweeper π found jewel when working and took to goldsmith ∆; ∆’s apprentice refused to give back to π. Who has superior title?
      2. HELD: Finder/present possession gives a title which is good against all the world *except* for a prior possessor, or the true owner/their successor in title
      3. Would be same outcome if thief first and finder second, bc can’t point to another party’s rights.
   9. ***Anderson v. Gouldberg* (MN 1892) – 1st thief > 2nd thief** 
      1. FACTS: P gets logs thru trespass; D steals logs from P; P sues. Which thief has superior title?
      2. HELD: first thief has superior title.
         1. One in possession of illegally acquired property may assert a claim against subsequent possessor (who is not the rightful owner) since, under *Armory*, actual possession of property supports a claim of title superior to anyone other than the true owner.
         2. C can’t defeat B’s claim or enhance its own claim by pointing to original owner/stealing – about B and C, relativity of title. Doesn’t matter that someone else has better title than B.
   10. ***Clark v. Maloney* (1840) – 1st finder > 2nd finder** 
       1. FACTS: P finds 10 logs floating in bay; ties up and leaves. Logs get loose; D finds them floating in bay and takes them.
       2. HELD: First in time has superior title.
          1. Finder 1 has superior title against Finder 2 (but not against True Owner).
          2. Losing/dropping property doesn’t change person’s rights to that property.
          3. If A can prove he had the item first (and didn’t abandon it), he wins.
3. **Accession**
   1. Title to one things give title to other, related things
      1. E.g. assume trees, minerals etc. in/on land follow title to the land
      2. Can sever connections if you want
   2. Doctrine of increase: title of baby animals follows title of domestic animal
   3. ***Weatherbee* *v. Green* (MI 1871)**
      1. FACTS: D harvested timber from P’s property under belief that had authority to do so from rightful owners of land; used timber to construct hoops. P sues for possession of hoops.
      2. HELD: When A takes B’s property wrongfully but in **good faith** and turns it into something substantially **more valuable**, A gets title but B compensated for original value of lost prop. 🡪 Hoops are D’s, P gets $ for timber.
         1. BUT: If intentional, prior possessor gets it all back
         2. Clearer standard (ex ante)
         3. Fairer: deserve benefits from labor (ex post)
         4. Incentives – encourage greater precautions, protect investments in labor/crafts
   4. Test for accession
      1. Which property right is more prominent: the original object (i.e. the timber, grapes, wheat) or the labor expended by the improver in transforming the original object (i.e. making hoops, or wine, or bread).
      2. Need to determine the extent of the improvements. If substantial, tips the scale.
      3. Examples where transformer gets title:
         1. Olives 🡪 Olive Oil
         2. Grapes 🡪 Wine
         3. Grain 🡪 Malt/Bread
         4. Coins 🡪 Cup
         5. Timber 🡪 House
      4. Examples where transformation is *not* sufficient:
         1. Cloth 🡪 Garment
         2. Leather 🡪 shoes
         3. Trees 🡪 logs
         4. Iron 🡪 bars
   5. Mistaken improver for **land**: *don’t* get to keep the land
      1. Land is different, precisely because of its many uses
      2. Whereas something like trees are presumed fungible (if you get compensated, you can just go buy some more), land is considered unique (it presumably can never perfectly be substituted with another piece of land)
4. **Ad Coleum** (from center of earth to sky)
   1. ***Edwards v. Sims* (KY 1929) – cave case** 
      1. FACTS: D discovers cave beneath his land, wants to exploit for tourism; built hotel, improved footpaths, etc. Neighbor sues, claiming that portion of the cave is under his land. No entrance to cave on P’s land. P wants to do survey (which would require trespassing on D’s land) and wants damages/part of profit.
      2. HELD: Court allows survey under *ad coleum.* 
         1. P has shown reasonable ev (under ad coleum) that D might be trespassing.
         2. No other way to confirm whether D is trespassing.
      3. DISSENT: D owns it by investment
         1. Thinks ad coelom does not apply to all circumstances -- only to what property owner can exercise dominion over
         2. P doesn’t have entrance to cave, so couldn’t use it if he wanted to – so ad coelum should not apply
         3. Thinks it’s unfair to profit off D’s investment, bc P couldn’t use it at all w/out D.
         4. Would give D exclusive rights
      4. Distinguishing Hinman
         1. Only 1 person to negotiate (unlike *Hinman* and air rights) – low transaction costs
         2. Bilateral monopoly problem
5. **Competing Principles of Original Acquisition** 
   1. Five principles for establishing original acquisition:
      1. First Possession
      2. Discovery
      3. Creation
      4. Accession
      5. Adverse Possession
   2. What happens when these principles come into conflict with one another?
   3. ***Hannah v. Peel* (Eng 1945) – first possession > accession** 
      1. FACTS: D owned house, never occupied it; house requisitioned by army. P staying at house as soldier; found old brooch; gave to the police. Police gave brooch to D; D sells brooch. D had never known about broach and was not in present possession of the house at any time. D claims ownership based on accession – he owned the house, he owns anything found in the house. P claims ownership based on first possession.   
         HELD: given the circumstances, finder of broach gets to keep.
         1. General rule (*Armory*): first finder has superior right of ownership against everyone except true owner
         2. Owner of land possesses anything attached to or under the surface of the land, but *not necessarily* things lying on top
         3. Brooch lost for considerable time, enough time has passed that TO probs won’t come back
         4. Finder’s conduct was commendable – gave to police
         5. D didn’t have knowledge until brought to notice
         6. Court draws distinction between “lost” and “mislaid” (when you put something down and don’t realize you left it)
            1. Mislaid things tilt to owner of place where thing is found, bc it is possible that the true owner may be coming back.
            2. Lost tilts towards finder. Here, broach lost (bc dust, time)
   4. ***Fisher v. Steward* (NH 1804) – accession > capture+trespass**
      1. FACTS: P finds swarm of bees on D’s land, marked tree, notifies D. D cuts down tree and converts honey to own use. P sues.
      2. HELD: D owns bees/honey bc on his land.
         1. Owner of land also owns wild animals captured on his land—capture of wild animal doesn’t confer prop right if capture is made on another’s property.
         2. Like minerals in the soil.
         3. Want to discourage trespassing.
   5. General applications
      1. **The owner of the place a thing is found almost always beats out a finder – exceptions, like *Hannah*, are rare**
      2. Distinction between lost and mislaid objects turns on the circumstances where the object is found, passage of time, etc.
         1. *E.g.* money placed on counter in store and forgotten vs. brooch found in crevice of a window
      3. When the passage of time is short, the scale tilts in favor of the owner of the place where it is found for policy reasons (we want to get things back to true owner, who might come back to the place where they left it)
      4. Accession usually gives rise to *constructive* prior possession
         1. E.g. bee guy constructively possessed bees first because they were on his land.
         2. Accession will usually be enough to win (esp against trespassers)
         3. In *Hannah*, however, first possession won out bc of circs.
   6. Exs of first possession v. accession:
      1. Licensees finding object on someone’s property:
         1. As soon a licensee moves outside the purview/limits of their license, they become trespassers – the ability to assert that is part of the owner’s exclusive possession to property
         2. *E.g.* If a window washer wanders off and finds a diamond ring, they don’t have a claim to that ring – they weren’t performing the duty they were hired to perform in discovering the object
         3. *E.g.* *South Staffordshire Water v. Sharman* – pool cleaner finds two rings embedded in the mud at the bottom of the pool – finder was an agent and not wrongfully on the property, so it is not trespass. But property of landowner via agent/principal.
         4. *E.g.* *Elwes v. Briggs Gas* – lessees found an ancient boat while digging to make a gasholder – objects found in course of their conduct permitted by the lease, and thus not a trespass. But property of landowner via agent/principal.
   7. Finder (first possession) > landowner (accession) when:
      1. Lost in the ordinary sense vs. mislaid
         1. When mislaid, TO more likely to return
         2. TO’s interest can bolster landowner’s claim
      2. For considerable time v. short time
         1. If considerable, doesn’t really matter if lost or mislaid
      3. Finder “commendable” vs. dishonest
      4. Owner of property never in present possession vs. prior/current occupancy
         1. If ∆ had moved in, would have enough constructive possession to trump rights of finder
      5. Owner of property didn’t know of thing’s existence
         1. Not “found” if owner had known
         2. knowledge of *possible* existence could be enough if owner of property brought house thinking he may find heirlooms there
      6. Finder is not agent
   8. Landowner > finder when:
      1. Landowner owns the thing (incl via constructive possession bc owner knew of thing)
      2. Thing was mislaid only short time ago
      3. Finder is servant/agent of landowner
      4. Finder trespassed
      5. If thing is in/under the ground, or (maybe) thing is in home/private place currently occupied by landowner

## D. Adverse Possession



1. **Principles** 
   1. Possession of the requisite character if maintained for x amount of time can trump an otherwise valid claim based on prior possession.
      1. Did the AP act like an owner?
      2. AP is a tool for trumping prior possession – biggest deviation from first in time rule.
   2. Privity = “reasonable connection” (valid transfer) from previous possessor. A mere succession of trespassers doesn’t cut it.
   3. Character of the specific property in question is key.
   4. Payment of taxes: not a required element, not determinative. Sometimes in the state AP statute, sometimes relevant to show bona fide claim.
   5. Justifications
      1. Penalty for sleeping on your rights for too long so lose them – don’t do your duty
      2. Want to reward person who made productive use of property
      3. Sympathetic to psychic connection to property – hurts more for AP to be kicked off land than for absent TO to not gain land
      4. Reduces transactions costs and clear up errors in conveyance that accumulate over time
2. **Framework**
   1. **Step 1**: Was TO ousted?
   2. **Step 2**: Has the present possessor been in possession for more than the required SOL time?
      1. If yes, move to next step.
      2. If no, can present possessor show privity with prior possessor(s) and link up time periods to fill SOL?
   3. **Step 3**: Was possession of requisite character to satisfy elements of adverse possession?
      1. *Main Q is whether they acted like an owner of that property would.*
      2. Actual?

🡪 If yes, adverse possessor wins

🡪 If no, true owner wins

* + - 1. Contextual, based on what the land is suitable for
      2. This requirement is satisfied if the adverse possessor is acting like someone who owns the property would act, without permission from the true owner
    1. Exclusive?
       1. Not literally “exclusive”
          1. Giving people permission to come on your property is OK
          2. If someone comes on your land without permission, and you act like an owner against them (sue, tell them to leave, etc.), doesn’t interfere with exclusive possession
          3. If adverse possessor let true owner grant permission to people to go onto the land, *that* would be inconsistent with exclusivity
    2. Open and Notorious?
       1. Acts of ownership that manifest to the world a claim of ownership
       2. Would a reasonable TO know that someone had claimed the land as their own?
       3. What would an outside observer conclude from the actions?
          1. Neighbors can be a good proxy (i.e. if the neighbors think you own the land, you are probably open and notorious enough)
       4. Not hiding is impt
    3. Continuous?
       1. Continuous public acts of ownership that manifest a continuing claim of ownership
       2. Not interrupted by others’ claims/acts of possession
       3. Doesn’t have to be literally continuous presence, varies with the characteristics/purpose of the land
    4. Under adverse/hostile claim of right/title?
       1. Majority rule: your conduct, by its nature, asserts a claim of right
          1. objective standard – state of mind is irrelevant
       2. Minority rule (*Carpenter*): need good faith belief that you own property
       3. If you get permission from the true owner, then your presence is not adverse/hostile – no AP

1. **Application in cases** 
   1. ***Scott v. Anderson-Tully* – majority rule – adverse possession (blue fence)**
      1. FACTS: P and D own adjacent tracts of land; wire fence separates parcels. D marked the fence at property line thought was theirs with blue paint (1969) and P did not object to the painting of the fence. D also issued hunting licenses on their property and P had harvested timber only up to the fence (never went to the other side of the fence). P sues (2010), D claims they own the land thru adverse possession from 1969-2010.
      2. HELD: adverse possession test satisfied.
         1. Actual? D harvested the land, issued hunting licenses (allowing others to come in to use the property for the thing its useful for).
         2. Exclusive? No ev of anyone using land w/out D’s permission, including P.
         3. Continuous? No one but D possessed land for reqd time period.
         4. Open and Notorious? Blue line on the fence (in a particular shade of blue that the community would recognize as that company marking its territory – something an owner would definitely do)
         5. Under adverse/hostile claim of right/title? Even if you know deed is void, adverse possession meeting the other 4 criteria is sufficient to acquire conduct – your *conduct* asserts a claim of right – an objective manifestation of claim of right through your conduct. Must be without permission.
   2. ***Carpenter v. Ruperto* (IA 1982) – minority view – good faith reqd for AP (empty lot)**
      1. FACTS: P owned home next to empty lot. P cleared out a portion of the adjacent lot, knowing the land belonged to another, and over the years used it to store a propane tank and extended her driveway onto it. P claims adverse possession.
      2. HELD: Since P’s use of the land was not in good faith, as she knew another person held title to it, adverse possession is not permissible (even if all other reqs met).
         1. For AP claims in minority jxs, must have all elements of AP + good faith.
         2. When knowledge of lack of title + knowledge of no basis for claiming interest in property, no good faith
   3. ***Howard v. Kunto* (WA 1970) – seasonal use continuous + combining time periods of immediate predecessors OK where privity in interests**
      1. FACTS: D acquired deed to property (summer home), where a previous owner, 28 years before, erroneously believed the tract included the 50-foot adjacent tract and had built a dock on the adjacent tract. P undertook a survey of the whole area and discovered that the deed descriptions and the land occupancy of the parties didn’t coincide. D claims AP.
      2. HELD: Yes AP.
         1. Continuous? Yes. Intermittent presence (only in the summers) satisfy continuity requirement for adverse possession when, as here, the property is a seasonal home and it was used in that way. (Q is whether they were acting as a true owner would – true owner here would use seasonally.)
         2. Enough time? Yes. Successive owners of a property may add their occupancy tomes together where they share privity in ownership interests (here, the common erroneous belief between D and the previous owner that they owned the land is sufficient to establish privity)
   4. ***Ewing v. Burnett* (SCOTUS 1837) – AP, don’t need good faith**
      1. FACTS: D and P both have titles from common grantor who is in prior possession – P claims elder title. D has been using the land, but had a defective title, and it is in dispute whether or not he knew that plaintiff had title. The SOL is 21 years
      2. HELD: Yes AP.
      3. Applying the Framework:
         1. Was the P ousted from possession more than 21 years ago? 🡪 Yes
         2. Has the D been in possession more than 21 years? 🡪 Yes
         3. Was possession of requisite character?
            1. Actual 🡪 periodic removal of sand and gravel; that’s what the land is suitable for
            2. Exclusive 🡪 gave permission to some, sued those who entered the land without permission
            3. Open and Notorious 🡪 D wasn’t trying to hide his claim of ownership; neighbors viewed him as the owner
            4. Continuous 🡪 no interruptions in claim of title; even though plaintiff told others he wanted to get his land back someday
            5. Under adverse/hostile claim of right/title 🡪 D claimed the land as his own, had no permission from P, and had color of title

# III. Values Subject to Ownership (Or Not)

## A. Personhood

1. **Principles** 
   1. Some things are too personal/too tied to personhood to be considered typical property
      1. Body parts: courts get uncomfy when asked to apply property law to body parts/things related to personhood
         1. rules of property developed for commodities/economic exchange
         2. the closer you get to personhood, the less likely to find property rights (but see *Hecht*)
      2. Individual’s unique persona (& various aspects of that persona): more likely to be property, esp if commercial value (“right of publicity”)
   2. Self ownership: each human owns themselves and their labor power
      1. Touchstone of modern law
      2. This property right is inalienable (cant sell yourself or your labor into servitude)
      3. Cant own another human – 13th Amendment ban on slavery applies to private parties too
   3. 🡪 But what about parts of humans, or aspects of their identities?
2. **Body Parts** 
   1. Penner: Separation Thesis
      1. Only items that are thought of as separate from their owners can be “things” and thus subj to property rights. One cannot possess something which is not separate from oneself.
   2. ***Moore v. Regents of UC* (Cal. 1990) – excised cells are not property** 
      1. FACTS: P had consented to removal of spleen, but wasn’t fully informed about research/econ value of his cells. D used P’s cell to create valuable cell line, which was then patented. P sues for conversion and other claims.
      2. HELD: No conversion, bc cells taken from P ceased being his property once they left his body.
         1. No property interest in excised cells under existing property/conversion law
         2. Declines to expand doctrine to incl excised cells
         3. Chilling effect on medical research, from which society benefits
            1. Don’t force scientists to investigate pedigree of every cell line – impossible
            2. massive expansion of researchers’ liability
            3. discourage research, make more costly
            4. industry is socially beneficial
         4. Recognizing certain property rights in order to promote/incentivize development
            1. Incentivize innovation/exploitation in medical field
            2. Typically: grant property interest to creator to engage production
            3. But here creator did nothing, so nothing to incentivize
         5. Should deny property interests in own body parts– don’t compromise human dignity
      3. Could have informed consent claim.
         1. Court says this sufficiently protects P’s legitimate interests and respects bodily autonomy.
         2. Hard to prove – need to show (1) injured by operation that didn’t get informed consent, (2) negligence, and (3) causation – reasonable person wouldn’t have gone through it
      4. Increased value but not like *Wetherbee* b/c no good faith + doesn’t matter if not property in the first place
      5. CONCURRENCE (Arabian)
         1. Should deny property interests in own body parts on basis of offense to human dignity. Something intimately tied to personhood cant be entangled to the marketplace.
         2. Concerns of coercion
      6. DISSENT (Mosk):
         1. should favor claim of source of cells over claim of commercializers/exploiters
         2. Humans have a property interest in their bodies and its products
         3. Not true that human organs and blood can’t be sold – and this impliedly supports π’s contention that blood cells are property and hence protected by law of conversion
   3. ***Hecht v. Superior Court* (Cal. 1993): sperm cells are property, strong individual interest**
      1. FACTS: suit over frozen sperm cells from deceased person.
      2. HELD: sperm cells are property subject to jx and control of probate court.
         1. Personal interest in body parts much stronger than in Moore
            1. “gametic” material, such as sperm cells, can be used for human reproduction—something in which persons from whom the material is taken have a particularly strong interest.
            2. Can’t de-personalize gametic cells – not de-personalized once they leave the body.
         2. Hard to say he abandoned them
            1. he *intended* it to be used
            2. Sperm dif than Moore’s cells bc intended sperm to be used
         3. Public interest weaker
            1. no one benefited by these cells
            2. no huge impact from probate court ruling
      3. Institutional context: probate court designed to manage complicated family issues
         1. sensitive to concerns other than economic
         2. didn’t bring commodity element
   4. ***Newman v. Sathyavaglswaran* (9th Cir. 2002): Dead kids’ corneas are property for purposes of triggering DP requirements**
      1. HELD: parents have property interest in deceased children’s corneas for purpose of triggering DP requirements
         1. don’t mention *Moore*
         2. court says property for DP requirements, but not necessarily others
            1. Note that things can be property for 1 cause of action and not for another purpose -- dif sticks in bundle of rights
            2. Important bc don’t want recipient liable for conversion
      2. Process:
         1. What rights do parents have in this thing? (state law Q)
         2. Does these rights amount to property rights sufficient to trigger DP protections? (fed constitutional Q)
3. **Rights of Publicity** 
   1. Courts & legislature more receptive to idea that individual’s unique persona or personality can be regarded as property
   2. ***Midler v. Ford Motor Company* (9th Cir. 1988): Voice of pro singer = property interest**
      1. FACTS: P suing Ford for appropriation of her identify (her voice) – after P rejected request, D got her backup singer to mimic her. D had license from copyright holder to song.
      2. HELD: CA will recognize injury for appropriation of a core aspect of one’s identity – something particularly distinctive about one’s identity
         1. CA statute only covers visual likeness, so no COA for Midler’s voice claim
         2. But court uses CL COA
         3. voice is as distinctive and personal as face
         4. voice is an identity
         5. human voice is one of the most palpable ways identity is manifested
         6. but not that every imitation of a person’s voice will be actionable – it must be very distinctive to their personality
      3. 🡪A party may not deliberately imitate the distinctive voice of a professional singer without their consent in order to sell a product (in CA) (or imitate something else particularly distinctive about one’s identity)
      4. Precedent
         1. *Nancy Sinatra*: failed b/c copyright holder of song had lawfully licensed to ∆ and Sinatra didn’t (no copyright here)
         2. *Lehr*: won claim for use of distinctive vocal style but market curtailed and π not competing w/ ∆ (no unfair competition)
         3. *Motschenbacher*: there used his actual picture in tv ad, π can’t be directly identified
   3. ***White v. Samsung*:**
      1. Vanna successfully argued, using *Midler*, that robot spinning Wheel of Fortunate evoked aura/identity such that it implicated rights
      2. Dissent: not evoking anything particularly distinctive about her identity, only evoking role she played in a context
   4. Notes on right of publicity
      1. The right of publicity comes into play only when the invocation of a particular person – his or her likeness, voice, or occupation – has some commercial value, as in advertising
         1. Some who have invoked the right – such as MLK estate and Bette Midler during the period covered by this decision – have done so to *prevent* commercialization of an image
         2. But, most litigation over the right is by persons who wish to control the use of their image to *maximize* its value in *own* commercial ventures
         3. This represents a very tiny slice of society, consisting for the most part of highly-paid celebrities
      2. In contrast, the restrictions on selling body parts probably has adverse distributional effects for the poorest strata of society, either because poor citizens might want to sell a kidney to augment their income or because the poorer are likely to be disadvantaged in gaming the system in order to obtain “free” body parts when they are in need of a transplant.
4. **Academic Perspectives on the Domain of Property**
   1. Harold Demsetz, *Toward a Theory of Property Rights*
      1. Demsetz offers a positive theory of the evolution of property rights, explaining, in economic terms, when and why property rights emerge in resources that previously were regarded as not being subject to ownership
      2. At the most general level: property rights emerge or change when economic or technological changes alter the costs and benefits of any particular property regime
         1. Elinor Ostram’s work: as value of furs increased in common hunting territory, a few things happened that made the recognition of property rights more sensible. How did the change in fur demand change the value of the land itself?
            1. When the economic value of the furs increased, we saw over-hunting, and there was a risk of the tragedy of the commons; the risk of destroying the overall pool of this newly valuable property increased the benefits associated with enforcing private property rights
      3. Property rights are an instrument of society and derive their significance from the fact that they help man form expectations as to what he can reasonably own exclusively in his dealings
      4. So for personhood, basically if economics makes sense, commodify
   2. Margaret Radin, *Property and Personhood*
      1. Concerned with normative, rather than positive, theory. In other words, she attempts to outline a moral basis for regarding certain things as inappropriate subjects for treatment as property
      2. Essay 1:
         1. Distinguishes between Personal property (things invested with personhood) v. fungible property (things that can be replaced by identical item).
            1. Personal = not replaceable, e.g. wedding ring, home

Related to personhood

* + - * 1. Sometimes bodily parts can become fungible commodities e.g. blood
      1. When things are closely related to one’s personhood, want to give control to that person – personal liberty
         1. Like Midler and her voice
         2. More closely connected w/ personhood, stronger the entitlement
         3. Shouldn’t be relegated to cost-benefit analysis
      2. *Moore*?
         1. The majority in *Moore*, seems to align with a Demsetz view, using the broad reading of cost and benefits to ultimately side in favor of the commercial “exploiters.”
         2. There are externalities associated with granting rights to the spleen “owner”: reduced technological and economic progress. So, we deny the rights of the owners and fortify the claim of the commercial users (more beneficial to society versus the cost of enforcing Moore’s rights)
    1. Essay 2:
       1. Children, sexual services, and body parts are all things that we could treat as property, but we don’t. Why not? 🡪 to protect personhood – market inalienability – some things are so closely tied to personhood, that we don’t want to allow them to become property.
       2. Slippery slope

## B. Public Rights: Waterways and Airspace

1. **Principles** 
   1. Whether certain resources are too “public” to be parceled out into private ownership
   2. Public trust doctrine
      1. State holds lands “in trust” for public (incl and esp future generations) for their unobstructed enjoyment
      2. Can apply to lands under navigable waters (most common), adjacent beaches, public parks, state wilderness areas
      3. The state may only release control of trust lands if the lands are: (1) used to improve the public interest or (2) can be disposed of without substantially impairing the public’s interest in remaining land and water (*IL Central RR*)
      4. Boundaries:
         1. Nontidal bodies of water: land below MHTL is in public trust (incl rives and lakes)
         2. Tidal bodies: land below MHTL is in public trust (incl wet beach, which is land bw MHTL and MLTL). Incl beach-front private property.
   3. Navigational servitude:
      1. very old expression of right of public to have access to navigable waters
      2. applies to water and air (Causby)
      3. Private citizens can also sue to enforce their right of access
      4. Comes from Constitution
   4. Purprestures
      1. Encroachments on public waterways and highways are purprestures
      2. Eg private landowner builds a dock on their land that makes it difficult for vessels to pass, or private landowner constructs a building with a cornice that overhangs the street and makes it difficult for tall vehicles to pass.
2. **Navigable Airways and Waterways** 
   1. ***US v. Causby* (SCOTUS 1946): principle of federal control over navigable waterways extends to navigable airspace – but compensable taking.** 
      1. FACTS: Military airport started flying planes 83 ft above land; chickens started going crazy and dying; decreased value of farm; P sues govt for taking his air rights under *ad coelum*.
      2. HELD:
         1. Principles of federal control over navigable waterways extend to navigable airspace.
         2. Stressing that the fed govt has ample authority to ensure navigable airspace remains a public resource
         3. But this is a compensable taking, bc actually interfered w his use and enjoyment of property.
         4. Court notes *ad coelum* doctrine is outdated because of changing technology of air transportation (see Hinman) – it is absurd to recognize a trespass in this case.
      3. 🡪SCOTUS has abandoned the *ad coelum* doctrine
      4. 🡪 The airspace, apart from the immediate reaches above the land, is part of the public domain
      5. 🡪 Flights over private land are not a taking, *unless* they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land
   2. ***Illinois Central RR v. Illinois* (US 1892) – public trust doctrine prevents legislature from granting private corp. title to submerged lands held in trust for the public** 
      1. FACTS: IL leg gave private RR title & qualified bundle of rights to submerged lands in harbor (incl lands used by public for navigation, commerce, and fishing). State AG sues to revoke grant, seeking a decree that confirmed the state’s title to the submerged lands and the exclusive right to develop the harbor by constructing wharves, piers and other improvements.
      2. HELD: public trust doctrine prevents the leg from granting a private corporation title to submerged lands held in trust for the public.
         1. True, wasn’t whole bundle of rights (restraint on alienation, state gets portion of fees, etc) but still too many sticks in the bundle
         2. Transgenerational: not going to let current generation and reps to take future access
      3. 🡪State may not abdicate its control of lands beneath navigable waters.
      4. 🡪The state may only release control of trust lands if the lands are: (1) used to improve the public interest or (2) can be disposed of without substantially impairing the public’s interest in remaining land and water
   3. ***Lake Michigan Federation –* public trust doctrine means state cant give away open water**
      1. FACTS: LMF sought injunction restraining Loyola U from building 20 acre lakefill to add to its lakeside campus. Most would have been private, parts open to public. Existing shoreline not v usable for pub.
      2. HELD: Injunction granted; state cant give away open water (public trust).
         1. Primary purpose of expansion: Loyola’s/private use.
         2. Doesn’t really assess gains/losses for public
         3. Govt today shouldn’t be able to abdicate rights/resources for future generations – not so much about today’s public, abt future – so no deal, even if improved shoreline
         4. Open water cannot be taken away.
   4. ***Thornton v. Hay* (Or. 1969): invoke custom to restrict owner’s right to restrict public access to dry sand beach**
      1. FACTS: Hays owned strip of beachfront property and built resort. Wanted to build fence to limit public access to dry sand.
      2. HELD: state has authority to restrict a property owner’s use of the dry-sand area of oceanfront real estate because the dry-sand area has customarily been used by the public for recreational purposes
         1. Court uses Blackstone’s 7-factor test for custom (*all* 7 factors must be met):
            1. Ancient/of longstanding usage
            2. Exercised without interruption (use and enjoyment must be continuous)
            3. Peaceable and free from dispute
            4. Reasonable
            5. Certainty in its boundaries
            6. Obligatory (adherence to the custom cannot be optional)
            7. Not repugnant or inconsistent with other customs or law (the law of trespass apparently doesn’t count)
         2. Invocation of custom partly justified by fact that private property owners had reason to know that the public had rights to the beach prior to acquiring the property (presumptive notice)
         3. Why not prescription?
            1. Prescription = use property in certain way for so long that you win a right to continue w/out interference (like AP)
            2. Applying prescription here could would result in case-by-case, tract-by-tract, litigation – by using custom, the court makes a more wide-spread ruling (categorical – ocean-front lands from the northern to the southern border of the state ought to be treated uniformly)
      3. After this case:
         1. Some states have used public trust doctrine to hold that all or part of the dry sand beach is inherently public property
         2. Florida, Texas, Hawaii have joined OR is using customary rights doctrine to declare public rights of access to dry sand beaches
   5. Rose (academic perspective)
      1. Recreation is important for socializing and educative influence helpful for democratic values
      2. Channeling Demsetz a bit: urbanization is cramping down on space and shared enjoyment of nature is becoming increasingly valued
      3. No single gatekeeper can manage property – not going to privatize, gvm’t can have some regulatory power
      4. Free-for-all: not worried about tragedy of commons
      5. Inherently public property: not fully controlled by gvm’t or agents - just b/c open to public, gvm’t doesn’t have to manage
      6. Why guarantee public access for rec when no threat of private holdout
         1. Attitude towards recreation changed so now recreations seems to support “publicness”
         2. Rec often carried in social setting so clearly improves w/ scale to some degree
         3. Olmsted: rec can be socializing and educative influence, particularly helpful for democratic values
         4. Rich and poor mingle, parks enhance pubic mental health and revive from antisocial characteristics of urban life
         5. Rec acts like social glue
      7. Beaches decisions had been justified b/c of public trust, prescription and custom but Rose argues it could defended w/ rec
         1. Rec has social and political overtones which can support publicness of some property, shouldn’t be held up by private
         2. Support beach decisions, rec use is the most valuable use and requires all of the beach which private owners could hold up
      8. If land has recreation value, then public should be able to use it and thus shouldn’t allow gvm’t to destroy rec value

# IV. Owner Sovereignty & Its Limits

## A. Trespass Actions

1. **Overview** 
   1. If property entails right to exclude, how does law protects/enforce this right?
      1. Criminal axns
      2. Civil axns
      3. Self help
   2. Criminal axns
      1. Usually modest penalty – not strong deterrent force
      2. Except arson/burglary: felonies, harsh penalties
      3. Suggests main function is to provide an alternative to self-help
   3. Self help
      1. Owners can use “reasonable force” to expel unwanted intruders from land
      2. But not deadly force (at least if an intrusion on land/unoccupied building)
      3. Risks of violence to parties or bystanders, risks of overreaction/escalation
   4. Civil axns
      1. Real property
         1. Trespass (possessory interest)
         2. Nuisance (use and enjoyment interest)
      2. Personal Property
         1. Trespass dba (forcible carrying off of P’s goods)
         2. Detinue (unlawful detention of goods)
         3. Trover (conversion)
         4. Replevin (recovering possession of something bc of superior title)
         5. Trespass to chattels (intentionally injuring or interfering w property, in some way falling short of conversion, while property still in possession of P)
   5. ***Intel Corporation v. Hamidi* (CA 2003): need actual harm for trespass to chattel**
      1. FACTS: D, disgruntled former employee, forms group and persistently sent emails criticizing P’s policies to nearly 35k current employees. High volume but never affected server function. P sues for trespass to chattels (the computer servers).
      2. HELD: Trespass to chattels doesn’t encompass and shouldn’t be extended to electronic communication that doesn’t damage computer system or impair function (need actual harm)
         1. Intel’s theory would expand trespass to chattels to cover virtually any unconsented-to communication that, just bc of content, is unwelcomed by the recipient or intermediate transmitter. This threatens to stretch trespass law to cover injuries far afield from the harms to possession the tort evolved to protect.
         2. Precedent spam cases are about quantity, not content, and functioning of server itself hindered – there was actual harm
         3. Why harm required for trespass to chattels but not reg trespass?
            1. Trespasses to land are less frequent, easier to avoid
            2. Slippery slope—eg touching another’s car
            3. Greater dignity, privacy interests in land
            4. Many productive uses of land—warrants protecting land better
         4. Employee distraction/productivity dip does not count as harm
            1. Employees/their time aren’t protectable property right
            2. About reactions to content rather than interference w property
         5. Their expenses to try and block his access (self-help) don’t count as harm
            1. Harm must come from D’s axns. Cant allow people to create their own harms, even if in response to D’s axns. This nullifies the harm requirement.
            2. Also blurs line bw privilege to use self-help and right against interference.
      3. DISSENT (Brown):
         1. objection isn’t communication but about use of π’s property to communicate it
         2. Even if content, π still entitled to injunction – can choose to exclude unwanted mail for any reason including content
      4. DISSENT (Mosk)
         1. majority doesn’t distinguish open communication in public commons of internet from unauthorized intermeddling private, proprietary intranet
         2. Part of the value of private computer system is the ability to exclude, esp if excluding uses disruptive to owner’s business operations - so Hamidi certainly impaired the quality and value of the system.
         3. H forced Intel to incur costs to try to maintain the security and integrity of its server, thus the law of trespass to chattels should be extended to cover this situation
      5. Not actionable as trespass to land claim
         1. Servers are on π’s land
         2. But electro magnetic intrusions (intangible intrusions) on land are not axnable under CA unless they cause actual harm
         3. Might be axnable as nuisances.
      6. State of affairs after court
         1. Hamidi does not have rights of access. Intel has self help privileges. But if Hamidi gest past Intel’s self help, Hamidi isn’t liable (unless eventually causes actual harm)
      7. Arguments re: whether court should extend doctrine of trespass to chattels to recognize this, for intentional interference/invasion?
         1. Could privatize internet
         2. Inhibit free flow of info
         3. Unpredictable consequences
         4. Academic debate
         5. Disrupt impt aspects of social life
         6. Institutional competence (INS dissent, Moore) – leg might be better body to innovate.
         7. Allow Intel to be gatekeeper for its portion
            1. Social values better promoted in more protected/controlled zones
            2. BUT would inhibit freedom of communication
         8. Epstein’s economic argument
            1. Metaphor as internet as physical space
            2. Will give incentives to actors like Intel to create valuable subsets
            3. COUNTER (Lemley): cyber libertarians would destroy internet and increase transactions costs
            4. REBUT: wouldn’t have sweeping consequences if all you have is right to personally object to personal usage (e.g. injunction against ∆)
         9. Cyber-libertarians concerned w/ risk to openness of internet posed by case-by-case analysis of violations – don’t trust judiciary to draw lines

## B. Self-Help

1. **Overview** 
   1. Property owners can take variety of steps to protect or enforce property rights w/o direct involvement of legal system
      1. Far more utilized than formal legal remedies
      2. E.g. fences, locks, security guards, cameras, dogs
      3. More controversial when it involves use of force – generally can use reasonable force
   2. Most jx require: self-helper has legal right to possession + peaceable means
   3. Can LL evict tenant w self help?
      1. More likely in commercial than residential
      2. Some jxs: never (*Wiley*)
      3. Others: only commercial leases + as long as peaceable
      4. Some: commercial and residential + as long as peaceable
   4. Self help repossession + Due Process clause:
      1. Not state action, so no DP claims.
      2. As a result, creditors have tended to rely on this self help remedy rather than statutory remedies so don’t have to deal w due process reqs.
   5. ***Berg v. Wiley* (MN 1978): LL may never evict tenant by self-help** 
      1. FACTS: Berg (restaurant tenant) allegedly violated lease by remodeling w/o permission & violating health code. Lease gave LL right to retake possession in case of breach. T left but jury found no abandonment/ surrender. LL changed locks w/ police escort. T claimed wrongful eviction.
      2. HELD: Landlords may not use self help to evict tenant—must rely on judicial system, or wait for lessee to abandon or voluntarily surrender (in this state).
         1. Old rule: LL can use self help as long as both:
            1. LL is legally entitled to possession, and
            2. Uses peaceable means of reentry
         2. Court creates new rule: LL may never use self help
         3. Concerned about high risk of violence in evictions
         4. Also says under old rule, LLs means were not peaceable bc forcible—changed locks
            1. Prof notes: but he had police escort, had tried notifying her in writing—what other “peaceable” means could he have used? Seems like he did everything in power.
         5. Even if T potentially damaging property, LL could seek TRO or use police to stop her
      3. Prof notes: What are LL’s options?
         1. Go to court – long process.
         2. T can still abandon (w/ no intent to return) or surrender (voluntarily give up) possession but hard to prove
      4. NOTE: This is not a universal view today. Many jxs say self help is still permitted, at least in context of *commercial* landlord-tenant disputes.
         1. In these jxs, recovery must still be accomplished w/out breach of the peace.
         2. Think about what steps someone could take w/out breaching peace—what could Wiley have done differently?
   6. ***Williams v. Ford Motor Company* (8th Cir. 1982) – self-help OK to repossess personal property, as long as no risk of violence/breach of peace + high bar for breach of peace**
      1. FACTS: P’s ex authorized repossession of car after he defaulted on payments. D showed up at 4:30AM to tow car. P stopped the truck by yelling and they gave her the stuff in car; yelling woke neighbors. P reported car stolen and sued company for conversion. P testified she never feared for her physical safety.
      2. HELD: This was a lawful repossession; self help okay in these circumstances where not accompanied by risk of violence/breach of peace.
         1. Sneaking in at 430am w no notice is not enough to show risk of violence—she never feared for her safety.
            1. Prof says this is hard to understand—clear that there was *risk* of violence or disturbing the peace, and she even yelled and woke neighbors.
            2. But court wants more confrontation, strenuous objx.
            3. Prof notes: weird, bc only reason it didn’t escalate is bc P kept her cool, not bc risk or stakes were low.
         2. Policy
            1. Benefit creditors by letting them get collateral w/out having to resort to judicial process
            2. Benefit debtors by making credit avail at lower costs (does it???)
            3. Pub policy should discourage self help axns that are likely to result in violence
   7. Reconciling *Berg* and *Wiley*
      1. Courts more tolerant of self help for personal property than real estate
      2. Why permit self help repossession of personal property (at least when owned had defaulted; *Williams*) BUT *not* permit self help repossession of commercial real estate (like *Berg*)?
         1. Greater likelihood of violence w real property? Interest greater, greater likelihood of physical presence?
         2. Real property cant go anywhere – less risk of running away w it, higher risk of non-recovery
         3. Greater likelihood of thing being destroyed, urgency

## C. Exceptions to Right to Exclude

What would otherwise be a trespass is not one, because…

### 1. Common Law

1. **Necessity** 
   1. **INSERT CHART OF ALL THE TYPES????**
   2. Have privilege to trespass if necessary to avoid serious injury to self or others or sometimes to your things
   3. Must be sudden/emergency
      1. Not pre-planned circumstances
      2. Make bargaining impossible
      3. *Jacque* NOT necessity
   4. ***Ploof v. Putnam* (VT 1908): privilege of necessity also triggers duty by owner not to interfere 🡪 affirmative right of entry if necessity** 
      1. Storm, πs tie boat to dock, ∆’s employee unties boat, π sues for damage to boat in storm after untied.
      2. Necessity not just privilege against trespass liability but affirmative right to use someone ese’s property.
   5. ***Vincent v. Lake Erie***:
      1. ∆ tied to dock longer than π wanted it so wouldn't get destroyed by violent storm but damaged dock.
      2. HELD: ∆ had to pay for damages. Privilege of necessity incomplete – D must pay for damage his presence caused.
   6. Synthesizing:
      1. Shifts right to exclude from landowner to person entering under necessity
      2. Landowner still has right, but when necessity kicks in, landowner can only vindicate rights by seeking damages for any injury caused by intruder (liability rule)
      3. Negates trespass liability
2. **Custom** 
   1. ***McConnico v. Singleton* (SC 1818): recognize custom in denying liability** 
      1. FACTS: Π proved he warned and ordered ∆ not to hunt on his land; ∆ still rode over and hunted deer on unenclosed and unimproved lands. Strong local hunting custom in such lands.
      2. HELD: custom protects right to hunt on unenclosed and uncultivated lands.
         1. Right to hunt on unenclosed and uncultivated lands never been disputed and well known that universally exercised from 1st settlement to now
         2. Even if legislature restrained, civil war would break out
   2. ^^ still good law! Undeveloped and unenclosed areas are open to hunting and fishing unless posted. But why, when…
      1. Interest in access have declined
         1. Militia no longer as strong
         2. Hunting no longer big part of livelihood, sustenance
      2. Interest in exclusion increased
         1. Change in what we value land for
         2. Enviro protection – recognize non-use as valuable use
         3. Interest in safety/security in more densely populated society
      3. Per Demsetz, these shifts in interests will likely lead to shifts in property law
3. **Public Accommodation Law**
   1. Owners of property that offer itself as public accommodation have much more qualified right to exclude
   2. General duty of non-discrimination
4. **Public Policy** 
   1. Most general exception
   2. New Jersey cases (?!)
   3. Balancing test: competing social interest must be weighed
   4. ***State v. Shack* (NJ 1971) – balancing test; live-in workers’ rights outweigh right to exclude** 
      1. FACTS: D entered the private property of P to give aid to migrant farm workers employed and housed on P’s property. P claims trespass.
      2. HELD: When people are delivering services, the scope of the owner’s right to exclude is limited because when you invite people onto your property (here, migrant workers), you cannot deny them services upon which they are dependent.
         1. Court employs balancing test
            1. Inviting people onto land, imptc of services v. rt to excl
         2. Once an owner invited people onto their land, for owners own benefit, the owner’s property rights may become limited in the interest of the rights of those people.
         3. Right to exclude is more limited when regularly have people on property
         4. Invoking the rights of the workers
         5. Human interests > right to exclude.
   5. ***Uston v. Resorts Int’l Hotel* (NJ 1982) – property open to public + for own $ benefit, have to justify excluding someone**
      1. FACTS: P is a card counter and ∆ casino kicks him out. P challenges.
      2. HELD: ∆ can’t kick out P.
         1. P’s gaming was conducted according to rules of Casino Commission.
         2. Commission could have made card counting rule, but didn’t.
         3. Casino had no right to exclude him on grounds that he successfully plays the game under existing rules
         4. Casino open to public, for own economic benefit
         5. 🡪If an owner opens their property to the public for their own economic benefit, they bear the burden to justify excluding someone from the place of public entertainment or accommodation.
      3. Flips presumption:
         1. Casino has burden of showing a good reason, and reason subject to judicial review
         2. Before, presumption was rt to exclude w/ exceptions. Now, standard of reasonable exclusion.
      4. Holding only applies to those who open property to public + for their own economic benefit

### 2. Constitutional Trumps

1. **Basic Structures** 
   1. Balancing test: Weigh the common law right to exclude against constitutional rights/interests
      1. Factors
         1. Nature of property (home, private restaurant, etc)
            1. Indiv owner’s privacy/liberty rights bolstering their property rights?
         2. Property open to public, for owner’s economic benefit (*Marsh*)
         3. Functional equivalence to public place (*Marsh*)
         4. Extent to which exclusion affects public interest (*Marsh*)
            1. vulnerable/isolated audience 🡪 greater interest in access to info? (*Marsh*)
      2. *Marsh* = ONLY case finding 1st amendment rights on private property
      3. To uphold exclusion, distinguish from *Marsh*. For opposite, draw similarity to *Marsh*
      4. *Logan Valley*: shopping mall was equivalent to municipal town in *Marsh*
      5. *Lloyd Corporation*: not entitled to distribute on privately owned shopping center – other places to go
   2. State Action
      1. Threshold Q!
      2. *Marsh*: arrest for trespass in company-owned town = state axn
      3. *Shelley*: judicial enforcement of racist covenant = state axn
      4. *Bell*: unanswered question: is arrest for trespass in privately owned restaurant state axn?
   3. Framework
      1. Trespassing under state’s trespass law?
      2. If yes, overriding state law? (statute, constitution, jurisprudence)
         1. E.g. in New Jersey (under *Shack* and *Uston*),
            1. Live in workers on land for $ 🡪 need for services outweighs right to exclude. *Shack*
            2. Property open to public for $ 🡪 burden of proving that they have a legitimate reason to exclude. *Uston*
         2. E.g. state constitution grants free speech right to grant this activity (also a balancing test) (eg *Pruneyard*)
      3. Overriding federal statute (eg Civil Rights Act)
      4. Overriding federal constitutional right? (DON’T just jump here)
         1. Threshold Q: state axn?
         2. If so, balancing test.
      5. [if any judicial limiting of owner of rights, consider judicial takings claim]
   4. In one’s private home, right to exclude is strong
      1. Rationales include privacy, security, etc. and have own quasi-constitutional protections
      2. Personal rights and liberties bolster and give greater potency to right to exclude
   5. Private colleges, universities:
      1. commitment to free expression limits right to set rules themselves
      2. *Schmid*: Princeton University – held to be subject to some limitations to extent to which they could exclude outside speakers of parts of campus essentially open to public
   6. ***Marsh v. Alabama* (US 1946) – privately owned town lost right to exclude bc outweighed by free speech/religious rights of public** 
      1. FACTS: Marsh distributing religious leaflets on sidewalk in *company-owned town.* Arrested under state trespass statute for refusing to leave. Company town operated just like any other town.
      2. HELD: although company owns town, operates like public forum, so cant exclude people for handing out leaflets.
         1. State axn? Police arresting him.
         2. Owner has diluted interest in exclusion bc:
            1. Company has opened up property to general public, for its own $ benefit
            2. Town looks/functions just like any other town, sidewalk looks like any other sidewalk
            3. When you ^^, owners rights are circumscribed by stat and const rights of those who use the space
            4. So owners here lost the right to “pick and choose” who can be excluded
         3. 1 amend concerns:
            1. free speech always impt right
            2. everyone works and lives in town—more isolated and vulnerable 🡪 even tronger interest in access to information/expression.
            3. If owner allowed to exclude info, would allow owner to exercise dominion over indivs – shield them from content owner doesn’t like.
      3. ONLY case finding 1st amendment rights on private property
   7. ***Shelley v. Kraemer* (US 1948): judicial enforcement of covenant is sufficient state axn to trigger constitutional scrutiny**
      1. FACTS: White Ps tried to enforce racially restrictive covenant; sought to enjoin Black family from taking possession of house they bought w/out knowledge of covenant.
      2. HELD: judicial enforcement is state axn
         1. Injunction would enforce the covenant.
         2. Even though b/w private owners
         3. Judicial enforcement of private property rights (injunction enforcing a racist restrictive covenant) = state action triggering constitutional scrutiny
   8. ***Bell v. Maryland* (US 1964) – Civil Rights Act moots state axn Q – is state enforcement of private owner discrim on own property state axn?**
      1. FACTS: 12 Black students protesting in sit in; privately-owned restaurant has segregation policy and calls cops; students convicted of criminal trespass.
      2. HELD: Court avoided constitutional issue; Civil Rights Act of 1964 answered the question: Discrim in public accomms is def illegal.
         1. Question would have been: does enforcement of private owner’s rt to exclude (via trespass arrests) equal state axn? Competing views:
            1. No state action, bc it was an ordinary private property owner – the interest in right to access is not strong enough to outweigh indiv owner’s interest in right to exclude, insulating one’s private property, etc. (J. Black)
            2. State axn, bc allowing state to enforce owner’s policy would perpetuate Jim Crow system we’ve struck down.
         2. And if state axn, would apply balancing test
            1. Access wins, bc restaurant is open to public for own benefit so dilutes (see *Marsh*). And not like a private home, more public.
            2. Access loses, bc less like public place/*Marsh* and more like home.

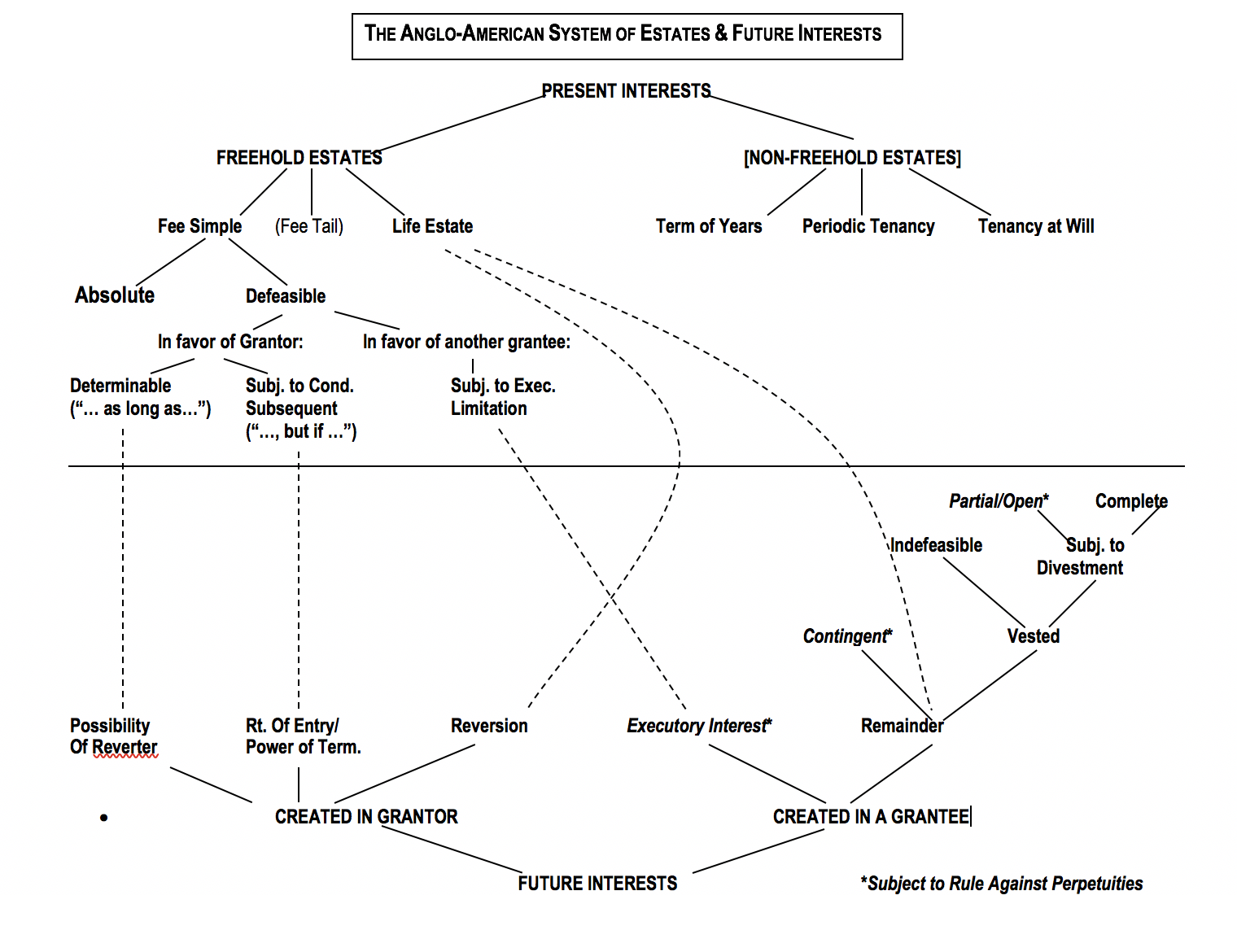
### 3. Property and Equity

**Property & Equity**

* The scope of owner sovereignty is pervasively affected by the law of equity
  + In some respects, owner sovereignty is enhanced by equity, especially through the development of new remedies like injunctions and restitution
  + In other respects, owner sovereignty is limited by equity, based on defenses to the enforcement of legal property rights that apply when owners engage in conduct that is deemed unjust of “inequitable”

# V. Forms of Ownership

## A. Estates



\*don’t need to know the difference b/w contingent and vested remainder + anything above

1. **Terms**
   1. General
      1. Estate: type of property right, measures a person’s interest in land in terms of duration. Can be either present possessory or future interest.
      2. Convey: grant (by sale or gift) during life of grantor to another living person
      3. Devised: leave property by will
      4. Inherit: acquisition of property by heirs where O dies w/out a will, or doesn’t account for everything in will.
   2. Remainder:
      1. The interest(s) that follow a life estate, if not reverting back to O.
      2. Test:
         1. Capable of becoming possessory immediately upon the end of an estate; AND
         2. incapable of cutting short life estate or potentially infinite estate.
   3. Vesting:
      1. An interest vests in possession when it becomes possessory
      2. But interest can vest in other ways before it becomes possessory – this means some other uncertainty about the interest is resolved
      3. Types of interest and how they vest:
         1. Reversion: considered vested when created, even if not possessory until much later/never.
         2. Executory interests: must become possessory in order to vest.
         3. Remainder:
            1. Vest in possession when future interests are terminated.
            2. But other kinds of vesting can happen sooner, eg if conditions are met (eg “to A for life, then to B if she passes the bar” could vest when B passes bar, though not possessory until end of A’s life estate).
   4. Non-Freehold Estates (leases)
      1. Terms of years
      2. Periodic tenancy
      3. Tenancy at will
   5. Freehold Estates
      1. Fee simple absolute:
         1. Unlimited duration and no limitations on use/ownership.
         2. Largest package of ownership rights from which others are carved out.
         3. ex) O grants Blackacre “to A” or “to A and her heirs.”
         4. Note: don’t have to say “and to heirs” – this is the default.
      2. Fee simple defeasible:
         1. Subject to conditions; if conditions broken, present interests may end and future interests would become possessory.
         2. Future interests in favor of grantor
            1. Determinable (“as long as”): if condition broken, then reverts back to O

Automatic!

O would have possibility of reverter

created using language of duration: “**as long as**,” “**so long as**,” “**while**,” “**during**,” “**until**,” etc.

can be implicit (if doesn’t say who it goes back to if condition occurs, reverts to O).

* + - * 1. Subject to condition subsequent (“but if”): if conditions broken, then O *could* take it back

Only optional (not automatic)

Present interest does not automatically end, but O would have right of entry/power of termination. Present possessor loses interest only if O chooses to exercise these rights.

* + - 1. Future interests in favor of another grantee
         1. Subject to executory limitation (“to A as long as … but then to B”): if conditions broken, goes to B (3rd party)

3rd party has executory interest

The present interest is automatically cut short by the executory interest upon the happening of the named event, regardless of whether durational or conditional language is used.

* + 1. Life estate:
       1. For life; exclusive right until death
       2. Note: you can still sell (but bad deal b/c lose it when person dies)
       3. Future interests created: Either reversion to O or remainder to a third party

## B. Mediating Conflicts between Owners: Conflicts Over Time

### 1. Waste

1. Intro
   1. Conflicts can arise when mult parties have interests in same property.
   2. Law of waste tries to mediate conflicts bw present & future interest holders. Limits what present possessors can do, in the interest of future possessors.
   3. Important background rule that defines respective rights of persons who hold present and future interests in property.
2. Types of waste
   1. Affirmative waste: life tenant actively/affirmatively does something that is unreasonable and causes “excess” damage to future interests (beyond normal wear/tear); defined in terms of normal use of prop.
   2. Permissive waste: “nonfeasance;” life tenant unreasonably fails to take some action w/r/t property, which causes “excess” damage to future interests (failure to repair a roof resulting in water damage, not paying taxes, allowing an adverse possessor to remain on land).
   3. Ameliorative waste: affirmative act by life tenant that substantially changes property but results in increase in market value of the property.
      1. E.g. Brokaw → most jxs do not follow the rule in Brokaw
      2. Under the NY/Brokaw approach, the holders of remainder interests are entitled to take possession of the property at end of life tenancy in substantially the same form as when the life tenant first took possession
         1. Significant change or transformation is ruled out
      3. In jurisdictions that permit ameliorative waste, they permit it at least when it can be justified by changed circumstances
3. ***Brokaw v. Fairchild* (NY 1929) – minority – life tenant cannot use land in way that injures the inheritance/future interest holders’ interests**
   1. FACTS:
      1. Guy dies, leaves one mansion each to four children in life estate; D gets one. [who exactly has what kind of future interest after life estate? How do the other siblings get a piece?]D wants to tear down and replace mansion w apartment building b/c losing money; apt would increase property’s market value; area has changed and is now lots of apt buildings. Siblings or children oppose it (right next to their mansions). Legal claim: demolishing the home is waste (even though it’s ameliorative).
   2. Held: Still waste in this jx. Under the rule of waste, a life tenant may not use his land in a manner that causes permanent injury to the inheritance
      1. A life tenant has no right to exercise an act of full ownership – D is not a full owner, and others have future interests.
      2. Court concerned about keeping it suitable as a residence for future interest holders.
         1. Distinguish from *Melms* (similar circumstances w property adjoining brewery – alteration worth more) b/c there the conditions in area had changed so much (totally industrial) that the property wasn’t suitable for residence at all.
      3. Must try to keep the property is near as possible in terms of nature, character, and improvements.
      4. But if everyone agreed, it would have been fine.

### 2. Restraints on Alienation

1. Court take dim view of attempts to restrain an owner’s power to alienate
   1. Void as contrary to public policy – related to concerns about “dead hand control”
   2. Ability to alienate or transfer property is normally part of owner sovereignty
   3. But will uphold restraints on alienation for limited period of time if they appear to be reasonably related to some family estate planning objective
2. Why protect power to alienate?
   1. Owner autonomy
   2. Prevents us from being slaves to our property
   3. Efficiency (want property to end up in the hands of those who value it most; encourage most productive use)
3. ***Toscano* (Ca. 1967): restrictions on ability sell invalid, restrictions on use OK.** 
   1. FACTS: T gave land to lodge as gift; conveyance said “for the use and benefit of the lodge only” and if the property is not used by lodge, or if sold/transferred by lodge, then land should revert to T (or successors).
   2. HELD: When land is conveyed, any limitation on the grantee’s rights to alienate the property is void as a matter of public policy, but, limitations on the acceptable uses of the property by the grantee are enforceable
      1. Court strikes down clause prohibiting sale/transfer as impermissible restraint on alienation.
      2. Restrictions on use is valid limitation.
         1. Institutions have purposes and the grantor had reasons for supporting the continuance of those purposes
         2. majority does not want to strike down use restrictions like this that go to charitable purposes
   3. DISSENT:
      1. use restriction is the same as restriction on alienation so it should be struck down
      2. If both lead to same result, should be treated alike

### 3. Rules Against Perpetuities

1. Interest is invalid if there is any way it could possibly vest more than 21 years after the end of (designated) lives in being at time of the creation of the interest
   1. So any provision that postpones vesting indefinitely, or too far in future
   2. Does apply to:
      1. Remainders (Contingent remainder or Vested remainders subject to partial divestment)
      2. Executory interests
   3. Does not apply to:
      1. reverter or right of entry/power of termination (bc vested upon creation)
2. Does apply to commercial property/agreements (*Symphony Space*)
   1. If no lives in being specified in conveyance docs, then RAP period = 21 years
3. Framework
   1. Bracket clauses and identify all interests created;
   2. Figure out which future interests (if any) are subject to RAP (look for third parties w future interests)
   3. Of those:
      1. Identify “lives in being” at time of grants
      2. Imagine what might happen to to cause vesting to occur as remotely as possible (look for later born children)
      3. If >21 years after “lives in being” is possible, cross out/invalidate the clause that creates that interest.
4. Justifications for RAP
   1. Don’t want too much dead hand control
   2. Designed to defeat certain grantor intentions that are contrary to public policy
   3. Future full of uncertainty and grantor can’t foresee contingencies. One generation +21 yrs is probably the furthest into the future and grantor could have knowledge of.
   4. Dead people don’t get utility
   5. long-lasting contingencies about title can impair alienation, or improve properties – few people will want to buy/improve property with unresolved contingencies about ownership hanging over it.
5. Not all executory interests necessarily violate the law but many do
   1. Use of land that triggers conditions is something that could last forever
   2. Remember only applies to remainder and executory interest
   3. Violates RAP: O grants to School as long as used for school, and then to B (could use as school for 200 years and then stop, interest would vest too remotely)
   4. OK under RAP: O grants to A provided A goes law school, then to B – we will know for sure if it is vested if A dies w (that’s measuring life)
6. ***Symphony Space* (NY 1966)**
   1. FACTS: in 1978, D sold P (SS) property for $10K + $1/year leaseback for the non-theater space. K also included an option to repurchase the theater portion in certain years, including 2003. P owned in FSA, subject to leaseback and option clauses. In 1987, D tried to exercise option to repurchase the theater. Tenant claimed option was invalid because one of the repurchase years (2003) was outside the perpetuities period, thus violating RAP.
   2. HELD:
      1. Litigation is bw corporations and no designated measuring lives, so perpetuities period is simply 21 years.
      2. Option could vest/be exercised in 2003, >21 years after interest created 🡪 violates RAP.
      3. Intent of parties and mutual mistake not a defense.
   3. D argued RAP does/should not apply to commercial real estate transactions; court says it does apply. Changing this reqs leg axn.
   4. D wants to rescind whole deal based on mutual mistake; court rejects this.
      1. BUT this would vitiate rule by allowing grantors to do what RAP says you can’t do. If mistake enough to invalidate deal, then everyone could claim mutual mistake every time RAP problem came up and the rule would be obsolete.
   5. How court could have rescued D from their drafting mistake (and aligned more closely w grantor’s intent)?
      1. Court could have severed options so had 5 different options and just invalidate the 2003 option.
      2. View option an interest retained by grantor (grantor interest not subject to RAP)
      3. Applied wait & see approach: option was in fact exercised w/in 21 yrs. But rejects bc leg hasn’t adopted this, and counter to public policy.
7. Modern RAP reforms
   1. Reforms (or lack thereof) will depend on jx
   2. Wait and see approach: wait for common law RAP period, see if interest does in fact vest remotely (but potentially leaves people’s interests uncertain for v long time)
   3. Drafting: perpetuities savings clauses – refer explicitly to possibility of invalidation under RAP and specifies a backup plan
   4. Interpretation and implication: courts might insert a perpetuities savings clause or otherwise reform an interest to avoid RAP problems
   5. BUT cf. *Symphony Space*: court rejected all attempts to “save” the contract as written

## C. Mediating Conflicts between Concurrent Owners

1. **Relations among co-tenants** 
   1. Economic challenges of shared ownership often arise, and personal friction bw co-tenants (often siblings)
   2. Usually parties work it out informally amongst themselves
   3. BUT law must provide:
      1. Background default rules that shape how parties organize/allocate economic costs and benefits
      2. Legal remedies for when parties don’t work it out
   4. Existing legal remedies
      1. Exit (partition)
      2. Background default rules: to which parties can refer to determine fair allocation of economic benefits/costs

### 1. Basic Co-Tenancies and Severance

1. **Concurrent interests** 
   1. Any of the interests we have studied could be held simultaneously by 2 or more people
   2. Pie is whole estate – about how it’s divided
   3. Joint tenancy and tenancy in common both create an undivided interest – either party has right to possession of whole
   4. Fully alienable and don’t need permission of the other party to convey
   5. Old common law: favored joint tenancy w/ presumption
   6. Modern flips: presumption of tenancy in common
      1. But courts more tolerant if clear intention for joint tenant but not all utilities match up
      2. O -> A and B as JT – many states would still construe as creating tenancy in common when don’t specifically state Right Of Survivorship (ROS)
2. **Tenancy in common (A’s shares 🡪 A’s heirs)**
   1. If A and B are tenants in common, A’s shares go to A‘s heirs if A dies
   2. Shares are alienable
      1. can be sold to 3rd parties w/o affecting nature of tenancy
   3. No ROS
3. **Joint Tenancy (A’s shares 🡪 B)**
   1. If A and B are joint tenants, B owns the whole if A dies
      1. ROS
      2. This is the main dif bw CT and JT
   2. Shares are alienable
      1. But if either party sells its share to another, joint tenancy becomes tenancy in common (loses survivorship)
      2. Strawmen can be used to get around ROS this way – sell to straw man to break up joint tenancy
   3. Only appropriate for intimate relationship like committed relationship or family business
   4. Requires 4 unities
      1. Time – each interest must be acquired or vest at same time
      2. Title – each must acquire title by same instrument or by joint adverse possession, never by intestate succession or other operation of law
      3. Interest – each must have same legal interest in property (fee simple, life estate, lease, etc.)—although not necessarily identical fractional shares (could have bigger piece of pie)
      4. Possession – each must have right to possess the whole
   5. Each tenant can sever unilaterally (turns into tenancy in common)
      1. By selling, don’t have unity of time (didn’t get title at same time) and unity of title (don’t get title through same doc)
      2. Common law used to require destruction of 1 of 4 unities which was usually achieved through conveyance to 3rd party (strawman)
      3. Today one can probably convey to oneself and effect a severance
      4. But if there are more than 2 JT and only 1 severs, the remaining JTs still have JT with each other and tenancy in common with the new guy
      5. Be careful if letter of intent to sever doesn’t appear until the person dies – reason to be suspicious (only show up if other JT dies first)
   6. ***Harms v. Sprague*: mortgage cannot sever a JT (bc it’s a lien that disappears when tenant dies)**
      1. FACTS: Joint tenancy – one tenant gets a mortgage on his share of property – is a joint tenancy severed when less than all of the joint tenants mortgage their interest in the property?
      2. HELD: mortgage cannot sever
         1. Mortgage is merely a lien on property interests, and not a conveyance of those interests
         2. So doesn’t sever unity of title
         3. And disappears w death of person
         4. And therefore doesn’t sever JT
         5. Mortgage extinguished along w/ J’s interest in land when he died
      3. Note: If the mortgage lender had dealt with both joint tenants, then the lien would have been unaffected by the death of one of the joint tenants – a legit financial institution would likely require both of the joint tenants to sign (but the lender in *Harms* was an unsophisticated lender)
   7. Can a lease sever a JT?
      1. Courts are split whether lease is severance
      2. Arguing for severance – characterize as title-like interest, conveyance
      3. Arguing no severance – characterize as lien like-interest, mere encumbrance/K
      4. If moving towards view a lease is a K, harder to say that JT severed

### 2. Partition

1. **Overview** 
   1. Ends co-tenancy completely by dividing up property bw former co-tenants
   2. Does not req any reason or justification.
      1. Any party can sue for partition at any time
      2. Absolute right of partition
      3. Can’t be compelled to stay in co-tenancy if you don’t want to be
   3. Applies to both JT and TC
   4. Partition in kind (physical partition):
      1. divide property geographically
      2. default method, in order to avoid dispossessing tenants in physical possession (see *Delfino*)
   5. Partition in sale:
      1. property sold and proceeds of sale divided b/w concurrent owners based on percentage of property they hold
      2. applied if partition in kind is impracticable or if parties’ best interests are better served
         1. best interests incl subjective value (see *Delfino*)
      3. Ex) property is fully occupied by a single house; use being made of one part of the property is nuisance to the rest; many co-tenants (common scenario)
      4. Easy when land is just an asset
2. ***Delfino* (Conn. 1980): partition in kind is favored; partition by sale only when in kind is impracticable/inequitable or not in best interest of the parties** 
   1. FACTS:
      1. P (residential developer) and D (trash removal biz) owned plot of land as tenants in common. P not in actual possession; D lived on part of land and operated biz there (tho no trash stored on premises). D: 99/144 and P: 45/144.
      2. P brought action asking court to order partition by sale, D moved for partition in kind.
   2. HELD: Presumption is partition in kind
      1. Don't like forced sales, esp if someone is actually living on/using property. Would forcibly dispossess occupying co-tenant (unless the occupying co-tenant can afford to buy the whole property)
      2. Partition by sale only when partition in kind is impracticable/inequitable or not in parties’ best interests
      3. Here, division is feasible.
      4. And best interest need to incl fact that D had been in actual and exclusive possession of property for substantial period of time, made it home, and made it livelihood.
   3. BUT presumption softening as land begins to look more like any other economic interest (less unique, more fungible)
      1. Partition by sale has advantages of sending land toward its highest/best use (highest bidder may put land toward best use)

### 3. Ouster

1. **Overview** 
   1. When one co-T absolutely denies other co-T’s rights of ownership & possession
   2. Triggers certain remedies; might begin AP/SOL
   3. How to prove
      1. Exclusive use is not enough
      2. Co-tenant(s) must necessarily exclude the others
         1. Act of exclusion; or
         2. Use of such a nature that it necessarily prevents the other co-Ts from exercising their rights
      3. Acts of physical exclusion from the whole property are sufficient for ouster
      4. But letter telling a co-tenant to vacate or pay rent may/may not be enough
      5. When a co-tenant out of possession makes a clear, unequivocal demand to use land that is in the exclusive possession of another co-tenant, and that co-tenant refuses to accommodate the other tenant’s right to use the land, the tenant out of possession has established a claim for relief under ouster.
   4. **Adverse possession + ouster**
      1. Might lead to AP, but requires an overt repudiation to start clock
      2. Must show unequivocal demand for use by non-possessory co-tenant
      3. What counts as overt repudiation?
         1. One co-T explicitly saying to others: “You have no interest in this property, it’s all mine”
         2. Refusing to pay gets you there
         3. Probably won’t work: Not responding
      4. Not enough to act like owner (already standard for ouster)
         1. Need to give actual notice to other owner (rather than just acting like true owner)
      5. 🡪 some acts are enough for ouster but not enough for AP
2. ***Gilmor* (UT 1984): P was ousted bc D’s use “necessarily excluded” her from use; P can sue for share of rent and profits bc ousted** 
   1. FACTS: D & P owned equal shares of land used for cattle grazing; D had exclusive possession; P asks D to alter use to allow her use; D ignored and continued use of land at max capacity.
   2. HELD: can sue for share of rent/profits if ousted from possession
      1. Mere exclusive possession isn’t sufficient for ouster
      2. P made clear, unequivocal demand
      3. But D acted in a way that necessarily excluded fellow co-tenant 🡪 sufficient for violating rights of co-tenant and
      4. ouster
3. **Payments on common property**
   1. Renting to third parties
      1. If one co-T rents to a third party, the rent payments must be shared proportionally among co-Ts.
      2. Note: you get half the revenue, not half FMV
   2. Payments bw co-Ts
      1. In general, no oblig for a co-T in exclusive possession to pay rent to other co-Ts.
      2. But, if a co-T ***ousts*** the other co-Ts, she may be required to pay those ousted their proportion of FMV of property (can be dif value from actual revenue from third party)
   3. Repairs/improvements
      1. Co Ts in exclusive possession who make repairs or improvements have no right of contribution from other Ts, except:
         1. If co-Ts have stood by and let the improver proceed to his detriment
         2. If co-T acted in good faith, believing himself to be sole owner
         3. If repairs were *essential* to preserve/protect the property

**Transferring Ownership: Real Estate Transactions**

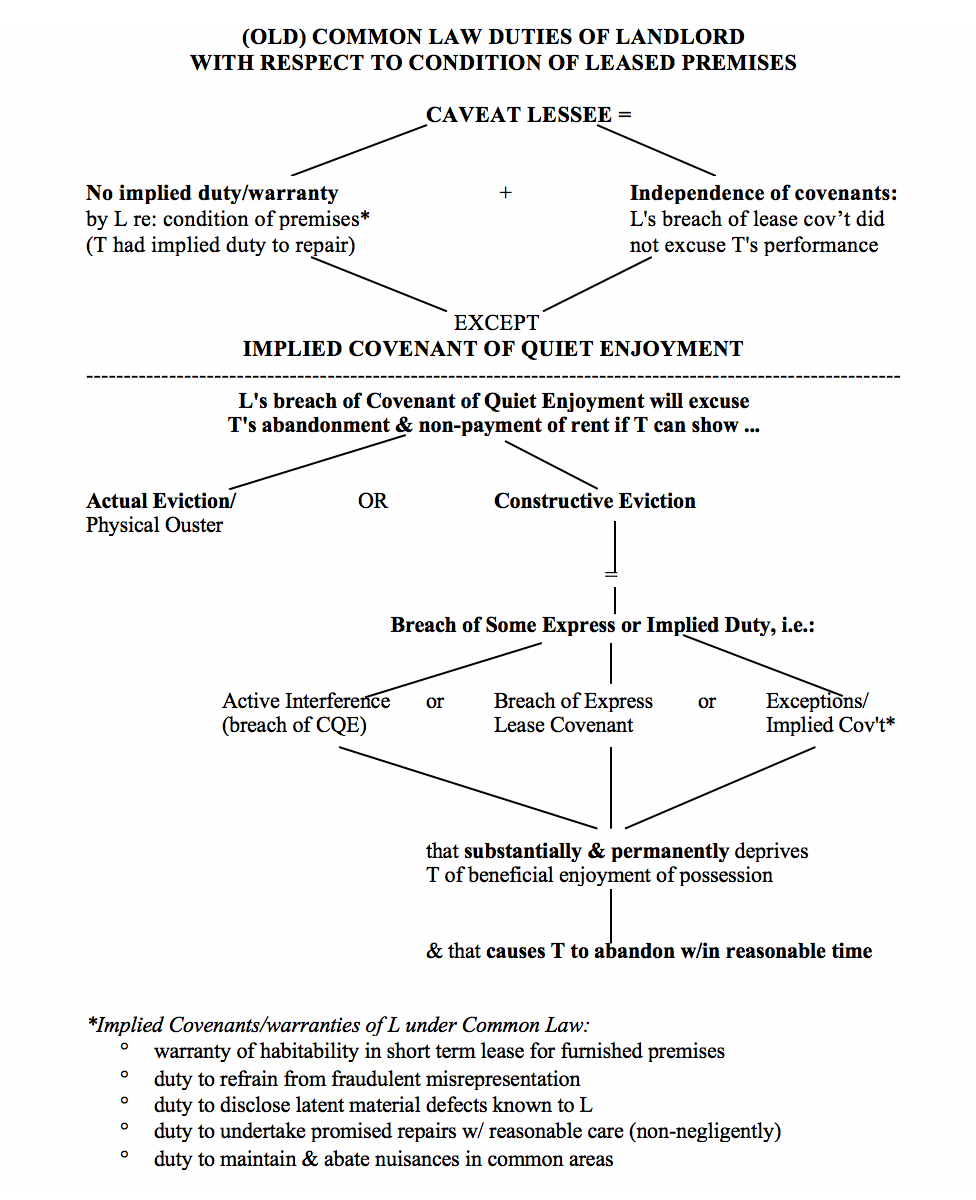
* Financing and Mortgages
  + Mortgage: gives bank/lending institution a security interest in the property (acts like a lien on the property), in case the borrower (buyer) can’t pay back the loan
  + If borrower can’t pay, lending institution may foreclose on the mortgage (sell off the property to cover the balance on the loan)
* Proving and Recording Title
  + Recording: keeps track of transfers of ownership of real property
  + Policy: protect markets and good faith purchasers against title defects and disputes in the seller’s chain of title.
  + Nemo dat:
    - “one cannot give that which one does not have”
    - prior in time = prior in right
    - derivation principle – transferee’s rights derive from those of transferor
    - current owners must be able to trace ownership back in time thru series of legitimate transfers (ideally) to an act of original acquisition (eg grant from US govt)
  + Types of recording statutes
    - Notice:
      * Subsequent bona fide purchaser wins, unless he has notice.
      * Types of notice:
        + Actual notice (knew in fact)
        + Record notice (it’s been recorded)
        + Constructive notice (should have known for some reason, like someone other than seller is occupying the prop you’re buying).
      * Ex) O 🡪 A (2018), then O 🡪 B (2019).
        + A never recorded sale. B has no idea about O’s transaction with A.
        + B > A, regardless of whether he records his transaction before A does.
    - Race-notice:
      * A subsequent bona fide purchaser wins only if she has no notice *and* records first.
      * Ex) O 🡪 A (2018), then O 🡪 B (2019).
        + A did not record sale. B has no idea about O’s transaction w A.
        + B > A, but only if B records first.
    - Pure race:
      * Whoever records first wins
      * Minority rule – few jxs use this
      * Ex) O 🡪 A (2018), then O 🡪 B (2019). Whoever records first wins.
  + But limits!
    - Off record matters may still bind or deprive a subsequent bona fide purchaser
    - If recording act fails to apply (nemo dat)
    - Need for surveying and physical inspection
    - AP claim wins over recording! ***Mugaas***
  + ***Mugaas v. Smith:* AP owner > subsequent purchasers w no notice and who record first, even where under a race-notice recording statute**
    - FACTS:
      * Mugaas in actual adverse possession of strip of land from 1910-1928. SOL passed at some point during that time. At one point was a fence up marking her area but taken down before Smiths on the scene. Smiths buy property from owner (before any legit AP claim made); record first (1941).
      * Statute: race-notice (reqs first in time + good faith, ie no notice).
    - HELD:
      * Smiths: We are bona fide purchasers w no notice of any kind of M’s title by AP, and we recorded first.
      * Court rejects. Says recording statute protects against unrecorded deeds/conveyances, but not against title acquired by AP.
      * Otherwise, AP owner “must keep his flag flying for ever, and the statute ceases to be a statue of *limitations*”
    - 🡪 Title in AP is in some ways better than normal title
      * AP wipes out prior claims based on prior possession
      * AND protects against subsequent purchasers even if a normal paper title would have been overcome by the recording statutes.

# VI. Entity Property – Separating Management and Possession

1. **Overview** 
   1. Entity property devices:
      1. permit management of resources (concentrated in specialists) to be separated from their use and enjoyment (distributed)
      2. allow owners to switch from exclusion strategy to governance strategy for management of resources
   2. Life estates and co-tenancies reflect the exclusion strategy for dealing with resources, rather than a governance strategy
      1. Traditional forms like fee simple, life estate, etc operate on the assumption that, at any point in time, one person/small number of persons will function as the “gate-keeper” of the resource
   3. The exclusion strategy, however, is too crude to serve as an effective basis for managing the resources used by complex entities like high-rise apartment buildings.

## A. Lease and Landlord Tenant Law

1. **Overview** 
   1. Leasing allows owners of resources to switch from an exclusion strategy to a **governance strategy**
   2. Modern Landlord-tenant law blends various sources, sometimes in tension:
      1. Property principles (common law)
      2. Contract principles
         1. Effort to discern intent of parties
         2. Default rules if parties fail to address something
         3. Remedies if breach
      3. Judicial/legislative reforms:
         1. Mostly in interest of protecting T from LL
         2. wide-ranging re-examination of how leases are interpreted
   3. LEASE as a:
      1. Financing device
         1. less well-off people can lease
         2. close relations w loans
      2. Risk-spreading device
         1. Tenant POV: Minimize risk if you’re not sure you want to stay, risk of investing most of your savings in an asset you may want to unload soon
         2. LL POV: if tenant defaults on payment, easier to retake possession than foreclose on a mortgage. And greater advantage when multiple tenants.
      3. Entity property
         1. Mechanism for integrating and managing complex assets (high rise apt buildings, office bldgs., shopping centers)
         2. Specialization of functions – common areas, individual spaces probably managed more effectively
   4. Types
      1. Terms of year
         1. Fixed time at which it terminates/ends
         2. SoF – must be in writing if > 1 yr
         3. Neither LL nor T required to give notice before terminating lease
      2. Periodic tenancy
         1. Lease that automatically rolls over for a stated period of time, usually a year or a month
         2. Requires notice for termination by either party
      3. Tenancy at will
         1. Lasts only so long as both parties wish to continue
         2. Either can terminate at any time for any reason
         3. At common law, no notice required, but in many jx, changed to require notice
      4. Tenancy at sufferance
         1. When tenant holds over after right has ended
         2. Different from trespass b/c original entry wasn’t wrongful
            1. May limit LL’s ability to use self-help – *Berg*
            2. Otherwise free to evict using forcible entry and detainer statutes or by bringing action ejectment
   5. **Status relations 🡪 contract law**
      1. Old CL: “tenant” = status.
         1. Rights and responsibilities of parties largely determined by law.
         2. Tenant: right of possession in exchange for payment of rent.
         3. LL: FSA subject to term of years (rights of lease + rights of tenant)
         4. Tenancy: defeasible (could end on occurrence of some condition), usually on condition subsequent giving LL a right to reenter (*Berg*).
         5. Leases: short and simple, because background rules defined what would happen.
         6. Most leases for agricultural land.
      2. New CL: rise of market economy 🡪 loosening/disruption of old status relations in favor of freedom to contract.
         1. Focus on:
            1. Intent (expectations/agreement of parties): what does lease say parties agree to?
            2. Contract law: different rules of interpretation, default rules, substantive rules, and remedies to work w.
         2. Policy:
            1. (+) respect individual autonomy; parties can bargain for what they want
            2. (-) unequal bargaining power, esp in urban, multiunit dwelling
      3. Today:
         1. CL reforms: protecting tenant more than the lease or old rules of the game did
         2. Legislative reforms
      4. 🡪 Movement from status relations (where law ascribed duties based on status of parties) to contract (what parties actually negotiate/agree)
         1. But a premise underlying K is that parties are equal enough equality to make Ks to what they actually want – question whether this is in fact the case for all/many tenants.



1. **Independent Covenants**
   1. All covenants must be performed w/o regard to whether other covenants have been/can be performed
      1. E.g. still have to pay rent if LL doesn’t fix sink
      2. You get upsides, you get downsides.
   2. Exception: failure by LL to afford quiet possession (amounts to eviction), actual or constructive eviction (incl from – excuses T from paying rent
   3. ***Paradine v. Jane* (1647): independent covenants – frustration of purpose doesn’t excuse nonperformance of K** 
      1. FACTS: Prince seized land, expelling Jane; this frustrated Jane’s purpose under the lease; so Jane stopped paying.
      2. HELD:
         1. Independent covenants
         2. Not excused
         3. Gain advantages and suffer losses under any K
      3. Note: result would be different if LL/LL’s agent invaded the land – that would be interference w quiet enjoyment.
2. **Breach of Covenant of Quiet Enjoyment** 
   1. ***Smith v. McEnany* (MA 1897): constructive eviction = LL’s physical intrusion on part of land = enough to trigger quiet enjoyment exception to independent covenants rule** 
      1. FATCS: LL built wall encroaching on leased premises; didn’t affect T’s use; T stops paying rent; LL sues.
      2. HELD: LL’s physical intrusion that interferes with the tenant’s quiet use and enjoyment of a portion of the property amounts to an eviction from the entire property
         1. **Covenant of quiet enjoyment:** at a minimum, I the LL wont evict you; if I do evict you, suspends your obligation to pay.
         2. Extent of interference only relevant if intrusion is not physical
         3. Here, landlord’s wall physically encroached upon leased prop 🡪 constructive eviction 🡪 don’t have to pay rent
         4. Does not matter that encroachment did not make premises uninhabitable nor change nature of its use.
         5. LL can’t take part of it away and still charge
         6. Rule wouldn’t apply to de minimis encroachment
         7. Also leaves door open for accidentally evicting small part
      3. Degree of interference w/ use and enjoyment of premises important only when don’t physically exclude but have allegedly equally serious practical effect
   2. ***Blackett v. Olanoff* (MA 1977): noise = constructive eviction** 
      1. FACTS: Ds apt residents; LL rents nearby space to jazz lounge; noise from lounge interferes w implied covenant of quiet enjoyment; LL didn’t make noise go away; Ds leave apts, stop paying rent, and argue constructive eviction.
      2. HELD:
         1. LL had control to correct condition – lease for lounge said noise couldn’t be heard to disturb. Had power to do something and therefore duty to do something, but failed to.
         2. LL sufficiently responsible for breach of covenant of QEnj.
   3. Note: if arguing constructive eviction, how critical it is that T vacates premises?
      1. Staying indicates not bad enough for constructive eviction
      2. Hard to claim substantial deprivation if not gone
      3. Abandonment is critical element
3. **Duty to Deliver Possession**
   1. This duty guarantees that neither LL nor another 3rd party acting under paramount title given by LL will be in possession when lease begins.
   2. But what happens if squatter or holdover tenant is in possession of property when new tenant’s lease begins? Authorities divided.
      1. English rule: landlord responsible for clearing them out
      2. American rule (not followed in all states): tenant responsible.
      3. ^ can be modified by parties in K.
4. **Caveat Lessee** (tenant beware)
   1. No implied warranty that that leased premises will be fit for tenant’s intended purposes
   2. ***Smith v. Marrable*: implied warranty of habitability in short term rental of furnished vacation cottage** 
      1. US courts later reached similar result re furnished vacation rentals
   3. ***Sutton v. Temple* (England 1843): No implied warranty by LL re: condition of premises**
      1. FACTS: D leased field of edible grass; D’s purpose was to feed cattle but not specified in lease. Manure in grass had paint and killed the cattle. D stops paying rent and LL sues.
      2. HELD: no implied warranties by LL that land will be suitable for the purposes for which T has rented the land 🡪 T must still pay rent.
         1. Caveat lessee: as long as discoverable by tenant, not LL’s duty to disclose
         2. Buyer beware – up to T to figure out if problems make the land unsuitable for his purposes.
         3. Doesn’t matter if LL knew of purpose
         4. And even if had warranted explicitly (eg term of lease), remedy would be damages (still have to pay rent).
         5. Latent defects: court leaves open possible duty to disclose
      3. Court careful not to overturn *Marrable* – distinguish bc that was about house and furniture for immediate occupation.
      4. Leasing for property itself, not its benefits – renter must pay regardless of whether met his purposes
      5. If they had included this term in the lease?
         1. Under independent covenants theory, still have to pay rent. Remedy is damages.
         2. BUT T could try to argue constructive eviction, bc warranty of suitability for purpose is broken, and then breach of CQE.

### 1. Condition of Premise

1. **🡪 represents legal shift toward contract principles**
2. **Implied Warranty of Habitability** 
   1. Reversed part of caveat lessee that says no implied duty/warranty re: condition of the premises
      1. From independent of covenants 🡪 duty to pay rent dependent on L’s IWH
      2. From standard set by facts on ground (conditions bad enough to reasonably force T out) 🡪 societal standard of decent housing measured by code
      3. Expands the CL notion that LL makes no warranties other than CQE. Now also IWH.
   2. Post-*Javins*: LL has implied duty to maintain habitable conditions in urban, multi-dwelling buildings
   3. Also, the **requirement of abandonment for constructive eviction is abolished** in *Javins.*
   4. IWH cannot be waived
   5. Societal standard of IWH
      1. Allow T to stay while claiming uninhabitable
         1. Otherwise, market kicks in b/c can’t afford
      2. Allow patent defects as breach for IWH
         1. Otherwise, LL will just be upfront and T will feel like they can’t leave
      3. Have to stop waivers
         1. LL will throw in paper and reintroduce market forces
      4. Have to reject fair market value for what LL can get from T in breach of IWH
   6. Effects
      1. LL would theoretically either raise priced or sell
      2. But didn’t have dramatic effects like predicted
      3. Can improve housing supply w/ public intervention e.g. housing vouchers and pubic housing
      4. T don’t believe going to get better housing w/o more $
      5. Possible that little enforcement is from people that value improvements and IWH helps them
         1. Maybe get some benefit but not enough to increase for everyone
3. ***Javins* (DC Cir. 1970): implied warranty of habitability** 
   1. FACTS: T withheld rent from LL due to numerous violations of housing code; violations weren’t present at time of lease. LL sued seeking ejectment b/c didn’t pay rent.
   2. HELD: Warranty of habitability (measured by housing code) implied in leases covered by housing code
      1. Precedent: *Brown* (illegal lease doctrine): if serious housing code violations @ time of lease 🡪 lease is illegal.
         1. But lease would be void, and tenants would be evicted.
         2. Here, tenants want to stay.
         3. So strategic choice to distinguish from *Brown* by addressing only situation where defects arise *after* place is leased.
      2. Warranty of habitability, measured by standards set into code, is implied by operation of law into leases of urban dwelling units covered by code
         1. Breach gives rise to usual remedies for breach of K
         2. Lease should be interpreted and construed like any other K
         3. Must be a material breach (substantial deviation) from code
      3. Concerned w power disparity, unequal bargaining positions.
   3. Substitutes the old CL standard of habitability (effectively a market standard) for a societal standard, as embodied in the housing code.
   4. Allows for constructive eviction even if you stay in the apartment
   5. IWH is non-waivable – can’t K out of it
      1. Ironic: general principle in K that parties get to decide what goes in K
      2. Being treated like a consumer product where hard for seller to waive any requirements despite 1-on-1 interaction
      3. Housing code establishes societal standards - expectations but not in usual K sense
      4. Public policy-based status relationship: too concerned re disparity of power to leave up to K
   6. Should waiver be allowed when consideration is given?
      1. Against
         1. LL would take advantage of bargaining power/paternalism
         2. Also meant to protect 3rd parties (children, neighbors, etc.) – invoking larger societal effects and externalities
      2. For: freedom of K, may price out low-income people

### 2. Abandonment

1. **Overview** 
   1. Under old CL, LL has 3 options if T abandons:
      1. Treat abandonment as offer to surrender leasehold, and accept surrender.
         1. Lease ends, T off the hook for rent under the lease.
         2. T might still be on hook for damages (T breached lease)
            1. Damages = leased rent minus FMV
            2. Bc law assumes LL can now rent at whatever FMW is
            3. Tenant remains on the hook in case FMV is less than leased rent (prevent LL operating at a loss)
            4. Don’t have to give surplus
         3. Best option for LL if value of property has gone up
         4. Acceptance: per *Sommer*, LL’s silence can be interpreted as acceptance of surrender
      2. Reenter & re-let the apt as T’s agent
         1. LL rents to another on T’s behalf
         2. T still on hook for lease rent minus any rent LL collects on T’s behalf (& LL owes T any surplus)
         3. Best option for LL if value of property has gone down/dif to find new T
         4. Some leases do not allow this
      3. [Do nothing & sue T for rent] – **DEAD** after *Sommer*
         1. T still liable for full rent for period of lease; LL has no duty to mitigate
         2. No longer an option – wiped out by shift to contract law/duty to mitigate – *Sommer*
   2. **Lost volume principle:**
      1. If by re-letting T’s abandoned apt, the LL loses out on renting one of their other avail apts, T might still owe damages.
      2. T could reply: my apt is unique, wouldn’t necessarily have succeeded in renting out a dif apt
2. ***Sommer v. Kridel* (NJ 1977): there IS a duty to mitigate in LL/T**
   1. FACTS: T (D) told LL he couldn’t afford rent anymore; during lease, 3rd party wanted D’s unit but P said no, already rented; LL sues D for entire 2 yr lease (trying to use option 3, see above).
   2. HELD: duty to mitigate damages by making a reasonable effort to re-let the premises when seeking to recover rent from a defaulting tenant.
      1. Court concerned about “basic justice and fairness”
      2. Court construes situation as option 1, and says that ignoring = acceptance
         1. LL has burden of proving reasonable diligence. Consider whether LL showed or advertised apt.
         2. Tenant may rebut by showing suitable tenants who were rejected.
      3. Property law 🡪 contract law
         1. Old rule based on idea of lease as a transfer of property interest
         2. But distinction bw residential lease & ordinary K not viable
         3. Should focus on intentions of parties, apply K law principles
   3. Generally, duty to mitigate is non-waivable
      1. But can use stipulated liquidated damages clause to plan for amount

### 3. Transfer

1. ***Kendall* (CA 1985): Consent to transfer commercial lease may be only withheld if lessor has commercially reasonable objection**
   1. FACTS: Hangar space at SJC airport. B (T1) subleasing from D (LL), then sold business (including lease) to P (T2). D refused to consent to assignment. P sought declaration that refusal was unreasonable and invalid unlawful restraint on alienation,
      1. Lease said written consent needed before lessee could assign interest
      2. Failure would render lease voidable at option of lessor
   2. HELD: Consent to transfer commercial lease may be only withheld if lessor has commercially reasonable objection
      1. Majority of jx have long ruled in favor of LL (when lease contains approval clause, can arbitrarily refuse)
         1. but court notes this has been steadily under attack
         2. and based on old idea of lease as conveyance of interest, not K
      2. Principle against restraint on alienation
      3. Implied covenant of good faith and fair dealing
      4. Lease is a K – assume it comes w this ^ covenant
   3. Determining commercial reasonableness
      1. Financial stability of proposed assignee
      2. Whether the proposed use of the property is suitable
      3. Whether the use will req alteration to the property
      4. Legality of the enterprise
      5. NOT: personal taste, convenience or sensibility
   4. Note: this dispute is about who can capture bonus (value of hanger space at regional airports risen significantly)
      1. LL can capture bonus if can terminate the lease
      2. T1 can capture if can assign or sublet
   5. Does the commercially reasonable standard apply to residential leases?
      1. Court leaves this Q open.
      2. LL: Could say residential more personal and subjective, so should retain absolute discretion to refuse sub-Ts.
      3. Possible issue: LL discrimination
         1. LL will counter anti-discrimination law could take care of that
   6. After Kendall, can parties ever contract around this; could LL ever write into lease that they can refuse for any reason?
      1. Court doesn’t reach this issue
      2. At least, language would have to make it clear LL is disavowing any need for reasonable justification for refusing consent (eg “consent at will”)
2. **Form leases**
   1. Be aware of which covenants and duties are implied in the lease by the law and which need to be specifically contracts for
      1. Covenant of quiet enjoyment🡪 implied
      2. Understanding that material covenants are dependent 🡪 implied
      3. Provision calling for termination of the lease upon destruction of the premises 🡪 ??
      4. Implied warranty of habitability 🡪 implied
      5. Landlord’s duty to mitigate damages 🡪 implied

## B. Coops, Condos & Common Interests Communities

1. **Generally** 
   1. Owner of unit is an owner in fuller sense than a T in the LL/T context
      1. Has more sticks in the bundle of rights
   2. Managing entity in each situation is a body of the residents 🡪 feels more democratic than the LL/T context (where the LL more like a dictator)
   3. Rules and restrix in all three types:
      1. Can be included in original title doc
      2. Might come up later thru rules promulgated by governing body (which owner agrees to follow as part of being in the community)
      3. Owners don’t have all the stick in bundle of property rights
         1. Give up some autonomy, liberty, maybe privacy in favor of collective self-governance
   4. 🡪 governance strategy of management
   5. principle mechanisms for solving governance issues
      1. Contractual
      2. Establishing board of directors, HOA, or more similar governing body
      3. Litigation last resort – cost of litigation can raise fees for all owners, bc corp pays.
2. **Condos** 
   1. Structure
      1. Residents own interior spaces (fee simple absolute)
      2. Condo Association (all residents) owns exterior, shared walls, common spaces
      3. Pay fees for maintaining
      4. Constrained by rules of Condo Assn
      5. Inside is freely alienable -- Worth more than coops b/c not afraid of being able to sell
   2. ***Nahrstedt* (CA 1994): tests for invalidating Condo rules – if** 
      1. Whether condo’s cat restriction was unreasonable since pet would only be inside
      2. *Hidden Harbors* (Fl) – 2 dif tests
         1. Restrictions from declaration or master deed of condo:
            1. Strong presumption of validity

Promotes stability and predictability by giving assurance

Protects owners from unanticipated increases in association fees from legal challenges

Upholding and enforcing instrument that embody expectations

* + - * 1. Only invalidated if arbitrary or in violation of public policy or some fundamental constitutional right
        2. Restrix on use key part of common interest communities, crucial to their stable and planned environment
        3. *🡪This is where the cat restriction falls – it’s upheld*

reasonableness decided in context of building as a whole

this restrix is not arbitrary, but is rationally related to health, sanitation and noise concerns

* + - 1. Rules promulgated
         1. Not entitled to presumptive validity
         2. Subject to reasonableness to fetter the discretion of board of directors

Need to look at common interest as a whole

* + 1. Dissent:
       1. pet ownership has substantial benefits that outweighs utility
       2. Confined to unit, doesn’t disturb quiet enjoyment of others

1. **Coop** (esp in NYC)
   1. Structure
      1. Corporations/coop holds title to whole building in fee simple
      2. Corp = residents, governing thru an elected board
      3. Residents own:
         1. Shares in coop/corp (become shareholders)
         2. Long-term “proprietary lease” of their unit (usually 99 yrs & renewable)
      4. Maintenance fees to coop/corp and fees
      5. Coop board generally has to approve sale of indiv units
   2. Since borrow money w loans secured by mortgage on entire building, v picky of creditworthiness of residents bc other shareholders have to make it up
   3. ***Pullman* (NY ‘03): less scrutiny to evict coop shareholder than in LL/T**
      1. FACTS: D had shares in coop governed by corp. Did crazy stuff and harassed old couple; board voted to eject him for “objectionable conduct” as set forth in lease agreement.
      2. ISSUE: what standard of review should be applied when coop exercises right to terminate?
      3. HELD:
         1. *Levandusky*: apply business judgment rule (from corporate governance law)
            1. Defer to Board in its exercise of business judgment as long as Board acts:

for purposes of corp.

within scope of authority

in good faith

* + - * 1. bc coops are legally a corporate entity, rule applies
      1. but also involves occupant being ousted
         1. local law (RPAPL) says there needs to be “competent evidence” for evicting the T – court says the Board’s decision counts as competent evidence
    1. Policy reasoning (not in case)
       1. Why more deference
          1. Trade-offs w collective governance/co-op
          2. Standard applies to everyone
          3. Democratic rather than dictators
          4. More accountable to constituencies and may fear retaliation
          5. Owners likely have more bargaining power and resources than renters, and can have voice in shaping the rules in first place
       2. Less deference
          1. Group decision-making/democracy doesn’t protect minority or dissident interests
          2. Owners have larger financial harms related to eviction than renters

Higher transaction costs

Owners less mobile than renters

* + - * 1. Owners have greater ownership rights than tenants so need more procedural protections

1. **Common Interest Communities** 
   1. Homes owned in fee simple absolute
   2. Subject to covenants, enforced by Homeowners/Neighborhood Assn
      1. Eg use restrictions, lot setbacks, reqs or prohibition of fencing, payment of fees for maintenance of common areas, etc.
   3. Owner-occupants don’t have all sticks in the bundle

# VII. Law of Neighbors

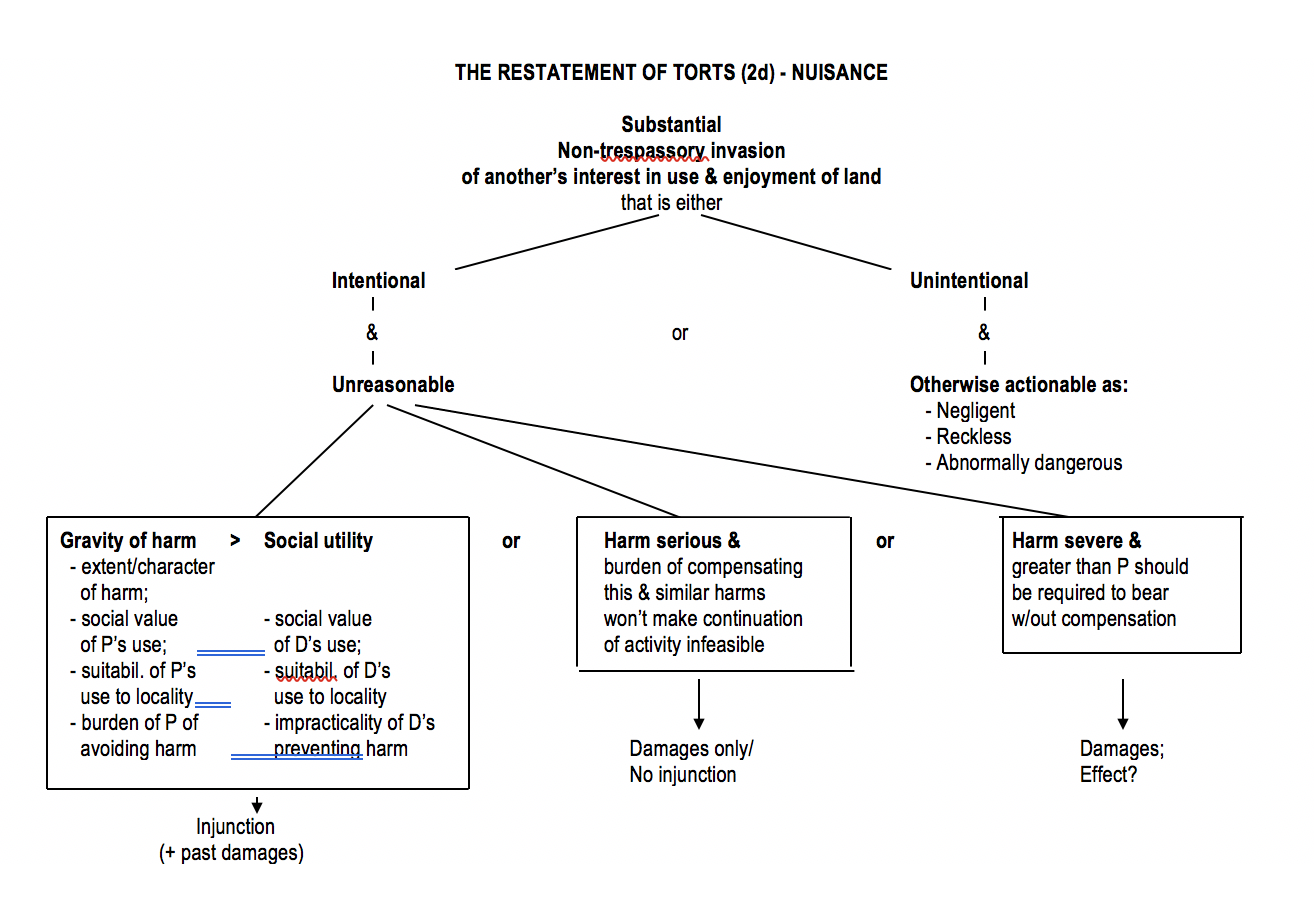
1. **Overview** 
   1. Trespass: defines right to exclude others + exceptions to right to exclude
   2. Nuisance: defines the right to use and enjoy property
      1. what your neighbor can do in interfering with your right to use and enjoy (passive)
      2. your own right to use and enjoy (active)
      3. All nuisance cases involve both active and passive rights to use and enjoy
   3. Use of neighboring property can have major impact on value + enjoyment land
   4. Legal devices to control conflicts among neighbors over incompatible uses

## A. Nuisance

1. General
   1. Nuisance: **substantial (actual) non-trespassory invasion of another’s interest in use and enjoyment of land** that is either
      1. intentional and unreasonable; OR
      2. [unintentional and otherwise actionable as negligent, reckless, or abnormally dangerous]
   2. 2 tests for unreasonableness:
      1. Threshold test:
         1. common law; *Campbell*
         2. if the intentional activity passes a threshold of harm, then it is a nuisance
         3. utility of D’s activity is irrelevant
         4. over-enjoinment
            1. strong plaintiff protection; strong use and enjoyment protection
            2. but net effect: some socially useful activities will be shut down
      2. Balancing test
         1. Common law? Minority rule*, Del Webb, Boomer*? Restatement?
         2. comparing the utility of the activity with the gravity of the harm
         3. under-enjoinment
            1. potentially under-compensatory and thus D isn’t forced to internalize externalities
            2. But can use regulation which can take into account the full range of harms
            3. Why regulations have largely supplanted nuisance
      3. Policy:
         1. Injunctions can spur innovation
         2. If really concerned about latent, unknown/unknowable harms of pollution or other enviro issues, should be extra cautious
         3. Under enjoining is more fix-able than over-enjoining
            1. Legislation, zoning regs, etc can shut down a use that is under-enjoined by the court
            2. Comparatively, no tool a leg could use to undo an injunction
         4. Institutional competency
            1. Legislature doesn’t have procedural constraints of indiv/private litigation, more investigative resources, more reflective of societal values/priorities
   3. Restatement test: for unreasonableness/remedy
      1. If the **gravity of the harm > than the social utility** of the activity 🡪 injunction and past damages are awarded
         1. Gravity of harm considers: extent/character of harm, social value of P’s use, suitability of P’s use to locality, burden of P avoiding harm.
         2. Social utility considers: social value of D’s use (incl $$ invested), suitability of D’s use to locality, practicality of D preventing harm. A company’s profits are good measure of its social value; also jobs.
         3. If not, then courts can award damages in accordance with one of the above approaches
      2. If **harm is serious** + burden of compensating this & similar harms won’t make continuation of the activity infeasible 🡪 damages, no injunction
      3. If **harm is severe** & greater than what the plaintiff should be required to bear without compensation) 🡪 Damages, no injunction, but not focus on the potential effect of liabilities.
   4. Must have actual damages to sustain nuisance claim
      1. compare to trespass: no actual damage reqd (*Jacque*)
      2. similar to [CASE NAME] re: trespass to chattels
   5. Things we are ignoring
      1. Nuisance per se: wrong wherever and whenever they may be
      2. Public nuisance
      3. Unintentional
2. Entitlements (Calabresi/Melamed) (4 quadrants):
   1. Whenever state presented w conflicting interests of 2+ people/groups, must decide which side to favor.
   2. options:
      1. Entitlement protected by property rules
         1. must be bought, person w the entitlement sets price
         2. 🡪 less state intervention
      2. Entitlements protected by liability rules
         1. prices set by court
         2. 🡪 more state intervention

|  |  |  |  |
| --- | --- | --- | --- |
|  |  | **How is the entitlement protected?** | |
|  |  | **Property rule** | **Liability rule** |
| **Who gets the entitlement?** | **P** | **Rule 1:** P can stop D (or set price to allow D to continue)  *Campbell* | **Rule 2:** D must pay P’s damages/ losses (set by ct) to continue  *Boomer* |
| **D** | **Rule 3:** D can continue w/o liability (or demand own price to stop)  *Adams*? | **Rule 4:** P must pay D’s damages/ losses (set by ct) in order to stop  *Del Webb* |

1. ***Adams* (MI 1999): non-trespassory invasion (dust) is nuisance not trespass**
   1. FACTS: ∆ = iron mine, π nearby homeowners; Ps brought suit in both trespass and nuisance, complaining of dust, noise and vibrations emanating from mine, which devalued home and caused psychological stress.
   2. HELD: Where the possessor of land is menaced by noise, vibrations, or ambient dust, smoke, soot, or fumes, the possessory interest implicated is that of use and enjoyment, not exclusion, and recovery can be had in nuisance.
      1. Dust: don’t treat as trespass even though might be tangible. Doesn’t occupy space, so doesn’t interfere w exclusive possession.
      2. Don’t blur line b/w trespass and nuisance
         1. Trespass – right to exclude
         2. Nuisance – right to enjoy – nuisance
      3. If blur the line, then going to make it harder for cause of action for trespass
   3. BOOK: tests used (sometimes in combo) for boundary b/w trespass and nuisance
      1. Whether action done giving rise to intrusion done on π’s land or outside π’s land
      2. Whether harm to π’s land direct or indirect
      3. Whether invasion committed by tangible matter by some intangible substance
      4. Whether intrusion deprives π of possession of land or merely of use and enjoyment of land
2. ***Campbell* (NY 1876) – threshold test** 
   1. FACTS: P built mansion on land, D is neighbor w brickyard; D there first but started burning bricks after; gas killed fancy trees, but only entered when wind carried (not continuously).
   2. HELD:
      1. Yes, this is a nuisance.
         1. Threshold test – doesn’t consider value of brick factory
      2. What remedy: damages or injunction?
      3. Court decides injunction.
         1. Prevent multiple suits (bc injury is a reoccurring one).
         2. What used to be non-noxious use of property has become nuisance due to changing character of neighborhood
         3. Doesn’t matter re: timing – can’t erect a nuisance on vacant lands and thus basically control what neighboring land can be used for – [but coming to the nuisance???? How does this square?]
         4. Court protects P’s fancy trees – luxuries are protected as strongly as necessities.
   3. Defense of laches?
      1. Laches = P waited to long to bring claim, and D relied on that.
      2. No active acquiescence, so no laches defense.
3. ***Boomer* (NY 1970): Liability rule w entitlement held by P** 
   1. FACTS: D is cement plant in Hudson Valley, P = neighbors complaining about air pollution/dust. Example of inconsistent land uses.
   2. HELD: court awards permanent damages
      1. Why not issue injunction?
         1. Social cost: jobs, tax revenue, huge investments in plant
         2. Avoid holdout problem (any one Ps w rt to injunction could refuse to sell, thereby shutting down entire plant)
      2. So instead court basically makes the company buy its way around the injunction, by ordering permanent damages (not reg ones).
      3. Court is balance impact on Ps with the social cost of enjoining conduct
         1. Court finds: gravity of harm and social cost signif
   3. Issues w this approach
      1. Doesn’t capture some factors we could consider in gravity of harm
         1. FMV doesn’t account for value landowners ascribe to homes
         2. Health effects
      2. Doesn’t capture harm to parties not before the court
         1. Systematic undercounting of others similarly situated
      3. Willing to count utility/benefits to third parties, but not willing to count costs to third parties – so systematically tilted against Ps.
   4. Dissent: gvm’t basically allowed private eminent domain
      1. Under NY precedent, would think property right is secure
      2. Forced to give up valuable right
   5. CE objections
      1. Contrary to concept of property – if court forces you to sell a right, then in essence not a property right since not setting the price
      2. Measure of damages is under-compensatory and skewed
4. ***Del Webb* (AZ 1972): Balancing test – Injunction, but P has to compensate D**
   1. FACTS: retirement community v. cattle feed lot.
   2. HELD:
      1. Court decides harm outweighs utility, so enjoins the D.
         1. Matters to court that P knew of cattle lot, but the residents who bought property there didn’t necessarily know (so maybe they didn’t come to the nuisance).
         2. Note it’s a *public* nuisance (court less likely to side w ∆)
      2. BUT still makes P compensate D, bc D came to the nuisance, bought land at low price bc near the nuisance, and then would have gotten windfall.
   3. Rare solution – but always consider when enjoinable conduct whether P is at fault for creating the incompatibility?
5. **Restatement Test – SEE CHART BELOW**



## B. Servitudes

1. Ks that bind successors in ownership

### 1. Easements

1. **Overview** 
   1. Affirmative right to use property of another which would otherwise be trespass/nuisance.
   2. Regarded as a property right
   3. Protected from interference by ST and 3rd parties
   4. Not revocable
      1. if revocable at will, it’s a license (not an easement)
   5. Terminology
      1. Dominant tenement: land benefited by easement
      2. Dominant tenant: holder of the easement
      3. Servient tenement: land burdened by easement
      4. Servient tenant: owner
      5. Grant: granted/conveyed in sale
      6. Reservation: I sell this to you, but I reserve the right to cross your land to get to my retained land.
   6. Types of easement
      1. Public v. private
         1. *Thornton* (OR beaches) is example of public easement – can cross private land
         2. But mostly focusing on private easements b/w neighbors
      2. Affirmative v. negative
         1. Affirmative: DT can make active use
         2. Negative: DT can prevent ST from doing something they can normally do (gets into covenant)
      3. Appurtenant v. in gross
         1. Appurtenant: attaches to particular piece of land
            1. E.g. classic right of way
            2. Runs w/ the land in a way that normal agreements don’t
         2. Gross: not appurtenant to piece of land
            1. NOT going to see this
            2. Doesn’t run w/ land, personal to holder
            3. No DT, only ST
   7. Four options
      1. Express grant/reservation
      2. Implied grant/reservation
      3. Prescription
      4. Estoppel
   8. Ex ante v. ex poste perspective
      1. Ex ante:
         1. apply the law so as to encourage parties to bargain ahead of time – maybe we don’t rescue P, let them be stuck w mistake they made.
         2. DT should have bargained for access they needed beforehand – *Schwab* and *Penn Bowling*
      2. Ex Post:
         1. Now that things have gone badly, how do we avoid injustice and opportunism?
         2. DT gets access they need and have come to rely on, in p tbc ST is responsible for predicament – “in fairness” – *Warsaw, Holbrook*
         3. Granting these easements undercuts incentives to be attentive and intentional up front
         4. Doing otherwise would give extortionate bargaining pow to ST
   9. For successor to ST to be bound, need (1) intent that easement runs w/ land and (2) notice of existence of easement
      1. Intent: express – easy to find, unwritten – use enumerated concepts to substitute for express intent
      2. Notice: actual or constructive
         1. Facts on the ground will usually reveal existence of easement due to evidence clearly indicating as much
         2. Record notice: constructive as a matter of law
      3. For unwritten easements, DT can file affidavit to close off no notice
   10. Exs of easements so far:
       1. *Boomer* – if Atlantic Cement went ahead and paid permanent damages, Atlantic Cement would have acquired an affirmative easement to commit a nuisance
       2. *Thornton* – public affirmative easement for public to cross land owned and possessed by private individual

|  |  |  |  |
| --- | --- | --- | --- |
|  |  | **How is the entitlement protected?** | |
|  |  | **Property rule     vs.** | **Liability rule** |
| **Who gets the entitlement?** | **Plaintiff/  ST** | **Rule 1:** ST can stop DT (or set price to allow DT to continue)  \**Schwab, PB* | **Rule 2:** DT must pay ST’s damages/ losses (set by ct) to continue use |
| **Defendant/ DT** | **Rule 3:** DT can continue use w/out liability (or demand own price to stop)  \**Warsaw, Holbrook* | **Rule 4:** ST must pay DT’s damages/ losses (set by ct) in order to stop DT’s use |

1. **Creation of easements** 
   1. **Express grant/reservation**
      1. Most common
      2. Usually in a deed but not always (can be conveyed separately)
   2. **Implied grant/reservation** – *Schwab* – need: 
      1. Unity of title/common O, followed by…
      2. Severance of DT/ST under…
      3. Circumstances at time of severance show: apparent prior use &/or necessity
         1. Circumstances *at time of* *severance* leads us to reasonably imply an expectation of the parties to that severance that an easement was going to be created
         2. If truly landlocked, necessity implied by law
      4. Implied reservation has flavor of derogation from grant so courts are reluctant
   3. **Prescription**: requirements/theory similar to AP (see *Warsaw*)
      1. Wrongs can ripe into rights by passage of time
         1. Sat on rights too long
         2. People became reliant
      2. Requirements
         1. Usually same SOL as AP (typically 10 yrs) (can use prior owner time if privity)
         2. Open and notorious
         3. No permission
         4. BUT exclusive use not required
            1. Don’t have to use as true owner
            2. Just have to act as if have a right to cross it
   4. **Estoppel**:permission + reliance (see *Holbrook*)
      1. Basically if A sat back and watched B spend money, could be vindicated by use – esp if gave permission at one point.

1. ***Baseball Publishing***
   1. sign on wall = easement in gross NOT lease or license
   2. BPC entered a K to place advertising sign on wall of bldg - K titled “Lease”
      1. gave BPC the exclusive right and privilege to advertise on Bruton’s building for one year, in exchange for $25
   3. Words simply mis-description of writing
      1. Lease – conveys a possessory interest in land
      2. License – merely excuses acts done by one on land in possession of another
   4. here – wall left in possession of owner & contract irrevocable 🡪 easement
2. ***Schwab v. Timmons* (WI 1999): NO implied grant/res bc fail to show apparent use/necessity at time of severance**
   1. FACTS: Property of several adjoining landowners bordered by lake on west and bluff on east, prior owner is U.S. Gvm’t conveyed lot which was subdivided into parcels. P conveyed away portions of property w/ public road access and then requested right to travel over private road on D’s land.
   2. HELD:
      1. Yes common ownership and severance
      2. But fail to show any use by U.S. so obvious, manifest or continuous to show it should be permanent *at time of severance*
      3. And fail to show necessity
         1. Not truly landlocked, even if more convenient. And do have water access
         2. also they *chose* to sell away part of land w access to public road; P’s created the necessity.
      4. 🡪no implied grant/reservation
3. ***Holbrook* (∆) *v. Taylor* (π)(KY 1976) – Estoppel? Yes!** 
   1. FACTS: D gave P permission to use road for construction of house and make improvements to road. P spent $ on improving road. Then dispute arose re use of road; D built steel cable so P couldn’t use.
   2. HELD:
      1. Not prescription – no evidence use was adverse, continuous
      2. Permission + reliance
      3. Given D’s permission and the investment, license to use subject roadway can’t be revoked.
4. ***Warsaw v. Chicago Metallic* (CA 1984) – Prescription? Yes! & no compensation.** 
   1. FACTS: D and P owned adjacent properties. D had vacant strip; P’s land too small for trucks to turn and use D’s strip for 6 yrs. D builds structure on strip; P sues claiming easement.
   2. HELD:
      1. P had valid prescriptive easement. D has to tear down structure.
         1. PE statute: use of property + open, notorious, continuous + adverse + 5 years
         2. Must show definite and certain line of travel for statutory period – substantial changes will break continuity
         3. Continuous use of easement over long period of time w/o landowner’s interference is presumptive easement
         4. Preference for use over disuse
         5. Absent of evidence of mere permissive use, will be sufficient to sustain judgment
      2. Where valid prescriptive easement, not required to compensate FMV of easement nor costs of removing/relocating encroaching structures which interfere w/ use of easement.
         1. P has acquired title by prescription sufficient against all
         2. Would defeat policies underlying AP/PE (reduce litigation, preserve peace)
      3. Court has discretion to balance hardships and deny removal if encroachment innocent but not the case here
5. ***Penn Bowling v. Hot Shoppes* (DC Cir. 1949) -- Misuse of Easements**
   1. FACTS: Common owner sells part of property to HS & reserves an easement over that prop to benefit the owner’s remaining land. PB buys that land incl easement, and purchased adjoining land of land to add a restaurant to the bowling alley. PB uses easement for both plots of land (incl the one not appurtenant). HS constructed a barrier to the easement, claiming that PB’s use was beyond the scope of the easement.
   2. HELD:
      1. Bright line rule: when you have easement that’s appurtenant to one lot, not allowed to use if for non-appurtenant lot you later/separately acquire
         1. Applies equally to implied easements
         2. Gray area: expanding scope of easement – reasonableness determination of whether use has changed so much that it’s no longer within original scope of easement
      2. Misuse isn’t sufficient to constitute forfeiture, waiver or abandonment of such right
      3. Injunction is appropriate when it cannot be determined whether use of an easement is benefiting not only a dominant tenement, but also an adjacent plot of land (remand)

### 2. Covenants/Conservation Easements

1. **Overview** 
   1. Covenant = K in which owner agrees to abide by certain restrictions on use of land for benefit of one or more others
      1. Governance mechanism
      2. Can avoid inconsistent land use beyond nuisance through promises
      3. E.g. single family residential use only
   2. Benefit of promise runs w/ land
      1. Almost always in writing, including that it runs
      2. 3rd party beneficiary (K doctrine): will say it runs to successor
   3. Enforceable against successor? Need: (1) intent (2) notice (3) touch and concern
      1. Intent: usually found in writing itself
      2. Notice to burdened successor of restriction
         1. Actual
         2. Constructive
         3. Record
         4. Inquiry (*Sanborn*; see pattern 🡪 duty to inquire)
      3. Touch and concern burdened land
         1. Basically means equitable servitudes that don’t count s easement must be close enough proximally to be relevant
         2. Everything we look at meet this requirement
   4. Enforceable against person who made buyers signs SFRs but didn’t himself?
      1. “reciprocal restriction”?
      2. Can argue O implicitly promised area would be SFR only
      3. Must be strong pattern for argument to work
         1. Expectation of buyers who signed
         2. Idea gets stronger as more SFR deeds are signed
         3. Existence of common plan relevant here
         4. If map of subdivisions, helpful
      4. If court finds implied promise here, can be enforceable against successors (still need to meet reqs – esp notice)
   5. Defense against enforcement (successor doesn’t want to burdened)
      1. Laches
      2. Estoppel
      3. Unclean hands
      4. Waiver
      5. Abandonment
         1. need proof that other violations (habitual and substantial) before this one have eroded the general plan (so enforcement on this D becomes inequitable) (*Peckahm*)
      6. Changed conditions
         1. must render the purpose of restrictions obsolete, such that the enforcement of restrictions will no longer benefit Os (not just $ benefits, incl others). Not just change at the border (part of what they paid for is border) (*Bolotin*)
      7. inequitable or against public policy
      8. unconstitutional
   6. Inquiry Notice
      1. Once you notice the pattern, duty to inquire (*Sanborn*)
         1. Existence of a common plan/pattern?
         2. Look at records, other area deeds from O
         3. Are there maps of the subdivision plan?
         4. Does the deed mention a recorded map?
         5. Ask neighbors
2. ***Sanborn v. McLean* (MI 1925)**
   1. FACTS: O conveyed several portions of their land to others, which included restrictions about only residences. D purchased some land thru conveyances tracing directly to O; D’s deeds did not include the restriction. D started building a gas station and Ps (other owners nearby) sued to enjoin.
   2. HELD:
      1. When O conveys part of land to another w/ restrictions intended to benefit retained land, same restrictions apply to retained land (reciprocal restrictions)
      2. Restrictions intended to benefit the neighborhood are enforceable against each subsequent purchaser of lots from common owner as long as they have notice – either actual, constructive, record, or inquiry notice – of the restriction
         1. Should have noticed plot of land traced back to O
         2. Should have noticed related parcels conveyed w/ strict use limitations
         3. Should have been able to observe lots surrounding contained houses conformed to common plan, which at a minimum puts them on inquiry notice that lands was uniformly burdened w/ similar covenants
         4. 🡪 D on inquiry notice of plan
         5. 🡪 duty to inquire
      3. When a party purchases a lot, inquiry notice dictates that they should have noticed that the neighborhood only contained homes with strict limitations on use, such as a consistent common plan, and thus should been on inquiry notice that their land was uniformly burdened with similar covenants (any inquiry would have put him on notice that his lot is subject to an equitable servitude and he should conform to the easement so he, like the others in the common plan, can enjoy the benefits of the covenant)
      4. The likelihood that a purchaser will have noticed a common plan is greatly increased if her individual deed makes reference to a recorded subdivision map
3. **Conservation Easements**
   1. Created by leg
   2. Servitudes that restrict future development of land
   3. Most common: prohibits subdivision and commercial development but permits existing agricultural and residential use
   4. More accurately classified negative covenants in gross
      1. Negative b/c ST can’t do certain things
      2. In gross b/c power to enforce restriction is typically given to local gvm’t or charitable land trust
4. **Termination of Covenants**
   1. ***Bolotin – changed conditions must render purpose of restrix obsolete***
      1. FACTS: land explicitly restricted to SFR, but commercially useless for this purpose. Other lots along Wilshire going commercial. Owner wants to go commercial. The commercial devel would not negatively affect the property value of the SFR owners but they sue to enjoin.
      2. HELD: covenant still enforceable.
         1. Value is not necessarily $$ -- character of neighborhood, traffic, noise, etc.
         2. DTs *paid* for right to stop neighbors in development from using land in ways inconsistent w covenant.
         3. Changed conditions:
            1. “changed conditions in neighborhood rendered the purpose of restrictions obsolete,” such that “the enforcement of restrictions ... will no longer benefit [Os]” (and not just $ benefit)
            2. Req changes w/in neighborhood, not just at border. Border is presumably part of what Os paid for.
   2. ***Peckham – covenant upheld and enforced; no defenses apply*** 
      1. Daycare in home but covenant said no commercial purposes. Pissed off neighbor sues to enforce covenant after complaining. Cov upheld.
      2. Court shoots down 4 possible defenses to enforcing covenant:
         1. Abandonment
            1. Would req proof that extensive violations have eroded plan, enforcement inequitable
            2. When covenant “habitually and substantially violate” – not true here
         2. Laches
            1. Reqs 1) knowledge or reasonable opportunity to discover cause of axn, 2) unreasonable delay, 3) damage to D resulting from unreasonable delay
         3. Equitable estoppel
            1. Reqs 1) admission, statement, act inconsistent w claim 2) axn in reasbl reliance and 3) injury
         4. Public policy
            1. Arg: public interest in daycares
            2. Court: if restrictive covs that incidentally prohibit daycares should be repealed, that should come from leg

# VIII. Public Regulation of Land Use and Regulatory Takings

5th Amendment: “Nor shall private property be taken for public use w/o just compensation”

## A. Eminent Domain

1. **Questions Raised**
   1. What is *private property*?
   2. When has property been *taken*? Specifically, what gvm’t actions, short of actual condemnation and appropriation, count as *taking*?
   3. What is valid *public use*?
   4. What is *just compensation*?
2. **Just Compensation** 
   1. Fair market value – what would a willing seller demand and a willing buyer pay under existing market conditions?
      1. Determined on day of taking, considering all uses to that point and not adding in any value that will be result of changes
   2. Gvm’t can’t always just buy the land
      1. Transaction costs of normal purchase are normally less than eminent domain proceedings
      2. Sometimes FMV doesn’t capture all factors and people simply don’t want to sell land
         1. FMV leaves considerations such as attachment to land, out hence resistance of eminent domain
         2. People might not be able to buy another house
         3. For commerce – business known by location and business good will is compensable value of business that FMV likely won’t capture
   3. Why FMV – quicker than alternatives, public doesn’t benefit from someone holding out on sale of land for public use
      1. Collective action problems: transaction costs do add up
      2. At some point, gvm’t must have ability to remedy at issue e.g. needed road
   4. Think of just compensation as the end game – once we decide there has been a valid taking, we consider just compensation
3. **Public Use** 
   1. Limitation on eminent domain
   2. Protect owner’s entitlement w/ liability rule instead of property rule – gvm’t may be able to take land but must pay
   3. *Kelo* (2005): public use includes just economic development within Takings Clause
      1. ∆ approved development project which had eminent domain to seize private property to private developers to create new jobs and taxes. Π didn’t want to sell houses and challenged public use.
      2. Justices agree:
         1. Can’t take private property to just transfer to private property
         2. Can transfer to private party if public use
      3. 2 precedents (other than maybe Thomas) that don’t want to overrule
         1. *Berman*: blighted neighbored was object of urban renewal – court said fine (Thomas dislikes/wants to overrule)
         2. *Hawaii Housing* (1984): permitted gvm’t to transfer private property b/c take had too much property and recipient didn’t have enough
      4. Leaves open the possibility that can use eminent domain whenever upgrade to more productive/lucrative use
         1. But here it’s part of an integrated plan – might need this
         2. Can’t transfer one-on-one b/c raises suspicion done to benefit private party
      5. So transfer of economic development is ok unless detect a purpose to benefit private property (as opposed to incidental consequence)
      6. Courts not good at second guessing gvm’t purposes
         1. Kennedy’s concurrence: parse out purpose v. incidental purpose
      7. O’Connor dissent: doesn’t think economic development takings are constitutional – benefits people w/ lots of influence and power and victims has fewer resources now
      8. Thomas’s dissent: no compensation possible for subjective value for those displaced and will fall disproportionately on poor communities
   4. For integrated plan: ask about substance and process (subject to democratic decision making?)
   5. V controversial: states passed amendments to stop this
   6. Merrill: given costs, gvm’t won’t use eminent domain unless they really need to

## B. Regulatory Takings

1. Doctrine: if gvm’t regulates property in especially severe way, regulation will be deemed to be taking of private property just as if gvm’t had exercised power of eminent domain
   1. Would still have to pay just compensation
   2. Also known as inverse condemnation – when does regulation rise to level of constructive condemnation?

### 1. Foundations/Theory

1. *Penn Coal v. Mahon* (1922): Holmes wins but Brandeis dissent comes up later
   1. ∆ conveyed land to π w/ provision for right to mine. Statute prevented mining unless owned the surface.
   2. Found unconstitutional: took support estate (right to mine beneath surface) w/o just compensation)
   3. If state acted within police powers (to prevent serious harms to public/prevent public nuisance) -> no taking
      1. This is asking whether it was a literal taking
      2. Note: complete defense b/c built In limitation on rights you already have (nothing has been taken from you) and don’t have right to commit nuisance
      3. Harm v. benefit, private v. public
      4. Holmes: subsidence -> not enough of public harm
         1. Sees as private harm
         2. No harm that couldn’t be solved by notice
         3. Bargainable ex-ante: gvm’t can’t achieve thru regulation on the cheap what it should have acquired by eminent domain
      5. Brandeis: subsidence harms public -> no taking
         1. Public, noxious us and surface collapsing
         2. Abating public nuisance, incidentally benefits private
         3. Analogy to height restriction – gvm’t can do even though hiehgt isn’t a nuisance
   4. Impact on owner: if not within police powers, then ask whether regulation went too far (aka diminished value too much)
      1. Mere diminution isn’t enough
      2. Holmes: too far, PA recognizes support estate, ∆ has an affirmative easement
      3. Brandeis: not too far, look at property as a whole and can’t just legally separate interest and say all has been taken
      4. (this is the denominator question)
   5. Average reciprocity of advantage may justify what would otherwise be a taking
      1. Height restrictions: everyone is benefitting and all of the neighbors are bound
      2. Brandies: not a factor when gvm’t exercising police power but when we are measuring, should take a broader viewpoint and look at benefit of doing business in a civilized country
2. Overview
   1. First ask if there was a literal taking?
      1. Everything we have learned in property so far
   2. If so, is it a constitutional taking requiring just compensation?
   3. Rule: if regulation goes too far, then a taking
   4. Police power of gvm’t has been expanded
   5. Property has evolved into bundle of sticks
      1. Broader range for regulation and restricted to taking clause
      2. Supplied basis for doctrine too: if regulation goes too far, it’s a taking

### 2. Balancing

1. *Penn Central* (1978): brings back a lot of Brandeis, the balancing test
   1. NYC passed landmark preservation law. Π had leased airspace above Grand Central ($$$$). NYC Commission rejected proposal to build atop of Grand Central b/c historic landmark.
      1. Gave transferable rights (to build above what is otherwise restricted by buildings heights)
   2. No question literal taking of building up to zoning height
   3. Police power has expanded so much that can’t end at reasonable
      1. both majority and dissent agree – now have to determine if gone too far
      2. majority: could be akin to noxious use but still not done, also footnote about destruction could be viewed as public nuisance but don’t say it’s such clear cut
   4. **Balancing test** (governs most takings cases)
      1. Economic impact of regulation on π
         1. Π tried to single parcel of air rights but court views rights for parcel as a whole
      2. Extent to which regulation has interfered w/ distinct investment-backed expectations
         1. Making money and getting reasonable return off initial investments
         2. Can still continue current uses
      3. Character of gvm’t action
         1. More readily found when physical invasion (cite *Causby*)
   5. CE: Primary factor economic burden owner, not so much as what taken but what’s left
   6. Taking law: idea that public as a whole should bear burden rather than some people
      1. Π tries to say singled out but majority says 400 other buildings, rationally picked out and integrated plan
         1. This is the opposite of average reciprocity
         2. Similar to Brandeis’s civilized society
         3. But here, probably got advantage b/c tourist attraction and have things like hotel
      2. Dissent agrees w/ π that being singled out and not being offset by benefits from preserving other landmarks

### 3. Physical Invasions

1. Overview
   1. From *Penn Central*: taking more likely when physical invasion but still balancing as character of gvm’t action
   2. *Kaiser Aetna* + *Pruneyard* balancing test
      1. Mainly economic impact – reasonable investments (takings is about economic value)
      2. Decision owner made opening to pubic
         1. If did, significant for not taking
         2. If not, value right exclude
   3. Per se rule: permanent physical occupation is constitutional taking.
2. *Kaiser Aetna* (1979): gvm’t must pay when open water made navigable to public
   1. Strip of land blocked access to marina and π made the opening. Gvm’t opens up to the public
   2. From *Penn Central*: taking more likely when physical invasion but still balancing as character of gvm’t action
   3. Navigable servitude is inherent limitation but made investment w/ reliance that could have right to exclude
      1. Now it has to be **reasonable** investments (which it was according to majority – relied on gvm’t when got permit)
      2. Dissent: can’t waive public right to access – nothing reasonable in expectations given history of navigational servitude
      3. Distinguish from great navigable streams – never subject to private ownership
   4. Case is unclear – could read as whenever physical invasion of gvm’t imposed servitude, constitutional taking
      1. Also unclear if taking only because it has a serious economic impact
      2. New way of conceptual severance
      3. Big fat stick (exclusion is taken)
3. *Pruneyard* (1980): not every physical invasion by gvm’t is taking
   1. ∆ owns large shopping center. Kicked out HS leaf-letters and CA Supreme Court said can’t do this b/c CA constitution protects this. ∆ argues taking.
   2. Court acknowledges literal taking but not constitutional taking
      1. Doesn’t interfere w/ use of mall or economics
      2. High school students didn’t do anything
      3. Can put constitutional restrictions to make sure it doesn’t interfere
   3. Courts feel obliged to say why not taking b/c *Kaiser*
      1. Significant economic impact and investments are not here
      2. Owners here already made it public (not true in *Kaiser*)
      3. State can define and redefine property rights, can’t define property in the 1st instance in *Kaiser*
         1. Within power of states: acting through the court who determine can no longer have right to exclude
         2. States have more latitude in changing underlying property rights
   4. Considered judicial taking: interpreting constitutional free speech which has always been there
   5. Marshall concurrence: scope redefining and defining
      1. Agrees with bottom line
      2. Wants to emphasize breadth of state’s power to change scope of property rights
      3. To say otherwise would put sharp limits on state’s ability to new conditions and needs of public
      4. But not unlimited – core beyond which state can’t go redefining away property rights
         1. Sphere of private autonomy
         2. Source seems to be constitution – something like substantive DP or right to privacy
4. *Loretto* (1982)
   1. NYC law makes LL have to permit cable be installed. Π bought apartment building w/ cables installed. Court said taking but on remand, only $1.
   2. No interference w/ use of property, value of property (may actually increase), no privacy issue
   3. Literal taking – part of physical space, no right to exclude
   4. Constitutional taking: destroys all 3 rights
      1. possess, use, and dispose
      2. equivalent to appropriation of eminent domain so must pay
   5. Has to say *Kaiser* and *Pruneyard* were not
      1. *Pruneyard*: temporary invasion and opened up to the public
      2. *Kaiser Aetna*: ambiguous whether physical invasion necessarily a constitutional taking or not
         1. Confirmed by *Loretto* that it wasn’t a per se taking but just literal taking since wasn’t permanent
   6. CE: have to consider permanent and occupation (seems clear at this point)
      1. Permanent: indefinite as long as property is to be used as it has been
      2. Occupation: here can take literally but complicated *Nolan*
5. *Nolan*: Rule-loving Scalia expands per se permanent physical occupation
   1. Wanted to build a bigger house. State required a permit. Would grant on the condition that public could use dry sand
   2. Focus: would it be a taking if not a condition but just slapped down?
   3. Call it physical permanent occupation which confuses what it means – requires permanent access
   4. Has to distinguish other cases
      1. *Pruneyard*: already open up to public for occasional access
      2. *Kaiser*: there: easement of passage, here: classical right of way easement
         1. Scalia basically uses the dissent’s argument (which the majority rejected) that it was inherent limitation
         2. Also it was an in and out easement where as here it is an out and back easement
         3. Court doesn’t really clarify but classic right of way easement is bought and sold – just like private parties buy it, so should the gvm’t

### 4. Regulation of Use

1. *Keystone Bituminous* (1987): basically *Mahon* Take 2 but fails after *Penn Central*
   1. Subsidence Act: purpose is essentially the same but PA legislature learned and did a better job at drafting
   2. Court saw as harm avoiding, not private benefit – not going to rely on this alone, going to see if too far
   3. *Penn Central* rejection of conceptual severity:
      1. denominator is parcel as a whole
      2. PA law still recognizes support estate but not enough
2. *Lucas* (1992): elimination of economically viable use triggers per se taking rule
   1. Π bought 2 beachfront lots. 2 years lot, act made lots part of critical area w/ future development restrict (basically no habitable structures)
   2. If eliminate all economical valuable use of it, per se taking
      1. “total taking”
      2. “it” – the denominator is v important
         1. Dicta: notes inconsistent b/w *Mahon* and *Keystone* (usually think later > earlier)
         2. Answer lies in reasonable expectations shaped by state law
         3. CE: consult everything about property for sever
            1. Geographically
            2. Layers
            3. By time (lease)
            4. By function (easement)
   3. Exception: consistent with background principles of property and nuisance law (so limit gvm’t power to public and private nuisance law)
      1. But this case doesn’t fit despite state court saying akin to public nuisance to build house (police power) and π conceded environmental issues
         1. Police power isn’t dispositive
      2. Can’t say beachfront development = public nuisance
         1. Different from public nuisance where say harm outweighs benefit
         2. Idea that building a single home could be nuisance when you’ve got other ones next door is hard nuisance claim w/ no precedent
         3. Nuisance law isn’t good at dealing w/ harm cumulative in nature (so can’t talk about all of the houses)
         4. Public harm is in the eye of the beholder
      3. Finding that nuisance applies is limited by objectively reasonable application of relevant precedents
      4. Legislative will get little or deference in its decision to call something a public nuisance
   4. SC Supreme court says valueless but not really
      1. land wouldn’t cost $0
      2. doesn’t mean all use or all value
   5. CE: option for numerator is reasonable return on investment
      1. In *Lucas* numerator = economically liable use
      2. Buy w/ reasonable expectation you build something and now you can’t build anything
      3. If eliminate all active and potentially profitable use, essentially eliminated “all economically viable use”
      4. Use = developmental, profitable
   6. Other limitation inherent in the title itself
      1. Actual necessity
      2. Limits on title from other background principles: nuisance, actual necessity, servitudes running w/ the land, conservation easement, permanent easement
      3. NOT just for total takings – exception across the board ends the story
      4. Statutory restrictions is ambiguous
   7. **Logically antecedent inquiry**: what did you own and what was inherent in title?
      1. Along with **denominator**, the important question
   8. Dicta: for physical invasion, no matter how minute intrusion or weight of public interest (at least w/ regard to permanent invasion) – occupation sort of written out

### 5. Denominators

1. **Intro**
   1. Limits that inhere in title/background principles
      1. Not all restrictions already in place at time of acquisition are background principles/limits that inhere in title 🡪 new owner can still challenge them as takings. *Palazzolo*
      2. BUT: where regs were in existence at time owner acquired property, these should be factored in to question of RIBEs under Penn Central Balancing (*Murr*)
   2. Denominators
      1. Who will argue what?
         1. Regulators want parcel as a whole – bigger pie means they took proportionally less of it, less likely to require compensation
         2. Plaintiffs want smaller geography/duration to be denominator – easier to show huge taking and thus win compensation.
      2. Denominator = Parcel as whole, defined by the geographic boundaries and temporal duration of the owner’s interests. (*Tahoe Sierra*)
      3. Old school conceptual severance is dead (*Tahoe Sierra*)
         1. But what if owner’s interests are more complicated/less complete than fee simple absolute over one parcel? Open Q.
         2. If lease, other type of ownership?
         3. If 2+ parcels: use three-part test from *Murr*
      4. *Murr* test for denominator when 2+ parcels:
         1. Treatment of land under sate and local law
         2. Physical characteristics of land (and existence/likelihood of enviro or other regulation)
         3. Prospective value of regulated land (and in case of adjacent lots, possible offsetting gains to value of other lot – complementarity)
2. ***Palazzolo* (2001): not all state restrictions inhere in title for takings purposes** 
   1. FACTS: Most of the property was marsh land. RI issues regulation significantly limiting development on marshland. P bought property after this restraint was in place; some but not all of land can be developed; sues for taking. Issue is whether this limit “inheres in title” or is “background principle of state law” under Lucas (this would defeat a takings claim).
   2. HELD: Statutory (??) restrictions already in place at time of acquisition do not serve as background principles/limits that inhere in the *Lucas* sense and thus the new owner can still challenge them as takings.
      1. Puts expiration date on takings claims
         1. Future generations should be able to challenge unreasonable limitations on the use and value of land
         2. (Prof: but everything has SOL)
      2. Would think Owner 2 acquired only the sticks that Owner 1 – doesn’t matter if common law or statutory restriction – but courts rejects this
         1. Would allow some gvm’t actions to escape + capricious
            1. (but previous owner could keep)
      3. Hobbessian stick in Lochian bundle – would give too much power to gvm’t to shape property rights prospectively
   3. 🡪The takings analysis is now run back in time –test for if you acquire land with a regulation on it is if, at the time of the regulation, it would have been struck down as going too far and being a taking
   4. Now price for restricted property = discount for restriction + increase for probability they can win a takings claim
      1. But before most prices probably had only discount
      2. Steven’s criticized this holding as windfall for owners who purchased at discounted price
   5. Debate: should existing statutory restrix be considered at all?
      1. O’Connor concurrence: existing statutory restrix should be in balancing test in RIBE – IBEs not reasonable if statutory limits in place, should have known and adjusted.
      2. Scalia concurrence: nope, we just decided not to consider these—don’t bring it through the back door
      3. Note: gets resolved in *Murr*
   6. On remand
      1. Economically viable uses remain, so no per se taking under *CASE*
      2. Apply *Penn Central* balancing test
      3. Owner probably ends up losing
3. ***Tahoe Sierra: Denominator is the parcel as a whole (geography + duration) – conceptual severance is dead***
   1. FACTS: P owns in fee simple estate. Govt puts temporary moratorium of all land use (32 months).
   2. HELD: Denominator is the parcel as a whole (geography + duration)
      1. Parcel as whole defined by the geographic and temporal dimensions of the owner’s interests.
      2. Not a per se taking bc only took 32 months/infinite fee simple duration – this is not *all* economically viable use.
      3. 🡪 conceptual severance is dead!
         1. But open question of how to handle “parcel as a whole” and the denominator Q is owner’s interest is not fee simple absolute.
   3. Good ruling for land use regulators – makes takings claims harder.
4. ***Murr v. Wisconsin* (2017) – adjacent lots are merged and treated as one denominator – new 3-part test for denominator (only when 2+ parcels?)**
   1. FACTS:
      1. P acquires two adjacent riverfront parcels.
      2. WI law restricted riverfront properties (already in place)
         1. No building on lots w <1 acre buildable land
         2. Adjacent lots w common owner are merged, treated as unified parcel & can’t be sold/developed separately unless they meet these requirements
      3. Each of P’s lots has <1 acre buildable land.
      4. P wants to sell one lot, bc cant build on it. But cant sell it individually either bc of regulations. Sues for taking of that lot.
      5. Issue: is denominator that one lot, or the two lots merged?
   2. HELD: denominator is the two lots merged.
      1. NOT bc merger provision was already in place/inheres in title, this is not determinative (*Palazzo*)
      2. 3 pt test to determine parcel
         1. Treatment of land under sate and local law
            1. Lot lines – treated separately
            2. Merger provision – treated as one lot
         2. Physical characteristics of land (and existence/likelihood of enviro or other regulation)
            1. Narrow lots, located on bluff, by gorgeous river – could alert them to likely regs/limits on devel.
            2. If house every 20 ft, would ruin scenery – this is obvi
         3. Prospective value of regulated land (and in case of adjacent lots, possible offsetting gains to value of other lot – complementarity)
            1. Value of lots combined is much greater than their value separately.
            2. Benefits of using property as integrated whole: increased privacy and recreational space
            3. Preserving surrounding natural beauty
      3. Under this test, denominator is merged lots.
      4. Clearly not per se taking, bc not deprived of all economic use of both merged lots
      5. 🡪 goes into *Penn Central* which is going to be fatal. Under Penn Central:
         1. no severe economic impact
         2. no RIBE because the regulation predated the acquisition of both lots (answers debate raised in *Palazzo*)
         3. government’s action was a reasonable land-use regulation enacted as part of a coordinated federal, state, and local effort to preserve the river and surrounding land
   3. Robert’s dissent:
      1. The denominator question has always been and should continue to be a question of state law – just look at how state law treats the property
      2. Majority is mushing up legal Qs that should be clearer
5. **Implications** 
   1. *Lucas* & *Palazzolo* constrain policymakers by tying regulatory capabilities to CL of nuisance
      1. Nuisance-type stuff inheres in title/is background principle (so shielded from being a taking), but many other regs don’t and so are challengeable as a taking indefinitely.
      2. Nuisance did well handling problems w neighbors and w confined externalities
      3. But deals less well w harms that are diffuse, extend beyond parties in litigation, are latent or become apparent over time, or result from aggregate effect
         1. Tends to under-enjoin, allow harms to continue
      4. Legal system had decided 2-party nuisance disputes weren’t adequate to deal w harms, so used regulations to fill the gaps. But now court is limiting regulatory possibilities.
      5. 🡪deregulatory ethos.
   2. Wildcard: public nuisance statutes
      1. *Palazzolo* implies some statues are sufficiently conventional/reasonable that they *will* become part of background principles/inhere in title.
      2. Public nuisance statutes, as long as applied in predictable way e.g. ordinary zoning laws, are fine 🡪 inhere in title/background principle.
   3. Erosion of Positivists consensus
      1. Positive consensus: you have the rights the state gives you
      2. *Lucas* hints and *Palazzolo* confirms
      3. Suggest sort of quasi-natural rights set of constraints on how far the state can go in regulating property
      4. Otherwise worry about degrading protection against gradual over-reaching (part of Holmes’ concern in *Mahon*)
      5. Both liberals and conservatives don’t like purely positivists

**Exactions**

* *Nollan-Dolan* test for “exactions” in land use permits
  + Where gov’t grants a development permit to O on the condition that O relinquish some property interest → two-step analysis is required:
    - 1) Would the exaction/condition be a Taking if imposed outright?
    - 2) If so, the condition is also unconstitutional/a Taking unless it:
      * “serves the same gov’t purpose as the development ban,” i.e., has an adequate “nexus” to that purpose (*Nollan*);
      * **AND** is “roughly proportional” to the costs/burdens of the permitted development (*Dolan*).
  + Question from Prof: Assuming gov’t could constitutionally deny the permit altogether - why can it not give owners the choice by creating conditions/exactions?
    - Doctrine of unconstitutional conditions: just b/c govt can deny you access to X, doesn't mean they can condition access to X on anything they want
    - Potential for extortion
    - Don’t want to incentivize maximum restrictions on land
* ***Koontz – exactions/condition precedents still subject to Nollan/Dolan test***
  + FACTS: P applied to District for permit to develop a portion of his property that was zoned as wetlands and thus subject to restrix. District denied application bc Koontz refused to either (1) reduce the size of his development area and deed an easement to govt on the rest of the property or (2) fund improvements to District-owned land miles away.
  + HELD: Where the govt denies a permit unless O fulfills a “condition precedent → still subject to Nollan/Dolan test. Fails test 🡪 Taking.

### 6. Judicial takings

1. ***Stop the Beach Renourishment* (2010):** 
   1. Fixed the owner’s property line at what had been mean high tide line and no longer subject to shifting tides.
   2. Π says taking my land, specifically littoral rights (rights of beach owners in FL)
      1. Right to have contact b/w my land and water
      2. Right to gain accretion to have my property be expanded from them
   3. FL Supreme Court: no, renourishment (expansion of beach) isn’t accretion that entitles you to expanded lot but avulsion which means property line is fixed – nothing was taken
   4. Scalia’s first attempt to define judicial takings in a case (but plurality)
      1. State court rulings that relative to law that had existed eliminates established property right (which was established under pre-existing law)
   5. Very strange case to declare momentous doctrine given case didn’t require it all
      1. All agreed it’s avulsion and no taking
      2. All FL Supreme Court did was uphold regulation under state statute
      3. Even if get over hurdle whether anything was taken (and FL court wrong in its conclusion), serious question of what denominator is
2. Judicial Taking Implications
   1. Examples
      1. *Pruneyard*: court breezed past judicial taking even though had interpreted CA constitution
         1. Not a taking not b/c it merely applies con principles and took nothing BUT because didn’t affect use and value
      2. *Thornton* (OR beach case): did OR Supreme court take dry sand beach of private property owners when it rediscovered and applied ancient doctrines of customary rights and affectively created public access rights which limited away right to exclude
      3. Under public trust doctrine, NJ (*Mathews v. Bayhead*) found value and meaning of access to wet sad beach required some access to dry sand beach including some which was privately owned and expanded public trust to dry sand above mean high tide line
      4. Want public prescriptive easement but state law says you can’t for some reason. Owner counts on state law but court overturns it and that can get an easement.
      5. Want private prescriptive easement but under precedent, doesn’t meat notice requirement. Owner says you lose but court says precedent misconceived test so meet prescription.
   2. All 5 examples arguably deprive owner of right to exclude others
      1. May even be permanent physical occupation like *Nollan*
      2. Unclear what happens if π lose – argue that went too far?
         1. Then federal court is going to have decide whether state courts went too far in interpreting state law in terms of taking
         2. Second guess states – federal courts decide how state allocate authority among the branch and how to deal w/ certain kind of matters
      3. *Kennedy* concurrence: litigation b/w 2 property owners to determine liability for trees rooting
         1. Garden variety dispute b/w neighbors
         2. Even incremental change in law could trigger so-called judicial taking – part of why Scalia didn’t get the votes
   3. Authority for federal courts in federal adjudication to 2nd guess state law – cited *Lucas*

**Common law**

**Licenses: permission for limited time**

**Easements: acquire property right to enter and use property**

**Public acces creates public easement**

Distinguishing factors of real property (land)

1. Title generally passes with fairly extensive documentation and public record-keeping
   1. Generally: Perfect title is traceable back to a patent grant from the U.S., but a defect in any of those transactions make the title of present holder technically defective (b/c you can only transfer what you have, and you can only acquire title through a valid grant).
   2. Defect in any grant makes current title defective
2. Longchinas of title

Start: would this axn be a taking if done through legislation? Apply diagram (normal takings analysis).

If not, then it cant be a taking when done by the court. But if would be taking if done by leg, then have to ask:

Why should it matter that it was done by court in course of adjudicating a conflict?

In Stop the beach, was this possibility a limit inherent in the title? Lucas suggests we go back and look at prior case law. So justices agree here the possibility was inherent in the title.

Wouldn’t be surprised to ssee pro takings litigants use this [what?] to try and reinvigorate the idea of conceptual severance.

Biggest takeaway: at least half the court is on the lookout for a case re judicial takings. Want case that allows them to recognize judicial takings as a real thing. Esp for those that just resolve common law disputes or address constitutional issues.

Implication: power of S Ct to second guess state courts in their interp of state law. Fed cts can police state courts for going to far. This should raise federalism concerns here.

Surprisingly uncertain whether there can ever be a takings claims based on nonphysical invasion of property.

Think abt relationship bw leases and adverse possession. Both involve prop rts.

Bw restrictive covenants, reg takings, affirm easements, and Nolan type physical invasions sanctioned by govt.

Why is trespass subject to hard edge rules w strong remedies as compared to nuisance.