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ATTACK OUTLINE

I. **Background Assumptions**: opinions (1) publicly known, (2) influential, (3) institutional competence, (4) policy > indiv justice
II. Acquiring and Exploiting Property (discovery, conquest, cession)
    A. **Sovereignty & Positive Law**: courts follow sovereign's laws (Mao: "power grows from barrel of a gun)
        1. Johnson v. McIntosh (1823): colonial purchase (backup: Crown as trustee)
            a. US system = positive law based on alienability (hopefully consistent w/ natural law)
            b. Consistency basic human rights values/lamentations through time: US fid duty → native occup'n right
        2. Oneida (2010): closed book on native-title experiment – disruptive valid title claims barred by laches
            a. Dissent: why not allow disgorgement? US breach fiduciary duty?
        3. Mabo v. Queensland (1992): "overruled" terra nullius fiction antithetical human rights laws, contemp values
            a. ≈ Johnson: Crown obliged preserve assimilable native title ≤ skeleton CL (conquest, cession)
    B. Labor & Possession
        1. Pierson v. Post (1805): (1) occupancy, (2) notice
            a. Lawyering: Post filed suit in case (interference), stipulated trespass (property) on appeal
                i. Causing escape from containment → RoA for $ damages, ≠ return of (wild) animal
            b. Rules depend on policy goals: prevent litigation or promote extermination? "Times change; men too"
        2. Keeble v. Hickeringill (1707): interference duck decoy/livelihood $ dmg (but ≠ prop right in ducks on water)
            a. Motive for interference irrelevant after Bradford v. Pickles (1895)
        3. Custom: Ghen v. Rich (1881): whalers w/ branded lances – comm'l custom persuasive
            a. Change Custom: Eads v. Brazleton (1861): shipwrecks: promote adoption efficient tech
        4. Justice: Popov v. Hayashi (2002): Barry Bonds's baseball – equitable distribution: split proceeds of sale
            a. Acknowledge both pre-possessory interest (like hunter) & unequivocal dominion
            b. Pitfall: generalizing from baseball custom in unique event
    C. Possession, Ownership & Title
        1. **Right to Exclude**:
            a. Jacques v. Steenberg Homes (1997): transporting across land w/o permission
                i. Right to exclude so fundamental, punitive damages despite ≠ econ harm
            b. State v. Shack (1971): legal/medical aid to migrants (right to see gvt, charity, visitors, press)
                i. "Property rights serve human values" – pub/priv necessity may justify entry
        2. **Adverse Possession**: community expectations; reward active use of land (≠ sleeping)
            a. Requirements (AP → title relate back trigger event)
                i. Actual, exclusive entry (unless color of title → "constructive actual")
                ii. Open & notorious (obj test constructive notice; acts as owner would act)
                iii. Continuous for SoL (ordinary presence/use; tacking by privity)
                iv. Adverse/hostile
                    i. Claim of right 3 stds: objective (maj, Upham), good faith (NY), aggressive
                    ii. Color of title (partial poss'n → full "deed")
            b. Tapscott v. (Lessee of) Cobbs (1854): prior peaceable poss'r (by inheritance: constr'v actual poss'n)
                i. Theory: Δ Tapscott, free black, wary of proving π's ≠ actual poss'n at trial?
            c. Ewing v. Burnett (1837): AP for Burnett's continuous use gravel despite 2d sale by orig seller
                i. Goal = efficient commerce, avoid losing intervening investments
            d. Howard v. Kunto (1970): AP for continuous vacationing despite mismatched deeds
                i. Tacking to prior residents despite ≠ strict privity b/c "reas'l connection"
            e. Marengo Cave (1937): ≠ AP for ~50yrs cave co b/c "≠ open/notorious, ≠ exclusive"
                i. Irrelevant evidence that Δ blocked π's survey after SoL likely influenced jury
            f. Sheets (1981): AP 2ft encroachment by garage + prescriptive easement for eaves
                i. ≠ AP for add'l 4ft by regular raking b/c ≠ exclusive
            g. Shell-Mex (1974): ≠ AP for farmer b/c ≠ adverse to Shell's "use" = wait
                i. Farmer's fail reply to sale offer killed claim anyway (better: reply as owner)
            h. Fallon (1958): QIR2 auction buyer adverse to prior TO, but ≠ to JT wife, kids
            i. Manillo v. Gorski (1969): 15" steps – overruled ME doctrine allow AP by mistake
                i. Retry actual kn, force sale? (Upham: bad policy req surveys)
                ii. But Ennis v. Stanley (1956): honest mistake over fence line killed AP (bad policy)
            j. E. Village Squatters: 1977–2002 ≠ AP b/c ≠ privity successive squatters (Dissent: focus on improvemts) – City eventual $1 "sale" to Homesteaders' Bd → Co-ops
    D. **Economic Growth** (prop rights = only positive law, or incl customs, mores?)
        1. Demsetz (1960s): new prop rights response to changing tech, prices (Montagnes vs. Plains)
            a. 5 Assumptions: all prop assigned; 0 exchange costs; 0 police costs; rational owners; wealth dist n/a

2. Shihata (1990): Governance → "rule of law"
    a. Legal: notice, enforcement, procedure, indep judiciary, amendment
    b. Subst'v: clear prop rights, neutral K enforcement
3. De Soto (2002): Black Markets in Peru – Dvping world never had mkt econ until black mkt forced it
    a. Mercantilism: bureaucracy, redistribution (elite monop), inefficiency
    b. Alternative: political & econ freedom via property rights, K enforcement
4. **Natural Flow**: trad'l surface water
5. **Absolute Ownership**: <u>Acton v. Blundell</u> (1843): Δ's mines ¾ mi away stopped w/ π's mill
    a. All ground water own land – dvping US econ: protect investmt agst unpredict'l grd water
    b. AO = ecologically disastrous, but any regime chg contentious (AZ)
    c. <u>Parker & Edgarton</u> (1838): ≠ NY prescriptive easement ancient light/air in dvping US econ
        i. If RoW (instead of light/air), may have made presumption of lost grant irrebuttable
6. **Reasonable Use**:
    a. <u>Evans v. Merriweather</u> (1842): upstream well dammed stream in drought
        i. <u>Tyler</u> (J. Story): all owners' necessities before any artificial needs
        ii. Even factories, farms under reas'lness analysis
    b. <u>Penn Coal v. Sanderson</u> (1886): RU analysis disguised as NF
        i. Great public industry > private, personal inconveniences
        ii. Ct's change scheme w/o leg'v process (dynamic rights → growth)
    c. <u>Prah v. Maretti</u> (1982): WI right to solar power; blocking rays may = nuisance
        i. Dissent: merely private nuisance; what if solar panels = nuisance?
7. **Prior Appropriation**: ancient lights, arid West

III. CL Estates

A. Estates in Land (Words of purchase: to whom? Words of limitation: what type of estate?)

1. **Fee Simple Absolute** (unltd rights; may last forever)
    a. 1290 Quia Emptores law diminished escheating to lord (but still to state)
    b. Heirs: look to state intestacy statute (modern: 1 first issue, 2 parents, 3 collaterals)
    c. **Numerus clausus** standardization: < fragmentation, > transferability, < info costs, normative ideals interpersonal relationships, stable prop rights in dynamic econ
2. **Life Estate** (or "pur autre vie" transferable during LT's life)
    a. <u>White v. Brown</u> (1977): upheld Mrs. Jesse Lide's "intent" FS despite "to live in" (modern FSA)
        i. Voided incompatible "not to be sold" (void restraint alienability, avoid partial instestacy)
        ii. Dissent: expressio/exclusio: outright gifts elsewhere in will so intent LE
    b. Restraints on alienation: disabling, forfeiture, or promissory
        i. Restatement: void if total – OK for FS if reas'l; OK for LE if forfeiture
    c. <u>Baker v. Wheedon</u> (1972): 3d wife must consider remainder interests of step-Gkids (+ fertile octogen)
        i. CL any material chg = waste – allow partial sale for reas'l needs of LT & remaindermen
    d. Waste: unreas'l interference w/ remaindermen's expectations
        i. Aff'v waste (eg open mines doctrine: testator's intent for rate extraction)
        ii. Perm'v waste: negl → $ dmg → forfeiture
    e. <u>Woodrick v. Wood</u> (1994): modern waste only < $, ≠ enjoin ameliorative barn razing
        i. Bad compensation/double-recovery to π daughter

B. Future Interests

1. Defeasible Estates: (Q: is grant condition (control land use/forfeiture) or covenant ($ dmg)?)
    a. Alienability: CL inheritable but inalienable/undevisable – modern trend → alienability
        i. More likely to allow restrictions if charitable, or big enough class potential buyers
    b. **FS Determinable** ("…so long as used for…"): possibility of reverter = AUTO reversion
        i. <u>Mahrenholz</u> (1981): "school purps only" = FSD (inheritable but inalienable)
            i. Diligent title search: Maeser School land crisis 100yo FSD
            ii. Subst'l compliance? <u>Ator</u> (2008) football stadium 40yrs
        ii. AP: SoL runs upon event term'ing FSD (but FSSCP laches analogy to ejectmt)
    c. **FSSCS** ("…but if…"): right of re-entry = transferor's choice to divest upon event
        i. Consider laches analogy if right of re-entry unused for long time
        ii. <u>Mt. Brow Lodge</u> (1967): habendum cl ("have/hold" int): 1) use, 2) no sale
            i. Use restriction → FSSCP (> FSD, if doubt) BUT void ≠ sale as ≠ inalienability
            ii. Dissent: use restriction effectively restraint on alienation (fct > form)
        iii. Void restrictions: kids live home 25yr, use as resid, daughter 1wk/yr (but siblings access OK)
    d. FSSEL: auto divestment to 3d party future interest

- **2. Trusts**
  - a. "Use" vestige of crusading knights (legal title, equitable duty to cestui qui use)
  - b. 1536 Statute of Uses (Henry 8): use → exec interest (exceptions: unreal prop, trusts)
  - c. Settlor creates trust: trustee legal owner; beneficiary equitable right to enjoy corpus
  - d. Farkas v. Williams (1955): zero-sum analysis benef's (+) vs. settlor's (–) present interest
    - i. Minimal req'mts for valid revocable trust, eg formalities for at-will revocation
  - e. Blankenship v. Boyle (1971): union trust mgmt. reorganized b/c CL fid duty
    - i. Court interped CL duty to corpus of trust > statutory livelihood union mbrs
- 3. Concurrent Estates (Partition: CL in kind → modern by sale – always notify remaindermen)
  - a. **Tenancy in Common** (inheritable, deviseable, transferrable)
    - i. Delfino v. Vealencis (1980): partition in-kind > sale (both sides' interests)
      - i. Emo attachments to prop often ignored (Hendrickson; Crotts straws)
      - ii. Alt: consolidate to single owner – owelty/compensation
      - iii. Historical tool expropriation from black farmers (frag'd owners)
    - ii. Spiller v. Mackereth (1976): cotenant full poss'n warehouse as long ≠ ouster
  - b. **Jt Tenancy** (uninheritable/undeviseable, survivorship right destroyed by vivos transfer)
    - i. CL 4 unities: time, title, interest, poss'n – Modern → "right of survivorship"
    - ii. Strawman or direct: Riddle v. Harmon (1980): JT severance by grant to self (wife) in TiC
  - c. **Tenancy by Entirety** (marriage at creation; convey only if both agree; divorce → TiC)

IV. Land in Commerce

- A. Landlord-Tenant Law
  - 1. **Leases**: term of yrs (explicit); periodic (notice); at will (uni/bi?); at sufferance (holdovers)
    - a. Historical dvpmt from property → contract lens: mut'l dep, destr, mitig, warranties
  - 2. At-Will Reciprocity: CL presumption; Garner v. Garrish explicit override CL; Myers ambiguity → reciprocal
  - 3. Anti-discrimination: Shelley v. Kraemer (1948) covenants; FHA, Jones (1968); FHA 1974
  - 4. LL's Duty: Hanan v. Dusch (1930): American Rule: legal right poss'n; only dep covenant = quiet enjoyment
    - a. English (also modern US) Rule: LL's duty actual poss'n
  - 5. Constructive Eviction: Reste Realty (1969): subst'l depriv comm'l ≠ quiet enjoyment (tenant must move out)
    - a. Expand CQE from right legal poss'n → right beneficial enjoyment
  - 6. IWH (housing code): Hilder (1984): resid'l damages: rent, repairs, punitive (tenant need not move out)
    - a. Cynical cop out? State control conditions rather than provide actual servs/housing (but soc/pol values)
    - b. Chicago Bd. Realtors (1987): Posner/Easterbrook 2d majority: IWS < efficiency
      - i. Upham: other values than mkt eff'y, but IWS/rent control → whole burden LL class
- B. Home Sales
  - 1. Hickey v. Green (1982): dep check memo: SoF exception b/c reas'l reliance + chg position
    - a. But Walker v. Ireton (1977): denied spec perf despite deliv dep check, sold own home
  - 2. Lohmeyer (1951): existing viols restr'v cov (2-story) zoning (lot lines) ≠ marketable title
    - a. Remedy: rescind K, return deposit
  - 3. Equitable conversion: if spec'ly enf'l K, regard as done what ought to be done
    - a. Seller has legal title in trust for buyer (equitable title)
    - b. Risk of loss? Paine (1801) on buyer, but MA on seller, but Uni Act on poss'r
  - 4. Merger K of sale into final deed (≠ RoA on K terms, but = RoA on deed warranties)
  - 5. The Deed
    - a. Types: Gen'l Warranty Deed: agst all defects
      - i. Special Warranty Deed: agst grantor's own acts but ≠ 3d parties
      - ii. Quitclaim Deed: no warranties
    - b. Issues: descriptors (nat'l > art'l > adj > cardinal > dist > areas > place names)
      - i. Waterways: accretion (gradual gain/loss); avulsion (sudden, so still own)
      - ii. Forgery (void) vs. fraud (voidable, but subseq bona fide > grantor)
    - c. Covenants: present (seisin, right convey, encumbs) vs. future (warranty, quiet enj'mt, further ass'nces)
  - 6. Financing: Murphy (1985): rev'd foreclosure sale b/c ≠ due diligence (fid duty) fair mkt value
  - 7. Prof Korngold lecture on transactions
    - a. All brokers duty to seller → Purchase of Sale Agreement: price, closing date
    - b. Title search (marketable) → title ass'nce → mortgage loan & promissory note
    - c. Closing: round-the-table (CA, Columbus) vs. escrow (NY, Cleveland)
  - 8. Guaranteeing Ownership
    - a. Luthi (1978): subseq bona fide purchase upheld b/c 1st buyer insuff descry by Mother Hubbard cl ("all prop in county") – simplify title search to req only chain of land
      - i. But Guillette (1975): "inquiry notice" subdivision lot covenants/restrictions
    - b. Orr (1988): ≠ apply idem sonans b/c misspelling material change – simplify search
      - i. But minority rule, so real takeaway: keep searching

- C. Private Land Use Controls
  - 1. **Nuisance**
    - a. Alt views (Upham: “hypertrophied econ analysis of law”)
      - i. Tort: subst’l & unreas’l harm (reas’lness: pure (Jost) vs. R2T §826 harm, utility, solvency
      - ii. Public choice balance mutually incomp’l uses – but inst’l capacity? (Boomer)
    - b. Morgan v. High Penn Oil (1953): oil refinery priv nuisance on RV park
      - i. Int’l & unreas’l → dmg – likely to continue → injunction
      - ii. “Deplorable tendency of courts to call everything nuisance & let it at that.”
      - iii. Trespass ≠ reas’lness anal – why water = trespass, gas/noise = nuisance?
        - i. Martin v. Reynolds Metal (OR 1959): gas = nuisance in atomic age
      - iv. Fear future harm (econ, tox) gen’ly ≠ nuisance, but sometimes halfway houses
      - v. Infringed use must reas’l, so ≠ Drive-In light sensitivity, but Prah solar?
    - c. Boomer v. Atl. Cement (1970): institutional competence air-qual policy
      - i. Injunction cond’l Δ’s payment perm dmgs – servitude π’s land = emin dom?
    - d. Spur Inds. v. Del Webb (1972): π indemnify Δ rancher’s injunction: came to nuisance
      - i. Unreas’l b/c statutory public health – rationale: single actor, $$$, sudden chg
  - 2. **Covenants, Servitudes & Planned Communities** (contractual, vs. easements = property)
    - a. Types: real covs (law) & equitable servs (equity)
      - i. Intent: benefit (π) → dominant tenement; burden (Δ) → servient tenement
      - ii. Touch and concern land
      - iii. Privity of Estate: horizontal (grantor/ee) for burden; vertical for burd&ben (n/a equity)
      - iv. Notice
    - b. Tulk v. Moxhay (1848): Leicester Sq garden burden ran despite ≠ LL-tenant (equitable servitude)
    - c. Neponsit Ass’n (1938): pierce corp form for effective vert privity (CG → owners “→” π ass’n)
      - i. Annual maintenance payments suff’ly touch land
    - d. Sanborn v. McLean (1925): “inquiry notice” uniform bldg. plan, enjoin gas station
      - i. UBP: univ coordination; reciprocity/proportionality of burdens & benefits
    - e. Rhue v. Cheyenne Homes (1969): 30yo Spanish style into ranch subdivision
      - i. Private arch review injunction b/c clear intent, good-faith std by cte
    - f. Davis v. Huey (1981): rev’d injunction b/c ≠ arch-review notice of > lot-line req’mts
      - i. Dvpr can’t contravene express req’mts, modify based on other owners’ acts
    - g. Columbia MD Plan: (unmarried) straw middleman for record notice all covenants (real covenant, law)
      - i. Maint RoEntry/repair, arch control cte, gen’l restrictions, “high qual resid’l”
- D. Zoning
  - 1. Sovereign police power: gen’l welfare, public safety, health, morals
  - 2. History: Howard anti-urbanization → Burnham urbanization → LeCorbusier mixed
  - 3. Euclid (1926): suburban zoning interfering w/ Cleveland’s “naturall” expansion
    - a. Trial: zoning = unconst’l “straightjacket” (subst’v due process)
    - b. US rev’d for city zoning b/c gen’l welfare incl suburban traffic, light, ≠ poors
    - c. Berman v. Parker (1954): gen’l welfare incl phys, spiritual, aesthetic, monetary, beauty, health, spacious, clean – justify landmark preservation
  - 4. Comprehensive Plan req’d by ½ states, gen’ly uphold even weak rel (but growing emphas)
  - 5. Aesthetic Regs
    - a. Stoyanoff (1970): litigious Ladue, MO – expand social welfare incl aesthetic (prop $)
      - i. But Michelman: symptomatic regulation b/c underlying issue = devaluation
    - b. But Andrews (1993): unconst’ly vague Issaquah ordinance, review process
      - i. Vagueness N/A to private covenants, only pub ordinances (14th)
  - 6. Household Composition
    - a. Belle Terre (1974): 6 students trying to live together in single-fam zoning
      - i. Douglas maj for Belle Terre – arbitrary std b/c ≠ fund’l Const’l right
      - ii. Marshall dissent: strict scrutiny b/c Const’l rights ass’n, privacy, travel
      - iii. Moore v. Cleveland (1977): jailing grandma ≠ privacy right
    - b. NAACP v. Mt. Laurel (1975): zoning poor families out by large plots, < density
      - i. Invalid exclusionary zoning – remedy: step back, trickle-down econ
        - i. Guidelines: reg’l needs, ≠ pure fiscal justs
      - ii. Mt Laurel II (1983): aff’v measures, every muni, fair reg’l share, judge assignment, builder’s remedy ct override muni rejection
    - c. Fed law ≠ very protective: housing ≠ fund’l right, wealth OK classification, single-fam = welfare, nonres gen’ly ≠ standing, must show discrim intent
    - d. Tiebout hypo: zoning as municipal competition; vote w/ feet
      - i. But effects? Wealth concentration, competing for same residents, externalities

V. Takings

A. Formal Takings: 1) Rational relationship, 2) Public use/purpose, 3) Just compensation (prop, ≠ K rights)

1. Sovereign police power (Johnson "courts/laws of sovereign") → 5th, 14th
2. Efficiency justification? But internalizing private cost w/o private benefit – pol motives
3. Berman v. Parker (1954): DC urb ren'l = public use (whole-plan analysis, broad welfare)
4. Midkiff (1984): HI = pub use b/c purpose (oligopoly) > methods (priv sale, ≠ gvt poss'n)
    a. O'Connor maj: Takings power coterminous w/ police power (gen'l welfare)
5. Kelo (2005): CT econ dvpmt (Pfizer) plan = public use (priv benefits incidental)
    a. O'Connor dissent: priv-to-priv for public use most troubling
6. Hatchcock (MI 2004): public use = 1) pub need assemble, 2) pub oversight, 3) indep facts
7. Kaur v. ESDC (NY 2009): Columbia Manhattanville campus = public purpose

B. Judicially Implied Takings

1. Categorical Rules
    a. Perm phys occ'n: Loretto (Marshall 1982): 3d party = compensable taking (easement)
        i. Blackmun dissent: untenable non/phys distinction
        ii. Housing Code (reg, ltd time) req'mt that LL provide amenity ≠ taking
    b. Noxious use: Hadacheck (1915) (brickyard) reg ≠ taking (progress > priv ints)
    c. Total destruction econ value: Lucas (Scalia 1992): beach lot = compensable taking
        i. Michelman neutral baseline: bkgd CL nuisance, prop (remand CL analysis)
        ii. Blackmun dissent: missile kill mouse – CL just as relative as statutory "harm"
        iii. Stevens dissent: freeze state CL into dvpmt insurance
2. Balancing Tests after eliminating physical occupation req'mt
    a. Penn Coal (Holmes 1922): mining restriction "too far" – bargained only surface rights
        i. Factors: noxious use, diminution, reciprocity, phys invasion, inv-backed expectations, nature of gvt action (enterprise vs. arbitral)
        ii. Brandeis dissent: noxious-use (subsidence) reg – whole-bundle land value
    b. Miller v. Schoene (1928): cedar rust "arbitral test" dang prox mutually excl'v uses
    c. Penn Central (Brennan 1978): landmark ≠ taking – investmt-backed expects?
        i. Rehnquist dissent: TDRs apply to compensation, not taking analysis
3. Back-Door Takings by Exaction
    a. Nollan (Scalia 1987): ≠ nexus purpose (beach visibility) & easement so = taking
    b. Dolan v. Tigard (Rehnquist 1994): = nexus but ≠ "rough proportionality" of means

Sources of law:

1. Statute
2. Common law
3. Public policy
   - Predicated on institutional assumptions of judiciary:
     - Legitimate authority via direct election
     - Decisions (law) will be broadcast, read, accepted by people
     - Law can modify human behavior/custom
     - Institutional competence?
       - Congress: commission reports, hold hearings
       - Judiciary: hear cases, summon expert witnesses
   - Economical rules of decision
     - Peace/order, certainty of bright-line rules
4. Other?
   - Custom – assumptions of consistency; danger of elite segregation
   - Natural law
   - Scholarship
   - Foreign law

I. ACQUIRING AND EXPLOITING PROPERTY

A. Sovereignty

1. Johnson v. McIntosh (US 1823)

- Ejectment: 1. π's superior right (≠ ownshp); 2. Δ's present possession
  - Legal fiction tenancy access to < legal threshold (superior vs. absolute title)
- Chains of title:
  - π: Piankeshaw (disc/conq) → Viviat, Johnson et al. (sale) → Johnson/Graham (will: "devise" if real property; "bequeath" if other property)
    - Colonists' 1775 purchase backup provision: Crown as trustee
      - Trust: trustee/legal owner's fiduciary duty to maintain corpus of trust in interest of beneficiaries/equitable owners
  - Δ: GB (disc) → Va. (revolution) → USA (cession) → McIntosh (sale)
  - π "became seized of" (legal) while Δ actually occupied (physical) land
- European law of discovery = monopsony
  - Right to title established by sovereign recognition of power over property
    - Convert power to law (Mao: "power grows from the barrel of a gun")
  - Terra nullius predicated on legal fiction of Indian societal inferiority
  - Indians lost absolute sovereignty to Crown by conquest
    - Sub modo (like States) sovereignty to occupy, use (but ≠ sell) in peace
      - But Indian warlike aggression precluded assimilation
    - Court can't put natural justice above law of sovereign, but moral imperative on sovereign to avoid wanton oppression
      - Marshall's continuity of social justice values through history: "History demands and policy requires that native and conquered peoples' land titles be respected"
- Arguments based on theory of property ownership as alienable
  - Natural law: π by Indians' occupancy; Δ by labor (Locke theory)
  - Positive law: whether Crown had power to divest Indians' original right

2. *Oneida III (2d 2010)*

- Oneida I (1970), II (1974) acknowledged Oneidas' complaint to move forward
- Ignored pre-Indian Nonintercourse Act transfers (5+ mil acres), despite Act's mere codification of existing law (McIntosh)
    - Purposes of INA:
        - Cynical: drive down prices by monopsony
        - Aspirational: fiduciary duty to protect inferior, ignorant society
- Ejectment action claiming 1795-1846 sales to NY (300k acres) void ab initio
    - Defenses:
        - Laches: 1. Lack of diligence/unreas'l delay; 2. Prejudice Δ
            - No fed SoL for ejectment, so equitable alternative
        - Sovereign immunity against contract claim: unconscionable consid
- Holding: despite illegality of orig sales and absence of "traditional" laches elements, applied same principle because "disruptive" nature of claims
    - Reas'l delay b/c novel legal theory, anti-Indian sentiment through history
    - Arguably little disruption if only disgorging profits from illegal sale (dissent)
    - Cert denial closed book on 1970s moves toward recognition of native titles:
        - Passammaquoddy, Sherrill, Cayuga, Oneida I/II
- Alternative theory of case: US's breach of fiduciary duty?

3. *Mabo v. Queensland (Austr. 1992)*

- State annexation of ~exclusively native island ≠ pass sovereignty to Crown
    - Helpful that Meriam people sedentary, isolated, recognized property rights
- Overruled terra nullius fiction b/c antithetical to:
    - Australian anti-discrimination statute (racial inferiority)
    - International law obligations under Univ. Decl. Hum. Rights
    - Contemporary social values
- Crown's "radical title" < absolute "native title" unless acquired by conquest, cession
- Similarities with Johnson:
    - Obligation of conquering power to preserve rights of conquered peoples
    - Limit obligation to ≠ "fracturing skeleton of common law"
        - Crown still sovereign right to acquire native land by clear intention
        - Abandonment by/dissolution of native society: absolute title → Crown

B. The Significance of Labor and Possession

1. *Pierson v. Post (NY 1805)*

- π Post (rich, English) fox-hunting w/ hounds on public beach
- Δ Pierson (Dutch farmer) intercepted fox, killed
- Procedure:
    - Post won below, action: trespass on the case (theory: interference w/ activity)
    - Pierson's wily lawyer changed theory on appeal: trespass (property right)
        - Property by possession, not Lockean labor
- Holding: mere pursuit insufficient to acquire property in ferae naturae
    - Must attain occupancy by mortal wound, containment, control
- Policy justifications:
    - Majority: clear rule of manucapture to prevent litigation, quarrels
    - Dissent: promote extermination of noxious beasts
        - (Should've been arbitrated by sportsmen anyway)

- Economical rule of decision – fact-finding
- Misreading of <u>Keeble</u> as ratione soli (right to opp'y to capture wild animals own land)
- Hypos:
    - Post catches, kills, leaves on beach. Pierson takes away.
        - If by rifle, then Post's b/c notice to Pierson that person killed fox
        - If by dogs, then less clear b/c pot'ly natural death
        - But cold blood, decay may indicate abandonment
    - Post grabs fox. Fox bites, escapes. Pierson shoots fox while Post pursuing.
        - Pierson's b/c fox returned to ferae naturae/res nullius state
        - If Pierson caused fox's escape, then Post has trespass action, but relief limited to $ damages b/c wild fox still acquired by Pierson
    - Post fox in cage. Pierson lets fox out, kills fox.
        - Pierson's b/c fox back in wild state ≠ animus revertende
            - What if still on Post's land?
        - Post action for interference
    - Post fish corral. Pierson kills while contained.
        - Post's by capture/containment, unless Pierson show inadeq notice by insuff visible improvements

2. *<u>Ghen v. Rich</u> (MA 1881)*

- π killed Cape Cod whale w/ branded lances - Δ retrieved 3d, 17mi away (agst custom)
- π's judgment on libel action: mkt value oil, interest
    - Rule: whale owned when fisher "does all that is possible" to possess
    - Rational:
        - Custom = notice to scavengers
        - Custom persuasive b/c unitary, commercial
        - Maintain market incentives to take on burden of whaling
- Melville:
    - "Fast fish" belongs to party in chase
    - "Loose fish" up for grabs, belongs to whoever catches first
- Elickson (1989): 3 essential whaling norms:
    - Owned when fastened to ship
    - "Iron holds the whale" – owned by first shooter
    - Fisher, finder divide value of carcass

3. *<u>Keeble v. Hickeringill</u> (QB 1707)*

- Δ rival scared ducks off π's decoy pond – action: trespass on the case (interference)
- π's judgment aff'd, for tortious interference (location of pond irrelevant)
    - No property right to wild ducks until confined beneath nets
- "Where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood, there an action lies."
    - Unfair competition: no CoA if Δ lured duck away to competing pond
    - Social benefit of π's entrepreneurship/industry
- Analogy cases:
    - Alluring students to a rival schoolhouse vs. scaring them away from old one
    - Obstruction of breeder from bringing horse to market
- Legacy: 1895 <u>Bradford v. Pickles</u> eliminated motive consideration from interference

4. *The Rule of Capture and Other Fugitive Resources*

- Oil and Gas
  - Early cases analogized to wild animals:
    - Title lost upon migration from land
    - Draining whole reservoir, incl portion outside own land?
    - Angled drilling from own land under another's?
    - Reinjection as storage? Hammonds (KY 1934):
      - A reinjected gas, which migrated to B's land
      - A ≠ liable for dmg b/c ≠ longer owner of gas
      - Possession issue overruled 1987: Tex. Energy Corp.
        - Still unlikely liability
- Water
  - Ground water
    - Early English rule: absolute ownership, unlim extraction
      - Fast fish: whoever captured water owned it
    - US rule: reasonable use (evolved into leg'v apportionment)
  - Surface water
    - West: first in time (challenge: first to start, but second to finish?)
    - East: riparian rights – interdependent rights of landowners along banks
      - 1st possession once-removed b/c based on land title

5. *Eads v. Brazleton (AR 1861)*

- Whether π's discovery shipwreck (flag, tree markings) vested property despite delay
- No – rev'd for Δ: "occupation, possession of prop lost, aband, or w/o owner, must depend on an actual taking of the prop w/ intent to reduce it to possession"
  - Here, must place boat over wreck, w/ means to lift lead cargo, persistent work
  - Notice irrelevant
  - Reward the more productive actor – promote adoption of new custom
    - Challenge to productivity rationale: externalities?

6. *Popov v. Hayashi (SF 2002)*

- π Popov caught Bonds's 73rd HR (~$1m), knocked down by "violent, illegal mob"
- Δ Hayashi recovered ball, committed "no wrongful act"
- Causes of action:
  - Trespass to chattel: dismissed for ≠ damage, interference of π's use of chattel
  - Conversion: wrongful exercise dominion over another's property
    - Req π's title, possession, or right to possession
    - "Possession" disputed – adopted Gray's rule: retain control after incidental contact w/ people or things
- Held: Equitable Division of sale $: π/Δ equal claims, both superior against world
  - π had "pre-possessory" property interest (like a hunter?)
  - Δ "attained unequivocal dominion and control"
  - Precedents: prorated shares of indivisible wholes: Arnold prunes, Keron sock
- Problem w/ judge's reliance on baseball fans' custom: unique event

C. The Meaning of Possession Ownership, and Title in Land

1. *The Right to Exclude*

a) Jacque v. Steenberg Homes (WI 1997)

- Δ transported mobile homes across π's land, despite objection, to avoid road turns
  - Laymen πs' worry of easement by prescription: implied future permission
- Trial verdict for π: $1 nominal damage, $100k punitive – aff'd but ≠ punitive
- Court reinstated punitive damage b/c exclusion (even w/o dmg) fundamental to prop
  - Maintain integrity of/confidence in legal system

b) State v. Shack (NJ 1971)

- Δs criminal trespass for migrant worker legal/med aid – insisted on private mtg
- Rev'd convictions by limiting property rights (ignored Const'l challenge)
  - Property rights always state-defined
  - "Property" in NJ ≠ right to excl gvt, charitable services, visitors, press
    - 1970s ethic: "Property rights serve human values. They are recognized to that end, and they are limited by it"
    - "Necessity, public or private, may justify entry upon lands of another"
      - Applied to Jacque: easement by necessity, pay for any damage, b/c countervailing rights: employees, home buyers

c) Reliance interest in property

- Singer (1988): reliance interest in property
  - Reliance on access relationship w/ owner
  - Redistribution after dissolution of joint efforts, mutual dep
  - Protect, compensate, provide for the vulnerable
- Examples (also implicate 1st, 5th Am issues)
  - No excl by casino of card counters (NY 1982)
  - No excl Princeton of off-campus orgs fr campaigning on campus (NJ 1980)
  - No excl by shopping ctr of leafletters (NJ 1994)
  - Yes excl by abortion ctr of protesters (TX 1987)

d) Limitations on exclusion

- Cohen (1927): property owners' power → public duty
- Macpherson (1978): right to excl as imp as right not excluded fr common property
- Alexander (2009): social-obligations norm of prop owners to promote public welfare
- But Epstein (1990s): absolute prop rights set conditions for mkt transactions – as long as thick, mkt forces check abuse
  - Acknowledge limits where mkts fail by < competition (bilateral monopoly, holdouts, transaction costs) – allow for "system a little but frayed at edges"

2. *Adverse Possession*

- Powell on Real Property §91.01 (2009)
  - Statutes of lims for recover of land (1623 model: 20yr)
  - Decisional law for which poss'ry actions nec'y to trigger SoL period
  - Title creation for AP once ejectment action by TO barred by SoL
- Ballantine (1918): "anomalous instance of maturing a wrong into a right"

    - Purpose: settle titles to land
- Holmes (1897) The Path of the Law
    - Rec’z AP’s longtime use of property
    - TO’s obligation to stop/do something re “gradual transfer before SoL
    - Applications to other theories:
        - Posner (2007): econ: < marginal utility of income, b/c transfer would be seen by AP as deprivation, by TO as windfall
        - Ellickson (1989): psych: loss-aversion stronger for AP
        - Singer (1988): moral wrong of allowing AP’s attachment then cutting
- AP vests new title that relates back to triggering event
- Peñalever & Katyal (2010): AP as mechanism for redistribution in dvping countries
- Modern statutory periods: 3-30 years, but 6-10 common
    - AP about community (banks, etc.), align legal regime w/ reality
        - TO’s knowledge irrelevant, b/c if knew, would’ve ejected
    - Gap in AP: irrebuttable presumption of TO’s possession
        - Challenge: community perceptions of AP’s continued poss’n?

a) Requirements

- Entry
    - Exclusive, actual (except color of title = “actual constructive”)
    - Creates trespass CoA, triggers SoL, defines property to be claimed
        - (Some say poss’r begins earning rights to prop)
- Open and Notorious
    - Public notice; “penalize negl, dormant owner for sleeping on rights”
    - Objective test of constructive notice
- Continuous for SoL
    - Ordinary presence, e.g. farm in season, vacation time
    - But abandonment, successful ejectment will break continuity
    - Usually ordinary use of land (Ewing), but not always (Pettis v. Lozier (NE 1984) suburban lot)
    - Tacking by privity
- Adverse/Hostile
    - Claim of right – differing views:
        - Objective (majority): state of mind irrelevant
        - Good faith: “I thought I owned it.” (avoid squatters’ rights)
            - 2008 NY legislation
            - Open Q whether time can mature → good-faith claim
        - Aggressive: I thought I did not own it, but I intended to make it mine.”
            - Sometimes coupled w/ obligation to pay fair value
            - Epstein proposal: 2-tier SoL, longer if bad faith
    - Color of title:
        - Invalid written instrument: deed, judgment, decree
        - Not required by English law or most states, but some < SoL
        - Full title w/ partial possession; otherwise AP = possessed land

b) AP Analysis

- Does AP have color of title?
- Who pays taxes? How much?

- What SoL applies? (Look to AP's actions)
- Good-faith occupancy by AP? (Blackletter irrelevant, but impact on jury)

c) Tapscott v. Lessee of Cobbs (1854): prior peaceable poss'r

- "Lessee" fiction to allow ejectment action instead of quiet title
- Chrono
  - 1825 Mrs. Lewis color of title, actual possession/living on land
  - 1835 Lewis → π Cobbs by will
  - 1842 Δ adverse entry
  - 1846 π ejectment action, π's judgment
- Aff'd ejectment of Δ by π's prior peaceable possession
  - Misreading of AP to require π's title > Δ's, but Δ's defects suff
    - Took VA ejectment back to where it should've been
  - Even though Lewis never TO, π C inherited L's poss'ry right
    - Alt view: L paid good money, superior right to ΔT
  - Why did ΔT demur to π's evid instead of proving π's absence upon arrival? Maybe ΔT was free black, wary of all-white jury

d) Ewing v. Burnett (1837): exclusivity, customary use, continuity, color of title

- Chrono of Cincinnati land orig granted to Symmes:
  - 1798 Symmes sold to Foreman, who sold to Williams
  - 1803 Symmes "sold" to Δ Burnett (TO = W)
  - 1824 Williams died testate, willed to π Ewing (TO = E)
  - 1834 Ewing sued Burnett (TO = B)
- Aff'd for Δ Burnett b/c 21+ years of use
  - Use as a true owner would: taxes, open claim, sue trespassers
  - Good-faith anaylsis?
    - Upham: irrelevant, b/c goal = efficient commerce; avoid risk of losing intervening investments ("merely void" ≠ fraudulent)
    - Prop-rights mvmt: good-faith important

e) Howard v. Kunto (WA 1970): continuity, claim of right, tacking

- Bad surveying: summer cabins ≠ match deeds
- Quiet title action
- Rev'd for Δ:
  - Summer occupancy + improvements = continuous (for like prop)
  - Tacking to prior occupants allowed despite absence of strict privity (deeds omitted land description) b/c purpose of privity to raise " reas'l connection btwn successive occupants" above squatters/trespassers

f) Marengo Cave (1937): exclusivity, open/notorious

- 1883 Δs discovered cave and explored/advertised; 1895 π visited; 1908 π bought adj land; 1929 π surveyed learned under prop (Δ denied π entry to survey after SoL – should've been irrelevant but likely jury impact)
- Aff'd π's jury verdict b/c Δ's possession ≠ open, notorious, or exclusive

g) Sheets (IN 1981): exclusive use

- Aff'd Δ's judgment for AP of 2ft ancroachment by garage + prescriptive easement for eaves, but rev'd add'l 4ft that Δ had been raking, mowing b/c ≠ exclusive

h) Shell-Mex (GB 1974): hostile

- Farmer sold land to Δ for planned road, remainder to π, who farmed both plots
- Δ letter to π before 12yr SoL expired, offering sale (permission ≠ AP)
- π waited for SoL expire before reply, claimed AP
- Δ's judgment b/c Δ's "use" of land = wait, so π ≠ adverse to that use
    - Even if adverse, failure to reply killed claim
    - Better alt: reply w/ claim of own'p

i) Fallon (CO 1958)

- Δ tenant who bought land sold at QIR2 auction was held AP to prior TO, but not to his wife and kids (jt tenancy)

j) Ennis v. Stanley (MI 1956): hostility

- Since honest π never intended to own another's land, ≠ hostile use of Δ's land up to π's own misplaced fence line
    - Upham: bad policy to require aggressive/bad faith

k) Manillo v. Gorski (NJ 1969): mistake sufficient

- Chrono:
    - 1946 Δ entered property, began home additions/changes
        - Δ admitted to 15" encroachment
    - 1952 Δ completed purchase, husband died
    - 1953 π acquired title to adjacent plot
- Overruled prior std:
    - Maine doctrine: AP ≠ "bottomed on" mistake
    - Pearce: subj hostility of poss'r irrelevant
        - Avoid handicapping honest landowners
        - Focus on real issue: TO's ouster from poss'n
- Retrial for 1) actual knowledge, 2) force sale? 3) how much?
    - Subseq: $250 settlement
    - Upham: bad policy b/c > transaction costs by forcing surveys
        - Better alt: allow AP by mistake, but refuse "ruthless usurpers"

l) East Village Squatters: 1977 – 2002

- Chrono:
    - 1977/8 NYC took over 535, 537, 539, 541, 545 E 13th: tax foreclosure
    - 1980s Squatters moved in: repairs, improvements
    - 1990 NYC selected bldgs. For rehab as low-income housing
    - 11/1994 Squatters filed injunction under AP theory
        - 4/1995 πs' judgment in 2 bldgs
        - 5/1995 rev'd for NYC on appeal – police removal 541, 545
    - 7/1995 Squatters snuck back into 541
    - 11/1995 πs' prelim injunction: 537, 539, 541, 545

            - 8/1996 rev'd for Δ b/c ≠ continuous – calmer police removal
                - Instances of sealing out by NYC
                - ≠ privity among various occupants
                - Dissent: perfect continuity ≠ dispositive; more relevant = improvements in blighted ghetto
        - 1999 NYC began negotiations w Urban Homesteading Assistance Bd
        - 8/2002 UHAB deal closed: 167 bldgs at $1/ea; 11 → squatters
            - Co-op incorporation, $500/mo maintenance fees

m) Title Problems

n) Tacking Problems

D. The Role of Property in Economic Growth

1. Demsetz (1960s)

- Essential: right of control (alienable, transferrable) over use to which scarce resources (incl ideas) will be put
- Gov/courts' role: 1) decide who owns what; 2) protect rights, or allow self-help
- Implications/beneficial results:
    - Value of all externalities will be borne by owners
    - Assuming rational owners, property will be used efficiently
        - Utility maximization: money, time, (+ values?)
    - Output mix independent of distribution, except income's effects on demand
- Assumptions
    - All potential property is assigned
    - Zero exchange costs
    - Police protection
- Externality: harmful/beneficial effect of transaction
    - External because cost of internalizing > benefit
    - Primary function of prop rights: incentives to internalization
- Theory: new property rights emerge as response to desires of interacting parties for adjustment to new benefit-cost possibilities
    - Response to change in technology and/or relative prices
        - E.g. Montagne Indians (Labrador, Quebec):
            - Successful hunts impose externalities on subseq hunters
            - Individualized hunting grounds = f(fur trade and over-hunting)
        - But SW Plains Indians: lower-value game animals, high cost of containment w/in wide graze lands, so internalization too expensive
- Types of ownership:
    - Communal (vs. public prop vs. open-access commons?)
        - No one can exclude another
        - Pot'l for overuse as ea mbr seeks to maximize (prioritize present use)
        - High negotiation costs b/c large-group dynamics
    - Individualized (Demsetz misuse of "private")
        - Owner acts as broker balancing present, future competing claims
        - But still ≠ incentive to consider externalities, eg dam on downstream
            - Challenges of bargains/offers as means of internalization
                - Investigation costs re source of external harm
                - Collective-action costs, free-rider risk

        - More efficient land-use decision-making (1-1 vs. 1-all)
- Summary:
    - Externality: effect that owner/actor ≠ forced to take into account in transaction
    - Externalities tend toward inefficiencies, but independent
    - Externalities are reciprocal, depend on both actors in the transaction
- Utilitarianism (Hume, Bentham): dominant today
    - Break from natural rights theory of property
    - Goals: efficient use of resources, re/distribute wealth, promote individuality
    - Political ideals
        - Pro: M. Friedman: essential to liberty
        - Con: Jeffersonian Republicanism: alienability → political freedom, but econ dependence
- Common property and the Rule of Capture
    - Tend toward overconsumption of fugitive resources (wild animals, water, oil)
    - Tend toward overinvestment in capture technology to capture faster
    - Solutions?
        - Demsetz: mostly private property rights
        - Judicial controls, eg nuisance laws
        - Leg'v/admin regulation
            - Compulsory unitization: jt own'p over single right
            - Transferrable quotas for fishers, hunters
- Pollution and the Tragedy of the Commons – alt views:
    - A) Inherent abuse unless gov't intervention
    - B) Certain circumstances encourage cooperation
- Tragedy of the "anticommons"
  multiple rights of exclusion → under-consumption
    - Multiple owners ea w/ veto power (eg Moscow empty storefronts)
- Virtues of common property: economies of scale, amassing capital, spreading risk, socializing returns – some resources "inherently public" (higher access, higher utility)
- Evolution of property rights
    - Likely dvmt among close-knit groups who could cooperate
    - Alt view (game theory): self-interest → respect others' things
- Economic view:
    - Dynamic, shifting property rights always good b/c aggregate benefit > cost
    - Ignores econ losers in rights shifts
    - Mismatched views of property rights:
        - Economists: include customs, mores
        - Lawyers: positive law

2. *Parker & Edgarton v. Foote (NY 1838) – no right to sunlight*

- 1808 Foote sold ½ block to Stebbins, who built home w/ windows facing Foote lot
    - Foote built addition 16' from boundary, used space as alley/RoW
    - Stebbins → π: title and possession
- 1832 Foote filled alley/RoW w/ store, blocking π's light
- Rev'd π's verdict, overturned English law of ancient lights
    - Legal: use wasn't exclusive/open/notorious (comm'y notice/expectation)
        - Unlike trespass/adverse use of RoW, no clear injury to Foote (w/ immediate redress) by use of light
        - Foote ≠ acquiesce to injury b/c lawful to have windows looking over property, so ≠ rights

        - Tautological: π ≠ rights b/c π lost case
    - Policy: property right over incorporeal light/air incompatible w/ US dvpmt
- Adverse enjoyment of commons → presumption of grant if suff time
    - But grant = permission ≠ hostile, so no easement possible, although "grant" makes easement unnecessary
    - Open Q: whether RoW presumption irrebuttable?

3. *Prah v. Maretti (WI 1982) – right to light for solar power*

- Chrono:
    - 1979 π Prah 1st home constructed in subdivision, solar panels
    - Δ Maretti bought adjacent lot, zoning permits for home
    - Δ and π ≠ agreement on distance, and Δ re-graded lot
- Rev'd nuisance SJ in favor of π, remand to determine reas'lness of use
    - R2T §821D nuisance: broad infringement of property enjoyment
    - English broad stopping lights doctrine (but here insuff time for SoL)
    - Narrower trad'l US application on policy grounds (Demsetzian econ alanlysis)
        - Liberty: limit claims to phys dmg (today: > regulations)
        - Light = aesthetic (today: light = energy)
        - Encourage land dvpmt (today: slower dvpmt)
    - Δ's zoning compliance, π's duty to mitigate inconclusive
- Dissent: here, only private nuisance, not public. Majority fails to require notice of π's solar panels to future buyers. Possible to view solar panels themselves as nuisance

4. *Water Rights after Natural Flow*

a) Rules and case exemplars

- Natural Flow: surface water
- Absolute Own'p: Parker/Edgarton, Acton, undergrd resources
- Reas'l Use: Prah, Evans
- Prior Appropriation: ancient lights doctrine

b) <u>Acton v. Blundell</u> (1843): Absolute Own'p

- Chrono
    - 1821 π's predecessor dug well to run mill
    - 1837 Δ coal pit on own adjacent land ¾ mi away
    - 1840 Δ 2d coal pit → insuff water for π's mill
- Aff'd Δ's verdict for any lawful use of own land
    - Surface water: natural flow: can't alter course, diminish qual/quant b/c public & notorious, long & continuously enjoyed
    - Ground water: absolute own'p: hidden veins, unpredictable courses
        - Impede industrial investment (<u>Pierson</u>: times change, men too)
            - Agriculture (NF) → Industry (AO)
        - Roman law: no RoA unless intent to injure
        - Open Q: >20yr uninterrupted use of ground water?
- Today, ground water courses knowable, so RU may become appropriate
    - AO = ecologically disastrous (like <u>Pierson</u>, encourage racing to capture as much as possible as fast as possible)
    - Any regime change is contentious: eg AZ: AO → PA b/c predictable (registries, commodification)

            - Political firestorm → change back to AO

c) Evans v. Merriweather (IL 1842): Reas'l Use

- Chrono
  - 1834 π's predecessor dug well
  - 1835/6 Δ Evans adjacent well (land above, $12k)
  - 1836/7 π acquired land, $8k
  - 1837 drought; Δ's employee dammed stream (Δ's knowledge?)
- Aff'd π's $150 judgment b/c RU = jury Q
  - English NF doctrine too strict
  - Tyler v. Wilkinson (J. Story): nonexclusive RU
    - All riparian owners right to necessities
    - Upstream can satisfy all necessities w/o regard for downstream, but ≠ "artificial" needs unless enough for all riparian owners' necessities first
  - Even factories, farms must be analyzed for reas'lness of use

d) Penn Coal v. Sanderson & Wife (PA 1886): Reas'l Use

- Coverture of wife under marriage/husband
- Chrono
  - 1867/8 Δ Coal Co began mining, draining into Meadow Brook
  - 1868 π Sandersons bought brookside land 3mi down, in Scranton
  - 1870 π finished home; brook water: pond (fish, ice), irrig, home
    - Some "artificial," value-add to property
  - 1875 π abandoned water use b/c too polluted
- 3 trials; rev'd for Δ: RU analysis masquerading as NF
  - Manipulation: 42 uses of "natural"
  - Private, personal inconveniences < necessities of great public industry
  - True NF application would've enjoined until costs → adopt RU
    - Demsetz "adjustment": benefits(change) > costs(change)
- Court's role: less enforcement, more change scheme w/o leg'v due process
  - Dynamic property rights → econ growth

5. *Developing Countries*

a) Shihata (1990): Governance

- Governance issues: how power is exercised and decisions are made
- Problem: World Bank loans being wasted
  - Recognized correlation political stability → econ growth
  - IMF charter: ignore politics
  - "Rule of law:" launder gvt function from political to technical
- Legal supremacy/rule of law assumptions (stability, predictability)
  - Legal incorporation of Demsetz, Coase, North
    - Pre-existing rules known in advance
    - Rules are enforced; procedure for departure from rules
    - Conflict-resolution: independent judiciary
    - Amendment procedures
  - Substantive: clear property rights, neutral contract enforcement

b) De Soto (2002): Black Markets

- Narrative analysis of informal economy/black market in Peru
  - ≠ unfair competition by social leeches (misunderstanding)
  - = spontaneous response to state failure re basic needs
    - Restrictive legality: productive energy → black market
- Experiment:
  - Open legal clothing factory: 289 days, 2 bribes (10 solicit), cost: 32 min monthly wages
  - Acquire vacant lot for housing: 7yr, 56 min monthly wages
  - Street cart license: 43 days, 15 min monthly wages
- Underdvpmt and Mercantilism
  - Myth: post-col laissez-faire → econ dependence → backwardness
  - Truth: never had mkt econ until black mkt forced it
  - Mercantilism:
    - Bureaucratized state
    - Views redistribution > production of wealth
    - Redistribution: monopoly concessions to elite
    - State and elite co-dependence
    - Inefficiency: money/time maneuvering bureaucracy
- Legal tangle: bloated, contradictory: 1% legislature, 99% exec admin agencies
- Alternative: political + econ freedom
  - Limits of black mkt: can't grow, plan ahead; vuln to extortion, crisis
  - Inalienable/exclusive rights over both real and personal property
- Conclusions: secure prop rights will lead toward
  - Efficiency by investment
  - Transfer/exchange
  - Incentivize collaboration (win-win)

- Costs of black mkt: investment movable goods > infrastructure (b/c insecure)
  - ≠ central registry/unequivocal rights
    - Hard to locate legit prop-backed debts (< credit)
    - Hard to defend against 3d-party claims
    - Hard to adjudicate valid disputes

II. <u>COMMON LAW ESTATES</u>

A. Estates in Land

- Feudal system: "status" as tenant of the fee, or tenant for life
  - "Status" → "estate" in fee simple, life, delimited term
  - Estate = bundle of rights; denotes legal relations of persons to things
- Purpose of estate system: clarify transaction, parties, property, type of interest
- Heritability:
  - 1066: tenant had life tenure only; heir had to pay relief/fealty to lord
    - Gradual acceptance of heritability ("to A & heirs"), but heir still had to pay
  - 1200s: right to inheritance of fee/fief, but still had to pay
- Alienability: 1290 Quia Emptores law settled alienability of fees

1. *Fee Simple*

- Quia Emptores alienability diminished escheating (reversion to lord) if tenant conveyed to 3d party
    - Escheat happened only when current tenant died w/o heirs
    - Reify the abstract: fee/holding → freehold estate ≠ terminable at lord's will
- Fee simple absolute ("fee simple") ~ unlimited rights, may last forever
- Creation of a fee simple
    - Words of purchase: to whom?
    - Words of limitation: what type of estate (against backdrop default)?
    - CL req words of limitation: "and his heirs" – default = life estate
    - Today: unnecessary – default = fee simple
    - Problems:
        - O → A "for life" then B "forever"
            - 1600: A: life estate; B: vested remainder in LE; O: reverter
            - 2002: A: life estate; B: vested remainder in FS
        - O → A "for life" then "remainder to heirs of B." B dies intestate (heir = C), then A dies.
        - O → "A & heirs." Only child, B. B's creditors access?
- Inheritance
    - Heirs: designated (by intestacy statute) successors of intestate decedent
        - CL ≠ spouse (only dower or curtesy interest) (today spouse = share)
        - Modern statutes (in order): first issue; parents, collaterals
    - Issue: descendent
        - Incl grandchild if child dies before parent
        - Primogeniture until 1925
        - Bastards: CL nothing; today from mother (+ father is claimed/proved)
    - Ancestors: heirs, if no issue
    - Collaterals: siblings first, then look to more complex relations
    - Escheat: CL → lord; today → state
- Standardization of estates (> alienability)
    - Limitation for fee tail, but cannot limit among class of heirs
    - Why limit freedom ownership?
        - < fragmentation, > transferability
        - < costs of gathering info re unusual rights
        - Normative ideals for interpersonal relationships
        - Stability property rights in face of dynamic pol, econ goals

2. *Life Estate*

- Easy legal recognition b/c compatible w/ feudal system
- Consequences:
    - Grantor control over inheritors (> than fee tail)
    - > trust mgmt. (bank), income to life tenant
- "Pur autre vie" – transferrable during life tenant's life
- Future interest
    - Reversion to transferor
    - Remainder to another transferee (vested vs. contingent)

a) White v. Brown (TN 1977)

- 1973 Mrs. Jesse Lide died testate: home "to live in" → sis-in-law Evelyn White; property → niece Sandra White Perry, executrix
  - 25yr living together (JL widow ≠ children)
- Rev'd for πs EW & SWP over Δ 12 nieces/nephs for fee simple construction
  - Cardinal rule: testator's intent
  - Statutory presumption FS > LE
  - "Not to be sold" insuff to override FS, held void phrase
- Dissent: unambiguous restraint of conveyance
  - Expressio/exclusio: JL knew how to make outright gift (prop) so "not to be sold" re house → intent: LE ("to live in")

b) Restraints on Alienation

- Objections to restraint
  - Makes property unmarketable (inefficient)
  - Concentrates wealth
  - Discourages land dvpmt/improvement
  - Limits creditors' access to land
- Types of restraint
  - Disabling: withhold power of transfer from grantee
  - Forfeiture: if grantee tries to transfer, then forfeit to another
  - Promissory: promise not to transfer (contract remedies: dmg, inj)
- Restatement:
  - Fee simple: void if total restraint
    - OK if partial, reas'l purpose, effect, duration
  - Life estate: void if total disabling; OK if forfeiture
- Valuation of LE and remainder
  - E.g. $10,000 home, 6% mkt interest rate ($600/yr)
  - Find present value of $600/yr for life expectancy, from table

c) Life Estate Problems

<table>
<tr><th>Language</th><th>1600</th><th>Today</th></tr>
<tr><td>"O to A"</td><td>A: LE
O: reversion FSA</td><td>A: FSA
O: nothing</td></tr>
<tr><td>"O to A & heirs"</td><td colspan="2">A: FSA
O: nothing</td></tr>
<tr><td>"O to A and then to her sons C & G & their heirs"</td><td>A: LE
C: vested remainder FSA
G: vested remainder FSA
O: nothing</td><td>(same, because clear from context that A intended to receive LE)</td></tr>
<tr><td>"O to A and then to her sons C & G"</td><td>A: LE
C: vested remainder LE
G: vested remainder LE
O: reversion FSA</td><td>A: LE
C: vested remainder FSA
G: vested remainder FSA
O: nothing</td></tr>
<tr><td>"O to A and then to her sons C & G who survive her"</td><td>A: LE
C: vested rem. LE
G: vested rem. LE
O: reversion FSA</td><td>A: LE
C: contingent rem. FSA
G: contingent rem. FSA
O: reversion FSA</td></tr>
</table>

d) Baker v. Wheedon (MI 1972): remaindermen's interests

- Chrono
  - 1925 JH Wheadon will: all to 3d wife Anna Wheedon "during her nat'l life and upon her death to her children" – if none, then to grandchildren (from 1st wife, but not to daughters) equally
    - Vested remainder in Anna's unborn children until her death
      - Legal fiction: fertile octogenarian
    - Alt contingent remainder in JHW's grandchildren
      - Open to more grandchildren being born
  - 1932 JHW died
  - 1933 Anna remarried: 20yr ≠ children
  - 1955 Anna rented out farm: ends-meet income
  - 1964 MI hwy dept to grandchildren re RoW settlement
    - Grandchildren's first knowledge of inheritance rights
    - "Honest efforts" to favorable terms, support Anna
- Rev'd Anna's force sale b/c ≠ interests remaindermen
  - Must balance interests of life tenant w/ contingent remaindermen
  - Remand for compromise or partial sale reas'l needs
  - Subseq: Grandchildren agreed sale all land except 5 acre home for Anna (lawyers as trustees): income for life
    - Land → Nat Geo printing press
    - Anna died 1996, 2 surviving grandchildren
- Wisdom of life estate?
  - Sale: life tenant req assent of all parties, or court order
  - Lease: (p. 215)
  - Mortgage: gen'ly ≠ lending against life estate
  - Waste: ltd ability to mine land, cut timber, take down bldgs.
  - Insurance: no duty; any insurance $ → life tenant
- Legal life estates in personal property (personalty)
  - Challenge: moveable
  - Law of waste n/a, unless state statute
    - PA: life owner = trustee; NY quasi-trustee (periodic acctg)
    - CT: life owner must post bond
- Protecting life tenant by creating trust
  - Fee simple → trustee to mng prop, pay income → life tenant
    - Life tenant may = trustee (fiduciary duty to remaindermen)
  - Legal life estate (w/o trust) always to be avoided
    - Upham contra: land value beyond commodity (social, emotional, moral meaning)

e) Waste

- Unreas'l interference w/ expectations of future interest holders/remaindermen
- Posner (2007): tenant vs. remaindermen bilateral monopoly
  - > tenant's interest, > freedom of use
  - < remaindermen's interest, < protection of rights
- Aff'v waste: open mines doctrine (look to testator's intent for rate extraction)
- Permissive waste: negl → dmg $ → forfeiture
- Walker, Intro. To American Law: "a spoiling or destroying of the estate with respect to houses, wood, or soil, to the lasting injury of the inheritance. ...

Voluntary waste is that which results from actual commission, as felling timber, defacing bldgs, opening mines, and changing the course of husbandry. ... Circumstances in this country have also made one change in the law -- in wild lands the tenant may clear a reasonable portion, for the purpose of cultivation."

- Melms: "any act or omission of duty by a tenant of land which does a lasting injury to the freehold, tends to the permanent loss of the owner of the fee, or to destroy or lessen the value of the inheritance, or to destroy the identity of the property, or impair the evidence of title..." OR "any material change in the nature and character of the buildings made by the tenant is waste, although the value of the property would be enhanced by the alteration."
- ALI Restatement (2001): "the owner of an estate for life who has the privilege to receive the issues and profits of such land, or the privilege to receive the rent and income thereof, has a duty to preserve the land and structures in a reasonably state of repair, …" and "a duty not to change the premises in such a manner that the owners of the interests limited after the estate for life have reasonable ground for objection thereto."

f) Woodrick v. Wood (OH 1994): ameliorative waste

- Δ Wood LE in dead husband's marital prop, incl lots
  - Remainder to son, Sheridan, and π daughter Woodrick
  - Sheridan conveyed interest to Δ, together sought to raze barn
- Aff'd denial of injunction, $3200 award to π
  - Clearing barn would > value of land
  - $3200 ≠ justify waste, but equitable recognition of π's interest in prop
    - Unfair b/c daughter paid now in cash, later remainder interest
- Ameliorative waste
  - CL: any material alteration = waste (e.g. Baker v. Wheedon)
  - Modern rejections following Melms v. Pabst Brewing (WI 1899): OK as long as ≠ < mkt value of remainder

g) Seisin

- Freehold estates: fee simple, fee tail, life estate
- Freeholder had seisin (special possession)
  - Feudal: possessor responsible for feudal servants
  - Dower and curtesy only to spouses seised of land
  - Transfer only by feoffment w/ livery of seisin (ceremony)
    - Medieval reification of abstractions

B. Controlling the Future

1. *Defeasible Estates*

- Defeasible = termination prior to natural end of estate
- 3 types
  - Fee Simple Determinable ("defeasible fee")
    - AUTOMATIC end upon explicitly stated condition
    - Transferor retains "possibility of reverter" in FSA
      - CL: inheritable but inalienable, undevisable
  - Fee Simble Subject to Condition Precedent ("…but if…")

        - MAY BE divested upon event, at transferor's election
        - Transferor retains "right of re-entry"/"power of termination" in FSA
            - CL: inheritable but inalienable, undevisable
    - Fee Simple Subject to Executory Limitation
        - AUTOMOATIC end/forfeiture upon explicitly stated condition
        - Transferor conveys future interest to 3d party – executory interest

a) Mahrenholz v. County Bd. School Trustees (IL 1981)

- Chrono
    - 3/1941 WE & J Hutton → Δ's predecessor S.D.: 1.5 acres "to be used for school purposes only"; "otherwise to revert to grantors"
        - Warranty deed (clear title; vs. quit-claim deed)
    - 7/1941 WEH/JH → Jacqmains 38.5 "+ reversionary interest in 1.5"
    - 1947 IL codified CL prohibition alienation/deviseability poss'y reverter, right of re-entry
    - 7/1951 WEH died intestate
    - 10/1959 Jacqmains → π Mahrenholzes 38.5 "+ reversionary int in 1.5"
    - 2/1969 JH died intestate: son Harry only legal heir
    - 5/1977 Harry → π "all interest in 1.5"
    - 9/6/77 Harry disclaimed → Δ "reversionary interest in 1.5" (gift)
    - 9/7/77 Recordation 5/77 conveyance
    - 10/4/77 Recordation of 9/77 disclaimer
- Trial for Δ under FSSCS, Harry ≠ exercise right re-entry
- Rev'd for π b/c orig WEH/JH conveyance = FSD (inalienable)
    - Remand to determine whether "school purp" violated
- Who owns 1.5acre school land at following dates?
    - 5/1973
        - If FSD, Harry b/c poss'y of reverter inalienable, so void transfer to Jacqmains
            - School in AP if mutual mistake (short ejectment SoL)
        - If FSSCS, future interest = right of re-entry, so ownership depends on Harry's exercise; belongs to school until then
            - Even though no SoL, latches applies
    - 5/1977 (H → M "all interest in school prop")
        - If FSD, then M owns present FSA, even though H thinks he's transferring future interest
            - Unless invalid K by mutual mistake
        - If FSSCS, then school owns b/c Harry ≠ exercised re-entry
    - 9/6/77 (H's disclaimer)
        - If FSD, then M owns
            - Unless ≠ recording suff to est H still owner
- Subseq: held S.D.'s storage = "school purpose", so ≠ trigger FSD condition
    - Davis v. Skipper (TX 1935): Church held FSd, but as along as using as church, right to drill for oil as well b/c FSD incl FS rights to land use
- Possibility of Reverter & Right of Re-Entry: Inheritable but ≠ alienable
    - b/c possibility ≠ thing
    - Right of re-entry = chose in action ≠ thing
    - Modern trend → transferability by state law

        - Some allow transfers inter vivos or poss'y of reverter but not right of re-entry (some even destroy right of re-entry if attempted transfer)
- Combined w/ adverse possession
    - Poss'y of Reverter: SoL runs upon end FSD
    - Right of Re-Entry
        - Theoretically upon failed/denied exercise of right to re-enter
        - Some states, upon triggering event
        - Others, reas'l time triggering event → exercise of right
- Abolished by CA, KS: collapsed into FSSCS
    - Restatement 3d collapses all 3into FSD
- Substantial compliance?
    - Ator (OK 2008): couple → SD land in FSD for football practice. SD used 40yrs as stadium, later as aux field + private teams. Sole heir sued to recover FSA, but SD argued that subst'l compliance w terms
- Covenants distinguished
    - Condition → Defeasible Fee → Forfeiture
    - Promise → Covenant → Injunction or Damages

b) Maeser School Land Crisis

- 1898/1910 Loose FSD → School Dist (condition: park)
- 2002 SD closed school
- 2004 Nonprof housing authority saved school from demo, to use for senior, low-income housing (≠ park) – $5.2M investment
    - Basic title search clear
- 2007 Loose great-grandson dropped suit for reverter (land $250k) in exchange for $10k memorial, $5k scholarship, $5k atty fees (paid by title co)

c) Mt. Brow Lodge v. Toscano (CA App 1967)

- 1950 grant Toscano → lodge (habendum clause conditions: use by lodge, no sale-transfer)
- Ct upheld use condition, voided sale/transfer condition as ≠ CL prohibition of restraints on alienability
    - Land use condition, in context → FSSCS (> FSD, if doubt)
    - Subtext: avoid disincentivizing charitable conveyances
- Dissent: use restriction effectively restraint on alienation – risk 100yrs on if lodge dissolves, grantor's heirs scattered
- Falls City v. Mo. P. R. Co. (8th 1971): City FSD → RR Co on condition HQ – held void b/c restraint on alienation
    - Cast (NE 1971): restraint if materially adverse effect on marketability – unreas'l limitation class of persons to whom alienable
- Form vs. Effect
    - Restrictions on land use gen'ly valid
    - Restraints on alienation gen'ly invalid unless reas'l under circs
    - Formalist? Eg Toscano
    - Effect/Functionalist? Eg Toscano dissent, Falls City
        - Restatement analysis: form, purpose, practical effect
- Testator's post-mortem attempts to control home use

- Cast (NE 1971): void FSD condition that heir or children live in home for 25yrs
- Wills v. Pierce (GA 1951): void FSD condition that grantee + heirs use house as residence
- Casey (AR 1985): void FSD condition that son's daughter spend < 1wk/yr in home: unreas'l b/c capricious, spiteful, malicious
- Babb v. Rand (ME 1975): valid FSSCS condition that grantee ≠ deny access to testator's other children (condition subsequent until death of testator's last child)

d) The Rule Against Perpetuities

- 1681 Duke of Norfolk's Case
- 200yr history of compromise btwn landed gentry, judges
  - Fathers allowed to control land → living heirs
  - Eventually, allowed to control +1 generation (+21 years)
  - Gray (1942) "No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest"
- Mechanics
  - Applies to interests ≠ vested at time of conveyance that creates them
  - Includes only
    - Contingent remainders
    - Executory interests
    - Class gifts
  - Logical proof that will vest (or terminate) < 21 years after death of someone alive at creation (otherwise void ab initio)
    - "Validating life"
    - "In being" = conception, if later live born
    - Even absurd but logical what-ifs will invalidate
  - Examples
    - Valid: O in trust to A for life, then 1st child to reach 21
    - Void: O in trust to A for life, then 1st child to reach 25
      - Unless A has child > 25 at creation
      - Reread as LE to A, reversion to O
- Presumption of lifetime fertility
    - But posthumous parentage ≠ yet decided; many states ignore
- Class gifts: must be closed/ID'd class
  - All or nothing rule: not vested in any member until vested in all
  - Class Closing Rule/rule of convenience:
    - Cut off new entrants to class at earlier of
      - Natural: end poss'y new births (e.g. death ancestor)
      - Artificial (saving construction): on the distribution date if a beneficiary is then entitled to disrtbution

2. *Trusts*

a) The "Use"

- Hold land for crusading knights
- Use = grantee's protected interest in equity
  - E.g. O → X & heirs to hold to use of A & heirs
    - Law: X has FSA

        - Equity: X good-faith duty to A (cestui que use: "the one for whose benefit…")
    - Bargain & Sale deed: unenforceable at law b/c ≠ livery of seisin, but equitable enforcement of grantor to hold for use of grantee
- 1536 Statute of Uses (Henry VIII)
    - Abolished uses, forced legal title transfer to cestui que use
        - "Uses" → "executory interests"
    - Modern executory interests (3d parties only)
        - Fee Simple Subj to Exec Limitaion
        - Gen'ly treated as contingent interests b/c subj to condition precedent & ≠ vest until possessory
    - Exceptions:
        - Non-real property
        - Active trusts (trustee duties)

b) The "Trust"

- Based on the use (feoffee to uses = trustee)
- Settlor creates trust:
    - Trustee: legal owner of corpus of trust
        - Fiduciary duty of loyalty, etc. to beneficiary
    - Beneficiary: equitable right to enjoy property (net income)
        - Corpus unavailable as collateral, debt relief
- Upon termination, clear property → designated beneficiary
- Spendthrift trusts: may be made inalienable b/c restraint on alienation n/a to equitable interests

c) <u>Farkas v. Williams</u> (IL 1955)

- Trust details
    - Settlor: Albert Farkas (died intestate)
    - Trustee: Albert Farkas
    - Beneficiary: Richard Williams
    - Corpus: 4 stock certificates
- πs co-admins of AF estate (niece and nephew Farkases, among heirs at law)
    - Allegation: AF's declarations = failed will ≠ trust
    - If failed testamentary disposition, then certs → estate, b/c RW would've had only "expectancy during lifetime
- Aff'd for Δ b/c revocable trust declarations (≠ testamentary)
    - Despite AF retention of most powers (true of every revocable trust)
    - Test 1: beneficiary's present interest?
        - Ct "throws up its hands"
    - Test 2: settlor's limits of present interest? (zero-sum analysis)
        - AF must follow tedious procedures to revoke (sufficient)

d) <u>Blankenship v. Boyle</u> (DDC 1971)

- Union workers comp fund
- Unusual trust mgmt., but ≠ allegations of outright corruption
- Applied CL fiduciary duty to interp 3 trustees' mgmt.
    - Trust $ → Union bank
    - Investments: union coal cos., public utils using union coal

    - Irrevocable
    - Pay-as-you-go: high cash flows, low investments
    - Increased pension payments upon election to union rep/trustee
- Relief: new trustees; admin ≠ trustee; prof counsel
    - Fiduciary duty to corpus of trust, or beneficiaries' livelihood?

3. Concurrent Estates

a) Types of Concurrent Estates

- Coparceny: daughters' share if ≠ male heir (n/a USA b/c ≠ primogeniture)
- Tenancy in Partnership: upper-level courses
- Tenancy in Common (businesses, families)
    - Inheritable, deviseable, transferrable
    - No survivorship btwn tenants
- Joint Tenancy
    - Uninheritable, undeviseable
        - Transfer destroys JT → TIC
    - Right of survivorship btwn tenants (reallocation among survivors)
    - Four unities (if lacking → TIC)
        - Unity of Time: vest simultaneously
        - Unity of Title: same instrument
            - ≠ intestate succession or act of law
        - Unity of Interest: equal undivided shares, identical duration
        - Unity of Possession: each tenant right to possess whole, although may give up to others vol'y
    - Divisibe by action for jud'l partition
- Tenancy by the Entirety:
    - Only marriage (some states also couples who can't legally marry)
    - Only conveyable/destructible if both agree
    - Divorce → TIC (but ≠ jud'l partition)
- Presumptions:
    - Trad'l CL: default JT b/c favor large plots
    - Today: default TIC b/c transferability
    - Conveyance to H&W gen'ly favor TBTE

b) Problems

- O → A, B & C as joint tenants
    - Words of purchase: "to A, B & C"
    - Words of limitation: none
        - CL: A/B/C JTs in LE, O reverter in FSA
        - Today: A/B/C JT in FSA
    - If A → D: severance of A's JT (≠ unity of time)
        - D 1/3 TIC w/ A/B as JT's w/ each other in 2/3
- O → H, W & X as jt tenants w/ right of survivorship. H & W married. X unrelated. H & W die
- T → A & B as jt tenants for their jt lives. Remainder → survivor
- 2wk before wedding, A & B buy house, take title "in A & B as tenants by the entirety. Years later, A moves out, conveys interest → bro, C. C action for jud'l partition.

- JT b/c no tenancy by entirety unless engagement sufficient by statute.
  - C ½ TiC w/ B
- Germaine v. Delaine (AK 1975): deed conveyance to grantees "jointly, as TiC…& survivor in FSA" – held as JT b/c right survivorship
- Kipp v. Chipps Estate (VT 1999):
  - Granting clause → A & B as JT "& heirs & assigns forever"
  - Habendum clause: "tenants in common" & heirs
  - Held TiC b/c granting clause ambig so resort to habendum clause + modern default TiC > JT
- Avoidance of probate:
  - Costly admin/exec of estate after death
  - JT tenancy theory: ≠ transfer of interest, simply extinguishing decedant's interest, continuation of JT's interest
  - But JT ≠ devisable
  - Fed law still taxes decedant JT's share (marriage exception)
- Unequal shares
  - CL unequal shares ≠ JT, so → TiC
  - Today gen'ly ignored: prorate jt shares by % contribution

c) Severance: Riddle v. Harmon (CA 1980)

- Facts:
  - Frances & Jack Riddle JT in land
  - 12/8 Frances grant deed → self in TiC to terminate JT
  - 12/28 Frances d testate (will & grant deed recorded 12/8)
- Rev'd trial's SJ quiet title in Jack, allowed Frances's termination
  - "2 to transfer" outdated feudal req'mt
    - Loopholes: intermediary strawman, trust
    - Common sense, legal efficiency
  - Alt means of indestructible survivorship
    - Jt life estate, contingent remainder to survivor
    - TiC, executory interest in survivor
    - FS vested in future poss'n
  - But JT: univ right to sever/destroy survivorship by conveying interest
- Recordation mechanism to root out (some) secrecy, fraud
- Modern tred → intent test (≠ 4 unities)
- Simultaneous Death Act: ½ & ½ approach unless clear/convincing evid sequential death
- Murder severs JT → TiC (killer ≠ right survivorship)

d) Partition: Delfino v. Vealencis (CT 1980)

- 2π Delfinos owned 99/144 of 20.5acres as TiC w/ Δ Vealences: 45/144
  - Δ sole occupant: dwelling, garbage removal business
- Rev'd πs' judgment for sale partition, ifo Δ: in-kind
  - Trial concerned w/ maxing efficiency (Posner)
    - But prop sale w/o consent = extreme use of power warranted only in clear cases
  - CL in-kind > sale partition, unless conditions
    - Physical land impractically divisible, (and? or?)
    - Sale > interests of all owners

- Here, divisible land, Δ's interest in staying on land
  - Trial ct erred in assuming Δ's ≠ future garbage business (zoning), πs' subdivision denial on remainder
  - ≠ future zoning issue b/c prior nonconforming use ≠ nuisance
- Modern trend → sale, b/c parties agree
- Ark. Land Co. v. Harper (WV 2004): rev'd sale b/c emo attachments to homestead > $
  - But Johnson v. Hendrickson (SD 1946): forced sale, ignoring tenants' interests in remaining on land
  - Gray v. Crotts (NC 1982): in kind partition, but random draw straws, ignoring tenants' emo attachments to certain parcels
- Alt approach: owelty/compensation
  - If 1) in-kind impracticable/wasteful 2) sale ≠ interest all parties
  - Assign all interests to one party, force fair/mkt payment
- Partition as tool to expropriate poor black farmers
  - Heir property (undevised) – distrust legal system?
  - Fragmentation of ownership among various heirs as TiC
  - White buyers from 1 tenant, force sale partition, buy rest
    - Economic & legal-representation advantage
  - Proposed solutions: owelty, majority rule by cotenants, restrictions on alienation, legal aid, supermajority consent + redemption period
- Conveyance prior to partition action?
  - Keane v. ench (3d 1969): A & B cotenants. A → C by metes & bounds. C partition suit gets conveyed land b/c ≠ prejudice agst B
- Hypo: Fred & wife 3 kids: Bob, Carol, Darcy. Wife dies. Fred remarries Winnie, w/ kids from prior marriage. Fred dies 20yr later, asks kids to ensure Winnie can live in W's own home ($99k, $33k mortgage)
  - B, C & D ea pay $11k for 1/9 interest as JT w/ W?
    - Impossible at CL b/c ≠ unities time, title, interest
    - Pro: if W dies first, survivorship 1/3 ea
    - Con: deprive W's heirs of her prop; risk dying w/o conveyance
  - B, C & D ea pay $11k for 1/9 interest, become JT w/ each other in 1/3, TiC w/ W in whole.
    - Pro: protect 1/3 interest from W's heirs
    - Con: risk losing interests to siblings at death
  - Give W $11k each, cash. Bad idea. Lose cash
  - BEST: ea pay $11k for 1/9 interest as TiC – protect each indiv sibling's prop

e) Possession: Spiller v. Mackereth (AL 1976)

- Facts:
  - Cotenants. Lessee moved out, Δ Spiller moved in: warehouse use
  - π Mackereth demanded ½ space or ½ rent
- Rev'd π's judgment ($2100 rent) b/c Δ's actions ≠ ouster
  - Each cotenant right to poss undivided whole, but can't oust another
  - ≠ evid that Δ denied π entry or agreed to pay rent
  - π's demand to vacate or pay rent insuff to est ouster
    - (Minority view would hold Δ's actions suff ouster)

III. LAND IN COMMERCE

- Economic changes/development/growth → changes in property law/rights
  - Econ growth (Sanderson)
  - Technological changes (Eads)
  - Cart before horse? Legal changes to spur econ growth in poor countries
    - Mixed success
  - Cases below: fundamental change in landlord-tenant relationship
    - Rural: land → urban: shelter, comfort
    - 1960s attitudes/social norms: property → contract principles
      - Multiplication of dependent covenants beyond 2: QE–rent
        - Introduce constructive eviction (property)
        - Implied warranty habitability (contract)

A. Landlord-Tenant Law

1. Leasehold Estate Types

- Term of Years: explicit termination
- Periodic Tenancy: notice of termination
- Tenancy at Will: unilateral (reciprocal?) termination right
- Tenancy at Sufferance: holdovers
  - Landlord's options:
    - Eviction + dmg
      - CL doctrine benefit tenants, but disproportionate penalties
    - Consent (exp or imp)
      - Defaults:
        - Majority: periodic
        - Minority: full term

a) Problems

- L → T "for 1yr, beginning 10/1."
  - Next 9/30, T moves out ≠ notice.
    - If periodic, T owes L 1yr rent
    - If term of years, no rights
- L → T "from yr to yr, beginning on 10/1."
  - More likely periodic, so T owes L 1yr rent
- L → T no fixed term, "annual $24k payable $2k/mo on 1st."
  - Periodic tenancy
    - If yr to yr,
    - More likely mo to mo (since no end date)

b) Garner v. Garrish (NY 1984): tenancy at unilateral will

- (Determinable life estates rare)
- Construed lease literally as life tenancy terminable at will of tenant alone
  - Rejecting, as outdated, CL reciprocity of at will tenancy
  - But under property principle (numerus clausus), K'or's will irrelevant
    - Upham prefers numerus clausus
- Myers (OH 1977): unambiguous leases by express terms; if ambiguous, then presumption at will both parties

- Hypo: L → T "for as many years as L desires"
  - Absurdity? Life estate determinable by granting party, or FSD

c) The Lease

- Chattel real → land property
- Rights
  - Property: conveyance tranfers poss'ry interest (real property)
  - Contract: reciprocal promises (personal property)
- Historical dvpmt of interp from property → contract
  - Modern K lens: mutual dependence, destruction, mitigation, warranties of quality
- Statute of Frauds: writing if > 1yr
- Form leases & bargaining power: > relationship, > length
  - Posner (2007): lessor cost savings → lessee(s)
  - Alts: disclosure req'mts, statutory leases to < monopoly

d) Unlawful Discrimination

- Fair Housing Act, 42 USC §§ 3601–3619, 3631 (orig 1968)
  - Exceptions: single-fam sale w/o broker, listing; < 4unit lease, if owner lives in bldg.
- <u>Shelley v. Kraemer</u> (1948): ≠ racist land covenants
- <u>Jones v. Alfred H. Mayer</u> (1968): interp'd 1866 Civ Rights Act as barring all priv/pub racial discrim in sale/rental prop
  - Narrower than FHA: only race, proof intent
  - Broader than FHA: all land, ≠ exemptions, ≠ dmg cap
- FHA amendments: 1974 sex, 1988 family status, handicap
  - Numerical occupancy lims may be justified by econ, but not if based only on single-parent status
  - ≠ protections to unmarried couples, professionals, sex'l orientation
  - AIDS = handicap protection
    - Reas'l accommodation
    - Companion pets protected unless impossible
  - No freedom religion exemption b/c gen'ly applicable law
  - Atty fees recoverable

2. *<u>Hanan v. Dusch</u> (VA 1930): CL quiet enjoyment*

- Facts:
  - Hanan tenant 15yr lease, encountered prior holdover when moving in
  - Dusch landlord ≠ express covenant delivery, ouster
- Held for Δ under American Rule:
  - English Rule: implied promise of open entry onto land
  - American Rule: only duty ensure legal right of poss'n
    - π's remedy agst wrongdoer, not landlord
    - Landlord only implied covenant = quiet enjoyment (& ≠ actively interfere w/ tenant's taking poss'n)
      - Eg landlord's accepting holdover's rent = breach
  - Modern urbanization gradual shift → English Rule (<u>Javins</u> (DC))

3. *Reste Realty v. Cooper (NJ 1969): constructive eviction*

- W/in terms of lease: express and implied
- Facts: 5yr comm'l lease in basement – common driveway runoff, flooding
    - Maintenance, repaires, promises, but ignored after friendly mgr's death
    - Δ tenant broke lease, vacated – π sued for back rent
    - Under CL Hannan, no duty to maintain premises
- Expanded tenants' rights
    - Intolerable condition, subst'l deprivation → contstructive eviction
    - Constr'v eviction ≠ ROA for back rent
    - Q: include tenants' specialized uses?
        - But CL, any add'l covenants = indep = only dmg remedy
- Eviction ends tenancy, but practical problem if "constr'v eviction" but tenant still physically occupies – constrained resoning
    - Difficulty of fitting previously indep covenants in covenant of quiet enjoyment, so logically extend to implied warranty habitability
    - Hard to enforce landlord's promise w/o evicting/rescinding tenancy
- Problems p491:
    - T = tenant at will of L. L nuisance interferes w/ T's business. T vacates, rents equiv space at higher rent, sues L dmg under constr'v eviction
        - T can vacate, recover back rent from nuisance on
    - T has term of years, vacates prior to end of term and stops paying rent. L sues for unpaid rent, T defense constr'v eviction:
        - If L failure control neighbors' excessive noise, evict noisy tenants = breach b/c w/in L's control
            - Social norms/context: even neighbors' secondhand smoke may = constr'v ev
        - If crime on premises, L's locks insufficient deterrence – T no recovery b/c beyond control of L

4. *Hilder v. St. Peter (VT 1984): resid'l warranty habitability*

- 10/74: $140 monthly periodic tenancy (+$50 deposit)
    - Stayed 14 months, made repairs, sued for all rent back
- Court awarded full rent paid + punitive, under implied warranty habitability
    - Rule: IWH all resid'l leases: safe, clean, fit human habitation
        - Essential facilities "vital to resid'l use"
        - Unwaivable, ≠ assumed risk
        - Subst'l violation housing code = prima facie breach
            - Withhold rent, deduct repairs, punitive dmg
        - K remedies: rescission, reformation, damages
            - Plus discomfort, annoyance
            - Paradigm shift?
                - Property = state-defined; numerus clausus
                - K = individual choice (w/in some limits)
                - But also state control conditions (~prop)
                    - Cynical political cop-out
    - Punitive or exemplary damages?
        - Jacques v. Steinberg Homes: exemplary b/c existing law only nominal dmg for int'l trespass
        - Here, punitive b/c Hilders actually injured

            - But trad'ly low-income housing landlords ~poor too
- Activist legal services/impact litigation seeking change in law
    - Constructive eviction achievable under existing law but ≠ back rent
        - Plus π never left
    - Little recovery available, even contingency, unless punitive dmg
- Problems p502: Limitation on freedom K after <u>Hilder</u> IWH
    - (b) Even UES leases ltd to health, safety, essential facilities
    - (d) Unwaivable, so ≠ contractual
    - "Fair market/rental value" vs. state control conditions
        - Jud'l + leg'v control of conditions for narrow stratum
        - US society designed for strong, legal req'mts for poor/weak (vs. actual services)

5. <u>Chicago Bd. of Realtors</u> (7th 1987): affordable housing

- p508: Chicago IWH statute Const'ly upheld b/c specific, reas'l
- Policy analysis: "superfluous"?
- Posner/Easterbrook "also a majority"
    - IWH statute destructive to mkt efficiency, ≠ interest of poor
        - < landlord resources, > cost housing/rents
            - Decrease supply low-income housing
            - Most benefit → mid-class, affluent owners, tenants
        - Responsible tenants subsidize irresponsible ones
        - Real target of legislation = wealth transfer, ≠ health/welfare
            - Ineffective w/o cap on rents
        - Upham: law more complex than simply promoting mkt
        - Loyola law prof statute drafter claimed ≠ > rents
    - p514 fn58: IWH → affordability > quality as problem
- Dignity interest inherent to IWH laws (opposition to "cynical cop-out")
    - Eg <u>Hilder</u> punitive damages for culpable (demeaning) conduct
    - "Positive" hypocrisy, b/c hypocrisy = principles, ideals
- William Simon (UCLA 1991): social-republican argument: rent control as protecting agst loss community membership
    - Rent-control abuse (20% NY) good thing? Eg CA Prop 13 freeze prop taxes in face of > prop values, allow long-term residents to remain
        - Prop tax control = burden to entire state
        - Rent control = direct cost to similar class landlords
    - Rent control rare outside NYC, Santa Monica
- Public housing since Housing Act 1937 (most built 1949–74)
    - Concentrated poverty, racial ghettoes
    - 1980s drugs, crime → demolition → mixed-income, vouchers
- Upham's analysis:
    - Belief in mkts/econ analysis (M. Friedman)
    - Gen'ly skeptical view on law-econ b/c different goals
        - Premise that efficiency = only underlying goal
    - But rent control/stabilization, to allow people to stay in homes, places whole burden on landlord class (not wealthiest)

B. Land Transactions: Home Sales

- Process (p519)

- Assess income, savings, risk aversion (loan pre-approval)
- Search for properties: independently; seek broker (comm'n by seller)
- Negotiate purchase/sale agreement (atty): description, price, closing date
  - Executory K: title search, mortgage contingency, inspection
- Deed transfer: some states (NY): all parties present; others (CA): 3d-p escrow

- Sample Real Estate K
  - No mention seller's marital status
  - No mention concurrent tenancy status of buyers
  - Title conveyed
    - "Good and merchantable title"
    - "Marketable title"
  - Covenants on land use?

1. The Transaction

a) Statute of Frauds: Hickey v. Greeen (MA 1982)

- 1677 "Act for the Prevention of Frauds and Perjuries" § 4: all land contracts/sales in writing, signed
  - US courts have treated as CL principle, not strict statute
  - Inconsistent application: min = signed, describe real estate, price
    - Price can be just method of determining ("fair mkt value")
    - Some req add'l "material terms"
- Exceptions:
  - Part performance (equity action: specific perf, ≠ dmg)
    - Theory1: subst'ly satisfy evidentiary req'mts of SoF
    - Theory2: prevent injurious reliance on K
  - Estoppel (equity & law): unconsc'l injury to deny enforcement oral K
    - Reliance → change of position
    - Unjust enrichment
- Hickey v. Greeen (MA 1982)
  - Facts: (p542)
    - 7/12 Hicky/wife oral agreement w/ Mrs. Green $15k for Lot S
      - $500 deposit w/ blank payee, add'l writing on back
    - Hickys sold own home
    - 7/24 Mrs. Green rescinded offer, refused H's counteroffer $16k
  - Trial for Hickys: specific perf – Aff'd under RSC § 129:
    - SoF exception if change in position b/c reas'l reliance
    - Remanded for judge's discretion:
      - Force conveyance upon payment orig $15k price
      - Reexamine circumstances, allow just restitution to Hs
  - But Walker v. Ireton (KA 1977): refused spec perf of oral K despite deliv deposit check, buyer's sale of own property
- Federal e-signature laws
  - Some courts/commentators reluctant: weakening of SoF req'mt deliberation inherent to trad'l writings

b) Marketable Title: Lohmeyer v. Bower (KA 1951)

- Facts:
  - 5/1949 π Lohmeyer purchase K for Δ Bowers' Berkley Hills lot 37
  - 1-story structure violation restrictive 2-story covenant

        - Home distance to lot line violation zoning
- Trial for Δ Bowers b/c defects ≠ unmarketable title
- Rev'd for π Lohmeyer (rescind K, return deposit)
    - Municipal restrictions ≠ affect mktblty
    - Restrictive covenants = affect mktblty
    - Violations of both regs, covenants → litigation exposure → unmktbl
    - Δ's offer to fix → compel purchase of different real estate

c) Equitable Conversion and Merger

- 552-3: Equitable Conversion: if spec'ly enforceable K, regard as done what ought to be done:
    - Buyer has equitable title
    - Seller may secure claim for $ by vendor's lien
    - Seller legal title in trust for buyer
    - Risk of loss/destruction btwn signing, closing:
        - Paine v. Meller (1801): burden on buyer b/c equitable conversion treat buyer as owner
        - But MA: risk on seller if subst'l dmg & bldg imp subj of K
        - Uniform Vendor & Purchaser Act: risk on party in poss'n
        - If seller insured & buyer takes risk, most states seller must hold ins recovery in trust
    - Inheritance: equitable conversion real prop → decedent, $ → seller
        - Hypo: O: Blackacre → A for $10k. O dies intestate before closing. $10k, once paid, → O's heirs for personal prop. O's heirs for real prop get nothing
- 563-4: Merger
    - Once buyer accepts deed, K merges w/ deed as final act re terms
        - ≠ ROA contract terms, but = ROA on deed warranties
    - Today, < doctrine, > exceptions: eg K indep/collateral oblig

d) The Deed

- 585-90: Warranties of title
- History:
    - Charter of feoffment: 1066 – 1536 Statute of Uses
    - Livery of Seisin abolished w/ 1677 Statute of Frauds
    - 19th C modern deed: superfluous words to ensure ≠ omission
        - Although "grant" suff, often "grant, bargain, sell," etc.
    - Statutory short-forms
- Modern types:
    - General Warranty Deed: warrant agst all defects in title
    - Special Warranty Deed: warrant agst grantor's own acts but ≠ others'
    - Quitclaim Deed: no warranties
- Issues
    - Consideration: nec'y to indicate, unnec'y/uncust'y to specify value
    - Description of tract: metes & bounds, survey, street name/#
        - Preferential descriptors, in order: Natural monuments; Artificial monuments; Adjacent boundaries; Cardinal directions; Distances; Areas; Place names
        - Waterways:

        - Accretion: gradual shift– gain/lose land
        - Avulsion: sudden change (eg flood) – no change land
    - Seal req'mts abolished most states
    - Forgery and Fraud:
      - Forgery = void; grantor (forged sig) precedent over all
      - Fraud = voidable by grantor, but subseq bona fide purchaser precedent over grantor
    - Indenture and deed poll:
      - Indenture: 2 copies on single sheet cut irregularly
      - Deed poll: signed only by grantor ("poll" = even cut)
- Covenants:
    - Present (broken/fulfilled/SOL runs at delivery)
      - Covenant of seisin (ownership)
      - Covenant of right to convey
      - Covenant against encumbrances (mortgages, liens, easements, other covenants)
    - Future
      - Covenant of gen'l warranty (defend agst lawful/winning claims, compensate for losses)
      - Covenant of quiet enjoyment
      - Covenant of further assurances

e) Financing

- 616-29:
- Intro to Mortgages
- Mortgage Foreclosure: <u>Murphy v. Fin. Dev. Corp.</u> (NH 1985)
    - Action to set aside foreclosure sale, or $ dmg
    - Facts:
      - 1966 πs purchased home, 1980 refi w/ Δ
      - 2/1981 π husb unemployed, stopped mortgage payments, utility payments, prop taxes
      - 10/1981 Δ notice → π intent to foreclose
        - πs paid past-due 7mo but ≠ legal fees
      - 11/1981 foreclosure sale, postponed to 12/1981
        - Δ bought for $27k, amt owed on mortgage, resold $38k
      - 2/1982 πs sued
    - Partially aff'd π's judgment: $27k dmg (mkt value – sale price)
      - Lender/Mortgagee's fiduciary duty in foreclosure sale
      - Insuff evid of bad faith
        - No atty fees
      - Suff evid of ≠ due diligence in fair mkt price
        - Remand to assess "fair price" under circs (forecl sale)

f) Prof. Korngold lecture on real estate transactions

- Involvement of lawyers depends on location
    - Seller's broker (K)
    - Buyer's broker (fid duty to seller)
    - Purchase of sale agreement (K to convey at future time)
      - Price & Closing date

    - Seller retains legal title
    - Buyer's equitable title (can sue for specific perf)
  - Title search – marketable title, insurance
  - Buyer's mortgage (K)
    - Lender's commitment (K to pay at future time)
    - Title insurance
      - US: private title ins company guarantee
      - Int'l: govt systems
- Closing:
  - Escrow (CA, Columbus OH)
  - Round-the-table (NY, Cleveland OH)
  - Fed preemption? Eg e-signatures valid
- 2008 home mortgage crisis
  - Trad'l local S&L operations: "3-6-3" (3% out, 6% in, go home at 3)
    - Uneven geographic capitalization
  - Dvpmt 2d'y mortgage mkt
    - Local S&Ls sell mortgage/note to regional bank
    - Regional bank → nat'l bank → investment bank
    - Investment bank: bundle, slice mtg-backed securities
      - Pros: cash to local banks, mtg brokers
        - Investment oppy to cash-heavy investors
      - Cons: addition subprime mtgs at investors' beckoning
        - Disintermediation of risk
        - "Shoveling shit up the pipeline"
  - 2000 > mkt value homes, continual refis, hiding underlying problem
    - Excess cash on consumer goods
  - 2006 < home values, ≠ longer refi way out of trouble – underwater
  - Total value subprime mtgs ~ $2T, so why such big econ hit?
    - AIG "credit default swap" = insurance by another name
      - 2000 law ≠ regulatory oversight: ≠ reporting, reserves
      - Unreported liabilities
      - Naked CDSs: etting on securities to lose

2. *Determining and Guaranteeing Ownership*

a) Title Records

- (p645)

b) <u>Luthi v. Evans</u> (KA 1978)

- (p651) Seller sold more than once:
  - 1971 Grace Owens → Int'l Tours: "all" interest 7 oil/gas leases
    - "Mother Hubbard" clause: all conveyor's prop in county
  - 1975 Owens "→" Burris 1 lease (≠ interest, but = color of title)
    - Burris title search came up clear
- Despite fraudulent sale, held Burris as owner
  - Tours recordation insuff description, so ≠ notice
    - Burris would've had to track all Owen's property in county
  - Court sought to make buyers' title search easier, still reliable
    - Buyer only need search chain title for land at issue

- Int'l Tours' recourse: sue Owens for breach of K

c) Orr v. Byers (CA App 1988): idem sonans

- (p661) Facts
  - Orr $50,000 judgment lien agst Elliott, recorded "Elliot" & "Eliot"
  - Elliott → Byers; title search clear
- Court simplifying title search while balancing reliability
  - Title search ≠ idem sonans (minority)
  - Criminal, contract = idem sonans
- Takeaways: search alt spellings, keep searching to rule out possible alts

d) Guillette v. Daly Dry Wall (MA 1975): inquiry notice subdivisions

- (p680) Facts: Gilmore (common grantor) selling subdivision lots
  - 7/1967 Subdivision plan (recorded)
  - 8/1967 π Walcotts purchased lot (1967 plan)
  - 3/1968 Subdivision plan
  - 5/1968 π Guillette purchased lot (1968 plan, practically same)
    - Only G's + 1 other deed restricted by seller: covenant for resid'l one-family home
      - First buyer: covenant on his deed
      - Common grantor: covenant on remaining deeds
        - But 1967 referent plan ≠ restrictions
  - 6/1968 π Paraskivas purchased lot (1968 plan)
  - 4/1972 Δ Daly, Inc. purchased lot w/o restriction
    - No inquiry re other restrictions, dvpmt pattern
  - 8/1972 Δ learned of restrictions, got permit 36 condos
- Court held covenant/restriction binding on all deeds even though ≠ in plan
  - Δ Daly, Inc. can't build condo despite clear title search
  - When buying subdivision plot, must search all lots to find burden
    - Opposite Luthi b/c subdivision
      - More limited burden than Mother Hubbard clause
      - Inquiry notice of likely restrictions – ought to ask
      - Investigation of existing resid'l use, likely restrictions

e) Title Registration (pp.704-13)

C. Private Land-Use Controls: CL Nuisance

- 2 views:
  - Normative, tort-based view: A inflicting harm on B (Morgan, Jost)
    - Liability test: Morgan (NC): substantial and unreasonable under circs
      - Jost (WI): absolute threshold, no balancing
      - Trad'l NY approach cited in Boomer: no balancing
    - Remedies: secondary (don't focus in class)
  - Public Choice: mutually incompatible uses, each interfering w/ other
    - Not blameworthy behavior, so not normative valence: who should pay?
    - Rather, who should be allowed to continue? How to avoid more serious harm?
      - Must calculate values of uses, costs of harms
      - ~ Regulatory takings (Scalia in Lucas)
    - Liability test: Coaseian cost-benefit analysis

- Rejected by Boomer (NY): institutional capacity
- Prah (WI): remand to trial to expose all underlying facts, balance utility Δ's conduct w/ gravity of harms
  - Pandora's Box of information: foreign affairs, energy policy?
- R2T §826:
  - Nuisance = harm > utility
  - Nuisance = harm < utility, but serious harm and activity can both compensate harm and continue
  - Nuisance ≠ harm < utility, if compensation would bankrupt
    - Recognize externalized benefits of industry
  - Which is worse: uncompensated πs, or out-of-bus Δs?
  - Courts reluctant to analyze so deeply

1. *Review Parker & Edgarton, Prah, Sanderson*

- Parker & Edgarton: ancient lights?
- Prah: solar panels
- Sanderson: upstream pollution

2. *Morgan v. High Penn Oil Co. (NC 1953): intentional private nuisance*

- Judge Ervin: later Watergate impeachment Nixon
- (p731) Facts:
  - 8/1945 π landowners occupied, improved land for RV park, restaurant use
  - 10/1950 Δ oil refinery began operation 1000ft – 2hr x 3days gases/odors
- Aff'd judgment for πs: $2500 + injunction
  - Nuisance = tort + property (interest = private use/enjoyment of land)
    - Unintentional: negl, reckl, ultrahazardous conduct
    - Intentional: unreasonable conduct, SL
      - Unreasonableness?
        - Jost (WI 1969): pure level-of-harm (subst'l) analysis
        - R2T §826(1): cost-benefit analysis of conduct
      - Reasonableness factors:
        - Demsetzian social customs/expectations
        - Priority in time ("coming to the nuisance")
        - Use of property
          - Liability: reas'lness
          - Balancing remedies; cost-ben if R2T
  - Here, intentional, unreasonable, so recover in damages
    - Likely to continue, so abate by injunction
- Nuisance ("interference") vs. Trespass ("invasion")?
  - (p733) "deplorable tendency of the courts to to call everything a nuisance and let it at that."
  - Trespass: no reas'lness analysis, no cost-ben balancing injunction remedy
  - Why treat intentional release of water (trespass) different from gas (nuisance)?
    - Martin v. Reynolds Metal (OR 1959): upheld trespass for fumes "in this atomic age" – any intrusion, visible or invisible
    - But Wilson v. Interlake Steel (CA 1982): excessive noise ≠ trespass unless physical invasion, damage
    - Sanderson water trespass
    - Jacques v. Steinberg Homes trespass by driving across

- Fear of damages?
  - Halfway house prop value/crime concerns cut both ways
    - Needler (AK 1972): upheld nuisance
    - Nickolson (CT 1966): dismissed nuisance claim
  - Adkins v. Thomas Solvent Co. (MI 1992): dismissed nuisance claim based on unfounded concerns/bad publicity about danger of toxic waste dump nearby
    - Smith v. Kansas Gas (KA 2007): rev'd $8M award for "stigma" dmg
- Light & air?
  - Portland Meadows (OR 1948): dismissed suit agst Δ raceway b/c π drive-in "abnormally sensitive" use (use must be reas'l & interference unreas'l)
  - Prah v. Maretti (WI 1982): solar may be nuisance if π's harm > Δ's utility
    - Sher v. Leiderman (CA 1986): reject Prah for departing from trad'l ≠ nuisance liability for stopping lights
- Spiteful conduct usually = nuisance, but spam email?
- Upham: "Hypertrophied econ analysis of law"

3. *Boomer v. A. Cement Co. (NY 1970): injunction cond'l Δ's payment*

- (p743) Δ Hudson NY cement plant: dirt, smoke, vibration – trial = dmg, ≠ injunction
  - Allow πs successive actions for damages as they occur (estimate $185k)
- Judiciary unequipped air-pollution policy (reject Restatement's breadth)
- Trad'l injunction analysis look only to significance π's harm, ignore econ disparity
  - Whalen v. Union Bag & Paper (NY): prohibit balancing of injuries
- Alternative solutions, trying to apply some cost-ben analysis:
  - Postpone injunction allow Δ fix nuisance
    - Unlikely solution short term 18mo
  - Grant injunction conditional on Δ's non-payment permanent damages
    - Subseq: total liability = $710k
    - Apply covenant of servitude on π's land
    - Effectively eminent domain? Court took property right from one party to benefit public
      - Compare Kelo (private home to Pfizer) democratic process
- Dissent: effective license to continue wrong

4. *Spur Inds. v. Del E. Webb Dvpmt. (AZ 1972): injunction cond'l π's payment*

- (p750) Facts:
  - 1911 farming in area, Maricopa County, AZ
  - 1954 Youngstown retirement community 1.5mi away
  - 1956 Δ's predecessors cattle ranch, feedlot
  - 1959 π bought nearby farms, began construction Sun City
  - 1967 π's dvpmt expanded south to w/in 500ft
  - Nuisance by odors, pests established
- Issues: (1) injunction appropriate? (2) Δ developer indemnify π rancher?
  - Aff'd injunction under public nuisance
    - Private nuisance, minor injury → damages (Youngstown)
    - Public nuisance (statute) → injunction (Sun City)
      - Standing: mbr public w/ "special injury"
        - Liberalized by R2T §821C for injunctions
      - Unreasonableness factors:
        - Public health, safety, peace, comfort, convenience

        - Conduct proscribed by statute/ordinance
        - Continuing nature, perm effect
- Remand for π's indemnity calc for π's "coming to nuisance" (later settled)
    - Relevant factor, not conclusive
    - Here, π single actor, deep pockets, brought others
        - Other cases more gradual change rural → developed; rural interests lose out
        - ~Sanderson inevitable dvpmt

D. Private Land-Use Controls: Covenants, Servitudes & Planned Communities

- (p763) Attempt at enduring land-use restrictions (~zoning, ~Guillette)
    - Compared w/ zoning
        - Zoning easy enforcement by public budget, authority
        - Covenants more flexible content (≠ due process, equal protection concerns)

1. *Easements vs. Covenants*

a) Easements: real property interest/remedies (eg RoW)

- Unlike covenant, easement value added to mkt value in eminent domain
- Enforcement may not need notice (depends on recording statutes)
- SoF applied: must be express
- Remedies: easier injunction
- At CL ≠ aff'v easements for pleasure
- Neg'v easements only light/air (Parker & Edgarton could bought easement)
- At CL, ≠ aff'v easements for aff'v obligations (eg Tulk statue upkeep)

b) Covenants: CL contractual interest intended to run w/ land

- Types (historical adaptation)
    - Real Covenants: enforceable at law
    - Equitable Servitudes: enforceable in equity
- "Requirements" (similar to estates)
    - Intent
        - Burden End → Servient Tenement
        - Benefit End → Dominant Tenement
    - Touch and concern land
    - Privity of estate
        - Horizontal Privity: btwn original covenanting parties
            - English: only landlord-tenant
            - USA: expand to grantor-grantee
        - Vertical Privity: btwn covenanter and successor in interest
        - Burden req horizontal & vertical privity to run
        - Benefit req vertical privity to run
    - Notice
- Conflict (~estates): parties' intent vs. numerus clausus
    - B/c other people will be bound beyond covenanting parties
- Adjustment to economic changes
    - Compare Johnson v. Whiton: simplify/commodify property via numerus clausus (can't set up new estate ≠ in-laws)
    - Covenants opposite (expansion) b/c limit on commercialization

        - At CL, limit covenants be req'ing horizontal privity
        - USA CL expanded horizontal privity beyond landlord-tenant
        - Gradual expansion beyond even grantor-grantee
            - Sanborn: inquiry notice
            - Neponsit: homeowners' ass'n

c) Example types

- A right to enter B's land → "aff'v easement"
- A right to enter B's land & remove something attached to land → "profit"
- A right to enforce restriction on B's land use
    - Neg'v easement, real covenant, or equitable servitude
    - Depends on several factors, incl remedy
- A right to require B to act on B's land → real covenant or equitable servitude, depending on remedy
- A right to require B to pay $ for upkeep of specified facilities → real covenant or equitable servitude, depending on remedy

d) Problems on Burdens/Benefits

- A and B are adjoining landowners. A covenants not to use land for anything but residential.
    - A has the burden. B has the benefit.
    - A → C and C attempts to build a store. B v. C. Which has to run? Burden must run from A to C. (Benefit remains in B, so ≠ run.)
    - A → C and B → D and C starts to build a store. D v. C. Which has to run? Both: Burden must run from A to C. Benefit must run from B to D.
        - Intent: yes
        - Touch/concern: yes (land use)
        - Privity:
            - Benefit: Vertical privity: yes
            - Burden:
                - Vertical: yes
                - Horizontal: NO (A & B ≠ grantor-grantee relationship; only neighbors)
        - Notice?
- A and B exchange similar covenants.
    - Who has burden/benefit?
    - A → C and C attempts to build a store. B v. C. Which has to run?
    - A → C and B → D and C starts to build a store. D v. C. Which has to run?

2. *Covenants Running with the Land*

- (p847) Historical development
    - Running burden of covenant, at law
        - English: privity of estate = landlord-tenant
        - American: privity more expansive → successors
- Ends of a covenant
    - Burden End → Servient Tenement
    - Benefit End → Dominant Tenement

- Privity of Estate
  - Horizontal Privity: btwn original covenanting parties
    - English: only landlord-tenant
    - USA: expand to grantor-grantee
  - Vertical Privity: btwn one covenanting party and successor in interest
    - Req'd for both burden and benefit to run at law
- First Restatement (1944)
  - Horizontal Privity for burden to run at law
    - Later rejected by "all commentators" as ≠ case law
    - Persistent in some states
    - Benefit run freely
  - Vertical Privity
    - Burden enforceable only agst successor to same estate as orig
      - So ≠ run to AP b/c new title by law
    - Benefit enforceable agst successor to same or lesser/portion estate

a) Third Restatement (2000)

- Horizontal Privity ≠ req'd for either burden or benefit to run
- Vertical Privity discarded in favor of distinguishing promise types
  - Negative Promises
  - Affirmative Promises
    - Lessees
    - Life Tenants
    - Adverse Possessors
      - Pre-title
      - Post-title

b) Privity Exercises

- Tricks
  - π always benefit, Δ always burden
  - Does it run?
    - If π was party, then benefit need not run b/c privity of K
    - If π ≠ party
    - If Δ party, then burden need not run b/c K liability
    - If Δ ≠ party
- A & B are neighbors. They exchange promises to use residentially. A → C. B begins to run a store. C v. B.
  - Who has benefit/burden in this litigation? B: burden, C: benefit
  - Must the benefit run? YES, b/c A → C
  - Must the burden run? NO, b/c B party to orig
  - Do you need HP? NO, b/c benefit needed
  - Who wins? C b/c VP ran benefit
- Same as #1 except C begins to run a store. B v. C.
  - B: benefit, C: burden
  - C's burden must/can't run b/c only neighbors, no HP A–B
  - C wins
- Same as #1 except then B to D and C v. D? Who wins and why?
  - C: benefit, D: burden
  - Both must run, b/c both conveyed

- Burden won't run b/c only neighbors, no HP A–B
- D wins

- In the following conveyances, the grantee always promises to use the land residentially. The Gr makes no Ps.
- Common Grantor to B/CG to C/CG to D, so that B, C, & D are now neighbors each having promised CG that she would not use the land commercially. Who can enforce these Ps against whom?

T1	T2	T3	T4
CG	B (burden to CG)	B (burden to C, CG)	B (burden to C, D)
	CG (benefit by B)	C (burden to CG) (benefit by B)	C (burden to D) (benefit by B)
		CG (ben by B, C)	D (ben by B, C)

  - B v CG after first conveyance
    - CG wins b/c ≠ promise to B
  - C v B
    - B's promise to CG (burden) ≠ need to run b/c orig K'or
    - Benefit runs to C b/c vertical CG–C
    - C wins
  - B v. C
    - C's promise to CG (burden)
    - B's land not benefited by C's promise to CG
      - B–CG only neighbors, no HP
  - D v. B or C
    - D wins both, b/c D's land doubly benefitted by C's, B's land
      - Benefit runs by VP
    - Burdens exist b/c B, C original parties
  - B or C v. D
    - D wins b/c B's, C's land not benefitted by D's promise to CG
  - CG v. D
    - CG can sue in K
  - If CG conveys to E the right to enforce, can E enforce?
    - Yes, in K, b/c promisee status

c) Tulk v. Moxhay (1848): equitable servitudes

- (p854) Action to enjoin conversion of Leicester Square from garden
- Aff'd injunction

d) Neponsit Ass'n v. Emigrant Bank (NY 1938): ass'n $, corp form OK

- (p864) Action to foreclose lien on Δ bank's land
  - Whether benefit of annual payments ran to prop ass'n
    - Promise from orig homeowners to CG dvpr
  - Whether burden of payments ran to bank
    - Bank's arg: payments never touch/concern land b/c ≠ restrict rights to land
- Facts:
  - 1/1911 Neponsit Realty recorded map of Queens resid'l subdivision
  - 1917 Neponsit → Robert Deyer, Δ's predecessor
    - Covenant/lien: annual charge, $4/2k sqft, until 1/31/1940

- Aff'd running covenant w/ land b/c subst'l effect on legal relations
    - Annual payments for infrastructure maintenance suff "touch" land
        - Non-payment would restrict land use, enjoyment
    - Privity of estate satisfied b/c real prop interests behind corporate form
        - Despite ≠ vertical privity CG → Ass'n
        - Pierce the corporate veil: ass'n = people who own land, all of whom VP w/ CG

e) <u>Sanborn v. McLean</u> (MI 1925): uniform bldg. plan, inquiry notice

- (p859) Action to enjoin gas station construction in resid'l subdivision
- Facts:
    - Haphazard covenants in chain of title (common w/ unsoph CGs)
    - Δ McLeans building gas station on their Detroit subdiv lot
    - πs neighbors claims: 1) nuisance, 2) violation of orig subdiv plan, 3) violation of reciprocal neg'v easement on Δs' land use
        - Δs: ≠ restrictions on title, ≠ notice of easement, ≠ nuisance
- Aff'd enforcement of covenant b/c restriction ran w/ land, inquiry notice to Δ
    - Reciprocal negative easement AKA uniform bldg. plan:
        - Nifty way to burden land: req'd elements
            - Universal coordination accdg to plan
                - Plan need not be homogenous
            - Reciprocity of burdens, benefits
            - Proportionality of burdens, benefits
    - Even though no recorded restrictive deed in Δs' chain of title, inquiry notice to check all deeds in subdivision
        - Even if ≠ check records, visual observation all resid'l
        - Inquiry notice = fake it till you make it
- <u>McQuade v. Wilcox</u> (MI 1921):
- Some courts (CA) take SoF more seriously: covenant must be recorded

f) <u>Rhue v. Cheyenne Homes</u> (CO 1969): architectural review

- (Supp) Subdiv only mod ranch, split-levels – covenant = arch'l cte review
    - Δs tried to move 30yr old Spanish style w/o arch'l review
        - Exhaust admin remedies? Cte stipulated would've rejected
- Aff'd injunction despite ≠ specific style req'mts in covenant
    - "So long as intention is clear"
    - Refusals by arch committee must be reas'l, good faith
        - Arbitrary & capricious std

g) <u>Davis v. Huey</u> (TX 1981): notice of restrictions

- (Supp) Facts:
    - Subdivision restrictions: 1) distance lot lines, 2) arch review
    - 1973/4 π Hueys bought lot
    - 5/1976 Δ Davises bought lot: proposed construction complied w/ lot-line distances, but rejected under arch review authority
        - Continued construction anyway
- Rev'd perm injunction & order to tear down unapproved addition
    - Arch-review paragraph insuff notice req'mts > lot lines
        - Can't contravene express req'mts (~Anderson)

- Dvpr rejection based on prior owners' tendencies, ≠ plan

h) Covenants for Columbia, Maryland (1966/67)

- Parties
  - Howard Research & Dvpmt Corp (HRD)
    - Columbia Park & Rec Ass'n (CPRA)
  - Aileen Ames, unmarried, "Declarant"
    - Unmarried status important to est ≠ other interested parties
- Chain of title: 14,000 acres
  - (10s ppl) → HRD → CPRA → Aimes → HRD → (1000s ppl)
  - HRD wanted record notice of promises (via AA) in chain title
- Columbia City
  - Annual charge up to 0.75% assessed value → lien on prop
    - Remedies: damages, foreclosure
    - Use of funds: 1) CPRA loan repayment, 2) CPRA expenses, 3) Property maintenance, upkeep
  - Community facilities
  - Duration: until 12/2065
  - Miscellaneous: CPRA assignment/successor rights
    - If CPRA disappear, owners may petition ct for trustee
- Wilde Lake Village
  - Maintenance – right to enter & repair, charge costs against lien
  - Architectural Control, Committee
  - General Covenants, Restrictions
    - No unauthorized bldg. use, subdivision, aboveground utilities, open boat/trailer storage, livestock/butchering, visible garbage
    - HRD, CPRA right of entry, w/ notice, to prun
  - Residential Protective Covenants
    - Only "high-quality resid'l neighborhood" professions: music, art, dance, education, med/dental, social clubs, seamstress
    - No clotheslines, machinery
    - By approval: multifamily use, signage
- Questions:
  - What is the structure and purpose of the conveyances among HRD, CPRA, and Aileen Ames described in the beginning? Who is Ames and why should we care about her marital status?
  - Who decides what a property owner in Wilde Lake Village can and cannot do with her property? What standards will be used? We will consider the Rhue and Davis cases in conjunction with this question.
    - Architectural Committee approval
    - Unclear stds (private agreement)
  - To what extent can the CPRA waive or amend the restrictions?
    - CPRA may increase land w/in subdivision
  - Why would a homeowners association want to do so?
    - Allow corporate residents willing to pay HOA for land, avoid increasing dues on existing mbrs
    - Tension w/ immediate neighbors of proposed expansion
      - Initial plans almost always wrong (~ zoning bd)

E. Public Land-Use Controls: Zoning Doctrine & Process

- Imagine Oldtown and Greentown. Oldtown is an inner suburb of Boston and decides that it needs to preserve its historical building stock and increase the amount of parking in its single shopping area. Greentown a town on the outskirts of Boston and decides that it wants to retain a great deal of green space and low density in the face of an advancing urban area. What options are available?
  - Eminent domain: expropriate, pay owners mkt value
    - State sovereign power
    - Limit: public use
  - Conservation easements/land trusts: pay to keep land as is, undeveloped
    - Most often private agreement, but city may, too
    - Pros: cheaper, preserve rural charm
    - Cons: remains private land, rural problems (Spur)
  - Zoning: eg area/plot size → undvpd land, wealthy landowners
    - Const'l limits (Euclid):
      - Subst'l decrease property value → effective taking
      - Public use (Euclid dist ct: socioeconomic segregation)
    - Pros:
      - Greentown: free, keep servs/taxes/density low
      - Oldtown: historic preservation, landmarking
    - Cons: no diversity of uses
      - Greentown: just green space around each residence
      - Oldtown: cost of parking (preserve existing, common fund add'l)
    - Main zoning issues
      - Zoning so drastic → taking (property):
        - Eminent domain: gen'ly OK as long as public use
        - Regulatory taking: severe zoning, environmental
      - Limits of police power; liberty violation
        - Subst'v due process (Euclid trial, Belle Terre, Mt Laurel, Moore)
      - Goals of centralized planning vs. indiv/minority rights/freedoms
        - Goals: gen'l welfare, good of majority (City? State?)
        - Rights: expression (Stoyanoff), travel, priv, ass'n (Belle Terre)
          - Peculiar US focus only gov't intrusions on liberty
          - Counterarg: rights advanced by good planning
      - Tension: comprehensiveness of plan vs. flex for unanticipated changes
        - What to do when plan hasn't anticipated demographic, tech, social, political events (~ Demsetzian assumptions)
          - Eg spot zoning: opportunism or reas'l adjustment?
        - ~ community-planning covenants options for later expansion
          - Balance controlling dvpr's opportunism vs. flexibility
          - Balance HOA's democracy vs. flexibility
        - Flex: allow prior nonconforming uses
          - Northwestern Distributors PA adult bookstore – munis powerless to compel change in nature of existing lawful use of prop unless nuisance or eminent domain
            - Minority view
          - Cts gen'ly allow amortization (time to conform)
            - Short period for unimproved land

- Longer period for easily convertible structures
- Leasehold = period of lease
- Longest/indefinite for long-est'd businesses
- Competitive advantage

1. *Introduction to Zoning*

- (p925) Police power: welfare, safety, health, morals
  - Sovereign: federal, state, tribal
  - State may enable municipal zoning by statute
- Limits of CL solutions to problems of industrialization
  - Nuisance: retrospective; courts' reluctance to hinder capital investment
  - Restrictive covenants: single-owner large-tract dvpmt only after WW2
- Ebenezer Howard (1898) Garden Cities of Tomorrow
  - Anti-urbanization
  - Foundation for modern city planning, zoning:
    - Separation of uses
    - Protection of the single-family home
    - Low-rise development
    - Medium-density population
- Daniel Burnham, 1893 Chicago World's Fair arch
  - Urbanization
  - City Beautiful mvmt: public works (incl 1901 DC plan; classic RRs)
- LeCorbusier: vertical dvpmt, elevated hwys → public housing projects
  - Mixed benefits urbanization
- Early zoning adoptions:
  - 1909 LA industrial restrictions
  - 1916 NYC 1st comprehensive zoning assignments
  - 1922 model statute: Std State Zoning Enabling Act
  - 1925: 368 municipalities had zoning ordinances
    - Constitutional challenges as uncompensated takings

a) <u>Euclid v. Ambler Realty</u> (US 1926): zoning = police power

- (p929) Test case: Cleveland suburb
  - Reduced π's land value by ¾ ($10k comm'l → $2.5k resid'l)
    - Standing: pot'l injury in fact, but ct overlooked exhaustion
  - Suburban zoning as interfering w/ Cleveland's expansion
  - Complex zones: 6 use, 3 height, 4 area ≠ justifiable as nuisance
  - π challenged entire ordinance as unconst'l deprivation liberty/prop w/o due process
    - Liberty to use land as want (<u>Lochner</u> subst'v due process)
    - Property: value of land (disputed economic effects)
  - Political issue
    - "Natural" dvpmt of Cleveland (view: mkt = natural)
    - 19th C logic – controlling industry unnatural
      - vs. municipality as separate legal entity w/ own powers, self-gov authority → central planning
- District Ct struck down zoning as unconct'l "straightjacket"
  - Exacerbate class divisions, aesthetic purpose – must compensate
  - Foresaw zoning challenges

- SCOTUS rev'd for Δ Euclid: police power → gen'l zoning
  - o Std of review: clearly arbitrary (≠ welfare, health, safety, moral)
  - o Zoning = regulation of living
    - ▪ Not only resid'l/industrial, but also homes/apts
    - ▪ Health, safety concerns: traffic, light, air, immoral poors
  - o Specific ordinances could wait for specific challenges
- Euclidean zoning:
  - o Highest: single-family residences
  - o Lowest: worst industry (or prisons & asylums?)
    - ▪ Lower-use zones inclusive of higher zones (but ≠ vice versa)
    - ▪ Modern preservation industry may prohibit cum'v zoning
  - o Chused (2001): "Overt licensing of segregation by class"
    - ▪ Exclude undesirable neighbors

b) Admin: Legislation, Comprehensive Plan, Economics

- (p941) Enabling legislation
  - o State police power (welfare, health, safety, morals)
    - ▪ Delegated to municipalities
    - ▪ Jackboot of the state (vs. HOA?)
  - o Standard State Zoning Enabling Act
    - ▪ Height, # of storys, size of bldg
    - ▪ % of lot occupied, size of open spaces
    - ▪ Population density
    - ▪ Land/bldg use
  - o Planning/Zoning Comm'n (leg'v – deferential review)
    - ▪ Citizens appt'd by mayor, (ideally) advised by experts (dept)
    - ▪ Recommend comprehensive plan/amendments to City Council
      - City Council writes regs, ords (should consistent CP)
    - ▪ Amendments by City Council at request of Comm'n
      - But also spot zoning at request of indiv
  - o Bd of Adjustment/Appeals:
    - ▪ Enforce via Bldg. Inspector permits
    - ▪ Adjudication & flex mechanisms (admin – strict review)
      - Variances: practical difficulty, unnecessary hardship
        - o Const'l issue: risk regulatory taking
      - Special exceptions ref'd in CP
        - o Statutory issue: appropriate application?
        - o Planned Unit Dvpmt (PUD): flex use conforming w/ density
- (p942) The Comprehensive Plan
  - o Statement of local govt's obj & stds for dvpmt: maps, charts, text
    - ▪ Only req'd by ½ states – often weak jud'l req'mts
    - ▪ Even ordinances inconsistent w/ CP may be upheld valid
      - Real-world unpredictability of planning
      - Better: short- & mid-term planning + long-term flex
    - ▪ Sullivan (1999) Modern trend toward greater weight on plan
  - o Planning challenges, eg post-WW2 suburbanization, malls, urban decay, ghettoization, suburban sprawl into farmlands
    - ▪ Air travel decimated RRs
    - ▪ 1960s zoning as reactionary to above forces

        - Frug, The Geog. of Community, 48 Stan. L. Rev. 1047 (1996)
- The Economics of Zoning
    - Justifications
        - Internalize externalities where bargaining (servitudes), judicial determination (nuisance) insufficient
        - Racism, class-based segregation
        - Monopoly zoning: raise property values by creating scarcity
    - Empirical evid: land use regulation → higher prices land & housing
        - Decrease negative externalities, provide positive amenities → increase desireability, raise prices
        - Scarcity → raise prices

2. *Expanding the Aims of Zoning: Aesthetic Regulation*

a) Stoyanoff v. Berkeley (MO 1970): aesthetic OK

- (p969) Facts:
    - Ladue, MO: wealthy StL suburb – Arch Bd restrictions
    - π Berkeley mod bldg. plan, though compliant, was denied as ugly
- Rev'd mandamus order ifo City's power to regulate aesthetics → prop value
    - Expanded view of social welfare
        - Aesthetics in context of stable property values
            - Critique: Michelman (1969): derivative/symptomatic analysis b/c ugliness → devaluation
    - Arch Bd process adequate
- Dvpmt of jud'l view of zoning
    - Nuisance = health, safety ≠ aesthetic
        - Some stretches of nuisance logic, like billboards pot'ly falling
    - Berman v. Parker (US 1954): expanded public welfare: physical, spiritual, aesthetic, monetary → beauty, health, spacious, clean, safe
        - 31 states allow indep aesthetic justification police power
        - Justify historic preservation zoning

b) Anderson v. City of Issaquah (WA 1993): vague aesthetics NO

- (p978) Facts:
    - Issaquah zoning: harmony, quality, ≠ monotony
    - Anderson comm'l builder, $250k investment
        - 3 hearings: vague advice to redraft, investigate locale
- Procedure: denied by Dvpmt Comm'n – aff'd (4-3) by City Council
    - Trial ct aff'd dismissal
- Rev'd for π Anderson – unconst'ly vague, facially and as applied
    - Facial analysis
        - No meaningful guidance (amici Am. Inst. Archs. Agreed)
            - Only concrete req'mt = screening machines from view
        - Procedural safegds, eg appeal, ineffectual b/c ≠ text for review
            - Anderson wanted "clearly erroneous" std
            - City wanted "arbitrary and capricious" std
    - As applied?
        - Comm'nrs' subj feelings of unwritten statement of City
    - Although ≠ settled, aesthetics OK as one consideration land use

- Architects against legislating beauty
    - No guidance, pot'l waste of money
    - Promote dull safety, simplistic sameness
    - Venturi (1985): Frank Lloyd Wright would've been denied
- Portland, OR, snout house prohibition?
- Unconstitutional vagueness
    - Palos Hills (IL 1992): "inappropriate to, or incompatible with, the character of the surrounding neighborhood and cause subst'l depreciation of prop values"
    - Hanna v. Chicago (IL 2009): "value," "important," "significant," "unique" → "vague, ambiguous, and overly broad"
    - Vagueness N/A to private covenants
        - Commentators urge stricter scrutiny
- 1st Am never applied to home design – why?

3. Expanding the Aims of Zoning: Household Composition

a) Village of Belle Terre v. Boraas (US 1974)

- Facts (p1019):
    - πs Dickmans (own), 6 student colessees (Truman, Boraas, Parish, +3)
    - Δ Belle Terre (Long Island) zoning restriction: single-"family" only
        - Blood, adoption, marriage relation, or
        - ≤ 2 unrelated
- Douglas rev'd for Δ under arbitrary/capricious std
    - Euclid: arbitrary std
    - Berman v. Parker expansion public welfare incl slum-clearing
        - But ≠ racist zoning (Buchanan v. Warley)
        - ≠ neighbors' vote (Seattle Trust Co v. Roberge)
    - This zoning ≠ fund'l Const'l right (voting, ass'n, justice, privacy)
        - Presumptively Const'l unless arbitrary
        - Leg'v discretion
- Marshall dissent: Const'l infringement → strict scrutiny
    - Euclid rule would apply to Dickmans alone, if econ interests only
        - No takings problem
    - Buchanan (1954) decided despite separate-but-equal regime
    - First Am: freedom ass'n, right to privacy, travel
        - Ass'n → selection of living companions
        - Privacy → est home, living companions deeply personal
            - Gov't enforcement moral selectivity unconst'l
    - Douglas's hypocrisy: 1973 Food Stamps case: ass'n → household
    - Std of review: necessary protection of subst'l, compelling gov interest
        - Here, alt means available
        - Restriction both under-, over-inclusive
            - Under: unlimited relatives
            - Over: few elderly cotenants
- Moore v. City of E. Cleveland (US 1977): ltd Belle Terre by invalidating zoning ord criminal > 1 set grankids in home – deep slice into family itself
- State courts:
    - McMinn v. Oyster Bay (NY 1985): relatives or ≤ 2 both 62+ invalid under NY const due process

    - Santa Barbara v. Adamson (CA 1980): ≤ 5 unrelated invalid under CA's broader right to privacy
    - Delta v. Dinolfo (MI 1984): Belle Terre ≠ guide to state const
    - Kirsch v. PGC (MD 1993): stricter req'mts for unrelated students invalid under equal protection
    - But Ladue v. Horn (MO 1986): upheld restriction agst unmarried couple w/ kids from prev marriage b/c gen'l welfare, so relaxed test
    - Glassboro v. Vallorosi (NJ 1990): avoided const'l issue by defining statutory "family" as incl 10 students w/ shared budget, chores
        - Functional std: must apply equally to related, unrelated

b) NAACP v. Tshp of Mt. Laurel (NJ 1975): exclusionary zoning

- Facts (p1036): Mount Laurel 1960/70s 4x population boom – zoning
    - Industrial: 29% land, 100/2,800 actually used
        - 2,700 "industrial" acres owned by someone w/ can't use
        - Pretextual zoning: zone industrial for non-use
    - Retail: 1%
    - Resid'l: 70%: only single-family, ¼ – ½ plots, < density
        - 3 Planned Unit Dvmpt projs – negotiated mlti-fam bldgs., but bedroom, children limits
        - High-income retirement zone
    - Justifications: < taxes, environmental preservation?
- Action by NAACP obo present/former residents, nonresidents, housing orgs
    - Municipal policy to force our poor residents
        - "Affordable" → "workplace" housing
    - Dramatic change/liberalization in state standing qualifications
        - Fed ct still narrow standing rules
- Aff'd invalidation of restrictive zoning (state const'l law)
    - Modified trial judgment to allow Mt Laurel to amend
    - Every "dvping" muni land use regs presumptively make realistic variety, choice of housing for fair share regional needs
        - Zoning = state police power so must consider all state citizens
        - Presumptive obligation (burden shift to Δ)
            - Procedural:
            - Substantive:
        - Zoning → gen'l welfare
            - Pure fiscal (< taxes) justifications never OK
            - Environmental justifications case-by-case (not here)
        - B/c NJ law ≠ regional taxing, zoning, each muni must consider regional demographics
            - Region: gen'ly radius (may incl out-state commuters?)
            - Fair share: gen'l industry use
    - "Developers' remedy" – order Mt Laurel to change zoning to allow for nat'l growth of housing (neither cts nor city create housing; dvprs do)
        - Idea: public institutions step back and allow mkt to function
            - vs. public housing?
        - Upham: easy, light burden on Mt Laurel
            - Mt Laurel actions no worse than comparable munis, given fiscal & state-tax arrangements

        - Local servs by local taxes – most expensive: schools, med, police, fire, roads, sanitation
        - Fewer residents, more self-reliance
        - No incentive to allow young, old, sick, poor to move in
    - Dramatic shift in police-power analysis to state/reg'l needs
      - But state's legal right often < political power
- Exclusionary zoning techniques
  - Min housing cost: invalidated b/c unrelated to gen'l welfare
  - Min floor-area: mixed jud'l reaction
    - Superceded by housing codes complying w/ 1954 Housing Act (urban renewal)
  - Min lot size: upheld if justified by community – some skepticism
  - Min setback: upheld as environmental improvement (light, air)
  - Barring home types (trailers): usually upheld
    - Some modern resistance, esp in South
- Fed Const'l law uneasy foundation for challenging exclusionary zoning
  - <u>Lindsey v. Mormet</u> (US 1972): housing ≠ fund'l right
  - <u>San Antonio v. Rodriguez</u> (1973): wealth ≠ unconst'l classification
  - <u>Belle Terre</u> (1974): single-fam = reas'l public welfare
  - <u>Warth v. Seldin</u> (1975): nonres ≠ standing unless concrete facts/injury
  - <u>Arlington Heights</u> (1977): must show discrim intent
- Legacy:
  - <u>Mt Laurel</u> (1975) based on deregulation, trickle-down econ ideas
    - Loopholes:
      - Only "dvping" communities
      - Sensitive ecology
      - Question how to calc fair share of region
  - <u>Mt Laurel II</u> (1983): struck down Δ's paltry plan
    - Every muni, not just dvping ones
    - Fair share by the numbers
    - Aff'v measures
      - Help dvprs acquire state/fed aid
      - Inclusionary zoning
    - Assignment to one of 3 judges
    - Builder's remedy: ct override of municipal rejection
  - NJ Fair Housing Act (1985)
    - Moratorium on builder's remedy
    - Council on Affordable Housing: subst'v certification: protect 10yr from builder's remedy
    - Regional contribution agreements: suburbs pay cities to rehab bldgs., house low-income residents
      - Eliminated 2008
    - Formulaic "growth share"
  - Kirp, NYT (2013): Mt Laurel Experiment
    - 32yr (1970–2002) delay in providing housing for poor
    - Positive developments since inclusion – no difference crime
      - Benefits for participating families
- Other states

    - PA: must zone for all reas'l housing types, dvprs may sue for muni noncompliance
        - Bilbar (PA 1958): 1acre lots OK for open space, low density (atomic attack)
        - But Nat'l Land (PA 1965): rejected 4acre lots b/c
            - Large homes/lots ≠ green belt, ≠ rural character
            - Zoning ≠ avoid > responsibilities fr time, nat'l growth
    - NY: Berenson (NY 1975): ct may annul inadeq zoning ords, but ≠ aff'v relief
    - MA: broad qualifications to apply for low-income bldg. permit, state appeals procedure
    - CT: expedited jud'l appeals for affordable housing
    - OR: Land Conservation & Dvpmt Comm'n auth to require add'l muni plans, issue permits if unmet need
- Charles Tiebout (1956) Hypothesis:
    - Local zoning → specialization, competition among municipalities
    - Citizens may vote with feet (but skewed incentives?)
    - Better than "Waring Blender" model: diversity w/in muni, but none among munis
    - But undesireable effects:
        - Consolidate wealth
        - Spillover effects: externalities → inefficiencies
- Zoning History
- Inclusionary Zoning
- Take yourself back to the Republican primary debates of 2012 and the positions of the various candidates. Would Gingrich, Paul, Romney, Perry, and Santorum approve zoning as illustrated by these cases? (You get extra credit for Huntsman and Bachmann.)
    - Would Obama?
    - Do you?

IV. CONSTITUTIONAL PROPERTY: EMINENT DOMAIN AND REGULATORY TAKINGS

A. Formal Takings

- Fifth Am: "nor shall private prop be taken for public use, without just compensation"
    - Confirmation (≠ grant) of existing power
    - Applies to states via Fourteenth Am's Due Process cl
- Takings: ancient Rome, feudal England, US colonial statutes, CL, US Const
    - State police power
        - Johnson v. McIntosh: "conquest gives a title that the courts of the conqueror cannot deny" – courts' deference to sovereign's constitution
        - Positive law > natural/moral law
    - Theories of justification:
        - State's original/prior poss'n – implied reservation of reacquisition
        - Remnant of feudal tenure (royal ownership)
        - Inherent to sovereignty/governance
        - Posner (2007): Functional antimonopoly – mkt failure in high-transaction-cost settings – shift resource to more valuable use
            - Imperfect in practice: eg inefficient schools, post offices, etc
- Why compenstion? (US colonial CL, Const)

- Moral imperitive? English tradition? Blackstone said so?
- Am liberalism/indiv rights? (Eg Madison incl protect expropriation of rich)
- Posner (2007): incentivize govt to consider mkt value – internalize costs
- Fischel & Shapiro (1988): protect private investments in land; control gvt expansion
  - Eg uncond'l hurricane ins would incentivize unconstrained coastal bldg.
  - Michelman (1967): fairness
  - But Levinson (2000): gvt actors respond to pol forces, so compensation perverse result both inefficiency & injustice
    - Public choice: gen'l welfare as perceived by constituents

1. *<u>Berman v. Parker</u> (US 1954)*

- 1945 DC Rev'mt Plan: clear slums, build streets, facilities, sell remainder priv dvprs
- Dept store owner challenged b/c (a) his store not blighted, (b) "better balanced, more attractive community" ≠ public use
- SCOTUS (Douglas) deferral to Cong, whole-plan review (≠ piecemeal, lot by lot)
  - Public welfare broad: incl spiritual & physical, aesthetic & monetary, beauty & health, spacious & clean, well balanced & safe
  - Urban renewal OK, even unblighted props

2. *<u>Hawaii Housing Auth. v. Midkiff</u> (US 1984): rationally related public use*

- Facts (supp):
  - HI feudal land tenure system → 1960s 49% gvt owned, 47% in 72 hands
    - Oahu: 72.5% fees simple in 22 hands
    - Public purpose: eliminate oligopoly
  - HI Land Reform Act 1967: Housing Auth (HHA)
    - Tenant-initiated condemnation (25 or ½)
    - HHA public hearing whether acquisition = public purposes
    - HHA acquisition (price by trial or lessor-lessee negotiation)
    - HHA sale to tenants (up to 90% purchase price)
      - Conditional 10yr right of first refusal
      - Limits: sell one lot per tenant/purchaser; non-profit
- 9th Cir for πs:
  - <u>Berman</u> req state's actual poss'n/use of taken property
  - State leg'v takings > scrutiny than Fed
- SCOTUS (O'Connor) rev'd for HHA: takings OK
  - Narrow scope of jud'l review of leg'v takings schemes
  - Takings power coterminous w/ state police power
  - OK as long as "rationally related" to "conceivable public purpose"
    - Purpose (ends) > mechanics (means): no actual poss'n req'd
- Legacy: assumed to be limit of taking power: few private → many private

3. *<u>Kelo v. City of New London</u> (US 2005): public use = econ dvpmt*

- Facts (p1065):
  - 1998 New London CT unemployment 2x state's, lowest pop since 1920
  - 1/1998 City revived New London Dvpt Corp: state bonds > $15M
  - 2/1998 Pfizer announced $300M research facility
  - 5/1998 city council auth NLDC to submit dvpmt plans to state for review
    - 7 parcels: 115 private properties + 32 acre ex-naval base
  - 1/2000 city approved plan, designated NLDC as agent

- Procedure:
    - 11/2000 breakdown negotiations w/ 9 landowners (15 lots in parcels 3, 4A)
        - Condemnation proceedings
    - 12/2000 π landowners sued for injunction:
        - Trial granted for 11 lots (park) but not 4 (office space)
        - CT S Ct rev'd for NLDC: all takings valid (econ dvpmt = public use)
            - Dissent: econ dvpmt > std jud'l review: clear/convincing evid of econ benefits
- SCOTUS (Stevens) rev'd for city/NLDC: econ dvpmt takings = valid
    - 5th/14th "public use" = public purpose
    - <u>Berman</u>: jud'l deference; broad public welfare; whole-plan analysis
    - <u>Midkiff</u>: deference; purpose > mechanics; social evils of oligopoly = valid
    - Federalism
    - Econ dvpmt = trad'l & long accepted fct of gvt – incidental private benefits
        - States may statutorily/const'ly restrict 5th Am takings – public debate
- Concur (Kennedy): incidental/pretextual public benefits shouldn't cure invalid taking
- Dissent (O'Connor): 3 categories of takings
    - Private prop to public ownership, eg road
    - Private prop to private parties for public use, eg common carriers
    - Private prop to private parties for public purpose, eg <u>Midkiff</u> (oligopoly), <u>Berman</u> (blight) – "Most troubling:" likely beneficiaries = rich, powerful
    - Upham agrees
- Legacy:
    - Property-rights wing of Tea Party
    - ~37 State leg'v responses limiting takings power
        - Broader power under Fed Const

a) Public Use: Purpose & Process

- Competing constructions ofa doctrine "in shambles"
    - Narrow view: actual use or right to use of condemned prop by public
    - Broad view: advantage or benefit to the public
- Ends-testing (by purpose)
    - Can the government do this? If "public use"
        - Public ownership
        - Public access
        - Public purpose gen'ly (amorphous, controversial)
    - Epstein (1985), Merrill (1986): if takings power coterminous w/ police power (deprive liberty/prop w/o $), then duty to compensate?
        - Proposal: limit "public goods" to defined econ category
        - Krier & Serkin (2004): yes, b/c text of 5th Am – real Q = level of scrutiny of public use issue
- Means-testing (by process)
    - Reasons for process, hearings
        - Is there a hidden, invalid purpose?
        - Can the government do this another, better way?
        - Notice, opp'y to be heard (litigant fairness)
            - Democratic legitimacy
    - <u>County of Wayne v. Hatchcock</u> (MI 2004): invalidated clearing unblighted land near Detroit airport for business park/econ dvpmt
        - Valid public use only if:

        - Extreme pub need to take to assemble land on behalf of orgs w/ public benefits (eg RRs, hwys); or
        - Condemned prop subj to public oversight after transfer (eg public utility); or
        - Taking not for private benefit, but for “facts of indep public significance” (eg clear blight)
- Judicial scrutiny:
    - Kelo: ends test, deferential scrutiny
    - Some states: close scrutiny (eg least intrusive means)

b) Just Compensation

- Only applied to States post-Civil War (14th)
- Posner (1988): JC gen’ly defined as mkt value (value of marginal owner)
    - Fair mkt value inherently too low, b/c rational owner would’ve sold
        - Or too much, b/c dependent on so many idiosync factors
    - Most owners “intramarginal” (value > mkt), so add’l cost justified only for public use
- SCOTUS (564.54 Acres 1979) rejected “personal value” compensation b/c practically difficult, subjective
- Binary determination in/validity of taking
    - Error costs
        - Mistakenly killing efficient gvt programs
        - Mistakeny approving non-beneficial, inadeq compensation
    - Alternatives:
        - Maintain trad’l just compensation for classic public-use takings
            - Proportionally increase compensation as f(skepticism)
        - Insurance premiums as proxy for land value
            - Eg Taiwan 2 land values: 1) ins and 2) eminent domain
        - Other countries (Canada, England) have used leg’v schedules, formulae to compensate special add’l value
            - Eg China make-whole value, avoid chance windfalls
                - Process fairness, but overlooks unfairness of reselling to highest bidders, eg hotels
- Fennell (2004): JC ignores 3 components of value
    - Owner’s subjective value
    - Assembly/aggregation surplus of several parcels
    - Compromised autonomy by forced sale
- Other issues
    - Gvt use of portion that changes value of remainder?
        - Gvt use affects rate of appreciation?
    - Mkt value before or after restrictive zoning?
        - Mkt value considering potential future zoning?
    - Fed taking state land? Substitute facilities compensation?

- Why allow the state to take property and what power is the state exercising when it does? How should that power be defined and its exercise limited? What should be the measure of “just compensation”?

4. *Goldstein*

5. *Kaur v. NYS Urban Dvpmt Corp (NY 2009)*

- Facts / Timeline:
    - West Harlem: 125th → 135th St., 12th Ave. → Broadway/Old B'way
    - Columbia Univ. Educational Mixed Use Dvpmt Land Use & Civic Proj
        - 17 acres (2 public access); 6.8M sqft in 16 new bldgs, 1 rehab
        - $6.28B Columbia's (≠ muni contribution) ($8B endowment)
    - 2001 began redvpmt planning
    - 8/2002 NYC Econ Dvpmt Corp (EDC) West Harlem Master Plan
        - Ernst&Young ≠ blight: 54/67 lots in fair, good, very good condition
    - 2002-03 Columbia bought up 51% proj area property
    - 3/2004 Empire State Dvpmt Corp (ESDC), EDC, Col. comdemnation plans
    - 6/2004 Columbia K w/ ESDC to pay everything, hired AKRF consultants,
    - 8/2004 Urbitron "Blight Study" for EDC → blight
    - 2004–06 ESDC sought own study, hired Col's AKRF
        - 11/2007 AKRF study → blight
    - 12/2007 NYC Planning Comm'n hearings approved rezoning
        - 6–7/2007 court orders compelling doc release: ESDC–AKRF ties
    - 2/2008 ESDC hired Earth Tech to audit AKRF study
        - 5/2008 Earth Tech study → even worse blight (Col owned 48/67 lots)
    - 7/2008 ESDC Gen'l Proj Plan (GPP)
        - 9–10/2008 ESDC public hearings → 12/2008 auth acquisitions
    - Procedure: 2/2009 storage facility, gas station owners challenged ESDC determinations condemning, taking unblighted prop w/o pulic purpose
        - App Div rev'd for π landowners
        - Ct Appeals rev'd for Columbia
- Issues
    - Closed hearing before FOIL: ESDC withheld 5 docs (gave 8000)
        - Probably immaterial b/c unmentioned in opinions
    - Civic project (further US Const'l inquiry: public use?)
        - Private, elite university
        - Public benefit of graduate research, facilities, rent-free school (49yr)
            - But "public space" actually just open space still priv own
            - But primary users univ residents – old residents forced out
        - Columbia offered to pay for whole proj, ESDC's costs
            - ~NYU2031 superblocks S of Bobst: faculty, low-income
                - 1961: urban renewal, high-density w/ green space
                - But 100% NYU owned, needed only spot zoning
                - Alternative: buy more land – horizontal expansion
        - NY statute: (1) need in area & (2) proj will satisfy need
            - Practically, courts considering future needs of city, state
            - Tension: local, regional, state needs
                - Reverse of Mt Laurel (town must consider state needs when exercising state power)
        - Reactions against civic proj justifications
            - Gradual, progressive expansion public use
            - Kelo dissent (O'Connor)
            - Poletown → Hatchcock (MI 1990s–2000s)
    - Blight

        - Columbia colonized neighborhood, exacerbated blight
        - Fishy process: anticipating holdouts, asked for eminent domain
            - Std practice in urban dvpmt?
            - Increasing holdout problem of bilateral monopoly
        - Contra New London's democratic process in Kelo, but lot now empty b/c Pfizer backed out
- Interaction btwn App Div – Ct Appeals
    - Ct Appeals: App Div owed deference to ESDC, ≠ de novo fact review
        - App Div: ≠ de novo review, but using unchallenged facts from record indicating corrupt process, void finding of blights

B. Judicially Implied Takings

- Due process:
    - Attemped negotiated purchase
    - Petition in court, notice to all interested parties
    - Trial (jury?): gvt's auth to condemn
        - Gvt deposit/bond? (≈ compensation amt)
    - Gvt pay compensation + int

1. *Categorical Rules*

a) Loretto v. Teleprompter Manh. CATV (US 1982) perm phys occup'n = $

- (p1082) Pre-1973: CATV 5% revenue share for cable installation
- 1973 law: onetime $1, landlord ≠ object, ≠ demand payment from tenants
- Class action: Sup. Ct. (1979) SJ for Δ, aff'd at App. Div. & Ct. App. (1981)
    - π bought bldg. after cable line installation (n/a to decision)
        - Cable line > value of property
    - Legitimate police power: TV → gen'l welfare
- Marshall aff'd for NYC
    - Any permanent physical occupation = taking
        - Destruction of property rights
            - Poss'n: ≠ power to exclude
            - Use for profit (significant, ≠ dispositive)
            - Disposal: only bare legal right, but < by ≠ use
        - Eg:
            - Causby direct overhead flights
            - Navigational servitude req'ing public access to pond
        - But ≠:
            - Public shopping ctr free speech req
            - Eagle-feather sale prohibition
            - Housing regulations
- Blackmun dissent (Brennan, White): balancing test
    - Untenable dichotomy permanent vs. temporary phys occupations
    - Intabgible gvt regs often > econ harm than phys occupations
    - What = "permanent?"
    - What = "physically touched?"
- Remand, NY upheld statute, calculated fair payment as $1
- Yee v. City of Escondido (US 1992): RV park restriction ≠ taking
- Who owns expropriated roof space?
    - Most likely easement interest (≠ FS) to City

- Right to alt use? Probably not, b/c unique leg'v purpose
- Is the court correct when it states on 1087 that compensation would be required if the state required a pool be built by "third parties" on the roof "for the convenience of the tenants"? (~ Loretto)
  - Exercise of police power? Gen'l welfare? Public use/benefit?
    - Analogy to cable TV, other bldg. code req'mts
  - Compensation b/c "permanent" phys occupation?
    - But 3d party req'mt for large-scale dvpmts? Why not?
- What if the State required landlords themselves to provide swimming pools?
  -

b) Hadacheck v. Sebastian (US 1915) brickyard noxious use ≠ $

- (p1096) Habeas action from misdemeanor zoning violation
  - π's brick yard before LA expansion: $800k bricks; $60k no bricks
  - LA rezoned 3sqmi (2 brick yards) around π's 8 acres
- SCOTUS aff'd CA dismissed b/c police power – "public bad" test
  - Nuisance-control is never a taking
    - No inquiry whether neighbor would win a nuisance suit
  - Progress (econ dvpmt) > private interests
    - Limits: ≠ arbitrary, ≠ discriminatory
  - ~ Reinman v. Little Rock: livery stable
  - π still free to use prop to extract clay, mfg bricks elsewhere
    - ≠ Kelso (CA): downzoning quarry = taking
- State power
  - Police: prevent public harm (≠ compensation)
  - Eminent Domain: promote public good (compensation)
- Michelman criticism: blurry line btwn public bad & good
  - Just v. Marinette County (WI 1972): wetlands control ≠ taking
    - Neutral benchmark: natural/indigenous uses
    - Division other state courts
- In Hadacheck why didn't the court consider indemnification as in Spur?
  - Deep-pocketed dvper: Del Webb
  - Less-planned expansion of LA vs. Del Webb – foreseeable?
  - LA's gen'l welfare, so why not have taxpayers pay?

c) Lucas v. S.C. Coastal Council (Scalia 1992) "total taking" = $

- (p1131) Facts:
  - 1977 SC Coastal Zone Mgmt Act (≈ 1972 US) – permit critical areas
    - Notice of pot'l future changes?
  - 1986 π $975k 2 island beach lots for single-fam homes (≠ critical)
    - Vicki Bean Property Story: Lucas bought lots anticipating law
  - 1988 Beachfront Mgmt Act barred π any perm habitable structures
- Trial for π (compensable taking), rev'd by SC b/c police power
- SCALIA rev'd for π: if total deprivation of econ use, then taking
  - Can't regulate out noxious use unless landowner never had lawful right to noxious use in first place
    - Inquiry: whether neighbor would win nuisance suit
  - Should legislature be able to devalue investment-backed expectations?
    - No, only by judges

- Bkgd view of law as value-neutral web of rules
  - Assumption: leg'v change vs. jud'l application
- Accepted trial ct's total econ deprivation finding
  - ~ Pierson stipulation (harm, depr) – bad faith by state AG?
  - Exception: preexisting bkgd prohibition by CL prop, nuisance
    - Michelman "baseline neutral"
  - Q: would removing/reducing subsidized emerg ins = taking?
    - Publicly funded roads/bridges?
- Eminent domain (public use) disguised as police power (public harm)
  - Upham: but all regulation = police power
    - Q: when does police power go too far → compensation
    - Midkiff: coextensive police/eminent domain powers
- Nuisance principle as "early attempt" by Court
  - Leg'v "harm" too relative – econ measure better
  - But nuisance test (p1138: degree harm, socialvalue, avoid'l)?
- Remand for SC to put forth reasons consistent w/ CL nuisance
  - State legislatures driven by politics (would always justify), so "harm" finding must be based on prior jud'l finding
  - Possible outcomes:
    - ≠ reconsider econ diminution
    - ≠ AG reference leg'v findings
    - Ct's factfinding/gen'l policy: whether bldg. houses along shoreline more likely than not → public harm
      - Judges indep from politics (democratic process)
        - But SC jud'l election by legislature

- Kennedy concur: deprivation analysis questionable given record
- Souter: econ deprivation ≠ issue on appeal – should never have granted cert
  - ~ Pierson stipulation (harm, depr) – bad faith by state AG?
- BLACKMUN dissent: missile to kill a mouse
  - Shouldn't rely on trial court finding unreviewed on appeal
    - ~ Pierson stipulation (harm, depr) – bad faith by state AG?
  - Legislature's prerogative to define public nuisance/gen'l welfare
  - Other property rights: exclusion, live on w/o perm structure, alienate
  - Precedent based on State police power, never extent of deprivation
    - Same relativity problem as "harm" – which "property"?
      - Michelman: denominator problem
  - Bkgd principles (nuisance/prop) incl only CL, not statutory
    - But prior jud'l decisions also based on "harm"
  - Ahistorical analysis: compensation recent phenomenon
- Stevents dissent: arbitrary all-nothing line
  - Likely outcomes:
    - Courts will alter denominator prop right to ignore ruling, or
    - Investors manipulate interests to ensure 100% loss
  - Court's arguments
    - ≈ physical appropriation: same problem ½ lot, but ≠ comp
    - Total takings relatively rare so < impact on governance
      - True of any small class of regs
    - Heightened risk expropriation: should turn not on extent of diminution, but on specificity of expropriating act
      - Here, gen'l reg applicable all coastline

- Freezing state CL into development insurance
  - But CL can adjust accdg to new knowledge
    - But efficiency ex post jud'l vs ex ante leg'v?

2. *Balancing Tests*

a) Miller v. Schoene (US 1928): cedar rust – arbitral test

- (Supp) Δ state etomologist (insects) ordered π destroy rusted red cedars
  - Cedar rust: benign to cedar hosts, destroy apples
    - Red cedar native to VA, small lumber industry
    - Apples significant VA ag: $millions
  - 1924 Cedar Rust Act:
    - Investigate upon request of 10 county residents
    - Order destruction (reimburse) w/o compensation value/dimin
      - Δ losing aesthetic value of trees
- J Stone: when forced to choose between preserving one class of property over in dang proximity, state OK use police power to save prop w/ > public benefit
  - Even state inaction would be effectively choosing sides
    - Application of Michelman's/Scalia's neutral baseline
  - No need to consider CL nuisance b/c unavoidable choice
    - More valuable use wins nuisance claim

b) Penn. Coal v. Mahon (Holmes 1922): "too far" – diminution in value

- (p1103) Injunction action:
  - 1878 Δ PA Coal conveyed Scranton surface rights to π Mahon
    - Δ reserved mining/support rights; π waived all dmg claims
  - 1921 Kohler Act ≠ mining if subsidence threat to surface homes
    - Exception: miner owns surface & >150ft other improved prop
    - (Omitted mining custom: compensate subsidence)
- Holmes: rev'd PA, reinstated trial ct for Δ – unconst'l police power
  - Police power = public interest
  - While prop may be regulated certain extent, if regulation goes too far it will be recognized as a taking – diminution in value test
    - Estates: surface vs. support (vs. mining) – cncp'l severence
    - Making mining comm'ly impracticable to mine "certain" coal ≈ appropriation/destr
      - Implied 100% loss support estate (amt coal supp surf)
      - ~ Sanderson: value of coal = mine for profit
  - Statute addresses private, not public harms, even though repeatable
    - Overreach of police power (gen'l welfare)?
      - But if ≠ gen'l welfare, then no right to take even if pay
    - Subtext: limits of uncompensable police power (noxious use)
      - Midkiff assumption of broad police power
  - Personal safety ≠ issue in statute b/c miner warn/notice to homeowners
  - Reciprocity of advantage:
    - Plymouth Coal req'mt support estate adjacent miners
    - ~ Sanborn uniform bldg. plan (covenants)
      - ~ Euclidean zoning
  - Slippery slope: qualify absolute prop right protection by police power

- Bkgd: recognize cheaper price paid by homeowners for coal surfaces
  - "Strong public desire to improve public condition is not enough to warrant achieving desire by shorter cut than const'l way of paying for change." – spread the burden
    - But in fact animating motive local (suburban) gvt
  - If public wants support rights, public should pay for them
- 1st est jud'ly implied regulatory takings idea

- Brandeis dissent:
  - Police power = health safety, morals
  - Police power to abate public nuisance (≈ emitting noxious gasses)
    - Public goal unaffected by incidental private benefit
    - Counterarg: if truly public interest, then reg should apply to all fees, incl those owned by coal cos
  - Conceptual severance: "value" in Holmes's test is relative denominator problem:
    - Should value land rights (surf, supp, mining) as whole bundle
    - Statute reas'l b/c self-interest prevent subsiding own land
    - Remaining value – profitability
      - Continuing practice of compensation
      - Continued mining even after <u>Keystone</u> (1987) upheld support-estate statute barring waiver support rights
  - "No room for considering reciprocity of advantage" in prohibitions, b/c n/a precedents: oil tanks, brickyard, livery stable, billiard hall, margarine factory, brewery

c) <u>Penn Central v. NYC</u> (1977-78): landmark zoning

- Facts/Timeline
  - (1964 π Penn C demolished Penn Station → offices, Mad Sq Garden)
  - 1965 Δ NYC Landmarks Preservation Law (restrict + reas'l return)
    - Restrictions: 1) good repair, 2) Comm'n pre-approval
    - Comm'n certs: 1) no effect, 2) appropriate, 3) insuff $$ return
  - 1967 Comm'n, pub hearing, Gd Central = landmark (π ≠ jud'l review)
  - 1968 (π Penn Central merger w/ NY Central RR, owner Gd Central)
    - π 50yr lease dvpmt rights to π UGP Props ($1m/yr → $3m/yr)
    - πs 55-story proposals: I: tower above, II: tower covering
    - Comm'n denied both certs 1) no effect, 2) appropriate
      - Primarily southern façade views
      - π ≠ alt bldg. plans, but plans = gen'l zoning
        - π seeking windfall? NYC pushing suit?
        - Window-guidance: back & forth accomodation
  - 1969 liberalized Transferable Dvpmt Rights
- Trial for π: injunction, dmg (but ≠ resolution taking issue)
  - App Div rev'd for Δ: legit public purpose, ≠ proof deprivation all reas'l benef'l use
- NY (supp): aff'd for Δ NYC
  - European view of property (period piece)
  - Bkgd massive social & gov'l investment, so prop'l return
    - Society as organized polity (gvt)
      - ≠ Holmes conglomerate of individuals
    - Denominator = privately created ingredient in prop

            - ≠ total value of parcel (b/c gvt value-add)
            - Particular importance b/c RR built on eminent domain, quasi-nuisance-immunity
                - ~ Lucas disaster insurance > beach value
        - Counterarg: intermediate buyers paying for social value-add
        - Rejected by SCOTUS b/c logical extension to all private prop
    - Private right only to reas'l return b/c ≠ actual gvt taking by em dom
        - TDR = reas'l return
    - Symbiotic value-bldg by urban dvpmt (RR, people), private investmt
        - Plus MTA connection city subway to hub
        - "πs may not now frustrate legit & imp social objs by complaining that gvt reg deprives them of a return on so much of the investmt made not by priv interests but by gvt"
    - Reas'l potential (≠ actual, present) return b/c avoid incentivizing bad-faith mgmt. for windfall
- Brennan (p1113) aff'd for Δ NYC
    - Issues: 1) whether taking (no); 2) whether TDR just compens (n/a)
        - Singled out/spot zoning? NO
        - Too far/diminution value? NO
            - Reas'l return (stipulated)
            - Primary inv-backed expectation = running RR
    - Not a taking
        - Multifactor, fact-specific analysis:
            - Investment-backed expectations
            - Character of gvt action: phys invasion vs. public prog
        - Gen'l areas of gvt regulation ≠ taking
            - Zoning (<u>Euclid</u>), noxious use (<u>Hadacheck</u>)
            - As long as not too far (<u>Penn Coal</u>)
        - π stipulations:
            - Landmark preservation = permissible gvt goal
            - NYC regs appropriate means of achieving goal
            - Reas'l return: TRDs = valuable but < dvpmt rights
        - Whole-parcel analysis
            - Diminution in value insufficient alone
            - ≠ spot zoning b/c comprehensive plan (recip of adv)
            - Disparate effects on some landowners insuff alone
        - Not too far (<u>Penn Coal</u>)
            - No interference w/ present use; allows reas'l return
            - No Comm'n prohibition any bldg., just plans
            - TRDs = some use of dvpmt rights
    - Just compensation Q avoided b/c ≠ taking
- Rehnquist dissent (p1125)
    - Property = group of rights: possess, use, dispose
    - Effectively nonconsensual servitude indiv'ly applied
        - ≠ reciprocity of advantage
    - No "taking" if:
        - Noxious use (<u>Hadacheck</u>) – but here aff'v duty to preserve
        - Broadly applied reg w/ reciprocity of advantage (<u>Penn Coal</u>)
        - (Omits mention of Euclidean zoning?)

- TDR applies to compensation analysis, not taking analysis
  - Should remand for just compensation analysis

d) Scalia (1989) Rule of law is a law of rules

- Generalizable rules > totality-circs stds
  - Predictability
  - Judicial restraint
  - Judicial courage when unpopular
- Equal protection under law > "fair" justice or "perfect answer"
  - Aristotle, Thomas Paine > Louis IX, King Solomon
- Qs of law vs. fact likely expression of issues' rel'v importance to liberty
- "Trick is to carry gen'l principle as far as it can go in subst'l furtherance of precise statutory/const'l prescription"
  - CL tradition b/c Cong'l intent
  - Depends on theory of interpretation/construction
    - Textualism
    - Originalism, or at least limited to actual social practices as embodied in enacted legislation
- "Totality of circs" std too much like jury factfinding
  - To be avoided
  - Hard to distinguish
    - Holmes Goodman RR crossing rule
    - Cardozo Pakora RR crossing flex std

3. *Back-Door Takings by Exaction*

a) Nollan v. CA Coastal Comm'n (Scalia 1987): nexus reg–state interest

- (p1170) Facts/Timeline:
  - Nollans beachfront Ventura lot lease – option to buy
  - 2/1982 permit app – Comm'n conditioned on public RoW easement
  - 6/1982 Nollans appealed to Sup Ct for ≠ evid dvpmt < public access
    - Comm'n reaff'd conditional permit after hearing
  - Sup Ct for Nollans, but ≠ as taking, rev'd on appeal (≠ taking)
    - CA aff'd for Comm'n: ≠ taking
- Scalia rev'd for Nollans: exaction = taking
  - RoW easement = perm phys occupation, but applied to exaction?
    - OK if nexus legit state interest & reg
    - Broad: Agins (scenic), Penn C. (landmark), Euclid (resid'l)
  - Police power deny permit = condition, as long as nexus
  - Here, purpose of reg = beach visibility, but reg/exaction = horiz RoW
    - ≠ nexus, so = taking & compensable
  - Singled-out π ≠ reciprocity of advantage
- Brennan dissent:
  - Valid exercise police power, so rational basis test
  - < std of review = State could rationally have decided means → end
    - Let the local experts decide
    - Upham: Brennan is wrong b/c ≠ like Euclid zoning map
      - Adjudicative > jud'l review than leg'v decisions

b) Dolan v. Tigard (US 1994): nexus + rough proportionality exaction–impact

- (p1178) Facts
  - Florence Dolan expanding plumbing store on Fanno Ck, Tigard
  - Tigard Comm’y Dvpmt Code: 15% open space, dedicate ped/bike paths, creek drainage sys
  - π’s site plan: 2x store size, parking, add’l structure//parking (= zoning)
  - CPC cond’l permit: exaction drainage & pathways ≈ 10& property
    - City bear cost landscaping buffer zone
  - π’s requested variances denied (≠ claim undue hardship)
  - CPC findings: custs/resids’ trans needs, make use π’s planned bike racks, offset traffic demands, offset storm runoff (relationship)
  - π appealed to Land Use Apps Bd: aff’d CPC b/c reas’l relationship
  - Aff’d on appeal & OR S Ct
    - Both rejected “essential nexus” reading Nollan ifo “reas’l rel”
- Rehnquist rev’d for π b/c although nexus, ≠ rough prop’l
  - 2-step analysis of exactions
    - Essential nexus btwn legit state interest & exaction cond
    - Reas’l relationship/rough proportionality exaction & harm
      - Some indiv’zed calculation
  - Here, OK nexuses
    - Flooding concern & ltd dvpmt on flood plain
    - Reduce traffic & ped/bike paths
  - But ≠ rough proportionality: too much land
    - Flooding: 15% open space in code suff address
      - Why public > private green space?
      - ≠ PruneYard free speech in mall b/c control time/place
    - Traffic: no individualized determs of traffic issue
      - OR dissent: “could offset” ≠ “will or likely to offset”
- (Stevens dissent omitted)
- Legacy:
  - Rough proportionality test expressly ltd to exactions context
  - Worst of both worlds:
    - Open-ended regulatory power over landowners
    - Tight restrictions on regulatory-adjustment bargaining
  - Argument that practically ≠ important
    - David Dana (1997) game theory analysis
      - One-time projects: may lead to defensive denials > exaction conditions (bad for everyone)
      - Repeat players (most): reputation concerns < suits
        - But may > inefficiency by cronyism, insularity

4. *Academic Perspectives on Takings*

- (p1189)