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# WHAT IS PROPERTY?

## Two Views

1. Essentialism
	1. Definition – The right to (exclude from) a thing good against the world (in rem)
	2. Penner
		1. Right to exclude is very important in terms of the formal right.
		2. Right to property is a right to exclude others from things which is grounded by the interest we have in the use of things.
	3. ***Jacque v. Steenberg Homes* (1997)** Synopsis: Steenberg crossed Jacque property to deliver mobile home after Jacque said no. Tool: Punitive damages are appropriate for trespass even when there are no compensatory damages. Rationale:
		1. Right to exclude (essentialism)
		2. Investment, planning and effort (shouldn’t this still be protected under compensatory damage rule?)
		3. Preserve owner autonomy
		4. Intentionally disregarded rights (intentional tort with no injury?)
		5. Seek advance permission (should this be required during emergency?)
		6. Prevent self-help (need not be violent – fences)
		7. Preserve owner’s gatekeeper role
		8. Privacy
2. Nominalism
	1. Definition – Bundle of rights
	2. Grey
		1. Right to exclude is not very important for specialists (legal and economic professionals) and advanced capitalist economies (Ownership implies reference to a tangible thing which does not often apply in our modern economy e.g. bank account; shares in a corporation).
		2. Cases have shown that property rights are more diverse and divisible.
	3. ***Hinman v. Pacific Air Transport* (1936)** Synopsis: Hinman sues airlines for flying above his land at an altitude below 100 ft. Tool: Ad coelom doctrine has limits. Rationale:
		1. Trespass only with possession (what you can actually occupy/use); no possession of upper airspace.
		2. Actual harm is required for trespass by overflight.
		3. Implicit in-kind compensation.
		4. Public navigation as with rivers or highways (but no compensation for taking?)

# COASE THEOREM

## Assumptions

1. Transaction costs – zero transaction costs,
	1. Costs of effecting a transaction (narrow) v. costs of delineating and enforcing property rights in economists’ sense (broad view)
2. Strategic behavior – Coase takes an optimistic view of bargaining (willing negotiators)
	1. Critique – bilateral monopoly
3. Rationale maximizers
	1. Critique – endowment effect can complicate matters. Wiling to pay and willingness to accept may differ.
4. Source of Baseline Entitlements – Coase assumed that the baseline for transacting was legal, but often people do not care or even know what the legal rule is.
5. Nature of Entitlements – For Coase, bundle of use-rights of hyperrealist sort (Cf. Grey)

## Theory

1. If there were no transaction costs, the assignment of liability for social costs would have no effect on the use of resources (or at least on the efficient allocation of resources). More valuable use wins out because a foregone bribe (costlessly effected) is a real cost (internalized).
2. In positive transaction world, the placing of the entitlement does matter and so should be done with an eye to solving the economic problem. Mostly what is more valuable.

Contractual Agreement – Pursuing a contractual agreement to resolving a resource dispute is a good idea. But lawyers must be careful because this type of agreement often has a high transaction cost; thus groundwork must be laid early before litigation becomes the only acceptable solution to the client. Two common situations will increase the cost of a contractual-agreement solutions: assembly problems (multiple property owners need to agree on negotiations) and bilateral monopolies (there is only one property owner who can negotiate to meet the needs of your client).

|  |  |  |
| --- | --- | --- |
|  |  | **More valuable** |
|  |  | Farming | Ranching |
| **Entitlement** | Farmer | No transaction/Farming | R bribes/Ranching |
| Rancher | F bribes/Farming | No transaction/Ranching |

## Trespass/Nuisance

1. Trespass
	1. Definition – A trespass is a physical invasion of land without the owner’s permission.
		1. Land – ad coelom rule (outdated)
			1. Title Theory – surface owner literally owns from heaven to hell. If this becomes inconvenient, then must establish a basis for superior title to someone else (e.g. government must establish “air navigation servitude”)
			2. Intermediate View – both perspectives are looking at two different aspects of the same thing. Property rights can be divided but this doesn’t mean that “full ownership” doesn’t exist. Property is represented by paper or share of corporation. Ownership means the right to exclusive use of the piece of paper that describes the property.
			3. Option Theory – surface owner has an exclusive option to occupy/possess to the heavens and depths. But if the surface owner has made no such attempt, then intrusion by others is not a trespass.
		2. Requires a voluntary act, causation, and a visible object but does not require intent or harm.
	2. Exceptions
		1. Necessity (e.g. ***Vincent v. Lake Erie***)
		2. Retrieval of child, pet or chattel, pursuit of thief
		3. Custom (e.g. hunting)
		4. Surveys – statutory right of surveyors to enter
		5. Civil Rights statutes, public accommodation statutes, and other statutory exceptions
		6. More open-ended exceptions based on public policy or constitutional values?
		7. Nuisance law
2. Nuisance (See Nuisance Section under Law Of Neighbors)
	1. Definition – non trespassory interference with rights in land
		1. Intentional and unreasonable OR
			1. Intentional – means actor knew or should have known there would be a substantial and unreasonable interference with use and enjoyment.
			2. Unreasonable determined by balancing test of “gravity of harm” and “utility of conduct factors.”
		2. Unintentional and negligence, recklessness or abnormally dangerous condition/activity.
	2. ***Hendricks v. Stalnaker* (1989)** Synopsis: Stalnaker’s well prevents Hendricks from installing septic tank. Court finds for Stalnaker because well is not unreasonable. Tool: Unreasonable element of nuisance determined by balancing test of gravity of harm and utility of conduct factors. However, court seems to actually consider other factors – invasion, first in time, norms, neighborliness, burden of proof.
	3. Exclusion/Governance
		1. The exclusion approach is analogous to the law for trespass, in which ownership, use and enjoyment of the property are all secured by assuring that no one else has access to the property.
		2. The governance approach is analogous to the law for nuisance, in which rights for various uses are balanced between multiple parties.

# EQUITY

## General

1. Areas of law – trusts, mortgages, guardianship, charity, business organizations, account, bankruptcy, construction of instruments, etc.
2. Goal – fairness and justice
3. Jury
	1. Law – right to jury
	2. Equity – no jury
4. Typical Requirement
	1. Remedies at law insufficient
	2. Clean hands
5. “Maxims” defenses – fraud, mistake

## Remedies – injunctions

1. Elements (See ***eBay Inc. v. Merc Exchange***):
	1. Irreparable injury
		1. Remedies at law (e.g. monetary damages) are inadequate
	2. Remedy in equity is warranted under balance of the hardships
	3. Public interest would not be disserved
	4. Likelihood of Success on the Merits (for preliminary injunction)
	5. Note: Good faith missing and balance of the hardships doesn’t require it to be disproportionate
2. Rule of no injunction for “mere” trespass exceptions that courts have said justify the conclusion that damages are inadequate relief for trespass:
	1. Repeated trespasses
	2. Trespasses by multiple individuals
	3. Trespasses that create subjective harms not easily compensable by damages
3. ***Baker v. Howard County Hunt* (1936)** Synopsis: Howard County Hunt hounds continually went on Baker’s farm and caused injuries to animals.
	1. Dog law and trespass – allowing a reputable dog to roam does not result in trespass unless the dog is known to cause injury.
	2. Courts suggests this rule is flexible and in this case, Hunt Club should be accountable for trespass because Club had been repeatedly warned about intrusions and pack of dogs more likely to cause harm.
	3. Hold: only an injunction will provide adequate assurance due to repeated trespasses, harm to Bakers’ animals have resulted, Bakers have clean hands, and there is no adequate remedy at law (Suggests that trespasses have harmed subjective values – Bakers’ interest in peace and quiet and being left undisturbed. Why no punitive damages (as in ***Jacque***)? Harm not measurable.)
4. ***Pile v. Pedrick* (1895)** and ***Golden Press v. Rylands* (1951)**
	1. Commonalities
		1. Defendant-encroacher is engaged in constructing a building up to or very close to the boundary line between the defendant’s and the plaintiff’s property.
		2. Defendant employed surveyor that made minor but fatal error.
		3. Good faith finding (***Pile***) or presumption (***Golden Press***)
		4. Encroachment is a few inches of footing underground.
		5. Defendant offers to chip off the offending encroachment but plaintiff refuses to give permission so defendant has to tear down wall. (In ***Pile***, D even offered to make wall a party wall. P said they would be fine with that as long as D got rid of windows now but D refused. )
		6. Both courts seem to regard plaintiff’s insistence on tearing down to be burdensome and thus inequitable.
	2. ***Pile*** – costs divided and defendant given a year to tear down wall
		1. Legal Theories
			1. Encroachment is a continuing trespass against which there is no defense of reasonableness
			2. Property rights are unique and will be enforced in equity by injunctions
			3. Note: ***Pile*** decision was exceptional in its day.
			4. Not clear why undue hardship doesn’t apply as in ***Golden Press*** – maybe because older case so older approach? Party wall dispute where P gave D way out?
	3. ***Golden Press*** – Injunction denied because (1) encroachment unintentional, (2) encroachment slight (de minimis), (3) balance of the hardships test must show disproportionate/undue hardship – small damages and cost of removal is great. Suggests that plaintiff does not have clean hands.
5. Good Faith (without knowledge) – bad faith encroachers do no benefit from disproportionate hardship defense.
6. Intellectual Property
	1. Patent troll – non-practicing entity (NPE) that uses (bad, aggregated) patents to surprise an innocent infringer who has a sunk investment that the troll extorts.

# MISTAKEN IMPROVER/RESTITUTION

## Mistaken Improver

1. Remedies
	1. Removal – P has right to force D to remove encroachment.
	2. If the improver is in good faith, the court may let the improvement remain if D pays damages to P or may let the building remain if D pays its value to P.
	3. Unjust enrichment – If the improvement cannot be removed, the court will ascertain the difference in value between the property in its unimproved state and the property with the improvement. The true owner will be given the option of paying the difference in value to the improver (or having the property subjected to a lien in this amount).
	4. Forced sale – if the true owner cannot afford this price, or elects not to pursue this remedy, then the improver will be allowed to acquire the land from the true owner, by paying the price of the unimproved land.
	5. Partition – If neither party is willing to engage in a forced transaction with the other, the court will take control of the property, sell it to a third party, and divide the proceeds according to the parties’ respective interests.
2. ***Producers Lumber & Supply Co. v. Olney Building Co.* (1960)** Synopsis: P bought land from D. D unknowingly built on that land. Negotiations between parties failed. D sent crew to remove building (kept only some parts) without P’s permission and did some damage to the land in the process. P sued D. P awarded compensatory damages for house D demolished and damage to land and punitive damages for D’s waste.
	1. Fixture – building that is attached to the land becomes part of the land (real property).
	2. Holding – A good faith mistaken improver can ask for equitable relief. However, an improver cannot go on someone else’s land with knowledge or consent and demolish improvements that he mistakenly made. If he does, he can be required to pay for waste. D does not come into equity with clean hands and therefore cannot seek equitable relief.
	3. Why doesn’t accession apply?

## Restitution

1. A remedy and ground for liability
2. Specific relief and damages remedy is often measured by the gain to the defendant at the plaintiff’s expense, rather than the cost to the plaintiff.
3. Often grounded in unjust enrichment:
	1. Enrichment of the defendant
	2. At the expense of the plaintiff
	3. Under circumstances that would make it unjust for the defendant to retain the benefit.
4. ***Olwell & Nye v. Nissen*** Synopsis: Nissen uses Olwell’s egg washing machine without permission. Olwell sued and awarded damages = amount of money D saved from not having to pay laborers to wash eggs for them. Nissen sued for unjust enrichment saying it was too much and damages should have been based on rental value.
	1. When tortfeasor benefits from wrong, P can waive tort claim (wear and tear on machine) and bring action in restitution.
	2. Necessary that P sustained loss – in this case, loss of control of chattel is itself a loss compensable in although no harm done (***Jacque v. Steenberg*** for personal property).
	3. Holding: Under restitution, damages equal gain to D at P’s expense = value of implied contract (reduce damages slightly). Why not value of renting machine? Bad faith perhaps.
5. Fraud
	1. Ponzi Schemes – fraud in which money from new investors is used to pay false profits to older investors. Promises necessarily outstrip ability to pay.
	2. Possible Remedies
		1. Tracing – claimant’s claim persists through transactions in the defendant’s hands.
			1. On bad investments, the wrongdoer spends his own money first
			2. On good investments, the wrongdoer spends the plaintiff’s money first.
		2. Following – the ability of a claimant to claim ownership in the hands of transferees(e.g. fraudster sells stock to someone who knew of his fraud)
		3. Constructive trust – wrongdoer is treated as a fictional trustee for the claimant. Presumptions about which money is sued and attribution of gain work in favor of the claimant. Used to provide restitution where there would be unjust enrichment. Requires:
			1. Violation of a fiduciary duty, confidential relationship, or other wrongful act
			2. Specific property acquired by the wrongdoer that can be traced to the wrongful behavior
			3. Violation of equity if the wrongdoer is allowed to keep the property.
	3. ***SEC v. Elliott*** Tool: Investors sued Elliott for securities fraud.
		1. Holding: (1) There was transfer of ownership of securities. (2) There was fraud. (3) Tracing rules suspended because not all victims would get securities back so court adopts loss sharing approach. (court suggests victims may not have clean hands

# ORIGINAL ACQUISITION

## Introduction

1. Principles are methods of establishing private property where there was no property before.
2. Possession in “nine points of the law” because it is presumptive ownership.

## First Possession

1. Definition – first in possession, intent to control plus act of control
2. Theories
	1. Locke – one owns oneself and therefore one’s labor. When one mixes labor with something in the commons, it becomes that persons’ private property, subject to “enough and as good,” non-waste, and charity constraints.
	2. Consent Theories – Grotuius, Pufendorf
	3. Convention Theories – Hume, Sugden
3. Governing the Commons

|  |  |  |
| --- | --- | --- |
|  | **Excludable** | **Non-Excludable** |
| **Rivalrous** | Private Goods (clothing, cars) | Common Property (timber, coal) |
| **Non-Rivalrous** | Club Goods (Cinemas, satellite) | Public Goods (national defense) |

* 1. Open Access – common property not owned by private individuals, corporations, or government. (Ostrom)
	2. Prisoner’s Dillema – problem with open access is that each appropriator gets 100% of the benefit of use and bears only a small fraction of the harm. Big externality or mismatch between private and social cost.
		1. Solutions – repeat play, contracting?
	3. Tragedy of the commons – dark side of first in time (e.g. oil and gas – not exactly open access but hard to institute governance when number of appropriators is more than 4.
		1. Racing
		2. Waste
	4. Advances of private property – ability to plan, invest and trade are involved in first possession because it leads to continued possession (but could have private property without first possession, e.g. auction)
1. ***Pierson v. Post* (Supreme Court of NY, 1805)** Synopsis: Post hunted and chased a fox. Pierson was aware of the chase and he killed it. Post claimed legal right to fox. Court ruled in favor of Pierson. Tool: Closing in on fox is not enough (dissent said this was enough). At least mortal wounding is required.
	1. Correctness of result
		1. Goals? Killing foxes?
		2. Effect on racing?
	2. Administrability/Certainty – certainty promotes investment and trade and avoids conflict
	3. Informational Load/Complexity – How much do people know? Claiming in rem right or just against hunters?
2. ***Ghen v. Rich* (District Court, MA, 1881)** Tool: Local customs as to the possession of wild animals are enforceable given (1) provenance (community depended on this trade); (2) Audience (general understanding by community otherwise would kill whale industry); and (3) reasonableness (especially given what is possible in terms of control.) Synopsis: Ghen shot whale with distinguishable bomb lance, but Rich found it floated ashore and sold it without notifying Ghen contrary to local custom. Court ruled in favor of Ghen saying that custom can trump maritime law given factors listed above.
3. Home Run Baseballs – Barry Bonds ball auctioned and divided between first to touch and final possessor.
4. ***Keeble v. Hickeringill* (Queen’s Bench, 1707)** Synopsis: Keeble had decoy pond to attract ducks killed for profit. Hickeringill intentionally fired gun to scare away ducks. Court ruled in favor of Keeble. P did not have title to the ducks, he was using his land in accordance with the law and he had property rights to them because they were on his property? Tool: Since D interfered with the P’s lawful use of his land, P was entitled to damages. Rationale:
	1. Trade v. Sport – this is a trade and is legitimate
	2. Good v. Bad – under common law, liability for interfering with good activities
	3. Maliciousness – taking pleasure in someone else’s pain is often not privileged
	4. Competition v. Unlawful Interference – competition benefits consumers by creating surplus, lowering price. Court found this was unlawful interference

## Discovery

1. Principle of Discovery
	1. A first-in-time rule that regulated process of claiming land as between European governments; did not regulate relations with Indians directly. It apparently does not require possession by the European power.
	2. Firstness not of possession but of a right to possess. E.g. IP (also see Creation), mining for “discovery” doctrines
2. Chain of title of a lot of property in American land
3. ***Johnson v. M’Intosh* (SCOTUS 1823)** Synopsis: Johnson bought land from natives. Then, U.S. “took” land (natives gave to U.S. via treaty) and sold to M’Intosh. Johnson claimed right because natives owned land. Court ruled in favor of M’Intosh. Tool: Indians retained “title” or right of occupancy or use with power to transfer to the U.S. or to a third party with the consent of the U.S. but did not have the power to transfer absolute title to any other than the U.S. or its designee. Dominion or sovereign title trumps the right of occupancy. Rationale:
	1. Cultural incompatibility – based in part on mischaracterization of native property rights (Indians not purely nomadic and why should this matter?)
	2. Necessity – Too many claims by Europeans based on assumption that Indian rights can be ignored.

## Creation

1. Definition – Firstness involved here, but the idea is that the resource can be said to owe its existence at least in part to owe its existence at least in part to the prospective owner’s act.
2. Information and Intellectual Property
	1. Public Good – nonrival and more nonexcludable than typical tangible resource. BUT it is costly to produce. Competition tends to drive price down to marginal cost of production but here that is zero (or close to it) and will not cover high fixed costs of production (incurred by the first producer only).
	2. Will first-mover advantage be enough reward in case of designs and news?
	3. Notice problems – how do you know it’s IP?
	4. Information does not come in predefined packages or “things” so law has to delineate them, raising the costs of property rights.
3. Creation of Property Rights – generally only legislature can create new types of property rights (numerous clausus). Exceptions – quasi-property interest in news and right of publicity
	1. Quasi-property interest
		1. ***International News Service v. Associated Press* (SCOTUS 1918)** Synopsis: INS collected and reproduced news posted by the AP. Tool: There is a quasi-property interest in news collected by an agency against other news collection agencies but not the public (equity acts in personam as opposed to in rem, piggybacks on commercial morality) and there is misappropriation. Some indication (not reflected in the case) of a custom (respecting hot news). It is unfair business competition for a news collection agency to distribute the news collected by another news collection agency.
	2. Rights to Publicity
		1. General Rule: The right to control the commercial use of his or her name, image, likeness, or other unequivocal aspects of one's identity. It is generally considered a property right as opposed to a personal right, and as such, the validity of the right of publicity can survive the death of the individual (to varying degrees depending on the jurisdiction). Generally considered to consist of two types of rights: the right of publicity, or to keep one's image and likeness from being commercially exploited without permission or contractual compensation, which is similar to the use of a trademark; and the right to privacy, or the right to be left alone and not have one's personality represented publicly without permission.
		2. ***Midler v. Ford Motor Company* (US Court of Appeals, 9th Circuit, 1988)** Synopsis: Ford Motor Co. imitated Midler’s voice in commercial. Tool: People have a right to publicity. Case law shifts from tort for unfair appropriation or invasion of privacy type of property right. Confusion is bad for consumers too.
		3. Kozinski dissent in Vanna White cases – simply evoking a celebrity’s image in the public’s mind without implying an endorsement withdraws far too much from the public domain, conflicts with Copyright Act and raises serious First Amendment problems.
		4. Zaccchini Brothers (shooting out of cannon show) – sued that show can’t be on shown on tv and won.

## Principle of Accession

1. General – awarding of things that are unowned (or whose ownership is contested) to the owner of the most prominent thing in the vicinity that is already owned. E.g. calf born to cow
	* 1. Designating a clear winner on the basis of some distinguishing feature, thereby perhaps reducing wasteful racing.
		2. Grounded in conception of ownership as agglomeration. Gravitational pull – psychological and/or practical. Individuals establish rights in things and as new things or increments in value arise, those things or values are awarded to person who is the nearest prominent and established owner of some other thing.
2. Increase
3. Accretion (won’t cover)
4. Ad Coelum
	1. ***Edwards v. Sims* (Court of Appeals of Kentucky, 1929)** Synopsis: Edwards sought writ of prohibition against court that issued an order for a survey of his (Great Onyx) cave. His neighbor, Lee, claimed a part of the ownership of the cave by virtue that it was under his land. Court denied writ of prohibition.
		1. Majority – Ad Coelum title version
		2. Dissent – Option theory or intermediate theory or equitable disproportionate hardship/irreparable injury (dog in the manger). Owner of the entrance owns cave. Is the dissent endorsing accession and/or first possession?
		3. Remedy of underlying case – Lee gets one third of profits from the cave
5. Fixtures
	1. ***Strain v. Green* (Supreme Court of Washington, 1946)** Synopsis: Strain purchased home from Green. Green took many fixtures away and replaced them with inferior versions (suggests a recognition that a house lacking those features would be considered incomplete). All things attached to the house (light fixtures, permanently fixed mirrors, water heaters, etc.) were deemed to be fixtures and, by accession, transferred to new ownership under the transfer of title when the house was sold. Tool: A fixture should be determined by: (1) actual annexation to the realty, (2) application to the use of purpose to that part of the realty, and (3) the intention of the party to make the annexation a permanent accession to the freehold. It is important that the intention in criterion (3) is determined by evaluation of the circumstances rather than the subjective testimony of the party in question.
		1. Classes
			1. Generic/Custom – would some sort of item of this generic class be included in any house in the same general price level (Light fixture)?
			2. Attachment – If a thing is firmly attached to the wall or ground, it is a fixture. If it can be removed without damage from the wall, it is personal property (mirrors in living room but not the mirror in the powder room).
			3. Specially fitted – is the item custom built or otherwise an unusually strong complement for the surroundings? (venetian blinds).
6. Doctrine of Accession/Specification
	1. Rule – If in good faith (usually) someone mixes something valuable with and/or physically transforms something less valuable, then the owner of the more valuable (unique, etc.) thing can acquire the other thing by paying damages.
		1. Not really a pure rule of original acquisition; it determines which remedies apply in certain actions by owners of personal property to recover the property after it has passed without their consent into the hands of another.
	2. Land; e.g. building encroachment, good faith improver who builds on someone else’s land
		1. Rationale – what is thing acquired? – portion of land encroached upon or whole property?; no transformation – original land can still be identified
	3. ***Wetherbee v. Green* (Supreme Court of Michigan, 1871)** Synopsis: D unintentionally trespassed onto P’s land, took timber and transformed it so that its value increased significantly. P sued for replevin. Court found for D. Rationale:
		1. Mental state of the improver – good faith dictum in this case
		2. Degree of transformation of the object
		3. The relative value contributed by the original owner and the improver – important in this case
			1. 50% contribution threshold?
			2. Equity/disproportionate hardship
7. Ratione Soli
	1. ***Fisher v. Steward* (NH Supreme Court 1804)** Tool: Captured wild animals belong to the owner of the land. No custom so locus ownership (ratione soli – accession principle).Bees are exception to American hostility to ratione soli probably because fixed location and cultivation required. Synopsis: Fisher finds and marks bees in tree on Steward’s land. Steward takes and converts honey.
	2. ***Goddard v. Winchell* (Supreme Court of IA 1892)** Tool: Unpossessed object becomes part of the land (rationale solis). Accession (ratione solis/locus ownership) wins over first possession (title by occupancy). Synopsis: Meteor landed on Goddard’s land. Meteor was dug up by tenant’s friend and sold to Winchell. (what if non-embedded?)

## Adverse Possession

1. Acquisition principle (not original acquisition but gives rise to a new root of title) and a limit on the right to exclude.
2. Passes title from the TO, and the title relates back to the date of original entry.
3. Prima Facie
	1. Running of the statute of limitations for the relevant possessory action plus collapse into a single wrong (once the statute runs) that takes place at the time of original entry rather than a continuing wrong.
		1. Before statute runs, the trespass is regarded as a continuing wrong and TO can get injunction preventing future intrusions and can get damages for past intrusions.
		2. Disability statutes lengthen period
			1. Typically must exist at time AP began
			2. Typically cover infancy, insanity, imprisonment
	2. Adjectival Requirements
		1. Exclusive – not sharing property with true owner or public generally; joint possession is fine
		2. Open and notorious – visible, owner could reasonably be expected to know
			1. If possessor had actual notice, this is met.
			2. Otherwise, measured against typical owner’s conduct – met if the adverse possessor’s use of the property is similar to that which a typical owner of similar property would make of it.
				1. Nature of land taken into account
				2. Fence or other enclosure usually sufficient in rural areas but not necessarily populated area
		3. Actual
			1. Reasonable percentage of land used (Exception - when AP holds color of title, obtains property as described in instrument even if AP only actually possesses a portion of it)
			2. Occupation by tenant of adverse possessor may suffice
		4. Continuous (context-dependent)
			1. Seasonal use may be permissible (See ***Kunto***)
		5. Hostile/Adverse – without owner’s consent
			1. Measured by objective evidence – AP’s actions and statements
			2. Color of title – sufficient to meet hostility requirement
		6. Under a claim of right – mental state
			1. Often means hostile
			2. Minority courts require good faith
			3. Color of title – sufficient to meet hostility requirement
4. Rationale
	1. Rewarding improver
	2. Penalizing lazy owner
	3. Cleaning titles cheaply (includes problems of lost or deteriorated evidence of title)
5. Not Good Against Government
	1. Government worse at monitoring, will have to raise and spend taxes
	2. Government lands harder to monitor
	3. Government sets the rules
6. ***Marengo Cave Co. v. Ross* (Supreme Court of IN 1937)** Synopsis: Marengo utilized cave that extended under Ross’ land. Court found for Ross that there was no adverse possession. Tool: Trespass underground is neither open (visible so that owner knows) nor notorious (so that community knows) because neither the owner nor public could know it extended under owner’s land. Is this true? Survey? Also not exclusive because did not oust owner from land (Ross still maintained actual and continuous possession of land above ground).
7. ***Carpenter v. Ruperto* (Supreme Court of IA 1982)** Tool: Good faith is a condition of obtaining title by adverse possession. This is unusual holding. Synopsis: Carpenter possessed neighbor’s land knowing that she lacked title.
8. Tacking
	1. Privity of Estate – Current AP must acquire its possessory interest via consensual transfer e.g. purchase, will, inheritance, gift, some direct relationship (usually familial or economic)
	2. ***Howard v. Kunto* (Court of Appeals of Washington 1970)** Tool: Tacking of adverse possession is permitted if deed is transferred. Seasonal occupancy does not destroy adverse possession if it is common to the area. Synopsis: Kunto’s and predecessors unknowingly possessed and lived in house on Howard’s land during summer months. Howards argue that tacking doesn’t apply because Kunto’s deed describes none of the property they possess. Court says this doesn’t matter. Point is whether possessory interest was transferred, not what was described in the deed so court rules for Kunto’s.
9. Starting the Clock
	1. Conversion – clock starts at conversion (Songbyrd)
	2. Demand rule – if a good faith purchase, clock starts after True Owner demands the goods to be returned (Guggenheim – effectively creates longer statute of limitations for good faith purchasers than for those who have converted property)
	3. Discovery rule – clock starts when TO discovers (or reasonably should have discovered) the loss. (O’Keefe (NJ) and Marengo Cave)
10. Adverse Possession of Chattels
	1. ***Songbyrd v. Estate of Grossman* (US District Court NY 1998)** Synopsis: Songbyrd sued to recover from the estate of Grossman damages for the use of certain music tracks. Tool: Conversion Rule – The time of conversion is defined to be the time at which the actual possessor acts to exclude the rights of the true owner for the purposes of determining whether statute of limitations has passed.
		1. Not referred to as adverse possession but court adopts view that conversion is not continuing wrong.
		2. Bailee cannot obtain title to property by AP but once bailee starts acting adversely to interests of TO than no longer bailee but acting as TO.

## Sequential Possession and Conflicting Principles

1. Nomenclature
	1. F1 = finder, first in sequence
	2. F2 = finder, second in sequence
	3. C1 = converter, first in sequence
	4. C2 = converter, second in sequence
	5. TO = true owner
	6. LO = locus owner
2. Categories of Property
	1. Abandoned – See Abandonment section
	2. Lost – property that owner accidentally and casually lost
	3. Mislaid – property intentionally places somewhere and then forgotten
	4. Treasure trove (England)
3. Finders
	* 1. F is usually considered a bailee for the TO. Who is most likely to protect the interest of the TO in eventually getting property back? F, C, LO?
		2. What should F get? Equitable division, co-ownershipfinder’s fees
4. Finder v. Converter
	1. ***Armory v. Delamirie* (King’s Bench 1722)** Tool: Finder obtains right to property against all but rightful owner. Synopsis: Chimney boy (F1) finds jewel. Apprentice (C2) takes it.
5. Finder 1 v. Finder 2
	1. ***Clark v. Maloney* (Superior Court of Delaware, 1840)** Tool: Finder obtains right to property against all but rightful owner, including subsequent finders. Synopsis: Clark (F1) found logs and lost them. Maloney (F2, maybe C2) found the logs but refused to give them back to Clark.
6. Converter 1 v. Converter 2
	1. ***Anderson v. Gouldberg* (Supreme Court of MN 1892)** Tool: Earlier possessor beats out later one even if individual obtains ownership via unlawful act. Synopsis: Anderson (C1) trespassed to cut down logs. Gouldberg (C2) took logs from Anderson.
7. Why protect earlier possession
	1. Protecting peace and order (less need for self-help)
	2. Protecting possession is often a cheap and effective way to establish and protect ownership (no need for carrying around receipts and documents)
	3. Facilitates bailments (esp. informal ones)
	4. Reward to finders (or at least incentivize reporting)
	5. Keeping property closer in chain to owner.
	6. Does good faith beat bad faith? What about C1 v. F2?
8. Finder (First Possession) v. Locus Owner (Accession)
	1. ***Fisher v. Steward* (NH Supreme Court 1804)** Tool: Captured wild animals belong to the owner of the land. No custom so locus ownership (ratione soli – accession principle).Bees are exception to American hostility to ratione soli probably because fixed location and cultivation required. Synopsis: Fisher finds and marks bees in tree on Steward’s land. Steward takes and converts honey.
	2. ***Goddard v. Winchell* (Supreme Court of IA 1892)** Tool: Unpossessed object becomes part of the land (rationale solis). Accession (ratione solis/locus ownership) wins over first possession (title by occupancy). Synopsis: Meteor landed on Goddard’s land. Meteor was dug up by tenant’s friend and sold to Winchell. (what if non-embedded?)
	3. Lost v. Mislaid
		1. Mislaid – McAvoy v. Medina – F and LO (barbershop owner) claim pocketbook. LO has right to pocketbook because mislaid, not lost. Mislaid property more likely to be found by TO if with LO.
		2. Lost in Private place
			1. Usually awarded to homeowner unless owner never in possession.
			2. ***Hannah v. Peel* (King’s Bench 1945)** Tool: Finder keeper of lost property on someone else’s land because owner was never in actual possession of premises. Synopsis: Hannah found brooch in house owned by Peel that Peel never occupied.
	4. LO usually wins in employee cases and trespass cases.

# RIGHTS OF OWNERSHIP

## Overview

1. General – Right to Use; Right to Transfer; Right to Exclude
2. Types

|  |  |  |
| --- | --- | --- |
|  | **Real** | **Property** |
| **Criminal** | Trespass, burglary, arson | Larceny, criminal mischief |
| **Civil** | Trespass, ejectment, nuisance | Replevin (equity), conversion/trover (damages), trespass to chattels |

1. Values to consider – efficiency and fairness; notice of what the law is; possession presumption; anti-commons (underuse due to multiple rent-seekers)
2. Domain of Property
	1. Demsetz
		1. Thesis – Property rights develop to internalize externalities when the gains of internalization become larger than the cost of internalization.
		2. As resource values rise, we expect more developed property rights.
		3. Efficiency is an automatic consequence of maximizing by economic actors; externalities are effects that decision-makers feel that are not worth internalizing. So the presence of an “externality” is not an indication of inefficiency (Compare with Coase).
		4. Beaver Hunting Territories like semicommons – temptation to kill someone else’s beavers for one’s own consumption. Private hunting territories developed but subject to insurance constraint. Did not prevent overhunting – insurance constraint hard to enforce.
	2. Carol Rose – Inherently Public Property
		1. Public Trust
		2. Implied dedication/prescription
		3. Custom
		4. Holdouts/Network externalities (Cf. Hamidi)
		5. Certain resources more valuable as public property
		6. Scale returns most important in custom areas, including interactiveness of use

## Criminal Law

1. Personal Property
	1. Shift in purpose of law of larceny from securing the peace to protecting property rights, with concomitant shift of emphasis from act of taking possession to intent to violate owner’s rights.
	2. ***People v. Olivo* (Court of App. of NY 1981)** Tool: Larceny for shoplifting can be established if D has not left the story because focus shifted to intent and protecting property rights. Synopsis: D convicted of shoplifting but never left the store with stolen goods.
2. Real Property
	1. ***State v. Shack* (Supreme Court of NJ 1971)** Tool: Fee simple owner’s right to exclude is limited in light of competing interests. Does not include the right to bar access of migrant workers to governmental services. Synopsis: Landowner sues aid workers for trespassing when attempting to help migrant workers.
		1. Human Values – property serves human ends and must give way in the face of more important rights
		2. Rules v. Standards – court switched from rule approach to the standard approach
		3. Categorical exception (carving out from the exclusion right a right of access for aid workers to visit migrant workers required to live on a farmer’s land while working there) and case-by-case approach – court must balance the interest of the parties in order to decide whether exclusion or access is more important.
	2. Governance competing with exclusion – Prosecution for trespass fails when the state has a particular interest in trespassing.

## Civil Law

1. Real Property
	1. Ejectment, Trespass, Nuisance
	2. Forcible Entry and Detainer (FED) – statutory, like ejectment, used in landlord-tenant evictions (to regain possession and for damages), and sometimes for evictions that are wrongful or that involve excessive force.
2. Personal Property
	1. Causes of Action
		1. Trover/Conversion – damages for exercising dominion over goods
		2. Replevin – return of goods
		3. Trespass to Chattels (like conversion – damages for something less than full value of goods
	2. Internet
		1. ***Intel Corporation v. Hamidi* (Supreme Court of CA 2003)** Synopsis: Intel brought suit against Hamidi, claiming that by communicating with their employees on Intel’s email system, Hamidi committed the tort of trespass to chattels. Court rules in favor of Hamidi.
			1. Majority – requires harm, mostly physical harm (damaging/slowing the system). Otherwise, only legal remedy is self-help (so no shift entitlement, just denying legal relief). No evidence that quantity of Hamidi’s emails caused Inte’s network any problems. Rejected application of real-estate-style trespass under which actual harm would not be required.
			2. Dissent – disagree on nature of harm. Point out that majority conflates public and private networks.
			3. Cf. Jacque (no harm required) and Baker (Injunction for repeated trespasses)
			4. No nuisance to chattels?
		2. Open Access advantages
			1. The internet has public good aspects because of network externalities
			2. The Internet is characterized by a culture of cooperation that does not require legal intervention
			3. For problems that emerge, someone will devise a technological fix.
		3. Intermediate solution – give right to exclude with an implied license to email which can only be overcome with notice to a specific emailer that the email is unwanted. (Cf. hunting, unwanted newspapers/mail)

## Self-Help

1. Real Estate
	1. ***Berg******v. Wiley* (Supreme Court of MN 1978)** Tool: The only lawful means to dispossess a tenant who claims possession of the property is by the judicial process. Forcible self-help is unnecessary because the judicial process (FED action) offers a speedy alternative. Rationale – Self-help may lead to violence and maybe person in possession should be given benefit of the doubt. Synopsis: Wiley changes locks to restaurant when his tenant, Berg, breaches lease.
	2. Build a fence
2. Personal Property
	1. ***Williams v. Ford Motor Credit Company* (US Court of Appeals, Eight Circuit 1982)** Tool: Upholds exercise of self-help as lawful under the UCC, citing policies of allowing holders of security interest an easy method for gaining possession of collateral on default, preventing breaches of the peace (is this really true in this case?), and expanding access to credit. Synopsis: FMCC towed Cathy Williams’ car because her ex-husband defaulted on payments. Court found for FMCC given UCC and no breach of peace (incentive for people to become violent?).
3. Should generally not pose a danger or threat to the peace

## Exceptions to Owner’s Right to Exclusive Control

1. Necessity – e.g. Ploof v. Putnam
2. Custom – e.g. hunting
3. Public Trust
	1. Doctrine to limit the power of government to transfer public property and as an argument against worrying about takings. E.g. navigable waters, beaches, airspace
	2. Scope
		1. Navigability may be broader, public trust may extend to other streams
		2. Public trust may extend to waters overlaying privately owned lands
		3. Public trust uses include navigation, fishing, commerce, and now recreation
	3. Strength of Review
		1. Presumption against grants that has to be overcome by a clear statement of legislature’s intent to grant, including a recognition of the existing public use (Massachusetts)
		2. “Close look” by court, using balancing test (impact on public use, etc.) (Wisconsin)
		3. Grants of public trust lands pass absolute title when they promote navigation and commerce, but if not, then the grant gives title subject to the public trust (California). See Mono Lake case.
	4. ***Illinois Central Railroad Co. v. Illinois* (SCOTUS 1892)** Tool: Public trust doctrine constrains the disposition of public lands under navigable waters. The state has no power to transfer trust lands except (i) to the extent that selling small parcels promotes the public interest therein or (ii) the disposal does not substantially impair the public interest in the lands and waters remaining. Synopsis: Chicago granted land by/in Chicago harbor to RR. Legislature later sought to make grant invalid. Court held that State legislature could not sell the waterfront or reclaimable lands for the harbor because it was land held in public trust and transfer violated (ii).
	5. ***State of Oregon ex rel. Thornton v. Hay* (Supreme Court of OR 1969)** Tool: Doctrine of Custom (for Public Access) – where land has been used for so long by common consent and uniform practice then it becomes the law of the land. Private ownership of dry sand (from mean high tide line to max high tide line) qualified by public easement acquired by custom/prescription (i.e. adverse possession of an easement). Synopsis: D wanted to fence beach area in front of his property. Court ruled in favor of State under easement doctrine.
		1. Blackstonian Criteria for Custom as Law
			1. Longstanding. “Time out of mind. “Time whereof the Memory of Man runneth not to the contrary.”
			2. Uninterrupted. Not necessarily continuous.
			3. Peacable and free from dispute.
			4. Reasonable. Court can review the custom for substance and also ask how the authorities have treated the custom.
			5. Certain. Notice and background knowledge were issues in Ghen and Fisher. In this case the boundary and the definition of the use (recreational ) are said to help.
			6. Obligatory. Treated as binding – like a law.
			7. Not repugnant or inconsistent with law. Other more formal law trumps.
		2. Custom broader than normal easement (don’t have to use particular stretch of land to establish custom)
		3. Alternatives to Custom for Public Access – Prescription (like adverse possession (minus exclusive); Implied dedication (similar to prescription, inferred intent, fictional).
		4. Judicial Taking?
	6. Anticommons? Lots of people have right to exclude but need approval to use; not necessarily bad.
4. Public Accommodations
	1. Non-discrimination
		1. ***Uston v. Resorts International Hotel, Inc.* (Supreme Court of NJ 1982)** Tool: When property owners open their premises to the general public in the pursuit of their own property interests, they have no right to exclude people unreasonably (standard, case-by-case basis). Synopsis: Casino tried to ban Uston, a card counter, from playing blackjack. Court holds that the Casino Control Act gives the Commission the sole right to make rules excluding players from casinos and this was not one of them.
		2. Housing
			1. Goals – (i) expand opportunities; (ii) prevent dignitary and emotional harm; and (iii) prevent message of subordination
			2. ***Shelley v. Kraemer* (SCOTUS 1948)** Synopsis: Shelley received a warranty deed from Fitzgerald, and owners of property subject to the covenant (voluntary agreement among neighbors not to sell to blacks) sued to restrain the Shelleys from taking possession and to divest title from them and revesting it in the immediate grantor or some other third party. Tool: 14th Amendment and Equal Protection particularly do not directly bar private (non-state action) discrimination, but judicial enforcement of a private agreement that is discriminatory would involve state action, and so is unconstitutional. (Before Brown v. Board of Education)
				1. What is state action? Allowing recording of discriminatory covenant, forcing someone out of someone else’s home?
				2. Alternative approach – unenforceable as matter of public policy (however, many states at the time had policies promoting discrimination)?
			3. Fair Housing Act – no discretion on the basis of race, color, religion, sex, familial status, or national origin [or handicap]. Applies only to dwellings.
				1. Exceptions

 Discrimination allowed for single family home sold by owner under limiting circumstances

Allowed in owner-occupied spaces, less than four units (Mrs. Murphy exception).

* + - * 1. No exceptions in advertising. Cannot advertise one’s discriminatory preferences, even in the above exceptions.
		1. Civil Rights Act – applies to race and ALL property transfers. FHA exceptions don’t apply to race.
		2. State and Local Laws – sometimes include other categories – sexual orientation, source of income
	1. Reasonable rates

## Licenses

1. Definition – temporary and (usually) revocable waiver of an owner’s right to exclude
	1. Revocable because it is not a property right since it is not created by delivery of deed – a signed writing under seal – as is required for conveying a property right. Note: public accommodation laws (e.g. antidiscrimination laws) still apply.
		1. Sometimes a license cannot be revoked – usually when coupled with a grant. E.g. license to hunt deer on private land. Now more easily made irrevocable by direct enforcement (coupling with a grant) or hypothetical contract remedies.
	2. Tend to be in personam and informal. Often backed up by contract which often leads to conflating of the two.
2. ***Wood v. Leadbitter* (UK 1845)** Tool: A license if always revocable unless coupled with a grant. Issue of payment is contract breach but not related to license. Synopsis: Racetrack owner kicks out spectator who bought ticket. Spectator sued for assault and false imprisonment, not for breach of contract.
3. ***ProCD, Inc. v. Zeidenberg* (US Court of App. 7th Cir. 1996)** Tool: The buyer must comply with the license terms. When terms not on the outside, buyer should have time to return. Shrinkwrap license is a binding agreement between two parties, an in personam contract. Thus Wisconsin contract law applies. Synopsis: D bought a CD-ROM database with a license restriction, limiting the consumer-purchaser to non-commercial use. Terms were inside the packaging and not on the outside. D ignored the license and resold the information on the CD database.
	1. Copyright (in rem) v. Contract (in personam) – trying to replicate copyright?

## Bailments

1. Definition – the transfer of temporary possession of personal property for limited purposes (custody) by the owner or other interest holder (bailor) to another (bailee). E.g. Songbyrd (Prof. Longhair was the bailor and Grossman was bailee)
	1. Finders (Armory) are sometimes considered (at least initially) involuntary bailees (i.e. not by contract)
	2. Not the same as contract or license so what’s the relationship? Bailment and license often hard to tell apart.
2. Bailee has higher duty than in normal negligence.
	1. Strict liability: Whether the whole item was “misdelivered.” Tends to make baileee liable no matter what. Why? Maybe possibility of collusion.
		1. ***Allen v. Hyatt Regency – Nashville Hotel* (Supreme court of TN 1984)** Tool: A bailment is created when owner gives custody and control over chattel to another to hold until the owner requests delivery. The bailee (or recipient) is under an obligation to return the object. In this case the failure of D to deliver the car upon P’s return subjected D to a statutory presumption of negligence. Synopsis: P parked car in D’s parking lot. Car stolen and not returned. Court held D liable as bailee despite assumption of risk on back of ticket. Dissent – no bailment because P kept car keys.
	2. Great diligence – bailment is for sole benefit of bailee
	3. Ordinary diligence – bailment is reciprocally beneficial to both parties
	4. Slight diligence – bailment is for sole benefit of bailor
	5. Negligence Rule: Whether the bailee was being benefited most. Tends to make bailee more liable.
	6. No Liability: Whether the bailee was so involuntarily. Tends to protect bailee from liability. However, bailee becomes voluntary once he exercises dominion.
		1. ***Cowen v. Presprich* (App. Division, NY 1922)** Tool: Involuntary bailee has no duty of care. Synopsis: Cowen delivers wrong bond to Presprich. Presprich attempts to return bond but gives it to wrong messenger who runs away with bond. Cowen sues Pressprich for misdelivery, which is assumed to be strict liability action grounded in conversion. However, Cowen negligent in delivery so involuntary bailee and no duty.
3. Bailee has a possessor’s rights against third parties (in rem) and has some power to create rights.
	1. ***The Winkfield* (Court of Appeal, England 1901)** Tool: Bailee can recover for lost goods even if under no liability to his bailor for loss in question. Synopsis: Winfield ship runs into Mexican ship which loses mail. Postmaster General sues Winfield. Winkfield’s defense that the Postmaster was immune from liability (sovereign immunity) to his bailors was a jus tertii defense and did not stand.
		1. Once again, possession serves as surrogate for ownership.
4. Limits on Bailee
	1. Cannot sell good
	2. Cannot transform the good (except as authorized)
	3. Cannot consume the good

## Abandonment

1. Definition – parting with possession to no one in particular, with no intention of resuming possession in the future. Returned to public domain with the implicit understanding that it is open to capture by first possession.
2. Requires: (1) intent and (2) overt act (like first possession).
3. Real Property – ***Pocono Springs Civic Association, Inc. v. MacKenzie* (Sup. Ct. PA 1995)** Tool: Traditional rule (under PA law) is that one cannot abandon real property to which one has perfect title (clear record title, reasonably free from challenge by others and also known as marketable title). Synopsis: D tried abandoning vacant lot. P sued D for not paying association fees. PA law does not allow for abandonment of perfect title.

## Destruction

1. ***Eyerman v. Mercantile Trust Co.* (MO Ct. of App. 1975)** Tool: Public policy and interest can stop destruction of property as ordered in a will. Synopsis: D’s decedent’s will asked that house be demolished. P (neighboring land owners) did not want house demolished and argued violation of trust indenture (covenant) and public policy and adverse effect on their property rights. Court granted injunction because right to dispose on death is traditionally less expansive than the right to dispose of during life.
	1. Tradeoff between incentives to earn (and other subjective satisfaction before death) and burden on later generations.
	2. Did majority make it too easy to discount testator’s wishes as irrational, capricious, etc.?
	3. Problem of externalities.
	4. What is testatrix’s valuation, motivation? Who gets to decide what is stupid?

# FORMS OF PROPERTY

## Introduction

1. Ownership can be divided by time or shared concurrently or both.
2. Types of Estates
	1. Freehold
	2. Non-Freehold – mostly leases

## Freehold (See 10/21/14 slides)

1. Fee simple – the largest package of ownership rights, from which other are carved. Indefinite in time.
2. Life Estate – can use the property fully (subject to the law of waste later) until her death, when interest ends and must be followed by a future interest:
	1. Reversion – interest that is (i) created along with the preceding estate (here life estate) and (ii) immediately follows (iii) upon the natural end of the preceding estate (iv) and is created in the grantor.
	2. Remainder – similar interest but created in someone other than the grantor.
		1. Vested – recipient is ascertained and interest is certain to become possessory upon natural termination of prior estate, i.e., no condition remains that must be satisfied other than the death of prior interest holder.
		2. Contingent – either recipient is not ascertained or interest will become possessory only upon the happening of some condition other than natural termination of prior estate.
3. Defeasible fees and future interests
	1. Interest Created in the grantor
		1. Fee simple determinable – fee simple that will automatically end upon happening of the named event and then reverts to the grantor; the interest is followed by a possibility of reverter (not reversion).
		2. Fee simple subject to a condition subsequent – fee simple that, upon happening of the named event, does not automatically end but can be ended by action (self-help or lawsuit) of the holder of the right of entry/power of termination (the grantor or his successor in interest).
	2. Interest Created in Grantee
		1. Fee simple subject to an executory limitation – Defeasible fee followed by an executory interest. Automatically ends upon the happening of the named event.

## Conservation of Estates and Related Principles

1. Conservation of Estates – all the interests that a grantor grants and retains must add up to what the grantor started with, so the last interest when it becomes possessory must be in fee simple.
2. Nemo dat quod non habet – one cannot transfer what one does not have
3. Owners are presumed to transfer what they have, unless specified to the contrary
4. Some rules can be used multiple times to their own output
5. ***Williams v. Estate of Williams* (Sup. Ct. of TN 1993)** Tool: The function of a suit to construe a will is to ascertain and effect the intention of the testator. Conservation of estates – grantors may break up their interest and transfer some or all of the pieces, but the pieces have to add up to what the grantor started out with. Synopsis: Testator’s will left farm to three daughters until they married or died. Question of whether it reverted to rest of children when three daughters died or married. Court holds that each has a life estate defeasible or determinable upon her marriage. Each had an executory interest in the other 2 daughters 1/3 interest. Heirs at had a reversion in fee simple (partial intestacy).
6. ***City of Klamath Falls v. Bell* (OR Ct. of App. 1971)** Tool: RAP applies to executory interests. An attempt of a grantor to transfer a possibility of reverter does not cause its destruction. Synopsis: Corporation gave land to city “as long as” it used the land for a library, and thereafter unto Fred Schallock and Floyd Daggett, their heirs and assigns (executory interest). The city closed the library. Executory interest void so question of whether to take grant as one of fee simple to the City or reverts to the grantor. Court found that “so long as” language stayed so found that it was fee simple determinable with heirs of corporation holding possibility of reverter.

## Numerus Clausus

1. Principle – Property, unlike contract, forces people to use a standardized set of property forms.
	1. Types of property come from a fixed menu, and major changes to the menu, especially additions or removals of whole items, are channeled to the legislature and away from court.
	2. Merrill & Smith on the in rem aspect of property – the actors who need to process information about property are greater in number and more anonymous than in the case of contracts.
2. ***Johnson v. Whiton* (Sup. Jud. Ct. MA 1893)** Tool: A person cannot create a new kind of estate (numerous clausus). When a person tries to convey property in a way that does not conform to one of the traditional estates, the limitations in that conveyance will be invalid. Synopsis: A grandfather conveyed property to his granddaughter, but in a way that did not fall in one of the traditional estates, so she was held to have taken a fee simple absolute.
3. Lease comes in three forms – at will, periodic, and term of years (and at sufferance)
	1. ***Garner v. Gerrish* (NY Ct. App. 1984)** Tool: A lessor can create a lease in which the lessee possesses the sole power to terminate the lease, which creates a life tenancy in the lessee. The old English rule of livery and seisin has been abandoned in favor of allowing such an agreement. Synopsis: Executor of landlord’s will filed suit to evict a tenant who was in possession of a lease that gave him the right to end the tenancy on a date of his choice. Executor said tenancy at will and tenant said it’s tenancy for life. Holds life tenancy was valid.

## Limitations to Ownership in Limited Estates

1. Waste
	1. Rule
		1. The greater one’s interest the more freedom one gets as owner.
		2. In a lease, the tenant is normally liable for anything beyond ordinary wear and tear.
		3. Default rule that established baseline against which the parties contract
			1. When trusts are used, specification of the powers of the trustee to invade the trust property effectively substitutes for the common law duty doctrine of waste.
			2. When property is leased, specific provisions about the tenant’s ability to modify the property effectively substitute for waste.
	2. Purpose – bilateral monopoly and disadvantaged party may not be able contract (minor or unborn)
	3. Standard – Posner’s analysis – law of waste should permit holder of present possessory interest to do anything a fee owner would do and prevent that which goes beyond. (But difficult to know what this would be)
	4. Kinds of Waste
		1. Affirmative waste – an affirmative act that is not reasonable, causes excess damage to the property. E.g. tree cutting, mineral extraction
		2. Permissive waste – a nonfeasance that has a similar effect. E.g. not paying taxes, allowing adverse possessor
		3. Ameliorative waste – an act that increase the market value but changes the property in some substantial way. Is it really waste? It may destroy subjective value.
	5. ***Brokaw v. Fairchild* (Sup. Ct. NY 1929)** Tool: A life tenant may not demolish his inherited building against the wishes of the remaindermen even if the property would be more valuable if demolished. Such action would constitute ameliorative waste. Life estate gives use, not full dominion/ownership. Synopsis: P has life tenancy in mansion. Wants to demolish and build apartments but remaindermen won’t let him. Court rules in favor of remaindermen because it would be ameliorative waste.
		1. Brokaw is minority view – Melms v. Pabst Brewing Co. – permits ameliorative waste, at least when it can be justified by changed circumstances. NY changed Brokaw rule by statute.
2. Restraints on Alienation
	1. ***Morse v. Blood* (Sup. Ct. Minn. 1897)** Synopsis: P’s husband left estate to her with condition that she couldn’t give one cent to his or her heirs. However, if she broke condition, it would revert to heirs. Court found that condition is void because it effectively prohibits alienation of property during P’s life, because if P tried to convey property, P would have to forfeit entire estate along with what was conveyed. Tool: Condition is good if it merely prohibits alienation to certain persons or classes of persons and bad if it allows alienation only to certain persons or classes of persons. Condition wholly restraining the alienation of a fee simple title for a length of time is void. Rationale:
		1. Condition could be triggered innocently or inadvertently
		2. Restraint is self-defeating
		3. Not equitable – like spite fence? Disproportionate hardship
	2. Conditions Restricting Use
		1. ***Mountain Brow Lodge No. 82, Independent Order of Odd Fellows v.* Toscano (Cal. App. 1967)** Tool: Restrictions on use do not violate the prohibition against restraints on alienation. The object in construing a deed is to ascertain the intent of the grantor from words that were used in the deed and surrounding circumstances. Synopsis: P instituted an action to quiet title to a parcel of real property. Sale restriction is invalid. Question whether the use condition created a defeasible fee as respondents maintain or whether it is a restraint against alienation.
		2. Courts are especially understanding of charitable purpose conditions.
		3. Factor – does it violate public policy? (e.g. racially restrictive)
		4. Possible interpretation as fee simple determinable is not favored in order to avoid forfeitures.
		5. Dissent – if use restriction has effect of restraint on alienation it should be invalid.

## Co-Ownership

1. Tenancy in common (TIC)
	1. Separate but undivided interest. (interests need not be equal in value)
	2. Each interest is descendible, conveyable, and devisable (no right of survivorship)
	3. Unity required – possession (each interest has a right to possess the whole)
	4. Straw required to create JT out of TIC.
2. Joint Tenancy (JT)
	1. Separate interest
	2. Right of survivorship – deceased joint tenant’s interest is extinguished; lack inheritability
	3. Can be severed while living creating a TIC by unilateral act, such as transfer, so joint tenant has right to exit. Can be done in secret and without notice to other JT.
	4. Four Unities required
		1. Time – all interests acquired simultaneously
		2. Title – all interests/titles acquired by the same instrument or by joint adverse possession; never by intestate succession or other act of law
		3. Interest – all must have equal undivided shares and durationally identical interests (e.g. fees simple); these days not necessarily identical value-portions (but very rare)
		4. Possession – each must have right to possess the whole.
3. Tenancy by the Entirety (TBE)
	1. Only for married couples
	2. No longer exists in many states
	3. Right of survivorship
	4. No unilateral exit as long as couple stays married (Note: couples can convey to a straw and then have the straw convey back to them as TIC.)
	5. Five Unities required – Time, Title, Interest, Possession, Marriage
4. Conflict
	1. Common-law conception was that TICs and JT have no property rights vis-à-vis each other. E.g. can’t exclude each other. Have to work it out without common law judges interceding.
		1. Love it or leave it – co-TIC’s and JT’s can exit via automatic right of partition at any time. Can work out affairs by contract.
	2. Partition (love it or leave it) – strong with respect to concurrent interests; but has a weak tradition with respect to future interests.
		1. Available to TIC’s and JT’s but not TBE’s
		2. Partition in kind was favored over partition by sale but now partition by sale is more common
			1. Problem with in kind
				1. Small parcels are often uneconomical
				2. More houses as opposed to farms now; houses are harder to split
				3. Difficult to appraise chunks of land
			2. Problem with by sale
				1. It can destroy other co-T’s subjective value, especially if for some reason (legal rule, liquidity, etc.) the other co-T cannot buy the whole in the judicial sale.
				2. Co-T’scan agree to sale by one co-T to another or to third person, but problem is that they are in a bilateral monopoly situation.
		3. ***Delfino v. Vealencis* (Sup. Ct. CT 1980)** Tool: Partition by sale as opposed to in kind should be ordered only when: (1) the physical attributes of the land are such that a partition in kind is impracticable or inequitable OR (2) the interests of ALL the owners would better be served by a partition by sale. Synopsis: P wanted partition by sale and D wanted partition in kind. Court finds in favor of partition in kind considering that D had garbage business on land so sale would not serve her interests.
		4. ***Gillmor v. Gillmor* (Sup. Ct. of UT 1984)** Synopsis: P wrote letter to D expressing intent to graze livestock but D refused. D appeals trial court’s (1) finding that D had exercised exclusive possession of the land and (2) amount of damages given that D had made repairs to land. Court affirms but lowers damages to offset for maintenance.
			1. Basic rule – cotenants do not have to account for their use to each other, absent ouster. They do have to account for rents received from third parties, with offsets for costs. (mini-commons with problems to be solved by cotenants themselves)
			2. When a cotenant out of possession makes a clear demand to use land that is in the exclusive possession of another cotenant, and that cotenant refuses to accommodate the other (necessarily excludes other tenant so is an ouster), the tenant out of possession has a claim for relief. It is not necessary that the out-of-possession cotenant resort to force or to means that would damage the common property to establish a right to legal redress.
			3. Where a cotenant in sole possession makes repairs or improvements to the common property without the consent of his fellow cotenants, he generally has no right of contribution. However, compensation is allowed when (1) the other cotenants have stood by and permitted him to proceed or (2) cotenant acted in good faith believing he was sole owner or (3) the repairs were essential to preserve or protect the common estate.
			4. Letter writing to express intent good enough here butnot always.
		5. ***Harms v. Sprague* (Sup. Ct. IL 1984)** Synopsis: Surviving joint tenant brought action to determine title and ownership of survivorship property against mortgage holder and executor of decedent’s estate. Court held that mortgage did not sever the joint tenancy and did not survive John Harms, leaving William harms with sole unencumbered ownership of the property.
			1. Lien theory of mortgages - a mortgage is similar to a lien, which merely establishes an interest but not a transfer of the title. Therefore, if the mortgage is treated as a lien, it does not sever any of the four unities, which need to be present to hold property in joint tenancy.
			2. Vanishing interest theory – lien does not survive the death of the mortgaging joint tenant, the lien disappears along with his interest (this seems to go against relevant statute).
	3. Marital Property
		1. Surviving spouse gets everything under most circumstances, esp. under current intestacy rules (spousal forced share traditionally between 1/3 and 1/2.)
		2. Divorce (equitable distribution v. community property depends on state)
			1. Equitable distribution – Courts exercise broad discretionary power to divide property in accordance with principles of equity. Movement away from alimony toward lump sum payment although support payments still awarded in some cases. No strong presumption toward 50/50 split like in community property.
			2. Community property – earnings of spouses during marriage are owned equally in undivided shares by the spouses. All property that is not community property is separate (property acquired before marriage or during marriage by gift, bequest, devise, or descent, and in some states the earnings on these).
			3. ***O’Brien v. O’Brien* (Ct. of App. NY 1985)** Tool: An interest in a professional license or professional career potential is marital property (Under NY statute, marital property defined as “things of value arising out of the marital relationship), which may be represented by direct or indirect contributions of the non-title holding spouse, and is thus subject to equitable division. Synopsis: A spouse sought to have a professional license declared as marital property, thus subject to equitable distribution.
	4. Waste (limited judicial arbitration of use dispute) – strong with respect to future interests, but has weak tradition with respect to concurrent interests.

## Entity Property

1. Introduction
	1. Allows for specialization of function (including management, financing and risk bearing)
	2. Separation of Management and Possession
		1. Landlord-Tenant
		2. Common-Interest Communities
	3. Separation of Management and Beneficial Interest
		1. Trust
2. Landlord-Tenant
	1. Types of Leases – (has to be in writing unless it’s less than a year or it’s tenancy at will)
		1. Term of years – can be for any time period (some states limit) so long as maximum duration is definite enough. No notice required.
		2. Periodic tenancy – Express or implied. Fixed duration that continues until notice by LL or T.
			1. Notice – 6 mos. Notice required for year-to-year lease; for shorter periods, lease period is notice period, not to exceed 6 mos.
		3. Tenancy at Will – no fixed term; either LL or T can terminate (modern – notice required, usually one rental period)
		4. Tenancy at Sufferance – holdover tenants
	2. Landlord retains reversion
	3. Duties
		1. Landlord duties: to deliver possession at beginning of the lease; not to interfere with the tenant’s quiet enjoyment; to provide habitable premises.
		2. Tenant duties: pay rent; not to damage the premises; not to disturb other tenants
	4. Remedies
		1. Landlord – Distress (seizure of tenant’s chattel); statutory liens; security deposit; rent acceleration clause; evict tenant.
	5. Two theories/models
		1. Property/Conveyance (independent covenants)
			1. ***Paradine v. Jane* (King’s Bench 1647)** Synopsis: Landlord sued tenant for unpaid rent for three years. Tenant defends his liability on the basis of frustration of purpose (army seized farm). Court found for landlord that tenant obligated to pay.
				1. Independent covenants model of the landlord-tenant relationship – each party must abide by their side of the covenant even if the other side is not and may sue for breach of covenant as relief.

Not entirely independent – Scope of covenant of quiet enjoyment – LL not liable for acts of third parties but liable for own acts or possibly acts it has control over.

* + - * 1. Tenant is “residual claimant” – bears risk.
		1. Contract (mutually dependent covenants)
			1. Express termination clauses – LL began putting express termination clauses in the lease, which allowed them to evict for failure to pay. Dependent to the benefit of LL but independent when T wanted to invoke.
			2. Constructive Eviction
				1. Elements: (1) substantial interference with the tenant’s use and enjoyment of the premises; (2) tenant must vacate the premises; (3) fault of the landlord.
				2. ***Blackett v. Olanoff* (Sup. Ct. of MA 1977)** Synopsis: A landlord rented property to a tenant running a lounge near where he rented property to residents. The lease required the noise not disturb others, but when it did, the landlord did not correct the situation. Tool: Landlord will not necessarily be liable when the disturbance comes from another tenant (violate covenant of quiet enjoyment), but is in this case because the landlord created the clash of tenants’ interests and had the right to control the objectionable condition which amounted to constructive eviction.

What of the common law rule that LL’s were not responsible for a nuisance committed by one T against another? Court held that where the LL has the power (under the lease) to control the offending conduct of one tenant, and where failure to control such conduct will foreseeably injure another T, the common law rule does not apply.

* + - 1. Surrender – in effect implies a contract for a mutual release of the lease obligations when T, by abandoning or stopping payment “offers” to relinquish its right to quiet possession. LL, by its statements in response or its actions, “accepts” the offer and thereby releases T of any further obligation under the lease. All liability for rent ceases the moment surrender is accepted (because the implied contract is a release).
				1. LL has three options when a tenant abandons or repudiates a lease before its termination date:

Continue to hold T liable for rent as it comes due.

Re-enter the premises in order to re-let for the benefit of T.

Accept T’s repudiation as a surrender of the leasehold, and re-let for the LL’s own account.

* + - * 1. ***Gotlieb v. Taco Bell Corporation* (Dist. Ct. Eastern District of NY 1994)** Synopsis: P leased to D. D made request to repudiate. P wrote back rejecting request. P later went into talks to re-let to other entity. Court found that this was acceptance of surrender and no acceleration clause so D liable for rent up to then. Tool: Tenant is liable for full amount of rent owed up to when landlord accepts surrender but not after. Doctrine of surrender requires that courts characterize the actions of the tenant and the landlord as evidencing a particular state of mind. Tenant’s state of mind must be to abandon the leasehold (surrender/repudiate). Landlord’s state of mind must be to accept the abandonment and reclaim the leasehold interest as an entitlement belonging to the landlord.
			1. States fall into four groups with respect to commercial leases:
				1. Implies a warranty of fitness into commercial leases (analogous to IWH)
				2. All lease clauses are dependent
				3. Majority – material clauses are dependent, nonmaterial clauses are independent
				4. All clauses except quiet possession are independent, and T remedies are based on constructive eviction.
			2. Material clauses are dependent (E.g. non-competition covenants)
				1. **Medico-Dental Building Company of LA v. Horton and Converse (Sup. Ct. of CA 1942)** Synopsis: P executed lease with D promising not to allow other drug store in building. P entered lease with doctor who ended up selling drugs. D stopped paying rent. P sued. Court found for D because P effectively breached lease by executing lease with doctor and not doing anything when doctor sold drugs.

Covenants are mutually dependent because although lease is primarily a conveyance in that it transfers an estate to a lessee, it also presents aspect of a contract.

Restrictive covenant was breached and was substantial because breached purpose of lease.

P’s inaction toward other tenant constituted breach of lease.

Three remedial options for T who has suffered a substantial breach of the material covenant:

T can rescind the lease and be released of any further obligation to pay rent. (drug store followed this course and thus court found judgment in its favor).

T can remain in possession and sue for damages for loss in profits suffered by reason of the breach.

T can rescind, putting an end to the contract prospectively, and sue for damages for lost profits suffered up to the time of rescission.

* + - 1. Implied Warranty of Habitability: an inhabitable dwelling, because of disrepair or other issues, breaches IWH and the tenant can thus be freed from the obligation to comply with the dependent covenant to pay rent for the period of the breach of IWH and until the LL corrects the problem.
				1. ***Javins v. First National Realty Corp.* (Ct. App. DC Cir. 1970)** Tool: Apartment lease should be treated as contract so there is an implied warranty of habitability. To determine whether breach of warranty of habitability can be used as defense must find: (1) whether the alleged violations existed during the period for which past due rent is claimed and (2) what portion, if any or all, of the tenant’s obligation to pay rent was suspended by the landlord’s breach. Synopsis: Apartment tenants stopped paying rent and made defense of breach of implied warranty of habitability due to multiple housing code violations. Court adopts IWH holding that substantial housing code violations arising during tenancy violate a warranty implied mandatorily into every lease and so give rise to remedies for breach of contract (furnishing a counterclaim to a LL’s claim for rent).

Rationale for IWH

Tenant lack of bargaining power

Tenant’s need to rely on the skill and honesty of the LL

Housing shortage

Impediments to competition in the rental housing market

Racial and class discrimination

Standardized form leases

Why mandatory?

Negative externalities (on community)

Other market failures (information asymmetry)

Distributive concerns

Merit goods/Moralism/Paternalism

* + - * 1. IWH and Housing Code Enforcement Effects

Inelastic supply?

Elastic demand? – small increase in price leads to large decrease in demand – pricing people out

Low enforcement

* + - 1. Constructive eviction – still matters because rely on it in commercial leases and IWH doesn’t cover everything.
			2. Duty to Mitigate
				1. ***Sommer v. Kridel* (NY Sup. Ct. 1977)** Tool: LL has duty to mitigate damages (try to lease to someone else) when T abandons lease. LL need not accept less than fair market value rent or substantially alter his obligations as established by the pre-existing lease. Synopsis: T signed lease, and attempted to terminate lease by letter to LL. LL did not attempt to re-let apartment and sued for full amount due. Court found LL had duty to mitigate damages. Remanded to see if LL met that duty.
				2. Similar to duty in contract law and almost like a substitute for surrender doctrine.

Consequences for not mitigating? LL/T – No damages; K – no damages for non-mitigated amount

Burden of proof? LL/T – Burden on LL; K – Burden on breaching party

Lost volume seller? LL/T – each premises is unique?

* 1. Transfers of Interest
		1. One can have a successor in interest on either or both sides, LL (reversion, covenants) and T (assignment and sublease, covenants). NB: Implied covenants (IWH and covenant of quiet enjoyment can be enforced against whoever is the landlord at the time the covenant is breached.
		2. Covenants Running to Assignees
			1. Intention – both parties to the lease must intend that the covenant run to assigns.
			2. Privity of estate or contract – assignee must be in privity of estate or contract with person suing or being sued.
			3. Touch and Concern
		3. Privity of Estate or Contract
			1. Types
				1. Of Contract – both signatures on the lease.
				2. Of Estate – one party is in possession and that party’s interest is directly carved out of the other’s.
				3. Parties in privity of estate but not of contract are only bound by those covenants which “touch and concern” the land. Successor landlord and successor tenant (assignee) alike.
			2. Sublease – nesting like Russian dolls
				1. Created if T1 transfers less than the entire remaining term of his leasehold. T1 retains reversion in a sublease.
				2. LL and T1 in privity of contract and estate. T1 and T2 are in privity of contract and of estate.
			3. Assignment
				1. Created if T1 transfers the entire remaining term to T2. T1 does not retain a reversion.
				2. LL and T1 are in privity of contract (T1 still liable for rent unless there has been a novation) and LL and T2 are in privity of estate (test: direct carving out and one of them in possession or having a reversion). T1 and T2 are in privity of contract.
				3. AKA LL can sue T1 and T2 and T1 and T2 can sue LL.
				4. English rule: look at lease language (did T1 retain any rights or time in the lease?); Modern rule: look at structure of relationship and intent of the parties
			4. Right to reenter – courts split on whether T1 retaining right to reenter is a contingent reversionary interest which would make it a sublease.
		4. Touch and Concern
			1. Many covenants in a lease do not run with the land and must be re-iterated between parties.
				1. ***Mullendore Theaters, Inc. v. Growth Realty Investors* (Ct. of App. Washington 1984)** Synopsis: P sued for return of security deposit from D who had transferred land to City and entered indemnity agreement with City. Court found that security deposit did not run with the land because not restricted to repairs and maintenance.

Two requirements for a lease covenant to run with the land when the original LL assigns her interest to a new owner:

The original LL and T must intend the covenant run with the land. (met here)

The covenant must touch and concern the land – must be “so related to the land as to enhance its value and confer a benefit upon it” (Court says not here even though lease says it runs with the land. For a security deposit to be running covenant, it must restrict the use of the funds to the benefit of the property and should say it has to be transferred to successors.)

Why is this necessary? Same reasons as numerus clausus? Can always contract between parties but won’t carry over to parties that step into their shoes.

Unclear that this is not met.

* + - 1. Lesson for tenants – insist on a clause that makes the security deposit transferable to successor LL’s and that spells out the functions of the deposit in terms of protecting against nonpayment of rent as well as physical damage to the premises.
1. Common Interest Communities
	1. General
		1. Involve multiple possessory interests but also multiple fee ownership interests and common ownership of certain areas, etc.
		2. More like democracies(cf. market-and-contract-constrained dictatorship of the LL)
		3. Governance is through mutual covenants and through a board or HOA (which can enforce the covenants and enact new rules).
	2. Main Types
		1. Condominium – fee ownership of unit and tenancy in common of outside walls, common areas, etc.; usually includes a condominium association. Very flexible – can be used for buildings, townhouses, detached units. Statutes limit rights to partition condos, otherwise would be a disaster.
		2. Cooperative – each owner owns a share of a corporation that owns the building and has an indefinitely long “proprietary lease” to unit. Functionally like condos but traditionally more sharing of financial risk (so one reason for more nosiness in admitting new members), but less so now that coop owners can mortgage their shares.
		3. Subdivision – planned unit developments especially in the suburbs, often with a homeowners association.
	3. Covenants, Conditions and Restrictions (CC&R’s)
		1. ***Nahrstedt v. Lakeside Village Condominium Association* (Sup. Ct. CA 1994)** Synopsis: D's project declaration recorded by the condo developer contained a restriction against allowing owners to have cats, dogs, and other animals. P sued D to prevent the homeowners' association from enforcing the restriction because it is unreasonable.
			1. If the use restriction is contained in the declaration or master deed of the condominium project, the restriction should not be enforced only if it is unreasonable.
			2. Challengers (i) have the burden of proving unreasonableness and (ii) unreasonableness cannot be shown by focusing on application one homeowner but common interest of the development as a whole and by showing that the covenant (a) is arbitrary, (b) the burdens it imposes on effected properties so substantially outweigh the benefits of the restriction that it should not be enforced against any owner, or (c) violates a fundamental public policy.
			3. Dissent – having cats is close to fundamental right and reasonableness should be decided on case-by-case basis. Burden of anti-pet covenants substantially outweigh the benefits.
	4. Judicial Review of Governance Disputes
		1. Eviction of Tenants – ***40 West 67th Street v. Pullman* (NY Ct. App. 2003)** Synopsis: D was a shareholder-tenant in the P cooperative building. D made and published accusations against his upstairs neighbors that turned out to be false. P sought to cancel D’s shares and evict D for “objectionable” conduct under their Lease Agreement. Co-op is part corporation and part LL/T. Co-op argues the decision should be reviewed under the deferential business judgment rule that applies in shareholder suits against directors of corporations. D argues that the review should be governed by the NY statute requiring review of reasonableness that applies to evictions of objectionable tenants under landlord-tenant law. Court rules in favor of P.
			1. Business judgment rule is the proper standard of judicial review when evaluating decisions made by residential cooperative corporations – prohibits judicial scrutiny of actions of cooperative boards “taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance or corporate purposes.”
			2. Court says shareholder-tenant must show (NB: burden of proof) that the board acted
				1. Outside the scope of its authority
				2. In a way that did not legitimately further the corporate purpose; or
				3. In bad faith.
		2. ***Kiekel v. Four Colonies Homes Association* (Ct. of App. of KS 2007)** Synopsis: Four Colonies approved bylaw amendment after receiving numerous complaints about tenants leasing from the Kiekels. Kiekels received a letter from Four Colonies asking them to provide information about their tenants pursuant to the bylaw. In response, the Kiekels filed a petition for declaratory judgment and argued the bylaw amendment was void because it conflicted with the Declaration. Four Colonies filed a counterclaim asking the district court to enjoin the Kiekels from renting their properties and to order them to sell their lots to owners who would occupy the residences. Court found that bylaw amendment essentially eliminated the right to rent property and it is clear that the Declaration intended any property use restrictions to be achieved through an amendment to the Declaration. Because Four Colonies failed to properly amend the Declaration, the bylaw amendment imposing rental restrictions is void and unenforceable. Thus injunctive relief is also denied.
			1. Factors considered – declaration makes references three times to tenants; course of conduct of parties over the years suggests that renting is permissible since it’s been allowed since the association was created; HOA can exercise a “right of restoration” to fix up the Kiekels’ properties and sent them the bill.

## Trust

1. Mechanism – separation of legal title (trustee) and equitable/beneficial title (beneficiary)
2. Three parties
	1. Settlor – conveys property to the trustee, who then manages it as a fiduciary for the benefit of the beneficiary
	2. Beneficiary – he for whom the trust was created, holds equitable title
	3. Trustee – holds the legal title to the property, must manage the property for the sole benefit of the beneficiary. Under fiduciary duties.
3. Numerus Clausus safety valve – trust rules ensure that third parties do not have to deal with the complexity of trust arrangement, but trust can be very complex as among the in personam parties.
4. Trust assets are fully alienable (usually) because legal title is in trustee. Third parties only take subject to beneficial interest if they have notice or did not give value, and there is little duty to inquire.
5. Used for family wealth transmission and in commerce (e.g. investments).
6. Spendthrift Clause
	1. ***Broadway National Bank v. Adams* (Sup. Ct. of Mass. 1882)** Synopsis: D owed debt to P. D beneficiary of trust that had $75,000 and paid out semiannually. D wanted to attach the debt to this trust. Settlor specifically provides that income of the trust are to be free from the interference or control of creditors. Court holds that clause is valid. Tool: Spendthrift clause is not unreasonable restraint on alienation and is thus valid. The income of the trust fund created for the benefit of D cannot be reached by attachment by creditors, either at law or in equity, before it is paid to him. Rationale – donor intent (suppose settlor was still alive and wanted to make periodic gifts of cash to beneficiary?). Dissent - This is paternalism destroying the ethic of individual responsibility.
	2. Spendthrift trust is not generally valid if settlor is also beneficiary.
	3. Not major notice problem for lenders these days.
7. Fiduciary Duties
	1. Trustees are hard to monitor and the beneficiary is often vulnerable.
	2. Associated with certain relationships – trust, executors guardians, lawyers, corporate officers and directors, partners, etc.
	3. Most prominent duty – loyalty (also prudence, impartiality, information and accounting)
		1. Loyalty involves prohibitions on self-dealing (especially profiting without the knowledge or consent of the right holder) and on conflicts of interest and duty.
		2. ***Rothko v. Reis* (Ct. of App. NY 1977)** Synopsis: Rothko left numerous paintings in his will a foundation (at the suggestion of his executors). His children filed suit claiming breach of fiduciary duty because the executors entered into improper business transactions to sell the paintings. Court rules for children and finds executors jointly liable for $9.2M based on FMV at time of restraining order (not at time of sale because want to take into account possible appreciation if had waited to sell at right time). Tool: Trustees have duty of loyalty that prevents them from accepting employment from a third party who is entering into a business transaction with the trust. An executor who knows that his co-executor is committing breaches of trust and not only fails to exert efforts directed towards prevention but accedes to them is legally accountable even though he was acting on advice of counsel. If a trustee in breach of trust transfers trust property to a person who takes with notice of the breach of trust, and the transferee has disposed of the property, it is proper to charge him with appreciation damages because if it had not been for the breach of trust, the property would still have been a part of the trust estate.
	4. Cy Pres and Changed Circumstances
		1. When settlor’s precise designs cannot be fulfilled and settlor is unavailable for consultation, a similar alternative can be accepted “to carry out, as near as may be, the testator’s general intent and purpose.”
		2. Traditional Test
			1. Court must determine that the settlor of the trust has a general charitable intent
			2. The court must find that the specific charitable intent specified by the settlor is impossible to fulfill, would violate public policy, or has been rendered problematic by changed circumstances.
		3. New Restatement and Uniform law loosens up cy pres to include wastefulness and allows the selection of a similar object rather than more mechanical general charitable intent.
		4. ***Wilber v. Owens* (Sup. Ct. NJ 1949)** Tool: When the original objective of the settlor or the testator becomes impossible, impracticable, or illegal to perform, the cy-près doctrine allows the court to amend the terms of the charitable trust as closely as possible to the original intention of the testator or settlor to prevent the trust from failing. Synopsis: Deceased’s will created trust to complete and publish his scientific notes by Princeton. Princeton found his notes to be worthless. Court found that provision still had charitable intent so it should go toward scientific research by University.
			1. Court was heavy handed with Bamford – trying to make strong argument to go against his wishes.
			2. Worried about deadman control?

# TRANSACTIONS AND TITLE RECORDS

## Mortgages

1. Foreclosure Sales
	1. ***Murphy v. Financial Development Corporation* (Sup. Ct. of NH 1985)** Synopsis: P’s defaulted on their loans and D, a mortgagee put P’s house up for sale. D was only one to bid at foreclosure sale and bought it for roughly amount owed on mortgage and quickly sold it for more. P sued to set aside foreclosure sale of their house alleging that D failed to exercise good faith and due diligence in the sale of their house. Court doesn’t find lack of good faith but does find lack of due diligence so rules in favor of P.
		1. Mortgagee has a fiduciary duty to the mortgagor in the conduct of the foreclosure sale. Sellers in a foreclosure sale must satisfy both the statutory requirements for a foreclosure sale and a duty of good faith and due diligence in protecting the interest of the mortgagor.
		2. Due diligence is measured against fair price, not fair market value. (Remedy for a violation of the duty of good faith, may well be the difference between fair market value and the sales price.) Fair price is what would have been obtained had the property been sold in a reasonable fashion (foreclose sales prices tend to be lower).
	2. ***U.S. Bank National Association v. Ibanez* (Sup. Ct. of MA 2011)** Synopsis: Ibanez took out loan secured by a mortgage. Initial lender assigned mortgage to Option One, which purported to assign the mortgage to Lehman then Structured Assets, which in turn purported to assign it, pooled together with other mortgage loans to U.S. Bank, as a trustee for a trust of mortgages securitized and sold to investors. In July 2007, US Bank, as trustee, foreclosed on the property and bought the property at the sale. Foreclosure deed to the property was recorded in May 2008. Court found bank was not entitled to foreclose, because it did not have in its possession written documentation establishing a clear chain of title to support the proposition that it was an assignee at the time of the sale. The problem was not that the assignment was not recorded until after the sale; the problem was that there was no documentary evidence that any assignment had taken place at all before the foreclosure occurred.
		1. An assignment in blank is not sufficient. An assignment of the note does not qualify as evidence of assignment of the mortgage. (Title theory probably doing some work here. In lien state, the strong presumption is that a mortgage is assigned along with the note but maybe not so much post-crisis.)
		2. This is under title theory, might be different outcome if lien theory.
2. Land Sales Contract
	1. ***Skendzel v. Marshall* (Sup. Ct. of IN 1973)** Synopsis: P, the assignees under the vendor’s will, sued to obtain possession of land by seeking enforcement of a forfeiture clause in a land sale contract. D raised defense of waiver because vendor had accepted late payments. Court found no waiver and that possession and $21K as liquidated damages would not be fair and equitable.
		1. Waiver – waiver of strict compliance with contract would lead to equitable requirement that the creditor give notice that it will then on insist on strict compliance and enforce right of forfeiture.
		2. Equity abhors forfeitures and damages must be in reasonable proportion to the loss actually suffered.
		3. Installment sales contract treated in equity as a mortgage, the retention of a lien from a security interest through equity, so incidents of mortgage, including remedies, should carry over into the context of a land sale contract, including the requirements of the foreclosure statute. (Vendor is equitable mortgagee.)
		4. Forfeiture would be appropriate if the vendee had little or no real equity in the property.
		5. What if you consider payments more as rent ($195 per month = $1606 in 2014)?

## Transfer

1. General
	1. Records are important in connection with transfer; transfer makes them difficult and they are most relevant to purchasers.
2. Gifts
	1. Require:
		1. Intent to give (by exercising the power to shift ownership to another)
		2. Delivery
	2. ***Irons v. Smallpiece* (Kings Bench 1819)** Tool: Gift requires intent to relinquish possession plus delivery or deed (writing).Synopsis: Father promised son two colts to buy hay. 6 months later son bought hay. Father died a few days later without giving son two colts. Son sued executrix of father’s estate for damages. Court finds that no delivery or deed so not gift.
	3. Causa Mortis
		1. Definition – Deathbed gifts of personal property, made on understanding that death is imminent. If the donor recovers, then the gift is rescinded by operation of law. Like other gifts, require actual or symbolic delivery of the property if they are to be enforced as valid transfers.
		2. ***Foster v. Reiss* (Sup. Ct. of NY 1955)** Synopsis: The decedent wrote a note prior to death which directed her husband to certain money, a savings account and shares in a building and loan association. The husband would not have received the property under the decedent’s will and the Plaintiffs, those responsible for carrying out the will, sued the husband to recover the property. Court rules in favor of P’s because no delivery.
			1. Wills Act – typically requires that will be in writing, that they be witnessed by one or two disinterested witnesses, and sometimes that the signatures be notarizes. Exception to Wills Act – Gifts Causa Mortis
			2. Court implies that if husband would have retrieved the items, returned to the hospital, received ratification from wife, than that would satisfy delivery. But wife in coma so that was not possible.
			3. Elements of a gift causa mortis are: 1. The gift must be made in light of the impending death of the donor; 2. The donor must die of the peril or disorder which creates the basis for impending death; 3. There must be delivery of the thing given; 4. The donor must be competent to make the gift; 5. There must be an intent on the part of the donor to make the gift; 6. There must be acceptance by the donee.
3. Nemo dat quod non habet
	1. Rule
		1. No one can give that which one does not have (baseline rule)
		2. Unless there is some explicit limitation, one is presumed in a transfer to transfer everything one has.
		3. Also called “Deriviation Principle” (works together with “Conservation of Estates”) – one cannot get better title than one’s transferor.
		4. Look at chain of transactions.
	2. Personal Property - UCC
		1. Void Title – No good faith exception (nemo dat applies)
			1. ***Kunstsammlungen zu Weimar v. Elicofon* (2r Cir. 1982)** Tool: Under UCC (NY and not German law applies because transfer occurred in NYC.), title is VOID (no good faith exception) if there is a thief in the chain of title. Synopsis: D purchased two portraits which were stolen by a U.S. serviceman during the Allied occupation of Germany. The museum brought an action against D to recover the portraits. Court holds for museum under nemo dat. No AP because not open and notorious.
		2. Voidable Title – Good faith exception
			1. UCC Section 2-403 – “A person with voidable title has power to transfer good title to a good faith purchaser for value.”
				1. Voidable title exists when:

The transferor was deceived as to the identity of the purchaser, or

The delivery was in exchange for a check which is later dishonored, or

It was agreed that the transaction was to be a “cash sale”, or

The delivery was procured through fraud punishable as larcenous under the criminal law.

* + - * 1. Good Faith (built into recording statutes)

***Kotis v. Nowlin Jewelry, Inc.* (Ct. of App. of TX 1992)** Tool: While a transferor with voidable title can transfer good title to a good faith purchaser (voluntary transaction creating interest in the property), the test for good faith is the actual belief of the buyer.Synopsis: D bought watch from X who bought watch from jeweler (P) with forged check. P filed suit seeking declaratory judgment that P was sole owner. Court found that X had voidable title, but that D was not good faith purchaser because he knew he was getting watch for cheap and called jeweler asking about sale.

Cheapest cost-avoider analysis: party able to minimize negative externalities (or third-party harms) most efficiently.

* + - * 1. Purchaser
	1. Real Property
		1. Fraud in the inducement
			1. Occurs when A enters into an agreement, knowing that it is supposed to be a contract and (at least having a rough idea) what the agreement is about, but the reason A signed/made the agreement was because of some false information that B gave to A.
			2. Equitable defense
			3. Voidable
		2. Fraud in the factum/execution
			1. Occurs where A makes/signs an agreement, but either does not realize that it is supposed to be a contract, or does not understand the nature/content of the agreement, because of some false information that B gave to A.
			2. Legal defense
			3. Void unless P is negligent
				1. ***Hauck v Crawford* (Sup. Ct. of SD 1953)** Synopsis: P unknowingly signed mineral deeds over to someone who then sold the mineral deeds to D, good faith purchasers. P sued D. Court found this was fraud in the factum so deed was void. However, remanded to determine whether P was negligent, which can raise an estoppel. Tool: Fraud in the factum leads to void title, but owner negligence can raise an estoppel. If P was negligent or committed acts sufficient to create an estoppel, he should bear the brunt of such negligence, rather than a bona fide purchaser.

## Title Records

1. Baird & Jackson
	1. Factors that push towards more elaborate and definitive recording – at their maximum with land – immobile, valuable, rarely transferred.
	2. Many kinds of personal property have registries only if there is borrowing against them, using the property as security.
2. Recordation v. Registration
	1. Registration
		1. Gives more definitive title, is more in rem
		2. Arrunada finds it is correlated with stricter numerus clausus
		3. New systems tend to be registration, typically with tract index.
	2. Recordation
		1. Often has private title insurance industry which narrows the gap between the two types of systems
		2. Probably not as accurate as registration but switching is not worth the costs.
3. Title Search (See 11/17/14 Slides p. 7)
4. Recording Acts (See 11/17/14 Slides p. 9 for sample problems) – protect bona fide purchaser (without notice and for value) against prior unrecorded interests, with a possible requirement that the bona fide purchaser herself record. Exceptions to nemo dat!
	1. Types
		1. Race
			1. Winner of the race to record prevails
			2. Exception to nemo dat principle and partial exception to GFPV doctrine.
		2. Notice
			1. Subsequent bona fide purchaser (i.e. for value, without notice) prevails. (notice – actual, record, or inquiry (some (states have laws that require purchaser to inquire), the latter two are constructive).
			2. Note the incentive to record immediately in order to be protected from subsequent bona fide purchaser (i.e. for value, without notice).
		3. Race-Notice
			1. A bona fide purchaser (i.e. for value and without notice) wins only if such person records before the prior instrument is recorded.
	2. Shelter Rule – once a subsequent good faith purchaser wins, transferees are protected even though they may have notice of defective chain of title. Does not apply when transferee is original owner because too much danger of collusion.
	3. Wild deed doctrine - a recorded deed that is not in the chain of title because the grantee records before the grantor. A wild deed will not provide constructive notice to later purchasers of the property, because subsequent bona fide purchasers cannot reasonably be expected to locate the deed while investigating the chain of title to the property.
	4. Good Faith Purchaser for Valuable Consideration
		1. ***Hood v. Webster* (Ct. of App. of NY 1936)** Tool: The holder of a prior unrecorded deed has the burden of proving the lack of good faith in the holder of a subsequent recorded deed. The burden is on him to prove notice or such circumstances as would give notice to a reasonable man. Burden of proof shifts to holder of subsequent recorded deed to prove valuable consideration. Synopsis: Property left to widow and then to brother (P) after widow dies. Widow transferred property to her brother and nephew (D’s) before she died by a deed then recorded. P brings action to annul subsequent deed to D’s. State statute required good faith purchaser and valuable consideration. D’s only paid $1 so no valuable consideration.
5. Adverse Possession
	1. AP is exception to Nemo Dat and land records
	2. ***Mugaas v. Smith* (Sup. Ct. of Wash. 1949)** Tool: A conveyance of record title to a bona fide purchaser will not extinguish a title acquired by adverse possession even though it’s not recorded. Synopsis: P brought an action to quiet title to a strip of land she claimed by adverse possession which was established by 1910 and to compel D to remove any buildings constructed thereupon. D took title in 1941 (more than 10 years after the fence that had marked the AP boundary line had rotted away) under a deed, which recited that his parcel included the disputed strip of land. D was good faith purchaser for valuable consideration. Court held for P because don’t want to make Adverse Possessor have to “keep his flag flying” indefinitely.
	3. Title insurance doesn’t cover AP.
	4. Does it make sense to make AP record?
		1. No, because if good faith AP, doesn’t know they are AP.
		2. Yes, because is point of AP to clear up old claims. Without recording, this wouldn’t be necessarily achieved.

# LAW OF NEIGHBORS

## Introduction

1. Property shades off into:
	1. Torts – Nuisance
	2. Contracts – Servitudes (Easements and Covenants)
	3. Regulation – Zoning (and other land use controls)
2. Law of neighbors is facet of real property law. Works together with customs and norms.

## Nuisance

1. General Rule: A substantial nontrespassory interference with use and enjoyment of land (need to show actual “harm”) that is caused either by:
	1. Unintentional but negligent, reckless, or ultrahazardous activities or
	2. Intentional and unreasonable activities
		1. Intentional is either (i) acting for the purpose of causing the invasion, (ii) knowing (or reasonably being supposed to know) that the invasion is the result, or (iii) knowing (or reasonable being supposed to know) that it is substantially certain to result.
		2. Unreasonable if the gravity of the harm outweighs the utility of the actor’s conduct. (Even if the utility of the conduct outweighs the gravity of the harm, an activity can still be nuisance if the harm is serious, and the defendant can afford to pay those damages.)
			1. Gravity of the harm factors: (i) extent of the harm; (ii) character of the harm; (iii) social value of the use or enjoyment invaded; (iv) the suitability of the use invaded to the locality; and (v) the burden on the person harmed of avoiding the harm.
			2. Utility of conduct factors: (i) social value of the primary purpose of the conduct; (ii) the suitability of the conduct to the character of the locality; and (iii) the impracticability of preventing or avoiding the invasion
			3. Standards of unreasonableness interference measured by sensibilities of average person.
	3. Other
		1. Bads/Invasions (cut-off), sometimes based on custom and context
		2. Becoming worse (movement), usually involves changes in scale or nature of complained-of operation.
		3. Cost-Benefit (anywhere of distribution), some inquiry into the value of the uses, and maybe generalized balancing a la Restatement.
2. Types of unreasonable interferences
	1. Character of Harm
		1. Depreciation of property value – not enough by itself but important factor
		2. Discomfort – e.g. noise, odors, smoke
			1. Sunlight – cutting of neighbor’s sunlight is not a nuisance. See ***Fontainbleau***.
			2. Spite fence – a spite fence erected solely to harm the neighbor and of no economic benefit to the erecting party, can be enjoined as a nuisance. Such conduct has no social utility.
		3. Fear of Harm – e.g. storage of high explosives; mental hospital
	2. Character of the neighborhood
		1. Use authorized by zoning ordinance – abiding by zoning ordinance is not controlling
	3. Social Value of the Conflicting Use
	4. Priority in time – “come to the nuisance”
3. Compared to Trespass
	1. Four Tests – Trespass:
		1. May apply where there is personal entry by D (the oldest test)
		2. Reserved for direct injuries to land as opposed to more indirect ones (from the old distinction between trespass and trespass on the case)
		3. Based on whether invading objects are visible to the naked eye, as opposed to smoke, odors, or possibly aesthetic blight, which would be nuisance.
		4. Reserved for situations of substantial harm that constructively deny possession to P (the modern approach).
	2. ***Adams v. Cleveland-Cliffs Iron Company* (Ct. of App. of Mich. 1999)** Tool: Trespass is appropriate for any appreciable intrusion onto land in violation of Ps right to exclude, while recovery for nuisance is appropriate for only substantial and unreasonable interference with P’s right to quiet enjoyment. Synopsis: Trial court instructed jury on trespass under strict liability and nuisance for vibrations and dust emanating from mine. Court reversed and remanded holding that trespass and nuisance should not be confused.
		1. Unlike trespass, nuisance calls for balancing and proof of actual and substantial injury.
4. Calabresi & Melamed
	1. Property Rule – an entitlement is protected by a property rule where the entitlement cannot be taken without the owner’s consent
	2. Liability Rule – an entitlement is protected by a liability rule when it can be taken as long as officially determined damages are paid (like private eminent domain)
	3. Inalienability Rule – transfer (or some kinds of transfer) forbidden
	4. Creates Four Rules
		1. Property rule for R: right to prohibit nuisances. (Campbell v. Seaman)
		2. Liability rule for R: right to be paid for suffering the nuisance. (Boomer)
		3. Property rule for P: right to perpetuate nuisances.
		4. Liability rule for P: right to be paid for stopping the nuisance. (Spur)

|  |  |  |
| --- | --- | --- |
|  | Property Rule | Liability Rule |
| Resident Entitlement  | 1 basic foundational trespass regime | 2 purchase of an easement through court proceeding |
| Pollute Entitlement  | 3 by easement or prescription (both of these are an add-on to the default package of rights) | 4 this has very very limited scope |

1. Injunctions – balancing test (See Injunction under Equity)

## Servitudes

1. Easements
	1. Definition – a privilege to use the land of another
	2. Appurtenant v. In Gross
		1. Appurtenant easement – one which benefits its holders in the use of a certain piece of land. Most of the time, the dominant tenement will have to be adjacent to the servient tenement. It is a benefit which can only accrue to one who is in possession of a particular parcel.
			1. Dominant tenement – the land for whose benefit the appurtenant easement is created
			2. Servient tenement – the land that is burdened, or used, by the easement.
		2. Easement in Gross – one whose benefit is not tied to any particular parcel of land. The easement is personal to its holder.
	3. Transfer
		1. Transfer of burden – when title to the servient estate is transferred (or subdivided), the burden of the easement remains with the property.
		2. Transfer of benefit
			1. Easement appurtenant – Normally passes with the transfer of the dominant estate.
			2. Easement in gross – traditionally not transferable but courts more open to assignment and transfer of easements in gross today
	4. Creation of Easements
		1. Methods
			1. **Express grant**: by document (deed or will)
				1. Meet the Statute of Frauds – must be in writing
				2. Recording act applies
			2. By **implication** requirements: (1) former unity of ownership; (2) at time of the severance of the estates, one part of the land was being used in favor of another part (quasi-easement); (3) the use is apparent, continuous, and reasonably necessary to the enjoyment of the quasi-dominant tract.
				1. Only appurtenant easement
				2. E.g. sewer line
			3. By **necessity** requirements: (1) former unity of ownership; (2) strict necessity (not mere convenience, courts vary on strength of this requirement); (3) necessity (strict) existed at the time of the severance of the estates.
				1. Pre-conveyance actual use not required
			4. By **prescription** requirements: (1) open and notorious; (2) continuous; and (3) adverse (no permission) for (4) an uninterrupted statutory period.
				1. Basic idea is that the adverse party is adversely using the property in the way someone with a granted easement would use the property, but not adversely possessing the property the way an owner would.
				2. Tacking allowed – must be in privity

Appurtenant easement – normal kind of privity applies

In gross – unclear what kind of privity applies

* + - 1. By **estoppel** requirements: (1) TO gave permission; (2) User relied to the user’s detriment on this permission by a material change in position; (3) It would be inequitable to revoke permission.
				1. Technically one gets an irrevocable license (for as long as the injustice would last).
		1. Document – ***Baseball Publishing v. Bruton*** Synopsis: P and D signed a writing entitled a “Lease” providing that in return for $25 P would have the right to use D’s wall for a billboard for a year, renewable for four additional years. D returned P’s payments but P put up sign anyway. When D eventually removed sign, P sued for specific performance. Court rules in favor of P for specific performance saying that writing is easement in gross as opposed to lease or license (license is revocable and this is not) given language about “exclusive right and privilege to maintain.”
		2. Implication and Necessity – ***Schwab v. Timmons* (Sup. Ct. of Wis. 1999)** Tool: No easement by implication because private road did not exist at time of severance and was not reasonably necessary because they had public road that extended to their parcel east of the ridge. No easement by necessity because P created necessity. Synopsis: P and Ds owned lakeside land. A private road runs to Ds’ property but not P’s. P’s property was formerly accessible via a road at the top of a high bluff but P sold that portion of their property. P sued for declaration of easement by implication or necessity for the right to cross Ds’ land (by extending the private road). Court found no easement by necessity or implication.
		3. Estoppel – ***Holbrook v. Taylor* (Sup. Ct. of KY 1976)** Tool: A license by estoppel can be created by licensor’s consent, along with the licensee’s construction of various structures and repair to the land in question. Synopsis: Road over P’s property used to gain access to mine and P’s were paid a fee for a license. Then used for access to tenant house which burned down. Then D’s build on adjacent land and only reasonable route is road over P’s land. After 5 years, P’s want a writing memorializing the arrangement and $500. D’s refuse. Court finds for D’s because P’s stood by and allowed D’s to build house and improve road with red dog.
		4. Prescription – ***Warsaw v. Chicago Metallic Ceilings, Inc.* (Sup. Ct. of CA 1984)** Tool: A prescriptive easement exists where the party seeking access to the land has maintained (1) open, (2) notorious, (3) continuous, and (4) adverse use of a path over the land. Synopsis: P used part of D’s property for trucks to turn. D started building on that part of property. P files for preliminary injunction but court denies (maybe indicating the P would succeed on the merits). D sued for declaratory judgment and injunctive relief. Court found for P that P had acquired prescriptive easement over D’s property.
	1. Negative Easement – which enables its holder to prevent the owner of land from making certain uses of that land.
		1. England recognized four kinds of negative easements: light striking window; air flowing in defined channel; lateral support of building; and flow of water in an artificial stream.
			1. Ancient lights right (prescriptive easement of sunlight) required continuous exposure of window to light for 20 years.
		2. American courts did not limit negative easements to four enumerated types. But American courts say you can never create a negative easement by prescription.
		3. ***Fontainebleau Hotel Corp. Forty-Five Twenty-Five, Inc.* (Dis. Ct. of App. FL 1959)** Tool: A landowner does not have a legal right to the free flow of light and air across the adjoining land of his neighbor. The right to have one’s view remain unobstructed cannot be created by prescription; otherwise, property development would be hindered. Synopsis: The construction of a new addition to a hotel will block sunlight from another hotel’s pool.
	2. Termination of Easement
		1. Merger/unification (complete unity required;no revival)
		2. By contract (release; Statute of Frauds, but estoppel possible)
		3. Estoppel
		4. Prescription
		5. Necessity (when necessity ends)
		6. Condemnation
		7. Destruction of servient estate
		8. Abandonment – requires an affirmative act, not mere words or nonuse, from which one can infer the intent not to maintain ownership.
1. Covenants
	1. Definition – right to insist on use or nonuse of land (compare to easements – about right to go onto land)
		1. Can be struck down for violating public policy or laws (e.g. racial covenants)
		2. No covenants by estoppel, implication or prescription because they are typically not about as serious matters as easements and relatedly do not involve notice-giving invasions.
		3. Lingo: Burdened tract and benefited tract
	2. Do they run with the land?
		1. Covenants at Law – treat it as property, tied to the land
			1. Remedy – money damages
			2. Requirements
				1. Writing (Statute of Frauds) – doesn’t need to be in every deed as long as it is in chain of title
				2. Intent of both parties that successors are bound by the covenant
				3. Horizontal privity – grantor/grantee relationship or shared interest in land when covenant is made
				4. Vertical privity of estate between burdened and benefited parties – On transfer, successor to burden must obtain the entire interest in order to maintain privity. Successor to benefit need only hold part of the interest.
				5. Touch and Concern the land – directly affects the party in the use or enjoyment of the property or enhances the value of the property. (Smith’s rule: modifies basic package of property rights – right to exclude/right to use)

E.g. lease covenant – status of land, who owns it, pay rent

* + - 1. ***Neponsit Property Owners’ Ass’n v. Emigrant Indus. Savings Bank*** Synopsis: Property owner’s association brings suit to foreclose on parcels in development after defendant bank acquires the parcel in judicial sale and refused to pay money required under covenant that goes toward common amenities (roads, paths, parks, sewers, etc.). Court holds that covenant does touch and concern the land (emphasizing function over form) because use public areas is appurtenant to ownership of estate and allows homeowners association to sue even though it is not technically the title owner of land benefiting from the covenants. Tool: Covenant to pay (essentially HOA dues) runs with the land. “Touch and concern” works by connecting the home to the appurtenant easement to use common roads and spaces in the subdivision.
				1. Exception to vertical privity requirement: homeowner’s association may sue to enforce the benefit of a covenant even though the association succeeds to no land owned by the original promise. The homeowners’ association is regarded as the agent of the real parties in interest who own the land.
		1. Equitable Servitudes – treat it as contract
			1. Remedy: injunction/specific performance
			2. Requirements
				1. Usually require writing but may be custom that allows otherwise.
				2. Intent of both parties that it is enforceable against assignees
				3. Notice to both parties

Actual

Record

* + - * 1. Touch and Concern the land
			1. ***Tulk v. Moxhay* (England 1848)** Tool: Since a covenant is a contract between the vendor and the vendee, it may be enforced against a subsequent purchaser who has notice of the contractual obligation of his vendor. Synopsis: Tulk conveys Leicester Square garden to Elms who promises: (1) that the grantee, his heirs and assigns will maintain the garden (affirmative covenant); (2) grantee, heirs, and assigns will not build on the garden (negative covenant – at issue here); (3) tenants of Tulk residing on the square will have right to use the garden on payment of a reasonable rent (an affirmative easement in favor of a third party, which was void at that time). Garden passed form Elms to Moxhay which contains no covenant but Moxhay knows about it. Chancellor holds it would be inequitable not to enforce the covenant.

## Land Use Controls

1. Zoning
	1. Background
		1. Comprehensive plan – can be implicit in zoning ordinance
		2. Zoning Ordinance – passed by local government. People can seek amendments, but they can be challenged as “spot zoning.”
		3. Board of Zoning Appeals: (i) hears appeals official’s denial of a building permit, (ii) hears requests for variances (in cases of unnecessary hardship, discretionary), (iii) and hears requests for special exceptions (variously named – permitted uses only if conditions specified in the ordinance met, but as of right).
		4. Nonconforming uses – grandfathered in and can become valuable
	2. Types
		1. Cumulative/Euclidian Zoning – hierarchy of uses; in a zone of a given level one can have uses of that level or any higher use. (e.g. can have residences in industrial zone)
		2. Exclusive Zoning – one can only have enumerated uses in a given zone. (e.g. can’t have residences in industrial zone)
	3. Due Process
		1. ***Village of Euclid v. Ambler Realty*** Synopsis: Ambler Realty Co. owned undeveloped land in Euclid, OH. City enacted a CZO that was Cumulative (Euclidian) and much of Ambler’s land was zoned in such a way that industrial uses were excluded from a large part of it which reduced the land’s value. Ambler challenged zoning law on substantive due process and equal protection grounds, seeking an injunction. (Note: this is a facial rather than an as-applied challenge). Court upholds zoning ordinance given rational basis test.
			1. Rationale Basis test – does legislation have a purpose? State interest in promotion of safety and security, reduction of street accidents, decrease in noise, preservation of an environment in which to raise children, fire prevention).
			2. Court seems to apply nuisance law rationale – nuisance is context-specific, making a facial challenge more difficult. Are apartment buildings nuisances?
			3. Ordinance was innovative in keeping out apartment buildings (with the desired result of segregation by class, race). The result in this case made zoning an available tool for exclusion.
	4. Exclusion Problem
		1. ***Southern Burlington City NAACP v. Mount Laurel*** Synopsis: Mount Laurel is Tieboutian suburb – put restrictions on lot size, size of home, single-family, etc. in order to protect tax base by keeping out low- and middle-income housing. Planned Unit Development (PUD), basically contract zoning, provided for fines for excessive number of school children. Also requirements of low density and amenities like air conditioning, and developer contributions to fire apparatus, town library. Court struck down part of zoning scheme for exclusion. Tool:
			1. State constitution in its due process and equal protection provisions, requires each developing municipality presumptively to use its land use regulations to achieve its fair share of low and middle income housing and not to foreclose the opportunity of low- and middle-income people to live in its boundaries.
			2. Presumption is procedural (showing by P that D have not made reasonably possible low- and middle-income housing or have expressly restricted it, shifts burden to municipality to show a valid basis for its action or non-action) and substantive (particular types of land use regulation will evidence invalidity and shift the burden, while valid reasons for existing provisions or lack of such precluding provisions, will carry the municipality’s burden).

# TAKINGS

## Eminent Domain

1. Introduction
	1. Rule – government or its delegate can appropriate property for (1) public use (2) upon payment of just compensation.
	2. Cumbersome, so governments usually purchase property when they can. However, it helps solve problem of holdouts. (Secret buyers are another way of getting around holdouts.)
	3. Fifth Amendment – “nor shall private property be taken for public use without just compensation.” Applies directly to federal government and states via 14th Amendment.
2. Public Use
	1. Standards
		1. Public ownership
		2. Use by the public (e.g. railroads, public utilities, stadiums)
		3. Public/government purpose/interest
	2. ***Kelo v. City of New London, Connecticut* (SCOTUS 2005)** Synopsis: The City purchased property from willing sellers and proposed to use its power of eminent domain to acquire the remainder of the property from unwilling owners in exchange for just compensation for economic development plan. Court ruled in favor of city.
		1. Majority (Stevens) – Economic development qualifies as “public use” under Fifth Amendment Takings Clause as long as it is not just a pretext for benefitting a private party. Economic regulation gets deferential judicial review. States can have more stringent public use requirements.
		2. Concurrence (Kennedy) – calls for heightened rational basis scrutiny into whether the taking was merely a pretext to benefit a private party.
		3. Dissent (O’Connor) – eminent domain can only be used for eventual transfer to private use when pre-taking use inflicted harm on society (e.g. blight). Otherwise, “Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.”
		4. Dissent (Thomas) – Policy concern about impact on minorities and those lacking power. If economic development is public use then anything is. Public use does not mean eminent domain or it would be surplusage.
3. Just Compensation
	1. Liability as opposed to property rule (Calabresi & Melamed)
	2. Owners get estimated fair market value, which does not compensate for subjective value (or for value created by the prospective public use).
	3. Mechanisms that sometimes ensure more generous compensation – bad publicity & political power, statutory duties to bargain, relocation assistance, etc.
	4. ***United States v. Miller* (SCOTUS 1943)** Synopsis: United States filed complaint in eminent domain against D’s in order to relocate R&R tracks. D’s appealed compensation amount. Tool:
		1. Just compensation means fair market value when government commits to project but not after-condemnation value of property in the area. Rationale – unjust enrichment and self-defeating because value to public would be transferred to condemnee.
		2. However, if the owner’s lands were not within the scope of the project from the time the Government committed to it but were merely adjacent lands, the subsequent enlargement of the project ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement.
		3. Condemnee gets opportunity cost = value of highest use of land except the condemnor’s proposed use or assembly gain.
		4. Subjective value to too difficult to measure and relatedly not insurable.
		5. Parcels treated as wholes but no damages for harm to value of adjacent parcels or assessments of benefits against them either.

## Regulatory Takings

1. Purpose
	1. Government supplied insurance against sudden changes in policy or burden-benefit matching principle (difficult) or
	2. Boundary-policing doctrine between police power and eminent domain.
2. Theories
	1. Michelman
		1. Utilitarian approach – benefit of project should exceed its costs including the lesser of settlement costs and demoralization costs. Compensation is due if demoralization costs exceed settlement costs (which include compensation and administrative costs). This approach foreshadowed a lot of takings jurisprudence.
		2. Rawlsian approach, by analogy – ask whether the worst off under the particular rule can see this as part of an overall pattern that that person would choose as a general matter (behind the veil of ignorance).
	2. Epstein
		1. Property as a natural right and/or utilitarian construct
		2. Preservation of value shares. Anti-rent seeking.
	3. Other considerations
		1. Shortcomings of the insurance model – Moral hazard and non-Pigovian government (Fischel & Shapiro)
		2. Equality, insurance, and fiscal illusion; rent-seeking
		3. When do we want people to foresee new law? (New School, Levmore)
		4. When does government want to make commitments outside of formal contracts?
3. Per Se Tests – Categorically always considered a taking
	1. Permanent physical occupation
		1. ***Loretto v. Teleprompter Manhattan CATV Corp.* (SCOTUS 1982)** Tool: A permanent physical occupation authorized by government is a taking without regard to the public interests it may serve. Synopsis: Cable company, CATV paid landlords to install components on property. NY law enacted that prohibited payment of more than $1 to landlords for opening their buildings to cable lines to service tenants. Loretto brought class action against CATV on behalf of all property owners serviced by CATV alleging that the installation of wires is a trespass and a taking without just compensation. Tool:
			1. Four Reasons why permanent occupation should be subject to per se rule of takings liability:
				1. A permanent occupation is a more severe deprivation than a use regulation, because it denies the owner all incidents of ownership with respect to the portion of property taken (to exclude others from it, use it, or dispose of it). A permanent occupation chops through the bundle of rights, taking a slice of every strand.
				2. The owner suffers a particularly severe injury to autonomy when the government forces the owner to permit a stranger to occupy a portion of her property.
				3. Permanent occupations demarcate a bright-line rule that obviates the need for case-by-case judgments about how large the occupation must be before there is a taking.
				4. Whether there is a permanent occupation will ordinarily be easy to prove.
			2. Preserves the longstanding understanding that utility easements must be obtained by eminent domain.
			3. Dissent – per se rule creates difficult line-drawing problems, most prominently in distinguishing between permanent and temporary occupations or in distinguishing between occupations and regulations of use.
			4. In light of later decisions, perhaps a way to characterize the Loretto rule is that any government regulation that has the effect of imposing an easement on a landowner will be categorically regarded as a taking requiring compensation.
	2. Denials of **all** economically beneficial or productive use of land (“total takings”) but with nuisance exception.
		1. ***Lucas v. South Carolina Coastal Council* (SCOTUS 1992)** Synopsis: P bought undeveloped lots. Later, the SC legislature enacts the Beachfront Management Act which prohibits development in the area occupied by P’s lots. P sues contending that the regulation is a taking of his property. SCOTUS rules for P. Tool:
			1. Two situations in which in which regulations will be deemed takings and require just compensation without case-specific inquiry: (1) permanent physical invasion of property and (2) regulation denies all economically beneficial or productive use of land.
			2. Harm prevention (limited to nuisance) can justify a regulation “only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with.”
			3. Concurrence – would not limit the harm-prevention defense to the common law of nuisance, but would also permit inquiry into environmental and other statutory restrictions on the use of land in effect when an owner acquires title.
			4. Dissent (Blackmun) – Regulation of land use was common in America in the colonial and early national period, with no suggestion that diminution in value caused by such regulation might give rise to a duty of compensation.
			5. Dissent (Stevens) – returning to the theme of reciprocity of advantage, says that the Court has failed to consider the generality of the Beachfront Management Act. Not singling out.
			6. Reflects two themes prominent in the property rights movement of the 1980’s and later:
				1. Ad hoc approach should be replaced or supplemented as much as possible by categorical rules.
				2. Scope of police power “exception” to the duty to compensate should be confined to common law nuisances.
		2. Nuisance exception – no taking results if the government regulates to control nuisance; the government should not have to pay to regulate activities that are harmful to the public. See ***Hadacheck***.
	3. Slow down of creation of per se rules? (Lingle)
4. Ad Hoc Test
	1. Narrow view of property – ***Pennsylvania Coal Co. v. Mahon* (SCOTUS 1922)** Synopsis: Under PA law, owners could deed away subsurface mineral rights. At common law, surface owners enjoy right of subjacent support. PA allowed owner to waive this right in a deed. Mahon’s predecessors in interest waived such support rights. PA later enacted Kohler Act which prohibited companies from mining coal in such a way as to cause the subsidence of homes and surfaces near improved properties. Mahon’s sued to prevent PA Coal Co. from removing supports. PA Coal Co. argues that this statute violates Due Process Clause of the 14th Amendment. SCOTUS found that Kohler Act went beyond regulation (police power) and was a taking (can only be pursued via eminent domain. Tool:
		1. Majority – Act goes too far. Emphasis on contract and the separate estate.
		2. Dissent – Emphasis on public nuisance and the parcel (holdings) as a whole.
		3. Factors to consider in determining whether police regulation goes too far (Majority and dissent agree on factors but not analysis):
			1. Extent of diminution in value caused by the regulation
				1. Relevant property denominator problem: Majority – narrow (support estate/pillars); Dissent – wide (“whole property”)
			2. The need to protect the public against nuisance-like harms
				1. Majority – waiver overrides
				2. Dissent – Scope of police power
			3. Reciprocity of advantage among property owners – the aggregate amount of benefit that comes from regulation is approximately equal to the amount of burden the regulation causes
				1. Majority – lack of reciprocity distinguishes this statute from another statute for pillars of coal on edge of property.
				2. Dissent – Public nuisance makes reciprocity irrelevant here.
	2. Broad view of property – ***Penn Central Transportation Company v. City of New York* (SCOTUS 1978)** Synopsis: New York City passed a regulation that prevented Penn Central Transportation from adding an office building structure to the top of Grand Central Station. Court ruled in favor of City finding that this was like zoning, Tool:
		1. Factors to consider:
			1. **Extent of diminution in value caused by the regulation** – court looked at all of owner’s property (seems to lead to different results for large and small landowners) probably because of usefulness of TDR (transfer of development rights) when one has other properties and the fact that the property was already making a profit so regulation was not preventing profit just limiting it.
			2. **Whether the regulation interferes with reasonable investment-backed expectations** (investments already made?) – it did in this case but court found this was outweighed by public interest
			3. The nature of the government action, in particular whether it causes a **physical invasion**
			4. **Public purpose**/not singling out (seems to serve purpose of reciprocity of advantage in ***Mahon*** but does not take into account burden that reciprocity of advantage takes into account) – public purpose seems to draw line between valid exercise of police power and takings – public purpose here was landmark preservation (is it right to place burden on few members of society?)
		2. Note: No public nuisance or average reciprocity of advantage factors from ***Mahon***.
		3. Dissent – no nuisance and no reciprocity of advantage (need to give property owner’s rights equal footing with public interest in order to serve purpose of government supplied insurance); this is singling out because “comprehensive plan” only covered a few buildings