

Property Outline

Professor Ryan Spring 2014

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I. The Meaning and Origins of Property

Acquisition, Labor, and Investment (231-239, Eros, Parking Wars)

1. Imagine Property as a Bundle of Sticks:

- a. Possession/Occupancy
- b. Right to Exclude
- c. Use
- d. Transfer/Conveyance

2. Goals of Property Law:

- a. Economic Efficiency - to advance specific economic policy
- b. Distributional Fairness - to facilitate equality of opportunity/access
- c. Sustainability - to encourage sustainable use of scarce resources

Possession (152-167)

Rule of Capture

Privileges possession over many others.

1. Is the rule of capture a good one for assigning rights in un-owned property?
2. Advantages of favoring possession?
 - a. Administrative - less waste of court time
 - b. Effective - reduces the number of foxes
3. Advantages of labor and investment?
 - a. Fairness

Pierson v. Post:

1. **Background:** Post, a fox hunter, was chasing a fox through a vacant lot when Pierson came across the fox and, knowing it was being chased by another, killed the fox and took it away. Post sued Pierson on an action for trespass on the case for damages against his possession of the fox. Post argued that he had ownership of the fox as giving chase to an animal in the course of hunting it was sufficient to establish possession. The trial court found in favor of Post. On appeal after the trial, the issue put to the Supreme Court of Judicature of New York was whether one could obtain property rights to a wild animal (*Ferae naturae*), in this case the fox, by pursuit.
2. **Issue:** Does Post have a legal right to the fox if he was hunting it even though Pierson is the one who actually killed and collected the fox?
3. **Holding:** The Court cited ancient precedent in deciding the case which said that pursuit alone gives no right to the huntsman and even pursuit accompanied with wounding is equally ineffectual for the purpose. The animal must actually be in possession. Puffendorf defines occupancy as the actual possession of them. Puffendorf also says that if a beast is mortally wounded or greatly maimed, it is within the possession of the hunter while he is still in pursuit. **In conclusion, Post had no legal right to the fox and became the property of Pierson.**
4. The court reasoned that given the common law requirement to have control over one's possessions, merely giving chase was not sufficient. Something more was needed, otherwise law would create a slippery slope. If the first seeing, starting, or pursuing such animals, without having so wounded, circumvented or ensnared the animal, so as to deprive them of their natural liberty, and subject them to the control of their pursuer, should afford the basis of actions against others for intercepting and killing them, it would prove a fertile course of quarrels and litigation.

5. **Dissent:** The dissent was not satisfied by the authorities used. Instead, it was argued that pursuit should be considered sufficient, as it serves a useful purpose of encouraging hunters to rid the countryside of that "wild and noxious beast" known as the fox. The dissent further acknowledged that possession can be seen in relative terms where the continued chase may merely be a formality of the pre-existing control already exerted by the hunter.

Popov v. Hayashi

1. Popov attempts to catch a ball from a pitcher from the stands. He is attacked by nearby fans and the ball is knocked from his hands after he catches it. Hayashi manages to collect the ball afterwards. Popov sues Hayashi for conversion for stealing his ball. Hayashi argues that the possession does not occur until the fan has complete control of the ball. Popov argues that possession occurs when an individual 'intends to take control of a ball and manifests that intent by stopping the forward momentum of the ball, whether or not complete control is achieved.'
2. Judge McCarthy says that this is different than the Pierson case since the ball is not an animal. It is physically possible for a person to acquire dominion and control of an abandoned baseball and fans expect as much. McCarthy adopts Gray's rule of possession which states: the actor must retain control of the ball after incidental contact with people and things. However, though Popov failed to establish control in light of Gray's rule, McCarthy says this doesn't resolve the case because Popov was interrupted by the assault of nearby fans.
3. In the end, McCarthy states that both Popov and Hayashi have equal claims to the ball and the claims are both equally greater than anyone else's claims to the ball. He holds that both parties maintain equal share of the ball by granting half of the proceeds of the ball's sale to Popov.
4. This court adopts the idea of pre-possessory interest.

Elliff v. Texon Drilling Co.

1. **Background:** Texon negligently removed oil from the reservoir beneath their property that ended up causing damage to a nearby oil pump and wasted a great deal of the oil in the reservoir. According to Texas law, the law of capture allows anyone with land over a reservoir access to whatever oil they pump from the reservoir below them. This is called the law of capture.
2. **Issue:** Whether the law of capture absolves respondents of any liability for the negligent waste or destruction of petitioners' gas and distillate, though substantially all of such waste or destruction occurred after the minerals had been drained from beneath petitioners' lands.
3. **Holding:** The law of capture does not absolve the respondents of liability for the negligent waste or destruction of petitioners' gas and distillate. "The fact that the owner of the land has a right to take and to use gas and oil, even to the diminution or exhaustion of the supply under his neighbor's land, does not give him the right to waste the gas. His property in the gas underlying his land consists of the right to appropriate the same, and permitting the gas to escape into the air is not an appropriation thereof in the proper sense of the term." As such, the petitioners maintained their right to the destroyed oil and the only legal remedy is for damages and should not be denied.

Water Rules

1. **Absolute Ownership:** Adopted by a minority of states. Anyone can draw as much water as they like from their property as long as they don't waste it.
2. **Shared Ownership:** Some states limit the ability of surface owners to deprive their neighbors of ground water.
3. **American Reasonable Use Rule:** Owners of land overlying an aquifer may withdraw water only if they put the water to a reasonable use on the overlying tracts. Some states permit off-tract uses if they do not harm on-tract uses.
4. **Restatement 2d of Torts:** Imposes liability for water withdrawals that unreasonably harm other surface owners or exceed a surface owner's reasonable share of groundwater.

Property in People(255-274, Thirteenth Amendment)

Dred Scott v. Sanford (1857)

Background: Dred Scott was once a slave from Missouri. His owner took him to Illinois, a free state, where they lived for two years. Then, they moved to Minnesota before returning to Missouri; there, he was sold to Sanford. Slavery was illegal in Illinois under state law and in Minnesota under the federal statute, Missouri Compromise. Scott claimed diversity of citizenship since Sanford was a citizen of New York and Scott claimed to be a citizen of Missouri. Sanford claimed that Scott was not a citizen of Missouri and that neither Illinois nor the Missouri Compromise could constitutionally act to take his property.

Issue:

1. Does the Court have Jurisdiction to hear the case?
 - a. Can an African-American with no prior citizenship, by Constitution or State statute, become a member of the political community formed by the Constitution and, as such, become entitled to all the rights, privileges, and immunities guaranteed to citizens of the United States?
2. Is the Missouri Compromise Constitutional?
 - a. Does the federal government have the legal authority to deprive Sanford of his property by freeing Scott?

Holding (Taney):

1. No. No State can introduce a new member into the political community created by the Constitution of the United States. According to Taney, African Americans, be they slave or free, were not citizens. As a slave, moreover, Scott was property and had no right to bring suit in federal courts. Taney considered Scott's domicile state to be Missouri and that Missouri law was to be used to identify his freedom. He remained a slave.
2. No. The Constitution does not grant the power to Congress to exercise control over private property against a person who had committed no offence against the laws. "The right of property in a slave is distinctly and expressly affirmed in the Constitution."

The Antelope (1825)

A pirate ship captured three vessels (one each from US, Spain, and Portugal). These ships were later captured off the coast of the United States. Because the US had outlawed the slave trade, the Court ruled that the persons taken from the American ship were freed; no owner claimed the Africans aboard the Portuguese ship, so they were freed as well. However, the Court stated that the owners from Spain should be returned their property should they prove their claims. Marshall said that when weighing the positive law of our world and natural law, positive law must prevail.

This case helps to show how the court rationalized slavery.

Legally, the problem was solved with the passing of the 13th Amendment.

In the Matter of Baby M (Supreme Court of New Jersey)

Background: The Sterns contracted with Mary Whitehead to surrogate their child. Upon birth, Whitehead did not want to part from the child. After more than four months of back and forth, a trial court held that the surrogacy contract was valid, ordered that Whitehead's parental rights be terminated, and granted sole custody to Mr. Stern. Shortly after, Mrs. Stern adopted the child, Melissa.

Issue: Is this surrogacy contract valid?

Holding: No. Based on (1) existing statutes, and (2) public policy considerations, the surrogacy contract cannot be held to be valid.

1. The Court found current laws prohibiting the use of money in connection with adoptions, requiring proof of parental unfitness or abandonment before termination of parental rights, laws that make surrender of custody revocable in private placement adoptions.
2. The Court also felt that the public policy effects were broad. The contract utterly disregards the interest of the child since there is no inquiry as to the fitness of the receiving parents. The Court differentiates surrogacy from adoption in that it would not exist without monetary incentive, is caused by the offer of money, the highest bidders become the adoptive parents regardless of suitability, and the mother consents early enough to be irrevocable (if it were legal). Surrogacy will be used for the benefit of the rich and at the expense of the poor. In sum, surrogacy guarantees the separation of a child from its mother, looks to adoption regardless of suitability, ignores the child, takes the child from the mother regardless of her wishes and maternal fitness, and does this through the use of money.

Frozen Embryos

Mary and Junior Davis created several frozen preembryos (fertilized eggs). After divorce, Mary wanted to implant one of the eggs to have a child. Davis said no and sued for an injunction. At trial, Judge Young said that the preembryos were not property, but a human life and that implantation was in the best interest of the 'children'. Court of appeals reversed stating that under Tennessee law, the fetuses are not 'persons' and that Young is one of those 'slow' judges that they just have to deal with from time to time. The Supreme Court of Tennessee agreed that the frozen embryos were not 'persons', but also did not label them as property.

As cases such as these are usually about two parties with opposite interests, the judges seek to balance these rights: on one hand, the right of the woman to get pregnant, and on the other, the right of the man to not deal with psychological and legal consequences of paternity. In the end, the Supreme Court of Tennessee sided with Junior's interest in avoiding unwanted parenthood. They noted that the case might be different if she could not achieve parenthood by any other reasonable means.

If the parties pre-contract to dispose of the preembryos in the event of a dispute, the courts have generally held the contract enforceable.

Gift, Find, Transfer (151, 605, 616, 171-182)

Acquisition of Previously Owned Property

1. Mostly by sale or trade
2. Gifts (three requirements below)
3. Trust - essentially an interrupted gift

Finder: first person to find a mislaid property has a greater claim to the property to all except the true owner.

Relativity of Title: Title is a relative concept. A finder's claim is good against everyone but the true owner. Prior possession tiers the finder system.

Bona fide purchaser rule - if a third party buys it from a merchant who deals in those goods, they have a greater claim than the 'true' owner. This is trying to get justice after the fact. This is also trying to structure behavior to avoid losses. We must figure out which party can exert less effort to prevent it - don't lend your hog to a hog farmer. This is to protect good, honest commerce and reliability in purchasing.

Exception: Theft precludes the bona fide purchaser rule.

Exception: This does not apply to real property.

This shows how the law reconciles deeply conflicting values. We also don't want to condone criminality.

Gifts and Inheritance

Inter vivos gift: a gift given from one living person to another

Testamentary transfers: effectuated at death through a valid will or inheritance

The **law of gifts** has three requirements:

1. Intent to transfer title (donor must have *present intent*)
2. Delivery of the property
 - a. Generally requires physical transfer of the object itself (constructive delivery or symbolic delivery might be sufficient) - *Constructive delivery e.g. gifting a key to a locked box*
 - b. Today, the delivery generally is recognized by a writing
3. Acceptance by the donee

Intestacy statute: state law that dictates the transference of the decedent's property

Trusts

A trust is a property arrangement in which a grantor conveys property to one person (trustee) for the benefit of a third party (the beneficiary). The trustee is the holder of legal title and has the power to sell the property and reinvest the proceeds in other assets if doing so is in the best interests of the beneficiaries (unless the grantor intended the property not to be sold). The income and the principal assets are turned over to the beneficiaries when and if the trust terminates. The trustee has fiduciary obligations to act in the best interest of the beneficiary and is subject to liability to the beneficiary for mismanaging the trust assets.

Charrier v. Bell (1986)

Background: Plaintiff Charrier, an archaeologist, excavated a site of an ancient village of the Tunica Indians. Charrier knew he did not have permission from the landowner. Charrier spent three years on this excavation. He could not prove ownership of the artifacts, and so sought a judgment declaring himself the owner of the artifacts, or in the alternative, compensation under the theory of unjust enrichment for his time and expenses. The State of Louisiana intervened on grounds to protect its citizens. The trial court denied both claims.

Issue: When a person expends a large amount of time and money excavating a burial site without the permission of the landowner, do those objects belong to him?

Holding: No.

Plaintiff argues that the evidence that the members of the Tunica Indians are legal descendants of the Trudeau Plantation was insufficient to entitle them to the artifacts. The court simply says no - the tribe is an accumulation of the descendants of the former Tunica Indians and has satisfied the required proof.

Plaintiff then says that the Indians abandoned the artifacts when they moved from the site. Plaintiff continues to say that he has obtained ownership through occupancy. As a matter of policy, the court doesn't agree since this would encourage grave and burial site robbery.

As to his unjust enrichment claim, the court says that there has been no enrichment to begin with. The Indians would not have wanted their burial grounds ruined. Even if the Indians have been enriched, the plaintiff has not proved that he has sustained the type of impoverishment for which unjust enrichment may be used. The plaintiff knew, or should have known that he was on property without the consent of the landowner.

The trial Court's judgment is affirmed on both counts.

Class Discussion: Plaintiff claims that he is the finder of the remains and thus establishes title. However, he needs to show that they were actually abandoned. Abandonment is about the intention of the former owner. There is a reasonable person standard about what is abandoned.

HYPO: What if they were dinosaur bones instead? He's the finder and therefore owns it. The landowner would say that he was trespassing to collect it and that they own it since it was on their property. Common law will give the bones to the property owner.

Tapscott v. Lessee of Cobbs

Issue: Even though a person may not have title to property she possesses, can she still successfully regain possession of the land when another person forces himself onto the land?

Holding: Yes. Judgment affirmed. Neither of the two parties are the true owner of the land. When a dispute arises over possession of the land, the land will be given to the first possessor. The suit is not about who has title, but about who has a right of possession, so the later possessor cannot defend his claim by showing that title belongs to a third person.

Discussion: Ejectment is an old remedy for eviction.

Cobb's best argument: it's disputed whether or not she actually owned the property. As a rightful heir it should just t

Whatever Louis had, Cobbs should have as an heir. Louis improved the land which establishes a good claim.

Cobb never actually had the property - Tapscott just assumed control and took it and has been there 12 years and improved the land. He's a peaceable possessor.

They decide in favor of Cobb because they decide that Louis was the rightful owner and was in possession of it and potentially bought the land.

Privilege of possession: 'The law protects a peaceable possession against all except him who has the actual right to the possession, and no other can rightfully disturb or intrude upon it.' At the beginning, Tapscott is the peaceable possessor.

Rules for Ejectment: the plaintiff gets ejectment on the strength of the plaintiff's own title, not on the defects of the defendant's claim. We have this rule to protect the peaceable possessor.

Except if B ousts A, he's estopped from questioning A's title.

Court declines to give to a trespassor the means of maintaining his wrong by showing defects, however slight, in the title of him on whose peaceable possession he has intruded.

Cobbs says she's the rightful owner because she's the heir. Her interest is greater than Tapscott. Another argument she could have made is that she still did own it even when she wasn't there. She never abandoned it.

II. Right to Exclude and Right of Access

Trespass and the Right to Exclude (3-23)

Trespass - an unprivileged, intentional intrusion on property possessed by another.

State v. Shack

Look at slides and group notes.

When you invite migrant farm workers onto your property, you do not get to control every facet of their life. The more you open up your property to others, the more you give up your right to exclude.

Desnick v. American Broadcasting Companies, Inc.

ABC wanted to do a segment on the Desnick ophthalmic clinic. They got approval to film the site as long as they didn't do 'ambush' interviews or 'undercover' surveillance and that it would be fair and balanced. ABC ended up using undercover patients to show that Desnick Eye Center was a terrible company. Desnick sues for trespass, defamation and other torts.

Plaintiff argues that the consent to trespass was fraudulently obtained, and thus the defendants committed a trespass.

When is fraudulently obtained consent

Posner's Reasoning: Fraudulently obtained consent is when owner didn't want some other harm unrelated to the exclusion.

Food Lion Case - introduces the idea of scope - they were invited on the property to be employees, but not invited on to video tape - applied and affirmed the Desnick analysis that there was no original trespass, but that the reporters exceeded this scope.

Uston v. Resorts International Hotel

Casino is excluding a famous card counter by revoking his privilege. Plaintiff sues. Defendants argue that they have a right to exclude. Plaintiff says they have no basis to exclude on a basis of his black jack strategy. Uston possesses the *right of reasonable access*.

If we want to have free moving commerce, we want to protect the needs of commerce (inns, carriers, etc.). The travelers might be vulnerable with common access to carriers.

Questions to ask in Difficult Trespass Cases:

1. What interest is plaintiff invoking trespass to protect?
2. What interest does defendant argue should that to give way?

In favor of allowing owners to exclude - market place will fix the problem. Owners will want to allow everyone so as to open up their market to the entire market place.

In Europe there is a push to increase the right to roam whereas the US is pushing to decrease the right to roam.

One theory is that the increase trajectory of the right to exclude was from the initial impetus in the response to the decline of the Jim Crow laws.

Public Accommodations Statutes and Public Commons (33-43, 56-69)

Public Trust Doctrine

- **Public Trust Doctrine:** Comes from common law - by natural these things are common property of all...
- Navigable waterways are held in trust by the state for the public
- In 1869, the legislature gave away the harbor to a private railroad and they were tossed out of office; the new legislature repealed and the RR sued arguing for just compensation for the taking; the state's best argument was that it wasn't theirs to begin with (it was beyond the power of the state to convey the harbor) - this was a big deal

Civil Rights Act of 1964, Title II

- All persons shall be entitled to the full and equal enjoyment of any place of public accommodation without discrimination or segregation on the ground of race, color, religion, or national origin.
- Does not prohibit discrimination on the basis of sex
- Entitled only to injunctive and declaratory relief

Civil Rights Act of 1866

- Regulates discrimination of race only
- Damages are available for violations of the act
- Applied to private conduct as well as legislation passed by state legislatures (gets around the holding of the Civil Rights Cases)

Matthews v. Bay Head Improvement Association

Public Trust Doctrine: Ownership, dominion and sovereignty over land flowed by tidal waters, which extend to the mean high water mark, is vested in the State in trust for the people.

Facts: Borough of Bay Head borders the Atlantic Ocean; there are 76 separate parcels of land, 6 of which are owned by the Bay Head Improvement Association. The Association's purpose was to improve and beautify the Borough of Bay Head, basically making it fucking radical for the residents. The Association controls and supervises its beach property between the third week in June and Labor Day. Nine streets in the borough ends at dry sand owned by the Association. Many owners of beachfront property executed and delivered Association leases of the upper dry sand area. Leases are revocable by either party to lease on thirty days' notice. Public has access to land on these private lots and does not intend to stop occupying it. Because the membership capacity of the Association was limited, they were not granting membership to new people (they had a 5,000 person cap). Precedent cases ruled that public can only access municipality land.

Issue:

1. "Whether, ancillary to the public's right to enjoy the tidal lands, the public has a right to gain access through and to use the dry sand area not owned by a municipality but by a quasi-public body."
2. Whether dry sand area that the association owns or leases should be open to the public to satisfy the public's rights under the public trust doctrine
3. Whether the Association may restrict its membership to the Bay Head residents and thereby preclude public use of the dry sand area.

Holding: Because the Association is acting like a quasi-municipality, they must allow their membership be open to the public at large.

The Bay Head Improvement Associate was a Quasi-Public organization because they acted for the good of the community but was actually a private organization. New Jersey owns the foreshore (anything below the high-water mark) - the dry sand is privately owned by the association and the residents. Avon says that dry-sand beach owned by municipality is publically available. Here, the plaintiff was looking to apply this same concept to quasi-public organization owned beaches.

Plaintiff says that they need access to the foreshore. Defendant says that if you make us allow them, they need to pay us. The court decides that the dry-sand beach owned by quasi-public must be available to the public. They never had a right to own this in the first place. The concurring opinion begs to look at what would happen if everyone adopted a policy like this; if only residents had access to the beach, then only beach owners would have access to the beach.

How far can the private land be intruded upon?

Current Case: Why hasn't this been applied to other things, such as the atmosphere. Mary Woods started a movement to utilize the public trust to protect the atmosphere from pollution.

Other legal doctrines which grant rights of access to beaches to the general public:

1. **Dedication** - offer by the owner and acceptance by the public. Longterm acceptance of public admittance can create implied dedication.
2. **Prescription** - If the public has used property possessed by another for a particular purpose for a long time (measured by Statutes of Limitations), the public can acquire these rights permanently even if they never had them originally.
 - a. The permanent right to do something on another's land is called an easement - they are generally created by agreement, but if the owner fails to exclude trespassers, she may lose her right to sue them under the relevant statute of limitations. (prescriptive easement)
3. **Custom** - If the beach has been customarily available to the public, private owners do not have the right to exclude.

Adverse Possession (281-289, 294-301, 289-294, 304-318)

Elements of Adverse Possession

1. Actual possession that is
 - a. Physical activities and use such as building a fence, building on the land, farming, clearing, and planting
 - b. "Color of Title" doctrine - where you have some sort of void deed that there was an intent to transfer the title but the deed is void from some technical error
 - c. "Ordinary use to which land is capable and such as an average owner would make of it"
2. Open and Notorious
 - a. A reasonable owner would notice that you are adversely possessing the property
 - b. The legal burden is on the adverse possessor
3. Exclusive
 - a. The ownership must be exclusive of the true owner
4. Continuous
 - a. Maintain a continuous possession
5. And adverse (or hostile)
 - a. The possession must be without the permission of the true owner
 - b. If the true owner says nothing to this effect, there is a presumption that the adverse possession is not permitted

- i. It's reasonable to assume that people want
 - c. The adverse possessor's state of mind is taken into account in some jurisdictions
 - i. Intentional dispossession versus good faith 'subjective test'
 - ii. The majority does not look into this subjective test
 - d. Government property constitutes an absolute defense
 - i. Very narrow circumstances in certain jurisdictions this has worked
 - e. If the true owner is acting as though they conveyed the property to the person (as in a void deed), this meets the adversity requirement.
 - f. You're adverse if you're there thinking as though you are the owner.
6. For the statutory period
- a. Can be tolled for the landowner if the true owner is a child, disabled, or otherwise incapable; the true owner won't be on notice in this case
 - b. Doctrine of Tacking - allows the adverse possessor to tack on previous owner's adverse possession time in order to meet the statutory period

Brown v. Gobble (1996)

There is a dispute over a 2 foot tract of land. Tacking was used here. You can't, as a squatter, tack previous owners. Gobbles win because of tacking. The adverse possession had happened long ago.

Application of Elements:

1. Actual possession that is
 - a. They are mowing it, they put up a fence
2. Open and Notorious
 - a. Fences
3. Exclusive
 - a. The Browns never utilized the land as a capable and average owner; only the Gobbles occupied this land
4. Continuous
 - a. They had been in possession of the land the entirety of the time (continuously possessing the land)
5. And adverse (or hostile)
 - a. Witnesses who testified that the property was fenced off as far back as 1937 and the Browns never said anything; adversity was therefore presumed
6. For the statutory period

Deeds

This is the way that we normally establish ownership. It is required under the statute of frauds. Adverse possession is the number one exception for the statute of frauds. Also will allow you to transfer property as well as imminent domain. The requirements are it must be in writing, signed by the grantor, identify the grantor and grantee, describe the property, and must use words of conveyance (some states require other things by other statute)

There are two kinds of deeds:

1. **Warranty deed** - makes promises about whether land is encumbered etc.
2. **Quitclaim deed** - whatever I have, it's now yours (no promises)

Romero v. Garcia

Procedure: Trial court for plaintiff, defendants appeal → Upheld for plaintiff

Facts

- Ida Garcia Romero and her deceased husband Octaviano Garcia (son of defendants) purchased 13 acres in dispute for \$290 from Octaviano's father (Antonio Garcia)
- Plaintiff/husband entered possession, 1947, deed record May 1950, Ida/Octaviano lived there til 1962
- He died then she moved to Colorado and remarried
- Ida filed suit to quiet title against defendant-appellants Garcias based upon adverse possession for more than ten years under color of title and payment of taxes
- The description in the deed specified that the land is bounded on the north by the National Forest and on the west by Alfonso Maruquez and on the south

Issue

1. Was the void deed inadequate for color of title?
2. Was the deed's description inadequate for adverse possession because it failed to describe a specific piece of property?
3. Did the appellee fail to pay tax continuously for land?

Holding

1. A deed is sufficient for the purpose of color of title even though it is void because it lacks the signature of a member of the community.
2. The plaintiff sufficiently able to ascertain boundaries adequate for adverse possession.
3. No, the appellee complied with the continuous payment of adverse possession under NM stat sec 23-1-22
4. Affirms judgment of trial court

Reasoning

- *Richardson v. Duggar* - a deed is not void for want of proper description if with the deed and with extrinsic evidence on the ground, a surveyor can ascertain the boundaries
- the fence line and boundaries were pronounced in the area for more than 50 years
- the land described in the complaint is capable of determination as to the exactly location of the boundaries of said land conveyed to the plaintiff's deceased husband
- in this case, the erection of a house and pointing to the land were sufficient to ascertain the boundaries

Additionally to the basic elements of an adverse possession claim, some states have different statute of limitations depending upon whether the possessor has acted under 7) "color of title or 8) has paid property taxes on the land or 9) formally require showing occupation was in "good faith, or 10) must act "under a claim of right"

Actual Possession - Without the color of title doctrine, she only satisfied actual possession of the house and the farm. However, because she has the void deed, she can utilize the color of title doctrine to satisfy actual possession for the entirety of the deed. As long as you had actual possession of some part of land described in the void deed, you are considered to have actually possessed the described property in whole. Color of Title Doctrine exists solely under the Actual Possession element.

Deed: As long as a conveyer can establish a specific property line, a deed's description is adequate.

Open and Notorious - they built a house, occupied the house, they sold hay from the land

Exclusive - The adverse possessor was exclusive towards the true owner (it was consistent with how an owner would act as an exclusive owner)

Continuous - the adverse possession was before she left for the 14 years (Tacking Doctrine goes here)

Adverse - It was understood with the transfer of the 'void' deed - they intended to transfer the title to the adverse possessor.

Statutory Period - Within the period

What if she hadn't met the statutory period? She would lose - this is because:

1. It's easier for the court when there is a bright line rule. (administrative)
2. Statute of Frauds - it weakens the statute of frauds to create exceptions

Nome 2000 v. Fagerstrom

1. Actual Possession
 - a. Fagerstroms showed that they were there (every other weekend), made improvements to the land (structures), they utilized the trails
 - b. Nome 2000 states that the trails were open to the public, as far as the structures: they are not enough
2. Open and Notorious
 - a. Fagerstroms had community members testify that they knew that the Fagerstroms owned it, structures are open and notorious
 - i. What about this problem of different standards between urban and rural lands? Do we have this to make it fair to 'good faith' users?
 - ii. It would be unfair to require more of the adverse possessors and it might not be good for the land.
 - iii. As a land owner - you need to pay attention! More so if you own rural area.
 1. You can defeat this by either fencing them out (and making sure it's effective, OR you can invite the public in to defeat the adverse element.
 - b. Nome 2000 argued that it was a commonly used area, they were only there for part of the year, the structures also were rather small
3. Exclusive
 - a. Fagerstroms - they acted as the owner and kept the true owner out of the property, they also excluded campers from the property (when they started stealing firewood)
 - b. Nome 2000 - they only excluded the campers to prevent them from stealing their firewood, they allowed the public to go through the land to pick berries (etc)
4. Continuous
 - a. Fagerstroms - they entered the land since 1945 and used it (unbroken pattern) through till the case
 - b. Nome 2000 - the use was sporadic (only on the weekends), if they had truly intended to possess this land, they would have been there through summer and winter
 - i. However, reasonable use is acceptable (no one lived there in the winter)
5. Adverse
 - a. Fagerstroms - they were acting as the owner and that since there was no permission granted, the court utilized the objective test and stated that it was presumptively adverse
 - b. Nome 2000 - Native Alaskan tradition - living on and utilizing the property is not ownership; therefore, they weren't acting like they owned the land.

- i. Court says - we don't care about someone's mind (subjective test) - they were acting as an owner and the community thought they were owners (objective test)
- ii. If they applied the Intentional Dispossession Test - they know it belongs to someone else and they are taking it - we don't really know because we'd have to get in their head
- iii. If they applied the Good Faith Test - as long as they were an innocent possessor (had no idea they were adversely possessing) - we don't know since we'd have to get in their head
- iv. This is why the vast majority of jurisdictions utilize the objective test rather than these fucktarded subjective tests.

6. Statutory Period

- a. 10 years - that's why we only talk about the last year

The court rules for the Fagerstroms for the northern portion of the property. However, for the southern half of the property. Court holds they could argue for a prescriptive easement for the southern portion of the land (pick berries, pick up trash, only the other things they were doing before)

Does a prescriptive easement come with obligations? (such as picking up trash - she doesn't know - but she doesn't think so.)

What would have happened if the Fagerstroms had a failed deed? How do the facts change the court's ruling then? Color of Title would kick in and they would also own the southern portion.

Elements of Prescriptive Easement

1. A pattern of Use that is
2. Open and Notorious
3. [Exclusive,](exclusivity is usually gone and not utilized in the courts; we're not fully possessing or even claiming to - you're just using the land) for our purposes, this is not an element
4. Continuous, and
5. Adverse,
6. For the Statutory Period

Community Feed Store, Inc. v. Northeastern Culvert Corp.

Plaintiff is suing for a prescriptive easement over a portion of defendant's land; defendant counterclaims for ejectment; trial court rejects the initial claim and enters judgment for defendant's ejectment.

1. A pattern of Use - customers driving over the land, the loading of trucks and utilization of backing up over the land
2. Open and Notorious - the true owner knew that they were utilizing the land, stream of customers using the land is noticeable
3. Exclusivity doesn't matter.
4. Continuous - the plaintiff was utilizing the land for loading, and customer parking during the entire time (this was a continuous PATTERN OF USE (which can be very sparse))
5. Adverse - The true owner hasn't expressly given permission - there is a presumption of adversity (majority)
 - a. The minority rule says that if the owner doesn't say anything, we'll presume permission; this can make sense because we want to reward neighbors who are simply being nice (we don't want to punish them by giving the adverse users prescriptive easements)
6. For the Statutory Period - wasn't an issue (15 years shown)

They reversed the trial court and the prescriptive easement was granted for the Feed Store. Why isn't it adverse possession? The pattern didn't show actual possession or continuous use.

Conquest and Government Grant (97-108, 121-129)

How the Government Takes and Gives Land Away:

Back to how do we get property? Capture sale, gift, find, adverse possession

Provenance: right are only as good as predecessors

Why we trace chain of title back to the source: the sovereign

How did the government get title? How did title get to present day?

How much property was acquired by conquest discovery?

How much of nation's property was then given away?

Who benefited from all this redistribution?

What is the significance? Property law sets forth principles that protect the current allocation of Oshp, how do we cope when the acquisition \neq principles?

The Property Clause is important

Policy of the 19th century government was to give away the land it had acquired.

Swamp Land Acts: Allowed the states to claim swamp land by filling it.

General Mining Law of 1872: if you are utilizing your claim, you can protect it from others

Johnson v. M'Intosh

Lawsuit to 'quiet title'

Go over this shit a lot more.

Principles of 'abstract justice' may seem offended by 'universal recognition' for rule that discovery gave US exclusive rights to extinguish Indian title, purchase or conquest.

"Conquest gives a title which the courts of the conqueror cannot deny..it is not for the Courts of this country to question the validity of this title, or to sustain one which is incompatible with it."

Marshall says that his reasoning follows from two understandings:

The European nations agreed that the nation that was first discovering nation had the best rights against other nations. This just gives relatively better rights than other countries.

Whoever gets this preemptive title gives that nation full right to purchase or conquer it from the indians. (purchase or conquest).

Upholds conquest but limits future indian conquest: US holds title by conquest, but indians hold occupancy rights - the only way to claim is to conquer (only the federal gov can do this. Non indians cannot just move into indian land and claim it.

III. The System of Estates

Present Estates and Future Interests (595-604, 607-612, 616-619, Estate Supplement: 1-8, 14, 15)

The Possessory Estates

1. **Fee Simple Absolute**
 - a. Examples: "to A"; "to A and her heirs"
2. **Life Estate**
 - a. Examples: "to A for life"; "to A for the life of B"
3. **Term of Years**
 - a. Examples: "to A for 3 years"; "to A through July 1 this year"

The Future Interests

1. **Reversion:** After Life Estate or Term of Years, the property reverts back to grantor
2. **Remainder:** After Life Estate or Term of Years, property may go to a third party
3. **Possibility of Reverter:** May cut short any Possessory Estate to go back to grantor
4. **Right of Entry:** May cut short any Possessory Estate to go back to grantor (with effort)
5. **Executory Interest:** May cut short any Possessory Estate to go to a third party

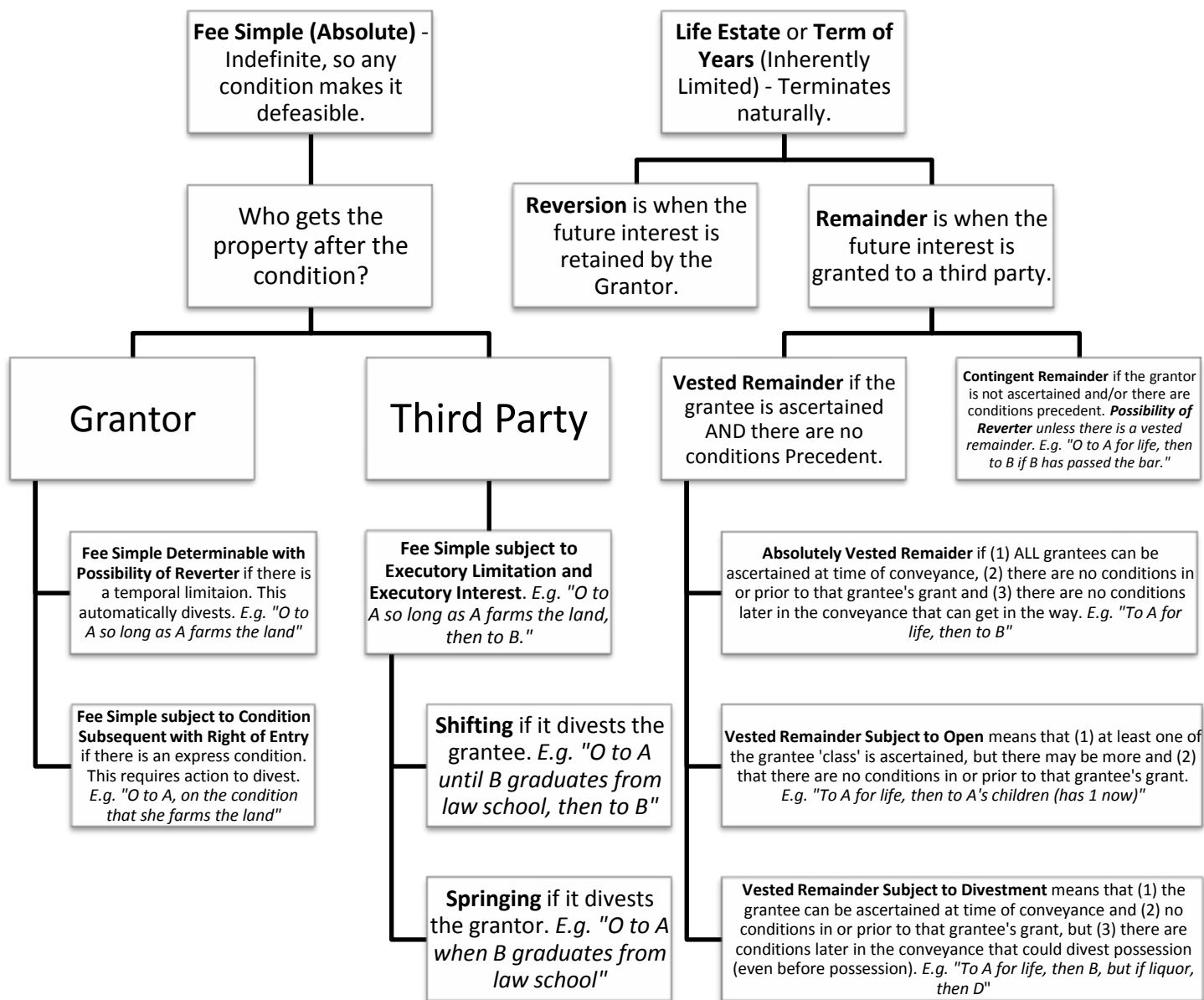
Canons of Interpretation for Ambiguous Conveyances

1. Implement the grantor's intent, but:
2. There is a Rule Against Creation of New Estates (Johnson v. Whiton)
3. There is a presumption against forfeitures (avoid finding future interests)
 - a. Here, a court might find a Fee Simple Condition Subsequent rather than a Fee Simple Defeasible
4. Unreasonable restraints on alienation disfavored
 - a. restraints on marriage, racially discriminatory conditions are unenforceable
 - b. Prohibition on waste of possessory estate
5. More leniency for charitable donations
 - a. **Doctrine of Cy Pres:**

Steps to Analyzing Possessory Estate and Future Interest

1. Identify the Possessory Estate
 - a. Is the estate transfer absolute or inherently limited? Who has it?
 - i. Fee Simple is the only absolute Possessory Estate.
 - ii. Life Estate and Term of Years are inherently limited.
2. Does the Possessory Estate terminate naturally, or get cut off?
 - a. If it gets cut off (the condition could divest it earlier than its inherent limitation), analyze the Possessory Estate and Future Interest as a Defeasible
 - i. Fee Simple are indefinite; therefore, any divesting condition makes it defeasible.
 - b. If the Possessory Estate terminates naturally, analyze the Possessory Estate and Future Interest as a Natural
 - i. Life Estate ends naturally when the holder dies
 - ii. Term of Years ends naturally when specified period ends
 - c. What about, if both?
3. Who gets the future interest (grantor or grantee)?

- a. Defeasibles List
 - i. If retained by the grantor:
 - 1. **Fee Simple Defeasible with Possibility of Reverter** if there is a temporal limitation and automatic divestment.
 - 2. **Fee Simple Condition Subsequent with Right of Entry** if there is an express condition and requires action.
 - ii. If Granted to a third party:
 - 1. **Fee Simple EL with Executory Interest** which includes some condition and automatic divestment
 - a. **Shifting** if it divests the grantee
 - b. **Springing** if it divest the grantor
- b. Naturally Terminating Estate
 - i. **Reversion** is when the future interest is retained by the Grantor
 - ii. **Remainder** is when the future interest is granted to a third party
 - 1. A **Vested Remainder** if the grantee is ascertained AND there are no conditions precedent; (three degrees of vestedness:)
 - a. **Absolutely Vested Remainder** means that ALL grantees can be ascertained at time of conveyance, there are no conditions in or prior to that grantee's grant and there are no conditions later in the conveyance that can get in the way. *E.g. To A for life, then to B*
 - b. **Vested Remainder Subject to Open** means that at least one of the grantee 'class' is ascertained, but there may be more and that there are no conditions in or prior to that grantee's grant. *E.g. To A for life, then to A's children (has 1 now)*
 - c. **Vested Remainder Subject to Divestment** means that the grantee can be ascertained at time of conveyance and no conditions in or prior to that grantee's grant, but there are conditions later in the conveyance that could divest possession (even before possession). *E.g. To A for life, then B, but if liquor, then D*
 - 2. Otherwise, this is a **Contingent Remainder** where the grantor is not ascertained and/or there are conditions precedent.



Merger: If the Life Estate/Term of Years and Remainder/Reversion end up in the same person - the possessory estate becomes a Fee Simple Absolute.

Traditional Rule of Contingent Remainder Destructibility:

1. The Contingent Remainder disappears if it is not vested before the end of the preceding estate.
2. Contingent Remainder holders that satisfy the contingency later are out of luck!

Edwards v. Bradley: If a will does not explicitly leave a life estate in property, the creation of a life estate can be implied from the intent of the testator.

Johnson v. Whiton: A person cannot create a new type of inheritance by will.

Overview of the Rule Against Perpetuities (619-628, Estate Supplement: 7-13, 16-19)

The Rule Against Perpetuities

The Rule Against Perpetuities invalidates future interest that may vest too far into the future by striking them out of the grant. **The Rule Against Perpetuities only applies to Executory Interests, Contingent Remainders, and Vested Remainders Subject to Divestment.** The Future Interest cannot stay contingent (unascertained, open, conditional) longer than the lifetime of someone alive at its creation + 21 years. Before then, it must be certain that it will either vest or not vest.

When creating these Future Interests, we need to be sure to figure out whether it's possible that the Future Interest WILL NOT obey the rule. Then we know the Rule Against Perpetuities will be violated. If there's any chance the Future Interest will not obey the rule, it's invalidated. We need to ask three questions:

1. Is there a contingency or openness in the grantee?
2. What will it take to resolve this contingency?
3. Is there any chance that it won't happen more than 21 years after all named people alive at creation have died?

Danger Signs to Remember

1. Condition not personal to someone ("if land is ever used as a tavern")
2. Identified age or time period < than 21 years ("A's kids who reach 25")
3. Grants that skip a generation ("to A, then A's grandkids")
4. Must survive someone described rather than named ("A's widow")
5. Specific event that would normally happen in 21 yrs, but might now ("after probate of will/local elections," - there are no favorable assumptions made!)
6. Can't identify holder until death of one described but not named ("to A for life, then to A's first child for life, then to sitting President")

Savings Clause

If there's a chance a Future Interest might stay contingent longer than the lifetime of someone alive at its creation +21 years, draft a Savings Clause that terminates the Future Interest on the expiration of the perpetuities period following a specified life in being. E.g. add "but no later than 21 years following death of grantor/life estate holder/my youngest living child/etc..."

Charitable Exemption and Modern Modifications

1. Charitable Exemption: If both possessory estate and vulnerable Future Interest are given to charitable organizations, Rule Against Perpetuities does not apply.
2. "Wait and See": Rather than voiding any interest that might stay contingent beyond the perpetuities period, wait and see if it actually does!
3. Uniform Statutory Rule Against Perpetuities: (OR) Limits perpetuities period to 90 years, applies "wait and see," reforms per cy pres. Exempts commercial transactions and some others.
4. Abolition: 15 States abolish the Rule Against Perpetuities.

Concurrent Ownership (663-670, 674-682)

Tenancy in Common:

1. Undivided interest - right to possess the entire parcel
2. Magic Words: O to A and B as tenants in common. (O to A and B)

3. Modern Default: presumed if unspecified conveyance to 2 or more
4. Shares divisible: in varying fractional amounts (25%, 25%, 50%)

From the problem slide:

4. B travels to Asia; C and D rent out his bedroom. If B is not in on the rent, the renter is getting C and D's possessory interest in B's bedroom. If B is in on the lease, we allocate according to the ownership fractions.

When one co-tenant forces another off the property - this is called ouster.

Any one co-tenant can sue for judicial partition.

Joint Tenancy:

1. Undivided Interest - right to possess the entire parcel in survivorship rights
2. Magic words - O to A and B as joint tenants.
3. Requires the Four Unities:
 - a. Time - created at same moment in time
 - b. Title - by same instrument of title
 - c. Interest - conveying equal undivided fractional interests
 - d. Possession - that give all joint tenants right to possess entire property
4. Severance - can reduce to Tenancy in Common by severing one of unities
 - a. Can convey it back to yourself in some jurisdictions
 - b. Can also use straw conveyance (like to lawyer and back)

When it comes to adverse possession:

1. Co-tenants cannot adversely possess the property by simply exercising their own possession. They would have to lock him out (do something illegal)
2. Also, the tenant they are trying to possess from must know about the adverse possession.

Maintenance and Necessary Repair

Accounting: Co-owners can force an accounting to require co-owners to pay fair share of maintenance or to receive rents

1. Co-owners in possession pays taxes and mortgages if occupancy value > costs
2. Can only sue co-owners for accounting if costs exceed occupancy

Repairs: Courts split on how to allocate costs of necessary repairs

1. Some: co-owners don't have a duty to pay unless agree; others, duty if notice
2. Can deduct the costs from proceeds due others (so, if the property is making money)

Judicial Theme: courts want to stay out of internal governance - they don't want to decide personal disputes

Tenhet v. Boswell - she will test us on this - know both sides: unilateral lease by one joint tenant - and then death? Lease does not equal severing joint tenancy because core feature is RoS, but there is jurisdictional variation

Kresha v. Kresha - unilateral lease by one co-tenant - and then transfer? New owner bound when they take with the notice of prior encumbrance.

Marital Property (670-673, 688-695, 697-706)

Olivas v. Olivas

Background: Husband and wife get a divorce, but they wait 3 years before they divide the property. As such, the husband files for rent damages because he was 'ousted' by the wife. The trial court found that the husband chose to move out and that he couldn't collect ouster damages. The husband appeals stating that the district court erred in deciding he hadn't been ousted.

Issue: Did the trial court err in deciding the husband had not been ousted?

Holding: No. The husband had not been ousted because chose to leave the house rather than being pushed out. The rule: *a tenant in common can be liable to his co-tenants for rent for the use and occupation of the common property if he is denied the right of occupancy by his co-tenants, or if the character of the property is such as to make joint occupancy impossible or impracticable.*

Here, the husband was arguing that due to the divorce, joint occupancy was impossible; Hertz v. Hertz held that, "if one of the parties in a divorce case remains in possession of the community residence between the date of the divorce and the date of the final judgment dividing the community assets, then there *may* be a form of constructive ouster."

However, the court holds that in a circumstance where the departing spouse has abandoned his or her interest in possession, rather than being excluded, they cannot collect rent. Here, the husband has the burden of proving constructive ouster. Looking to the evidence, the court believes the husband was 'pulled' out to live with his girlfriend rather than being 'pushed' out by his wife. This is further evidenced by the delay of several years before demanding any rent. He dun' goofed.

Class Discussion: Should the court default ouster or default no-ouster?

Default no-ouster: this protects the person that stays. This might encourage couples to work it out; but then it also might keep domestic violence going.

Default Ouster: A rebuttable presumption (ouster unless the person is pulled out instead of pushed) is useful.

Class Notes

1. Tenancy by the Entirety (Still in 20 States, Including OR)
 - a. Undivided interest - possess the entire property and indestructible survivorship
 - b. Magic Words: "O to H and W as tenants by the entirety."
 - c. Default: Some Jurisdictions, ambiguous grants to married couples are Tenancy by the Entirety. (OR)
 - d. Requires that holders are legally married, and then:
 - i. Property can't be partitioned except by divorce
 - ii. Right of Survivorship cannot be unilateral destroyed
 - iii. Majority: No transfer or encumbrance without consent
 - iv. Majority: Creditors cannot attach to satisfy the debt of one spouse

The mortgage (in both names) is due. Who pays what? Each responsible for half.

Wife transfers her interest to C. Who has what? If only one person does it, it's invalid. If both spouses agree, c would own her interest.

Husband runs up enormous gambling debt. Casino wants to lien. The casino can't place on property.

Wife conveys to straw party and back. Who has what? Husband and wife both have same property (transfer is void).

Husband sues for partition but Wife objects. Can be partitioned through divorce proceeding.

Wife changes the locks and bars husband from the premises. He'd be entitled to rent because this is an ouster.

Husband comes back, but after a new fight, he leaves to live with gf. This is considered abandonment by the husband - he gets no rent. (from Olivas - there are jurisdictional differences)

Marital Property

- **Separate Property:** Everything belongs to whoever received it, unless conveyed as joint property. (OR)
 - Divorce: CL: if Husband earned wages and the wife did not, husband owns all (w gets dower)
 - Death: some give spouse 1/3-1/2 of estate even if willed elsewhere
- **Community Property:** All acquired before the marriage is separate property; all acquired during the marriage (including earnings) is community property except gifts and inheritances to one; ergo: both own undivided half of community property. (CA, WA)
 - Divorce: some spouse gets ½ of community property: some 'equitable distribution'
 - Death: spouse gets half of community property even if willed away (they already own it)

Equitable distribution tells us what property is subject to distribution at the time of divorce. They protect the economically dependent spouse. The advantage is that it allows them to adjust the distribution based on facts. Disadvantage is that this is judicial discretion.

O'Brien v. O'Brien

This case talks about what can be considered property for equitable distribution. The trial court held that the license is marital property. The issue here is whether the marriage license is marital property.

Leaseholds (733-736, 754-767, 770-780)

The Leasehold Estate

1. **The Lease Contract** will control the location, parties, rent, and duration (Statute of Frauds for any lease longer than a year) - everything else can be set either by contract or legal defaults.
2. **Entitles:** This entitles the Tenant to exclusive possess (even against landlord) and entitles the Landlord to reversion and rent (if specified in lease)
3. **Duties:** The Tenant has a duty not to damage the property beyond normal wear and tear. The Landlord has a duty to not disturb the Tenant's possession (Covenant of Quiet Enjoyment).
4. **Leaseholds and Foreclosure:** If the Tenant performs fully, but the Landlord does not? Here it depends on if the mortgage came before the lease. If the mortgage came before the lease, the bank can evict; if the mortgage came after the lease, they have to wait to evict.

Types of Tenancies

1. **Term of Years:** Lasts for any specified period of time
2. **Periodic:** Automatically renews at specified intervals (month to month, year to year)
 - a. unless statutory notice by landlord or tenant
 - b. can be inheritable - if you die, your spouse can continue
3. **At Will:** Informally create, mostly by mistake or in families
 - a. less or no notice to terminate, ends at death of either landlord or tenant
4. **At Sufferance:** Describes holdover tenant, but not a real leasehold

- a. Holdover is 1 rung above trespasser regarding eviction rights. The landlord cannot self-help to remove tenants at sufferance.

Interpreting Types of Tenancies

1. If the landlord and tenant orally agree to a 2 year lease with monthly payments - then this is a month to month because of the statute of frauds
2. After the Term of Years ends, the tenants stays on land and writes a check for month's rent - this is a month to month
3. If a 5 yr lease fails to specify location of the house, but T pays rent monthly, month to month because statute of frauds
4. if orally agree to indefinite month to month - month to month

Sommer v. Kridel

Kridel contracted to rent from Sommer; he payed first months rent and a security deposit. His plans fell through and he sent a letter before the lease started. At some point during when he was to be leasing, another person seeks to rent it, but Sommer tells her that Kridel is renting it. After the lease ends, Sommer sues Kridel for all of the renter. The trial court found for Kridel stating that Sommer should have mitigated the damages. The appellate division reversed based on traditional property common law.

Why should we adopt the contract law approach? We don't want the property law common law doctrine because it promotes waste of property. Land is scarce and it should be utilized. We look at fairness, efficiency, and the least cost avoider (the landlord is in a position to limit the loss and less cost). The only mitigation test we have is whether the landlord used reasonable efforts to mitigate.

Transferring Leasehold Interests

1. **General Rule of Transfer:** Unless you contract otherwise, either party can transfer any rights.
2. The landlord can transfer their reversion right.
3. The Tenant can transfer their possessory rights by subletting or assigning.
 - a. Assigning is a complete transfer of interest
 - b. Subletting is simply for a part time (you hold onto a future interest)
 - c. In either case, the landlord can go after the tenant, however if it's an assignment, the landlord can go after the assignee
 - d. The tenant is always on the hook, but the sublease provides some protection from the lessor

Kendall v. Ernest Pestana

A whole list of transfers and subleases between different parties ending with Kendall and Pestana.

Issue: Whether a lessor can arbitrarily withhold consent to subleases. (is there a reasonableness issue here?)

In contract law, we have a fair dealing duty whereas in property law, they have a right to arbitrarily withhold consent.

Court agrees with the public policy reasoning, they don't like the acts of discretion to deny at will. They make the argument that the LL still has the power to deny the potential subletter if there is a legitimate reason.

Slavins v. RC Board of Brookline

Finds the opposite way - residential context vs commercial property. But extended to commercial anyway. So there is a split.

Tenant's Right to Habitable Premises (782-798, 802-805)

Blackett v. Olanoff

Takeaway: A tenant's implied covenant of quiet enjoyment is violated when the landlord leases property to another tenant, and the lease gives the landlord the right to control the level of noise, but the landlord does not prevent the undesirable conduct.

Background: A landlord rented property to a tenant running a lounge in an area that was residential. The lease required the noise not disturb others, but when it did, the landlord did not correct the situation.

Issue: When the acts of one tenant prevent the other tenants from enjoying their premises, will the landlord be liable when the lease prohibits the tenant from disturbing others?

Holding: Yes. Judgment affirmed. Occasionally, a landlord has not intended to violated a tenant's rights, but a breach of the landlord's covenant of quiet enjoyment still occurs which flowed as the natural and probable consequence of the landlord's actions, inactions, or what he permitted to be done. The landlord's conduct, not his intentions, is controlling.

Plaintiffs had the ability and right to control the noise, which caused Defendants to vacate their apartments because of the provision in the lease that regulated noise.

Even though Plaintiffs only knew that there would be a potential noise problem at the time they gave the lease, experience demonstrated that an acceptable music level at a lounge is unacceptable for residential tenants.

Because the disturbing condition was the natural and probable consequence of the Plaintiff's permitting the lounge to operate in that location, and since they could control the actions of the lounge, they should not be able to collect rent for the residential premises that were not reasonably habitable. Tenants in these situations should be able to bring a claim against the landlord. The covenant of quiet enjoyment, which is implied in every landlord-tenant relationship, holds that the landlord promises not to disturb the tenant's quiet enjoyment of his premises. As seen in this case, the landlord will be liable when the disturbance comes from another tenant.

Types of Eviction

1. Actual Eviction: Landlord bars actual possession by Tenant. Here, the Tenant can move out, stop rent, or sue.
2. Partial Actual: Landlord bars actual possession of part of the leasehold. Tenant can stay part, but this is still a material breach.
3. Constructive Eviction: Landlord takes actions that violate the covenant of quiet enjoyment. Entitles Tenant to breach of contract if he leaves the premise.
4. Partial Constructive Eviction: Landlord takes actions that violates the covenant of quiet enjoyment for part of the lease. This entitles the tenant to stay in other part and reduce rent payment.

Minjak Co. v. Randolph

Takeaway: When a suit is brought for nonpayment of rent, a tenant may assert as a defense the doctrine of construction eviction, even if he has abandoned only a portion of the premises due to the landlord's acts, which made that portion unsuitable for use.

Background: A couple's residence became difficult to live in after the building went under construction, and they could not use a portion of it.

Issue: May the doctrine of constructive eviction be used as a defense to the nonpayment of rent, if the tenant only abandons only a portion of the premises?

Holding: Yes. A tenant may assert as a defense to the nonpayment of rent the doctrine of constructive eviction, even if he or she abandons only a portion of the premises due to the landlord's acts in making that portion unsuitable for use.

Respondents were compelled to abandon the music studio portion of the loft due to the landlord's wrongful acts, which substantially and materially deprived the tenants of the use and enjoyment of that part of the loft.

Respondents only need to pay a portion of the rent for the months a part of the premises was uninhabitable.

Punitive damages may be awarded in breach of warranty of habitability cases when the landlord's actions or inactions were intentional and malicious. The determining factor is the moral culpability of the defendant. Here, the landlord permitted the construction work to be done in a dangerous and offensive manner with a disregard for the rights and safety of others.

The Implied Warranty of Habitability

Today, there is an implied warranty of habitability adopted in almost all states by statute or common law for residential leaseholds.

Some jurisdictions indicate this is violated when something renders the space unsafe, unsanitary, and uninhabitable. Other jurisdictions utilize community standards. Common triggers include no heat/hot water, pest infestation, leaky roof.

Tenant's Remedies for Breach of Implied Warranty of Habitability

1. Withhold rent and stay (defend the claim for rent with implied warranty of habitability)
2. Rescission: repudiate the lease before term (move out, cease rent)
3. Repair and deduct if the tenant has the skill and needed capital
4. Sue for injunction commanding the landlord to repair as required
5. Sue for rent abatement (but most withhold until sued and then defend)
6. Administrative remedies under statute triggering government intervention
7. Criminal penalties in extreme cases
8. Compensatory damages if the landlord breach led to other costs (such as a hotel stay)

Javins v. First National Realty Corp.

Takeaway: In regards to residential property, the landlord makes an implied warranty of habitability, and the standard of habitability will be set by the relevant housing codes.

Background: Tenants (Appellants) at a housing complex did not pay their rent for one month. The landlord, First National Realty Corp. (Appellee), sought possession based on the default. Appellants alleged numerous violations of statutory housing regulations as a defense.

Issue: In the lease of an apartment, is there an implied warranty of habitability?

Holding: Yes. Leases of urban apartments should be treated as contracts. Obligations are imposed on landlords by modern housing codes to keep the premises in a habitable condition.

Since a lease specifies a certain period of time in which the tenant will use the apartment, the tenant may legitimately expect that the apartment will be fit for habitation for that time. There is no allegation that the apartments were in poor

condition or in violation of the housing code at the time the leases started. Since the tenants continued to pay the same rent, they were entitled to expect that the landlord would keep the premises as it were in the beginning of the lease.

There is inequality in the bargaining power between landlord and tenant. Tenants cannot really demand better housing.

The housing code requires that a warranty of habitability be implied in the leases of all housing that it covers. By signing the lease, the landlord takes a continuing obligation to the tenant to maintain the premises in accordance with the law. The code implies a warranty of habitability measured by the standards outlined in the code into all leases that it covers.

Appellants' obligation to pay rent depends upon Appellee's performance of his obligations. Appellants' must be given an opportunity to prove violations that breach the warranty in order to determine if rent is owed.

IV. Nuisance and Land Use Conflicts Among Neighbors

The Conceptual Architecture of Legal Rules (333-348)

Ways to Resolve Land Use Conflicts

1. Priority in Time: Who was there first?
2. Privilege the land owner's autonomy interest: land owner always wins (common enemy)
3. Privilege the neighbor's security interest: neighbor always wins (civil law)
4. What seems fair under the circumstances

The Policy Origins of Legal Rules

Familiar Rights

1. Self Determination (autonomy)
2. Security from harm (under tort)
3. Speech, association, procreation

Familiar Indices of Social Utility

1. Public Safety
2. Availability of food, shelter, employment
3. Clean environment

Diffuse Surface Water (368-373)

Armstrong v. Francis Corp.

Armstrong lives downstream from Francis Corp's land; Francis Corp decided to develop the land and put in a drainage system that sped up the drainage to as to quickly erode Armstrong's land. The water also became nasty and 'evil-smelling'. This is Armstrong's harm. Francis Corp's harm would be the financial investment in maintaining the new sped-up stream and preventing it from eroding Armstrong's house. The court considers several rules: the common enemy rule (surface water is seen as bad and you can do whatever you want to get rid of it), the civil law rule (the possessor has a duty to his neighbors; a person who interferes with the natural flow of surface waters is liable to anyone they cause an invasion of their property). The court notes that the courts have been applying tons of exceptions to each rule and the practice is 'actually' using a third approach: the 'reasonable use' doctrine. This says that the possessor has a limited privilege to discharge surface water on other lands, by artificial means in a non-natural manner. This limitation is by 'unreasonable harm' to the neighbors. Here, the court looks at the amount of harm caused, the foreseeability of the harm, the purpose with which the possessor acted...

Surface Water Rules

1. **"Common enemy" rule** - allows property owners the absolute freedom to develop property without liability for any resulting damage to neighbors caused by increased runoff of surface water
 - a. adopts doctrine of *damnum absque injuria* - defendant is privileged to develop its property and to expel unwanted surface water without liability for resultant damage to neighbor's property
2. **"Natural flow" rule** - grants injured property owner absolute security against injury from flooding caused by a neighboring property owner's development of her property
 - a. adopts strict liability or veto rights
 - b. development can still occur. developers just have to compensate neighboring landowners

"Reasonable use" test

The decision maker determines in specific cases whether defendant's conduct caused unreasonable interference with the neighbors' use of their land

- a. possessor has limited privilege to discharge surface water on other lands by artificial means in a non-natural manner
 - i. how is this established? make a judgment call of legitimacy of conduct in a specific context

b. balancing of 1) social benefits derived from development of defendant's property, 2) the availability of cost-effective means to avoid or mitigate the harm 3) AND the gravity of the harm to the plaintiff's property

c. Restatements' factors

ii. Fairness

1. Character of harm to Π ?
2. Which use established first?
3. Any important rights implicated?
4. Motives of the parties?

iii. Utility

1. Social utility of Δ 's harmful activity?
2. Social utility of Π 's harmed activity?
 - a. What's at stake for society re: loss?
3. Any means to avoid or mitigate harm?
 - a. Who is the least cost avoider?

Common Law Nuisance (376-379)

1. **Rest. of Torts (2d):** "Non trespassory invasion of another's interest in the private use and enjoyment of land."
2. **Private Nuisance:** A use that creates a substantial & unreasonable interference with a neighbor's enjoyment. (has to do with private enjoyment of your property whereas trespass protects your use of the property) (negligence focuses on the conduct whereas nuisance focuses on the result of conduct)
3. **Public Nuisance:** A use that interferes w/ rights of the public in general, usually by threatening health or safety.

Test for Private Nuisance

1. A private nuisance is a use that creates a
 - a. substantial and
 - i. Here, refer to a use that you no longer can enjoy or a disruptive attraction
 - b. unreasonable
 - i. Here, evaluate the manner, place, and circumstances of the challenged use against prevailing community standards.
 - ii. Rest. Tort: Balance the rights (utility of harmful conduct vs. harmed conduct)
 - iii. Utilize the Community Standards Yardstick - normal persons in a particular locality
2. interference with neighbor's enjoyment.

Example: The Suburban Hog Farm - here, the plaintiff's objections are to the smell and noise. Here, there is no physical trespass and the farm is not operating negligently. Here, the best claim would be private nuisance. As far as substantial, there is no way for the neighbor to sleep or enjoy the fresh smells of suburbia with the pig farm.

Page County Appliance Center

The store's tvs stop working because of radiation leaking from the nearby travel agency's computer. The court looks at whether there is a particularly sensitive use of the property. The other issue on appeal is whether the jury got right instruction regarding whether it's reasonable. The plaintiff could argue that he was there first (selling TVs), and that he should be able to utilize his property. Additionally, the plaintiff might argue that tvs are more important. Additionally, the computer could be fixed easily whereas the TV business would have to spend a large amount of money to move the business. The defendant argued (can't argue that it isn't a substantial harm), that they're simply conducting business and need this technology, people need to go on vacations, computers are useful for everyone. Additionally, the plaintiff is hyper-sensitive to the harm.

The Hyper-Sensitive Plaintiff Defense

1. Would defendant's challenged activities cause this level of harm to the average neighbor (by community standards)?
2. Is the plaintiff harmed use so unusually sensitive that it would be wrong to curtail defendant's otherwise non-harmful use on a basis of plaintiff's unusual harm?

Remember, this is different from the eggshell plaintiff doctrine in that the hyper-sensitive plaintiff defense is about liability rather than damages.

Property, Liability, and Inalienability Remedy Rules (379-386)

1. **Property Rule:** The entitlement can be shifted around - the person who has it can trade it away; the loser can offer up some money to get the entitlement (e.g. common enemy rule - they could purchase their common enemy rights from neighbors)
2. **Inalienability Rule:** the entitlement cannot be shifted and no shifting will be legally enforced. (e.g. the Implied warranty of habitability cannot be bargained around; you also cannot enslave yourself)
3. **Liability Rule:** can be shifted around, however only the competitor can make the decision. The entitlement to not be negligently inflicted emotional harm. In property law: eminent domain (if the government wants to take, they can as long as they compensate)
 - a. **Punch and Pay Model:** This rule gives rise to the punch and pay rule - as long as you pay for it, you're fine.
4. **Nutshell:**
 - a. Can parties bargain around the default rule?
 - b. Who gets to decide?

Boomer v. Atlantic Cement

There's a factory, and the factory is spewing smoke and ash and vibrations to make the neighbors unable to live there reasonably. They sue and they argue substantial and unreasonable interference. The court agrees that the claim meets the requirements of private nuisance. The court, however allows the factory to continue because of the social benefit. The case was a shocker for the legal community.

Special Rules for Some Land Use Conflicts

1. Drainage (Diffuse Surface Water)
2. Removal of Lateral and Subjacent Support
3. Light and Air

Light and Air (403-411, skim 411-421)

Fountainbleau Hotel

1959 case the Edenrock hotel is suing Fountainbleau addition will block their light for their pool intentionally. The plaintiff argues for an injunction (substantial and reasonable interference of my land). Substantial (lose business), and unreasonable (I was here first, you're building it in spite). There is evidence of spite, but inconclusive. The court grants a temporary injunction. Upon appeal, the Fountainbleau, we don't have any recognition for the rights of free flow of air. Ancient rights is England, not here.

The paradox of this case: The court says that there is a private nuisance only if it interferes with the plaintiff's lawful rights. However, the paradox is that the court's conclusion is how do we know anybody's rights without apply the substantial reasonableness test?

This rejection of an easement for light and air was important in this case because there was suddenly the ability to build large and tall buildings.

Prah v. Maretti

Takeaway: The court uses the balancing test, which compares the utility of use of the defendant to the gravity of harm to the plaintiff when considering a claim for private nuisance.

Background: Maretti (Defendant) planned to build a house, which would obstruct Prah's (Plaintiff) solar powered house from having an unobstructed view of the sun.

Issue: Did the Plaintiff's complaint state a claim for relief, which could be granted by a court?

Holding: Yes. Reversed and remanded. The Plaintiff alleged a private nuisance. A private nuisance occurs when one landowner's use of his property unreasonably interferes with another's enjoyment of his property. Historically, the courts in this jurisdiction have not recognized deprivations of sunlight as a private nuisance.

This court, however, holds that the private nuisance law, as defined by reasonable use, is applicable to the case at bar. In considering a private nuisance claim, the court's decision will rest on whether or not the use is unreasonable.

The lower court incorrectly applied the balancing test, which compares the utility of defendant's conduct against the gravity of harm to plaintiff. The lower court concluded that because the Defendant's proposed home was within the specifications of the housing code, no actionable nuisance could be found. This court concluded that compliance with local housing codes is only one factor to weighed, and is not dispositive.

The court held that the Plaintiff's complaint did state a claim upon which relief could be granted, and that the lower court was in error to grant Defendant's Motion for Summary Judgment. The court did not consider the Plaintiff's statutory claim or the claim based on prior appropriation.

V. Private Land Use Controls

Licenses and Easements (423-429, 435-438, 439-451)

1. **License:** Landowner's revocable invitation to others for a limited access to property (even extended over time, revocable at owner's will)
2. **Servitude:** Creates a right or obligation regarding the property that "runs with the land" (Rule against Perpetuities does not apply here)
 - a. **Easement:** Right that can be given to another to use your land in a certain way (Intended to be a permanent interest)
 - i. Negative Easement Exception: These act more like Real Covenants (e.g. the Doctrine of Ancient Lights)
 - b. **Real Covenant:** Obligates you to use or not use your property in a certain way
 - i. Equitable Servitude: Similar to a Real Covenant, but it is easier to create and you get an injunction rather than damages

Carpet Cleaner Example

She had carpet cleaners come when they got a new home. She called the police to eject some trespassers. Trespass claim won't succeed because she didn't revoke the license. The cleaners are in there on a license basis. Their license, though, is limited in scope and time. Also, the license can be revoked at will. What if she hadn't paid them in advance, she can still kick them out (they might have a remedy in contract). What if they had paid in advance for the vacuum cleaner, so they owned the vacuum. You can go onto the property to recover their own property.

The Beloved House Cleaner Example

House cleaner to clean her house. He comes every day and he has a key to come and go when she's not there. He stays for 20 years, what's the legal basis for the house cleaner staying on the premises. This is still a license. He might claim prescriptive easement here, but this would fail because it wasn't adverse (she gave permission). There is no evidence of express easement.

Easement by Express Agreement

This is the same as any other interest in land. This is done by a deed that complies with the Statute of Frauds. This is put in writing that specifies the parties, and what they are conveying. Here, words of conveyance are used and the grantor signs it.

1. You can grant an Easement either:
 - a. Independently: Right of way across land for use as footpath
 - b. In larger conveyance: Sell rear lot with easement over front driveway
2. You can reserve an Easement when you convey land (e.g. sell land but keep right of access for yourself)
3. Reserving Easement in a 3rd Party:
 - a. The modern trend would allow this
 - b. Traditional Rule would say no - you used to have to sell the whole property to the 3rd party; this would be a negative easement and negative easements (with very few exceptions) are not allowed.

Affirmative Easements vs. Negative Easements

1. **Affirmative Easements:** confer a right to someone else to do something affirmative on your land (e.g. pass over it or dig under it)

2. **Negative Easements:** give someone else rights to restrict what you can do on your own land. (generally disfavored and unenforceable)
 - a. There is a traditional hostility to negative easements because we want people to be able to decide what they want to do to their property and they do not want dead hand control to alter the use of land. Easements came first before covenants.
 - b. When there is an affirmative easement, you can see it (keep buyers on notice). Negative easements are not easily noticeable. This can create endless arguments.
 - c. **Permissible Negative Easement Exceptions:**
 - i. Lateral Support: This is a negative easement because this is something you cannot do on your own property
 - ii. Light and Air
 - iii. Prevent Interference with Flow of Water or Aqueduct

Easements vs. Covenants

1. Easements are affirmative rights for someone.
 - a. E.g. to do something on someone else's land
2. Real Covenants are obligations that restrict what an owner can do with their land or requires the owner to do something if they own a land
 - a. E.g. pay dues or groom bushes

Easement Exceptions to the Statute of Frauds

The statute of frauds generally applies to easements, but there are a few important exceptions:

1. **Easement by Estoppel** (in other words: when does a revocable license become an easement?)
 - a. Kentucky Supreme Court: Where a license is not a bare, naked right of entry but includes the right to construct improvements thereon, the licensors may not revoke the license and restore his premises to their former condition after the licensee has exercised the privilege given by the license and erected the improvements at considerable expense.
 - b. Underlying Legal Theory: Reasonable reliance/promissory estoppel
 - c. Dangers of the Rule: You might not know you're implying access; the property can become burdened. We take this danger because the owner should have a duty to take care of his property and the owner is the least cost avoider. We place the burden on the least cost avoider and because the owner is in the best position to avoid the problem.
 - d. How can this be reconciled with Adverse Possession? Part of adverse possession is that the owner has no right to exclude by temporarily permitting access. Easement by Estoppel says that temporary permissive access leads to loss of right to exclude. This goes to show that promissory estoppel is more important than the right to exclude.
2. **Easement by Necessity**
 - a. Arises only when an existing parcel is subdivided and one parcel is left landlocked and it can only be implied over remaining lands of grantor - not on neighboring lands that could also connect parcel to a public road.
 - b. Policy: We don't want people prevented from accessing their land. Also good faith - nobody would intentionally create landlocked parcels of land and the traditional answer would still imply the easement. However, the modern trend is to look at the intentions of the parties.
3. **Easement Implied by Prior Use**
 - a. Elements:

- i. Two Parcels previously owned by a common grantor
- ii. One parcel previously used for benefit of other in an
- iii. Obvious and continuous way and
- iv. Continued use is reasonably necessary for enjoyment of retained land (necessary for the enjoyment of the property).
 - 1. Must be "important" or "highly convenient" to enjoyment of benefitted lot.
 - 2. The required necessity is reduced by the obviousness of prior use.
- b. This differs from Easement by Necessity in that necessity look at the importance of access on a landlocked parcel whereas here, we look at the importance of enjoyment of existing use on the retained parcel. When prior use is established (the criteria are not as strict as necessity), but reasonable necessity must be important or highly convenient to enjoyment of benefitted lot.
- c. This rule effectuates the intentions of the party (they would have known), but this is getting around the statute of frauds (it really should have been in the contract).
- d. Common Easements Implied by Prior Use (most concern right of way for people or vehicles, but also):
 - i. Access to sewer lines crossing under the grantor's remaining land
 - ii. Rights of entry to maintain and repair a common structure, like a retaining wall
 - iii. Rights to obtain water from a well or aqueduct
 - iv. Controversial: Access to public recreational areas (lake or beach)

Holbrook v. Taylor (Easement by Estoppel Case)

Trying to establish right of way to use a road. The holbrooks have let the Taylors use and improve this road; but five years later, the Holbrooks wanted to secure the lack of an easement, so they block the road. The Taylors sue for easement estoppel and prescriptive easement. The prescriptive easement didn't fly because the use was permissive. This disposes of the prescriptive easement claim. The easement by estoppel claim, though continues. This case is different than the beloved house cleaner case because the Taylors maintained the road, used it for construction, and improved it. They didn't just drive over it. But, can't owners be fickle and use their right to exclude? An important part of this story is that they made a lot of improvements that would only make sense if they thought they would always have access to this and that the Holbrooks had notice the entire time.

Finn v. Williams (Easement by Necessity Case)

Finn is suing williams for easement by necessity. The property is land locked (didn't have access to a roadway). They used to use the driveways of a third party to access the road. Then, the other parties decided to cut off access to the road because of development. What happens now? There is an assumption that when the land is sold (and is landlocked) that they will have access to the road (by necessity). When there is no access to a public road, you automatically get access to the road. Moral: Where there has been unity of title, Easement by necessity may lay dormant through several transfers of title, pass with each and be exercised by some later owner.

Granite Properties Limited Partnership v. Manns (Implied by Prior Use Case)

Granite Properties is suing Manns to use two separate driveways - one for a road into an apartment complex and the other, a road into the back of a supermarket. The plaintiff was the original owner of everything. When the plaintiff conveyed part of the property without a mention of the easements in the grant. The grantor has not put them in the deeds but now has access to them. Easment by necessity is for landlocked only. Easement by estoppel doesn't work because there is no promise.

Benefit vs. Burden

1. The Benefit of an easement is the legal right to enforce performance of the obligation entailed in the easement (e.g. demand access).
2. The burden of an easement is the legal responsibility to perform on the obligation (e.g. provide access).

Types of Easements

1. **Easement in Gross:** Benefits a specific party and doesn't attach to land. (E.g. utility easement, public trail easement). The Easement in gross burdens one parcel to benefit use by a specific person or group of persons.
2. **Appurtenant Easement:** Benefits users of a specific parcel of land that has some relationship to the burdened parcel (usually proximity). Burdens one parcel to benefit the use of another.
 - a. The **Servient Estate** is the parcel burdened with the easement because it is used to service the other.
 - b. The **Dominant Estate** is the parcel benefitting from the easement (the one served by the servient estate).

When does an Easement Run with the Land?

With appurtenant easement, the benefit is presumed to run with the dominant estate. In order to bind the burden of the servient estate to successors, the easement:

1. Must be conveyed in a writing that satisfies the Statute of Frauds
2. Grantor must intend that it run with the land
3. Subsequent Owner of Servient Estate must have notice
 - a. Actual Notice: heard, read, or was told about it (buyer actually knew about it)
 - b. Inquiry Notice: Might have seen the easement in action (reasonable buyer follows up with inquiries to find out if it means servitude)
 - c. Constructive Notice: Because deed recorded, she's on constructive notice even if never bothered to check chain of title because she should have known. (Reasonable buyer researches chain of title before buying real property)

Scope and Apportionment (456-462, 463-474)

Green v. Lupo

Takeaway: When the benefit runs with the land, it is attached to that particular parcel of land and is called an appurtenant easement.

Background: A couple sold a portion of their land and obtained a promise of an easement over a part of it. The other couple refused to formally grant the easement as promised.

Issue: When an easement is granted for the purposes of ingress, egress and utility, will that be evidence of intent to create an appurtenant easement?

Holding: Yes. Judgment reversed and remanded. The intention of the parties must be constructed from the instrument which created the easement. When the language is ambiguous, the court may consider the situation involving the property and the parties, the surrounding circumstances at the time the instrument was executed, and the practical construction of the instrument given by the parties, as proved by their conduct or admissions.

The grant of an easement for ingress, egress and utilities to the owners of adjacent land is evidence of an intent that the easement benefit the grantees' adjacent land, thereby being an easement appurtenant. Appurtenant easements follow

possession of the dominant estate through successive transfers. The rule applies even when the dominant estate is subdivided into parcels, with each parcel continuing to enjoy the use of the servient tenement.

Easement appurtenants are assignable to future owners of that property.

Cox v. Glenbrook

Takeaway: The size of an appurtenant easement is determined by the intent of the grantor.

Background: An easement is the only existing ingress and egress into an 80 acre tract of land. One landowner wants to widen the road, the other wants to keep it undeveloped.

Henry Quill obtained the Quill Easement from the Glenbrook Company, which gave him use of the roads on Glenbrook Company's property. After Quill's death, his property was sold, and came into the hands of Cox and Detrick. Cox and Detrick (Plaintiffs) plan to divide into approximately 40 parcels to build homes. The Quill Easement is the only existing ingress and egress from the tract. Glenbrook Company (Defendant) has a resort business, which has a quiet atmosphere that the company wants to maintain. Plaintiffs want to widen the road used by Quill.

Issue: When an easement appurtenant grants a right of way, will the easement be violated if the intent of the original parties is not followed?

Holding: Yes. The Quill Easement does not contain a restriction that the easement granted is to be appurtenant to the dominant estate only while the estate remains in single possession. So, even though Plaintiffs are dividing the parcel, all of the eventual owners will be able to use the Easement because the original parties intended for the easement to remain even if the land was divided.

The owner of an easement may prepare, maintain, improve or repair the way in a manner to promote the purpose for which the easement was created, as long as an undue burden is not caused on the servient estate.

When the width of the road is not specified in the writing, the conveying instrument must be construed in the light of the facts and circumstances existing at its date and affecting the property. The intent of the parties is the object of the inquiry. If the intention of the parties at the time of the grant is to keep the road at its original width, later owners cannot widen the road.

Henley v. Continental Cablevision

Takeaway: Easements in gross are interpreted broadly in order to serve the primary goal of the easement.

Background: A cable company installed cable wires on a property and was accused of violating an easement for telephone and electric lines.

Trustees of a subdivision (Plaintiffs) had the right to grant easements to other parties for the purpose of creating and maintaining electric, telephone and telegraphic service for the lots on the subdivision. Continental Cablevision (Defendant) used a license it received from two utility companies who serviced the subdivision, with easements granted by Plaintiffs, in order to erect cables, wires and conduits for the purpose of transmitting television shows. Plaintiffs seek an injunction.

Issue: Are the easements granted to utility companies exclusive, and therefore apportionable by the utilities to another utility company?

Holding: Yes. The easements in question are easements in gross, which are easements which belong to the owner independently of his ownership or possession of other land, and thus lacking a dominant tenement.

If the rights granted in an easement are exclusive of the servient owners' participation, divided utilization of the rights granted are presumptively allowable. This is because when one grants another the right to use the grantor's land in a particular manner for a specified purpose but retains no interest in exercising a similar right himself, he suffers no loss if, within the specifications expressed in the grant, the use is shared by the grantee with others.

The owner of an easement may authorize a third party to use its right of way for purposes not inconsistent with the principal use granted. Adding a cable line does not increase the burden on the servient tenement beyond the scope of the intended and authorized use.

The intention of Plaintiffs predecessors was the acquisition and continued maintenance of available means of bringing electrical power and communication into the homes of the subdivision.

Questions about Scope

1. The **Kind** of uses contemplated by the original grant
 - a. Did Green's easement allow for motorcycle racing or just ingress/egress?
 - b. Was Henley's easement good for cable TV as well as telephone lines
2. The **Divisibility** of uses contemplated by the original grant
 - a. Was Cox's easement expandable from use by 1 to use by 50 families?
 - b. Could the utilities infinitely subdivide benefit of the Henley easement?
3. When the right kind of use expands into an **Unreasonable Burden**
 - a. Interpreted per grantor's intent, but if ambiguous, balances the dominant estate's free development versus the servient estate's security from unanticipated overburden.

Exclusive vs. Non-exclusive Easements

1. If **Exclusive**, then the easement is apportion-able by grantee
 - a. The grantee can assign benefit to others without interfering with grantor's rights
 - b. Absent excessive wear and tear, grantor sustains no loss if the easement is shared
2. If **non-exclusive**, grantee shares the permitted use with the grantor
 - a. The grantor retains continued rights to engage in use or further assign it
 - b. Grantee cannot apportion benefit to others because it might interfere with grantor

Methods of Terminating Easements

1. **Written release** by holder
2. **Own terms** (e.g. if stated to terminate on transfer/death)
3. **Merger**, if dominant and servient estates become held by the same owner
4. **Adverse possession** by owner of servient estate (works like merger)
5. **Abandonment**, if holder's conduct demonstrates clear intention
6. **Frustration of purpose**, if intended purpose become impossible
7. **Marketable Title:** Sometimes, a statute will require the periodic re-recording (every x years or so)

These last forever rather than like perpetuities because unlike perpetuities where there is the fear of dead hand control, there is always an interested party.

Equitable Servitudes and Real Covenants (475-477, 481-498)

History of Real Covenants and Servitudes

1. Developed from limitations of 19th Century English Common Law
2. Back then, contract law didn't allow for assignment to a third party
3. Also, traditional hostility to negative restrictions
4. Obstacles to restricting land uses past title transfers
5. Contract exceptions in context of real property became: Real Covenants (damages) and Equitable Servitudes (Injunctions)
6. Shift from medieval farming to urbanization

An easement is a right to give others to use your land a certain way and there are a few negative easements that are disfavored. In medieval farm communities, there was not a lot of need for negative easements beyond traditional. As land use became more intensive, negative promises became very productive. Forestall race to bottom of intensive land uses and loss of other values. New zoning but when only common law nuisance, private land use controls prevented public nuisance. Here, there was a problem when we wanted them to run with the land given the contract law limits on assignment.

Common law's first try was the creation of Real Covenants (damages). Their second try was Equitable Servitudes (injunction).

The result is that the law of Real Covenants and Equitable Servitudes is confusing because it is in an active state of transition and there are jurisdictional variation because of different points between archaic roots and modern convergence.

Real Covenants and Equitable Servitudes are Forms of Servitude

1. Easements are rights you give others to use your land a certain way.
2. Real covenants and equitable servitudes are rights you give others to require you to use your land in a certain way
3. **Real Covenant:** Pledge you make either to do something or not to do something on your own land for the benefit of someone else's land.
4. Equitable Servitude: Same except (1) no privity (or writing, if estoppel); (2) remedy (injunction, rather than damages)

Requirements for Real Covenant to Run with the Land

1. Must be in a writing that satisfies statute of frauds
2. Promisors must intend it to run to successors
3. Servient estate owner must have notice
4. Horizontal and vertical privity of estate
5. Obligation must touch and concern Dominant Estate and Servient Estate

Requirements for Equitable Servitude to Run with the Land

Same as Real Covenant except, don't need privity of estate, and the writing requirement relaxed if estoppel

1. Usually a SoF Writing unless estoppel/Implied Reciprocal Negative Servitude
2. Promisors must intend it to run to successors
3. Servient estate owner must have notice

4. No requirement for privity of estate
5. Obligations must touch and concern Dominant Estate and Servient Estate

Tulk v. Moxhay

Takeaway: 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, even though it does not run with the land.

Background: The Plaintiff sold Leicester Square with the restriction that it be maintained in a certain form as a public “pleasure ground”. The deed restriction was covenant for heirs and assigns requiring that the land be maintained as a square garden. The Plaintiff continued to own homes and live around the square after its sale. In 1808, the person who originally purchased Leicester Square from the plaintiff had notice of the covenant contained in the deed. Forty years later, the property was sold to the Defendant, Moxhay. Moxhal sought to build upon the land on the square. Plaintiff brought a bill for injunction to stop any construction.

Issue: Can a covenant restricting a property to a specific use be enforced against a subsequent purchaser?

Holding: Whether or not the covenant runs with the land, such an agreement could properly be enforced in equity because the one who purchases the land from Tulk had notice of that covenant. Defendant, Moxhal could not stand in a different situation from the owner from whom he purchased the property.

The Touch and Concern Test

This is the only substantive requirement for Real Covenants and Equitable Servitudes to run because this tells us what kind of pledge qualifies to run with the land. The other requirements are simply formalities.

Nutshell: A pledge touches and concerns if it is really about the land, not the people.

The obligation touches and concerns:

1. The Servient Estate if it relates to use of servient land.
 - a. A pledge to do or not do something on the land (normally satisfies this part of the test
 - i. E.g. build a fence, maintain a garden
 - b. A restriction on kinds of uses of land will also suffice
 - i. E.g. to use land only for compatible commercial development, and to restrict structures to single-family residential homes
2. The Dominant Estate if it improves enjoyment of Dominant Estate or increases its market value.
 - a. Must benefit not just current owner, but also future owners of Dominant Estate
 - b. Think of it this way: if average purchaser would pay more for the dominant estate because of the benefit conferred by pledge, it probably touches and concerns.
 - i. OR: Who will value the benefit more after transfer of the DE - the original covenantor or the successor?
 - c. **Implication:** No personal easement analogue in Real Covenants.

Golf Course Real Covenant Example: Covenant to join and pay dues to the golf course. When you sell to me, do I have to join the golf course even if I don't play golf? This touches and concerns the dominant estate because we will have a well-maintained golf course (improves the market value). However, a strict reading of the rule shows that this does not touch and concern the servient estate because it has nothing to do with the land. Some jurisdictions have allowed the fees to run with the land and some will not.

Whitinsville Plaza v. Kotseas

Takeaway: Reasonable covenants to compete may be considered to run with the land when they serve a purpose of facilitating orderly and harmonious development for commercial use.

Background: Charles Kosteas (Defendant) sells a parcel A to trustees of the 122 Trust (Trust). The deed had numerous restrictions, including one that restricted Defendant from using the abutting land for a discount store that would compete with the discount store Trust intended to build. Defendant was allowed to build a drug store on his retained land. The deed states that the restrictions are covenants running with the land. Trust conveys parcel A to Whitinsville Plaza (Plaintiff). The deed to Plaintiff expressly made Plaza subject to, and gave it the benefit of, the restrictions in Defendant's deed. Defendant leases its abutting land to CVS for use as a discount department store and pharmacy. Plaintiff sues to enjoin Defendant and CVS from operating a discount store.

Issue: Does a non-competition clause in a deed that puts restrictions on the grantor touch and concern the land?

Holding: Yes. Massachusetts has been practically alone in its position that covenants not to compete do not run with the land. This rule is in need of change. Reasonable anticompetitive covenants are enforceable in most states.

It would be unfair not to enforce the anti-competition clause because Plaintiff was probably paid extra money in return for the restrictions and the restriction was one of the reasons Trust bought the land in the first place.

Reasonable covenants to compete may be considered to run with the land when they serve a purpose of facilitating orderly and harmonious development for commercial use.

An enforceable covenant will be one which is consistent with a reasonable overall purpose to develop real estate for commercial use.

Writing? It was written Intent? Can be determined from the covenant. Notice? There was actual and constructive notice (it was recorded). CVS was only leasing the property, but they were a business - they aren't leasing an apartment. Generally a residential tenant's duty to check is very low. Most jurisdictions would put CVS on constructive notice. T&C? SE (CVS): Yes, relates to the use of the estate (prohibition to run a drug store) DE (Plaza): owner is protected from competition and more market value. [Privity?] Fuss? If the covenant not to compete is reasonable in time, then you can have the covenant not to compete. (reasonably limited in time and scope).

Privity of Estate

Privity tells us who has the legally operative relationship to the real covenant. At any time, it obligates or empowers these persons. Real covenant stories can have a long cast of characters: covenantors, later owners, renters, occupiers, adverse possessors, neighbors. Privity tells you who can manipulate the real covenant.

Once you figure out who's in privity with whom, you know who is entitled to benefit from real covenant and who is responsible for the burden. I.e. who can sue for breach, and who will be held liable for breach.

1. **Horizontal Privity:** Relationships created between parties to real covenant in which one parcel is burdened for benefit of another. (makes real covenant eligible to run with land in general)
 - a. Original creators of the real covenant stands in horizontal privity on opposite sides of real covenant promise.
 - b. **Horizontal Privity Test: Instantaneous Test:** This test is satisfied whenever the Real Covenant is built into a transfer between the parties relating to the Servient Estate and Dominant Estate

- i. At the instant the new property interest passes from one to the other, both hold a fleeting, simultaneous interest in land. Ergo, Instantaneous Horizontal Privity any time a fee is sold, a leasehold rented, or an easement granted and the legal instrument contains an otherwise qualifying Real Covenant.
 - ii. This test will not be satisfied when people simply get together and agree to a covenant. Instead, you would use a 'straw-man' sale with a lawyer.
- 2. **Vertical Privity:** relationships between original covenantors and successors that allows real covenant obligation and benefit to run with the land. (vertical privity is what enables it to run to specific successors)
 - a. Satisfying vertical privity enables successors to "step into shoes" of original creators
 - b. **Strict Vertical Privity Test:** Satisfied whenever successor acquires the same duration of estate that the original covenantor had in either the benefited or burdened estate.
 - i. Strict Vertical Privity exists only when predecessor retains no kind of future interest in estate; must be fully transferred to successor
 - ii. **Ergo:** Strict Vertical Privity allows real covenant to run to successor whenever predecessor sells the relevant property interest, but never when just leases it (because retains reversion).
 - c. When a successor steps into these shoes, she becomes the one in horizontal privity with the party on the other side, but not all successors will qualify to stand in the shoes.

Only those "standing in the legal shoes" of privity get to "play ball"

Interpreting as Real Covenants and Equitable Servitudes

If it touches and concerns and meets all the real covenant formalities, it doesn't matter what it was previously called. The pledge is open to interpretation as either real covenant (damages), or equitable servitude (injunction), or both. The flip side is that just because it calls itself a real covenant, doesn't mean it is.

Davidson Bros. v. Katz

Takeaway: If a covenant is contrary to public policy, it may not be enforced.

Backgrounds: Davidson Bros., Inc. (Plaintiffs) owned supermarkets. At one time, he owned a supermarket in the inner city, which he had to close because its volume decreased. Plaintiffs sold the property to D. Katz & Sons, Inc. (Defendant), a rug merchant. A covenant in the deed stated that the property could not be used as a supermarket, and that the covenant ran with the land. Defendant then leased the property to the local Housing Authority that planned to use it as a supermarket because the neighborhood was in need of one. The residents did not have easy access to another supermarket because many did not have cars. Plaintiffs seek to enforce the covenant.

Issue: If a covenant is contrary to public policy, does it still have to be enforced?

Holding: No. The covenant was so contrary to public policy that it should no longer be a valid, enforceable obligation.

The city where the store is located has been the focus of redevelopment and revitalization. Many moderate-income housing projects are located downtown. The residents depend on the supermarket for their shopping needs. Many do not have cars to go to other locations. The closing of the supermarket was a hardship.

When a supermarket leaves a neighborhood, many other merchants leave. Food becomes more expensive. A struggling neighborhood struggles even more because of the effects of the withdrawal of a supermarket.

The property in question could easily be reconverted to supermarket use, when other properties could not. Having a supermarket is essential to restore the community as a desirable place to live, work, and shop.

The deed restriction impeded the relocation of another supermarket operation in the area because there were no economically viable substitute supermarket locations. The covenant causes a hardship because of the withdrawal of a supermarket as well as the damage to the ongoing efforts to revitalize the city. The covenant is so contrary to the public interest so is unenforceable.

Implied Reciprocal Negative Servitudes

1. **Negative Servitude:** A pledge not to do something on the land (e.g. not to build a high rise apartment building)
2. **Reciprocal:** creates reciprocal benefits and burdens (e.g. lot A is burdened for benefit of B, which is burdened in the same way to provide the same kind of benefit to parcel A)
3. **Implied:** unlike ordinary servitude, so it wouldn't require Statute of Frauds writing

This is order to protect early buyer in badly planned common plan community.

This doctrine enables an owner lacking privity to enforce the burden of a real covenant as an equitable servitude if deemed an intended third party beneficiary of the original promise

This doctrine presumes early/all buyers are intended beneficiaries of later real covenants if the lots are all part of a common plan of development

The doctrine can satisfy the equitable servitude writing, intent, and even notice requirements by implying that all owners in community property development are burdened for the benefit of all other owners and all should know it regardless of privity

Again, there are conflicting policies underlying estoppel and statute of frauds.

Factors Tending Toward Common Plan Community:

1. Best evidence: recorded plat and declaration showing similar lots and mutual restrictions
2. But the law of Implied Reciprocal Negative Servitude will also consider:
 - a. Presence of real covenant on most deeds in area previously owned by grantor
 - b. Recorded declaration that real covenants intended to be mutually enforceable
 - c. Representations to buyers that real covenants would be mutually enforceable
 - d. Conformance by similarly situated landowners with alleged restrictions
 - e. Similarly situation nature of the parcels

Modification and Termination of Equitable Servitudes and Real Covenants (519-526)

Terminating Real Covenants and Equitable Servitudes

1. By written release of all parties
2. By own terms
3. By merger, if the dominant estate and servient estate become held by same owner
4. By prescription by owner of servient estate
5. By abandonment by dominant estate conduct

Marketable Title statutes require periodic re-recording

Additional Equitable Defenses

1. **Promissory Estoppel:** if plaintiff represented to you orally that she wouldn't enforce the covenant against you and you rely on that promise, you can make them keep the promise

2. **Unclean Hands:** If you can show that plaintiff has violated the terms of a reciprocal negative servitude herself
3. **Laches:** If the plaintiff waits too long to try and enforce Real Covenant, but before statutory period of adverse possession.
4. **Acquiescence:** If the plaintiff has tolerated your repeated violations.

Equitable Doctrine of Changed Conditions

1. Allows termination or modification of Real Covenant or Equitable Servitude if the intended purpose can no longer be served because conditions inside restricted area are so changed that enforcement provides no substantial benefit to dominant estate even if technically possible to perform on obligation.
2. Compared to Frustration of Purpose doctrine (easements): The difference is that with the frustration of purpose doctrine, it is actually impossible to perform. Here, if it's just less beneficial, you couldn't beat it with a Frustration of Purpose doctrine.
3. What if the change comes from outside the restricted area? As long as there is no substantial benefit, this doctrine applies. Only if no part of the dominant estate can benefit from the servitude can the changed condition still apply.

Equitable Doctrine of Changed Conditions

1. Covenant will not be enforced in the harm to the owner of the servient estate will be greater by a "considerable magnitude" than the benefit to the owner of the dominant estate. This shifts the focus from benefit to burden.
2. Where the hardship to the servient estate is really big, and the benefit to the dominant estate is really small, the real covenant won't be enforced if hardship to owner of servient will be much greater than the benefit to the owner of the dominant estate.

El Di v. Town of Bethany Beach

El Di is suing the Town of Bethany Beach to remove the RC. The RC says no sale of alcohol and that only residential buildings can be built. Over time the residential restriction has been ignored - 1952 they established a zoning law that enabled commercial building. The residents have been 'brown-bagging' alcohol into the restricted zone, but no buying it.

Writing? Ye Intent? ye Notice? ye Touch & Concern? Yes has to do with controlling the servient estate because it deals with use of the land - DE: yes, the neighbors don't have to deal with drunk neighbors (enjoyment of land) Privity?

Equitable Defenses? Acquiescence - that alcohol thing was abandoned, Abandonment - everybody's drinking

Changed Conditions? Over time the community has become touristy and has moved away from the original community - the intended purpose was that it was to be a quiet town - now there are a bunch of tourists anyway

Public Policy? El Di - underage drinking can be regulated if they are selling - if they control the sale of alcohol, they

Relative Hardship? There is a reduced benefit to the dominant estate and burden for the servient estate is huge

Majority? The enforcement isn't really providing any benefits (changed conditions doctrine)

Dissent? Alcohol has never been sold and we should be protective of the property rights.

Racially Discriminatory Real Covenants (532-536)

Shelley v. Kraemer

Takeaway: The Fourteenth Amendment's guarantee of equal protection applies in this case to prohibit the enforcement of the restrictive covenant at issue due to the fact that the provisions of the Fourteenth Amendment apply only where

there is state action, which is found in this case due to the action of the Supreme Court of Missouri in enforcing the agreement, the result of which is to deprive the Petitioners of their property.

Background: Petitioners Shelley, who were black, bought a home in a neighborhood in which thirty out of thirty-nine parcel owners had signed a restrictive covenant which stated that no home was to be sold to any person who was black, which led to the suit by the neighborhood to undo the sale of the property to Shelley.

Issue: Does the action of the state court in enforcing the restrictive covenant deprive Petitioner of rights guaranteed by the Fourteenth Amendment and acts of Congress?

Holding: Yes. The judgment of the Supreme Court of Missouri is reversed.

First, the Court noted prior decisions and found that the restrictive agreements, standing alone, could not be regarded as a violation of any Fourteenth Amendment rights. The Court found that the requirement for state action was not met in a purely private and voluntary covenant. However, the Court found that in this case there was state action by virtue of the Supreme Court of Missouri's decision to enforce the restrictive covenant. The Court found that state action includes actions by legislative bodies and also courts and judicial officials.

The Court held that in granting judicial sanction to an agreement which, by its terms, would deprive the Petitioners of equal protections guaranteed by the Fourteenth Amendment is an action which cannot stand. Therefore, the Court held that the Supreme Court of Missouri had to be reversed.

Because the Court decided the case on the question of equal protection it was unnecessary to consider the Petitioner's arguments regarding due process and whether the Petitioners had been denied privileges and immunities accorded to citizens of the United States.

The State Action Doctrine

1. The Supreme Court: Long settled that judicial actions are as much "state action" as those by legislative or executory.
2. Bringing the power of the state to bear in enforcing a discriminatory real covenant would "hopelessly entangle the state" in violating the Constitution's promise of equal protection of law.
3. In the Shelly case, if the Shelly's had lost, the state would evict them. This is state action.

The Doctrine of Cy Pres: "as close as possible" - when a gift is made by will or trust and the named recipient of the gift does not exist, has dissolved, or no longer conducts the activity for which the gift is made, then the estate or trustee must make the gift to an organization which comes closest to fulfilling the purpose of the gift.

Evans v. Abney

Takeaway: When the general charitable intent of a testator cannot be carried out, the charitable trust will fail and revert to the grantor or his heirs.

Background: A United States Senator willed property in trust to his home city for the purpose of creating a public park exclusively for the use of white people. His will contained a large amount of information regarding his desire to have separate accommodations for whites and blacks. The park could not continue to operate on a discriminatory basis. The Supreme Court of Georgia ruled that the grantor's intention had become impossible to fulfill and so the trust failed and the trust property reverted to the Senator's heirs. Several black citizens (Petitioners) sought to have the park integrated by using the doctrine of cy pres.

Issue: Should the doctrine of cy pres be applied to prevent a trust from failing, when the general intent of the testator is to create a racially segregated park?

Holding: No. Judgment affirmed. Georgia cities and towns are authorized to accept devises of property for the establishment of parks and to hold the property thus received in charitable trust for the class of persons named by the testator.

At the time the Senator made his trust, racial restrictions were allowed to be included and enforced. However, the Supreme Court of the United States held that segregated parks were unconstitutional. *Evans v. Newton*, 382 U.S. 296 (1966). This meant that the purpose of the trust failed.

The doctrine of cy pres allows a court to carry out the general charitable intent of the testator where this intent might otherwise be thwarted by the impossibility of the particular plan or scheme provided by the testator. But occasionally, the doctrine cannot be applied because the testator had only a particular purpose in creating the trust, and if that purpose failed, the testator would want the whole trust to fail.

The Senator made it clear in his will that only whites were to use the park. Racial separation was an inseparable part of the testator's intent, so cy pres cannot be used.

Justification of Regulating Private Property Transfer

1. System presumes that the owner controls the use of property and the right to determine transfer
 - a. Limits when this interferes with rights of others to acquire similar rights?
 - b. Right to participate in open market for property is legitimate property right that all hold?
2. Avoid concentrating owner in ways that systematically prevent others
 - a. Origin of hostility v. restraints on alienation: goal is to spread property rights out widely
3. Rules governing real covenant thus ensure widespread availability of ownership
 - a. System is designed to push power down from feudal lords to laborers
 - b. Avoid creating new forms of power concentration over valued resources
 - c. That support new forms of hierarchy incompatible with other constitutional tenets
4. Counter: Freedom from government interference trumps all other considerations

Public Policy for Servitudes

The trend is to utilize the reasonableness test to balance covenanters autonomy verses others' security.

1. Equal Protection and prohibited forms of discrimination
2. Public health and safety, access to legal system
3. Restraints on alienation or competition
4. Interference with personal liberties (speech, association, K)
5. Interference with socially productive land uses (utility calculations)

No Unreasonable Restraints on Alienation

Oldest public policy constraint on private land use controls - need more here.

Common Interest Communities (540-550, 551-552)

Explosion in planned communities, most governed by real covenants under supervision of homeowner associations

Most by private initiation, some by legislative requirement

A Common Interest Community might be:

1. Neighborhood of free-standing homes (Sue the Neighbors Handout)
 - a. Shared interests may be common areas along streets, shared recreational areas, or even just the mutual real covenants that bind each parcel for the benefit of others.
2. Condominium or cooperative
 - a. Apartment buildings and adjoining townhouses sharing commonly owned:
 - i. Walls, hallways elevators, entry, carpet, lights, roof, and other structural features
 - b. Covenants, Conditions and Restrictions lay out governing rules.
 - c. The difference between a condo and a coop
 - i. Condo - each person owns a portion of the full - these are better.
 - ii. Coop - everyone owns everything - can be difficult if someone stops paying for rent
3. Community Land Trust and Limited Equity Co-ops
 - a. Using servitudes to provide affordable house where scarce by removing residentially suitable land from the speculative real estate market.
 - b. Dudley Street Neighborhood Initiative: A Community Land Trust with great success.

Homeowner Associations

1. Have taken over many responsibilities traditionally associated with local government.
 - a. Privatizing traditionally public facilities like roads, sidewalks, parks, recreational facilities, and even policing and sanctioning
2. Voting rights limited to homeowners, not residents
 - a. Often weighted by size of property interest in development
3. Common Interest Community rules may extend to most seemingly private realms
 - a. Such as where children can play, weight of your pet, whom owners may have living with them, interior design
4. Some post guards and gates, limiting entrance to the community

Implications of using Servitudes Law This Way

1. Servitudes enable common interest communities to create binding rules that may persist indefinitely, often of sort that private parties can make but public agencies cannot.
2. At what point do homeowners associations enforcing common interest communities servitudes essentially become private governments and how should we feel about it? Are we:
 - a. Favoring policies that maximize individual autonomy in light of constitutional protections for contract and free association?
 - b. Giving private organizations power over individuals' lives we've forbidden to government under competing constitutional provisions?
 - c. Kimberly's Family? The Town of Ave Maria?

VI. Public Land Use Controls

Zoning and the Land Use Planning Process (1027-1031, 1037)

Land Use Planning = Urban Planning = Zoning:

1. All states have conferred authority to regulate land use to their localities
2. Some require localities to use it (CA); some don't require, but allow it (TX)
3. All major metropolitan areas do, except...Houston Texas

Public Land Use Controls: The Usual Model

1. State adopts Zoning Enabling Act delegating to local governments authority to zone for the public welfare.
2. Locality adopts a General (or Comprehensive) Plan setting forth the goals of its land use planning effort.
 - a. The General Plan does two things:
 - i. Sets goals for orderly development of land use (e.g. avoid sprawl, promote housing opportunities for all income levels, support economic development, preserve specified natural resources)
 - ii. Segregates intensities of use into zones (e.g. heavy industrial, light industrial, communal, residential, agricultural, green belt)
3. The plan divides jurisdiction into zones for different intensities of use; locality then promulgates Zoning Ordinances to effectuate the plan.

Types of Regulation

1. Area: regulates size of lots and buildings and where the buildings can be built
2. Use: Regulates what can be done on the property zoning ordinances

Who does what with Zoning?

1. Legislature: Town/City Council passes the zoning laws
2. Assisted by executive agencies:
 - a. Planning Commission (hearings, recommendations)
 - b. Zoning Board/ Board of Adjustment (administers zoning laws)
3. Accountable to the judiciary: if don't like agency's decision, can appeal to court

If you want to change it: You can appeal to the zone appeals board, or apply for variances...or you can try to change the zoning ordinance by talking to the legislature.

The general rule is that you can always put a less intensive use in a more intensively zoned area.

Example: Zoning Ordinance challenged in Euclid

1. Zoned for single-fam. detached homes could also have: "Public parks, water towers and reservoirs, suburban electric railway stations & rights of way, farms, & noncomm'l greenhouse nurseries."
2. Next less restricted residential zone could also include: "Apartment houses, hotels, churches, schools, libraries, museums, a community center, hospitals, and public playgrounds."
3. Increasingly intense use zones up to last one, which could also have: "Plants for sewage disposal & gas production, garbage and refuse incineration, aviation fields, penal and correctional institutions, storage of oil and gas, and any other manufacturing or industrial operation not allowed in the other zones."
4. Negotiate factory in residential zone per 'real-world Betsy' example? A legislature might be more prone to this argument, but this would be spot or contract zoning. There's a limit to the kind of change Betsy was trying to do

(everybody should be allowed to do) rather than this (I want my zoning use excepted for me alone). There are some limits as to what you can limit because the contract zoning is suspect, it binds future legislature and it seems to benefit the few over the many. There's not unlimited freedom.

The Irony of Euclidean Zoning?

1. "Euclidean zoning": Practice of strictly segregating uses this way
 - a. Popularized because was first model tested at Supreme Court
2. Became Model: with Supreme Court seal of approval, others raced to imitate
 - a. Because knew it would withstand legal challenge
3. Irony: May be constitutional (and prevents Common Law Nuisance)
4. But, may not have been best model at least not for advancing the usual general plan goals
 - a. Avoid sprawl, reduce pollution, affordable housing
5. Instead, it encourages sprawling suburbs that create daily gridlock to and from central commercial districts.
6. Lengthens commutes reducing family, community, volunteering time; sends tons of auto exhaust into air each day (health and environmental effects)
7. May weaken communities, as whole neighborhoods in endless blocks of single family residences seldom interact in common public spaces.
8. May facilitate isolation between different age and economic subgroups, fraying community bonds

New Urbanism: Mixed Use and Planned Unit Developments

1. Integrate single and multifamily residences with commercial and light industrial zones
2. Residents can walk to work, shop, dine, theatre
3. New Town Example

Mugler v. Kansas

The statute prohibited the sale of alcohol. This law destroyed all value of preexisting breweries. The plaintiff's claim is that this is a 'taking' under the constitution and they should be compensated for it. The court said that this isn't a taking since it was valid legislation and there were social welfare concerns: health, morals and safety of the community. The state should not be burdened that they should compensate every individual for pecuniary losses they may sustain by not being allowed to harm the community.

Supreme Court: The exercise of the police power cannot be "burdened w/ condition that the State must compensate such individual Os for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community."

A successful takings claim in 1887 would have to amount to an actual taking of title or deprive the owner of possessory rights. As long as the regulation only takes away use rather than possession.

Pennsylvania Coal v. Mahon

First successful regulatory takings case. In this case, the owners are suing to prevent a mining company from mining under their home and destroying their land support. This wasn't a slamdunk, because their predecessors had already contracted with the mining company to do just that. The state law was later adopted that prohibited mining that would damage the subsidence of the surface. PE coal was arguing that the law was in effect taking their right to mine. Under Mugler, this is a use regulation and therefore it isn't a taking. This is the first case to hold that a land use regulation is actually a takings. This was an economically viable use regulation.

Famous Rhetoric of Pennsylvania Coal:

“Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone.”

When are those limits surpassed? When it goes too far? WTF does this mean? We dont know.

“We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change... the question at bottom is upon whom the loss of the changes desired should fall.”

Brandeis dissent? (NB: prevails in *Keystone Bituminous Coal*, SCT 1987) He differentiates use and possessory rights. The majority has all been overturned.

Historical Context of the Road to Euclid

1. **Industrial Revolution:** Transformed metropolitan living beyond recognition between Civil War & Great Depression
2. Most degraded human envt ever known: supercharged economy, but
 - a. Overcrowding, congestion, noise, foul odors, tenement housing
 - b. Factory smoke from soft coal belching directly into homes & schools
3. Beyond corrective power of servitudes, because most development proceeded lot by lot...
4. Beyond corrective power of common law nuisance, because community standards in disarray...

Origins of Land Use Planning

1. How to preserve desirable features of pre-industrial community life.
 - a. Emerging international discourse inspired localities to experiment.
 - b. Tried differen forms of land use segregation
2. 1916: NYC is the first in the world to enact comprehensive zoning
 - a. Use and height restrictions for different zones of the city
 - b. Central Park project as respite from urban ills
 - c. By 1925, 368 US cities had enacted zoning
3. Resistance, especially from real estate dealers
 - a. Argued that zoning is state deprivation of property without due process
 - b. Mixed results in different jurisdictions; everyone wanted to hear from Supreme Court

The Police Power (1097- 1103)

1. Before zoning, before Constitution, it was well settled for the state regulate the conduct of its citizens in certain circumstances, regulate for the public welfare
2. Foundational source of state authority to legislate to protect the public health, welfare, and safety
3. From public schools to criminal law...
4. When drawn on to regulate land use, mostly wielded at the municipal level

Determining validity of Police Power

Police power is how the state regulates for public welfare. A state law is within the police power so long as it

1. Bears a substantial relationship to public welfare
2. It is not clearly arbitrary or unreasonable

Whether a law is within the police power is less about the extent of harm to the plaintiff and more about whether the law bears a substantial relationship to protecting the public welfare. But the extent of harm to the plaintiff matters as a factor in whether the law effects a taking. (See Takings)

Euclid

Tiny suburb of Cleveland, Ohio. This was used as a test bed because the zoning requirement was so specific. The plaintiff was a realtor challenging the law of a prohibitive zoning rule. The zoning rule was cause a 75% reduction in the lands value. They claim that it was a taking claim because it wasn't a physical taking. The claim that made it was that the gov was violating due process because zoning itself is beyond the regulatory power of the government. The claim is that the police power gives the government this power. Is segregating use a valid use of the police power at all.

Best statement from Euclid: "A court should not set aside the determination of public officers in such a matter unless it is clear that their action 'has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health... morals, ...safety, or ...welfare in its proper sense.'" Here? This is okay here because the zoning bears a substantial relationship to public welfare because it makes communities able to count on what's around them. The big factories wouldn't bother the residential factories - this prevents car accidents, light and air concerns.

Euclid accomplished three notable things for zoning:

1. Ringing endorsement of the zoning enterprise so long as zoning follows solid land use planning
2. Suggested that validity of zoning ordinance could be measured by extent it seeks to prevent common law nuisance-like harms
3. Indicated that although upholding zoning as a general enterprise, would use flexible case by case approach on particulars

Nectow v. City of Cambridge

Here, the owner claimed that because his vacant lot was cut by a zoning restriction. His claim was the same as the Euclid case; the court held that this was an invalid use of the police power since it substantially harmed the plaintiff, wouldn't protect the public from harm or prevent a nuisance. The ordinance is invalidated as applied to the plaintiff's lot.

Takeaway: Nectow provides a counterbalance to Euclid in clarifying that: although municipalities may zone to prevent nuisance-like harms, the zoning power remains limited by the rights of owners asked to bear too much private loss for too little public benefit.

Zoning Protections for Pre-existing Rights (1038-1047, 1048-1052, 1014-1026)

Prior Nonconforming Use Doctrine

Zoning usually happens after many uses already in place; some will be inconsistent with the new restrictions. The Prior Nonconforming Use Doctrine gives special permission to violate zoning law so long as the harm to public of doing so is not too great. This protects the public without unduly burdening one owner in fairness to lawful investment before the change in zoning. However, no change or intensification of use can occur; reasonable repairs only.

Many states limit the duration of prior nonconforming use; some limit it if you didn't continue the use throughout. This amortizing to a conforming use is fair because the companies get an artificial monopoly while they are amortizing.

Town of Belleville v. Parillo's, Inc

Takeaway: An existing nonconforming use can only continue if it is a continuance of substantially the same kind of use as that which the premises were devoted at the time of the passage of the zoning ordinance. Nonconforming uses may not be enlarged except where the change is so negligible or insubstantial that it does not warrant judicial or administrative interference.

Background: A restaurant converted to a nightclub, which was impermissible under a newly enacted zoning ordinance. Parillo's (Defendant) operated a restaurant and catering service. The Town of Belleville (Plaintiff) passed an ordinance, which did not allow restaurants, but since Defendant existed before the ordinance was passed, they were allowed to remain in operation. Defendant made renovations and turned their property into a nightclub. They applied for a license, were rejected, and still operated the club. Plaintiff filed charges.

Issue: May the nonconforming use of property continue if it is not substantially the same kind of use as that to which the premises were devoted at the time of the passage of the relevant zoning ordinance?

Holding: No. A nonconforming use is the use of a premise that lawfully existed prior to the enactment of a zoning ordinance and which is maintained after the effective date of the ordinance, even though it does not comply with the use restrictions applicable to the area in which it is situated. The property has the right to continue, despite the restrictive zoning provisions.

To limit nonconforming uses, the method used is either to prevent any increase or change in the nonconformity. An existing nonconforming use can only continue if it is a continuance of substantially the same kind of use as that which the premises were devoted at the time of the passage of the zoning ordinance. Nonconforming uses may not be changed except when the change is so negligible or insubstantial that it does not warrant judicial or administrative interference.

Converting the restaurant to a nightclub was a substantial, and therefore impermissible, change. The entire character of the business has been altered.

Nonconforming uses of property are inconsistent with the objective of uniform zoning. So, strict limitations are placed upon nonconforming uses.

Variance

A variance can be granted if the strict application of the zoning ordinance would place undue hardship on the property owner. The criteria for "Undue Hardship":

1. Strict application leaves lot with no economically viable use
2. Hardship is not self-imposed
3. Variance must not be contrary to the public interest
4. Some jurisdictions, the hardship must arise from the unique physical characteristics that make the lot different from surrounding lots.

In the real world, your best predictor of whether you'll get the variance is whether your neighbors complain about it or not. Use variances are much harder to satisfy than "area" restrictions because they're harder to satisfy that the public policy wouldn't be thwarted.

Cochran v. Fairfax County Board of Zoning Appeals

Takeaway: A variance should only be granted if the current zoning ordinance interferes with all reasonable beneficial uses of the property taken as a whole

Facts: There are three variances requested here:

Fairfax: A man named Michael R. Bratti applied for four variances from local zoning. He wanted to demolish his house and create a bigger house with a side garage. There was a zoning ordinance requiring all properties to be back 15 feet. He conceded that the project could be done without violating zoning but it would not be the ideal house he wanted and cut down on square feet of living space. The Board of Zoning Appeals (BZA) granted all four variances stating his request were modest ones and his land had unusual topographical considerations.

Pulaski: Mr. and Mrs. Nunley owned a corner lot in the Town of Pulaski. There was a zoning ordinance for corner lots that required property to be back 15 feet from the road. The Nunleys requested an ordinance to have no set back so that they could create a garage on the side of their house. The house had public streets on three sides of the house. The only way they could construct the garage closer to the house would be to construct a ramp due to curving property line and difficult topography of the land. Also there is a stone retaining wall behind the house that would be weakened or destroyed if the garage was built closer. Neighbors objected because it would be a blind area and create an eyesore. The BZA granted a modified variance that required them to not alter or destroy the aesthetic looks of existing vegetation.

Virginia Beach: Mr. and Mrs. Pennington owned a parcel of land in a subdivision known as Avalon Terrace in the City of Virginia Beach. There is a zoning ordinance that requires all accessory structures to not exceed 500 square feet of floor area or 20 percent of the floor area of the principal structure, whichever is greater. They applied for a variance of 816 feet for a storage shed and also to make their existing garage be in conformity with zoning. First the BZA denied the variance for the storage shed but allowed the garage to be compliant. They then filed a petition stating that Mr. Pennington was ill and his daughter was moving back home to take care of him and the shed was to store her things. The court found they now met the hardship requirement and granted the variance.

Issue: Whether the granting of zoning variances should be granted on a case by case basis even if the property still has beneficial use without such variance.

Held: There is a particular standard in allowing zoning variances. Until property has lost its value due to zoning such variances should not be allowed. It seems reasonable that considerations of harm to the community, aesthetics, tax base, lack of opposition, support of such variance, and serious personal needs should be considered. However zoning boards do not have such authority to do so. The only way a zoning variance can be granted is if that zoning bylaw makes all reasonable beneficial use lost on that property. Which each case the project on each property could still be completed without the variance, or the land could be used for other reasonable beneficial uses. This is because zoning is a valid exercise of police power. It is understood that zoning can not be tailored to each parcel in a particular town. Therefore there is usually one particular zoning structure. If zoning renders a particular property useless it is unconstitutional. In order to prevent unconstitutional zoning, zoning boards are allowed to grant variances to protect our property rights.

Discussion: Some states allow zoning boards to allow variances in cases of undue hardship. This court finds that in Virginia, undue hardship occurs when the zoning reasonably restricts the utilization of the property.

Notes: THEY ALL flunk the test - there is an economically viable use for each case, and therefore they all fail. The court is clear that the administrative agency does not have the discretion to go beyond the law. The court says that the

legislature gets to make the law and the BZA does not have the discretion to change the law. There is a separation of powers problem, concern about corruption, and concern that no one will trust the law is being followed at all.

Vested Rights

Claimant wants to use the property in some way that was legal when started plans for use, but now illegal due to a change in zoning law. This is essentially claiming vested rights in prior zoning classification.

The difference between vested rights and prior nonconforming use is that the prior nonconforming use already existed before the new zoning and that the vested right is in a use that is not yet in place, but the owner invested so much in reliance on prior law that he is asking to be treated as if it were a prior nonconforming use.

Stone v. City of Wilton

Vested rights in the prior zoning classification. When they bought this tract of land, 75% of the land was zoned for multi-family housing. With the new zoning restriction, the entire piece of land became single family housing zoned. The court says that this is too preliminary to get to vested rights. This is essentially another judgment call. The court says it would be substantial if they had begun building the foundation, had the blueprint made. What's so fishy about this case? The rezoning started happening when this plan for multi-family housing was filed.

There's a lot of jur. Variation. Ex. Colorado - as soon as you file your application, you have vested rights in the prior zoning.

Southern Burlington County NAACP v. Township of Mount Laurel (Exclusionary Zoning)

Here, there are only single family zoning in this township. Really important detail: industrial zoning specifically prevents residential use. There are also minimum lot sizes and minimum house sizes.

What's "exclusionary Zg?" Using the police power to exclude a class of persons. If you wanted, how would you do it? Restrict house size, restrict transportation, large minimum lot sizes, no residential use of industrial/commercial zone.

What facts here are suggestive? They didn't intend to exclude; can Mt. Laurel do that? This violates the Euclid test - this use of zoning is beyond the legitimate police power because it doesn't substantially advance the public welfare. The police power comes from the state to provide for the public welfare of all citizens of the state, not just Mount Laurel. Laurel can't disregard the interests of other citizens outside of Laurel.

This is a minority rule: Why such a minority rule? Property rights based objection - the idea that it will cost a lot of money who have a lot of value invested in exclusive communities. The lost economic value is coming from zoning, though...

Why study Mount Laurel at all then? This is all about redistribution - when is that redistribution legitimate and when is it not? We want to show the full extent of what zoning can do. Zoning helped order post-industrial society and it definitely prevents harmful common law nuisances, but like servitudes, it can be used to exclude from the market. All zoning causes redistribution - when is the redistribution legitimate?

VII. Takings

Eminent Domain and the Problem of Public Use (1071-1091)

The Fifth Amendment Takings Clause

Grants Eminent Domain to the federal government. The Fourteenth amendment grants this to the states.

Inverse Condemnation: When the government has taken your land, but you have not been given just compensation.

Why have this clause: It balances the power of private citizens by giving individuals some kind of check on what the government can do and balances private rights with government's obligation to protect public welfare and health.

The Taking of Private Property by the government is okay if:

1. It is for a legitimate public use, and
2. The owner gets just compensation

What is a Taking?

1. Physical Taking - state takes title to/possession of land
2. Regulatory Taking - state limits potential uses of land
 - a. "Ad Hoc" Balancing Test - the supreme court has been unable to develop any set formula for determining when justice and fairness require that economic injuries caused by public action be compensated by the government rather than remain disproportionately concentrated on a few persons. So we apply the "Ad Hoc" test balancing the:
 - i. Economic impact of the regulation on the owner (undue hardship)
 1. Is the diminished economic value of property too much?
 - a. How much value taken? How much left?
 - b. Reasonable return on investment?
 2. Impact justified because of nuisance?
 - a. Strong public interest in preventing a harm?
 - b. Preventing use the owner never had a right to engage in?
 - ii. Owner's reasonable investment backed expectation (vested rights)
 1. Vested rights in the restricted use?
 - a. Does the regulation interfere with existing use?
 - b. Interfere with primary expectation of use?
 - c. Interfere with opportunity for future use?
 2. Was the owner's reliance on old law reasonable?
 - a. Investments mad on notice of change?
 - b. Could or should the owner have foreseen the change?
 - iii. Character of the government action (complicated)
 1. What's the nature of the regulation?
 - a. More like a use restriction or an invasion?
 - b. A choice between incompatible uses?
 2. Benefits and burdens of the regulation?
 - a. Burden too individualized?
 - b. Reciprocity of advantage?
 3. Purpose of the Regulation?

- a. To prevent a harm?
- b. To extract a benefit?
- c. Workable distinction?

Kelo v. City of New London (Public Use)

Takeaway: The court had previously held in the Midkiff case that such economic development qualified as a valid public use under both the Federal and State Constitutions. The court has to meet two burdens for eminent domain- (1) that the takings of the particular properties at issue were “reasonably necessary” to achieve the City’s intended public use and (2) that the takings were for “reasonably foreseeable needs.”

Background: In 2000, the city of New London approved a development plan that, in the words of the Supreme Court of Connecticut, was “projected to create in excess of 1,000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas.” The city purchased property and seeks to enforce eminent domain to acquire the remaining parcels from unwilling owners.

Issue: Whether the city’s proposed disposition of this property qualifies as a “public use” within the meaning of the Takings Clause of the Fifth Amendment.

Holding: The city’s proposed disposition of petitioners’ property qualifies as a “public use” within the meaning of the Takings Clause. Public use in this case was broadly interpreted to mean “public purpose”.

Dissent: O’Connor, J., filed a dissenting opinion, in which Rehnquist, C. J., and Scalia and Thomas, JJ., joined. Thomas, J., filed a dissenting opinion. The three dissenting justices would have imposed a “heightened” standard of judicial review for takings justified for economic development.

Concurrence Kennedy, J., filed a concurring opinion adding that even with a deferential standard of review, a taking should not survive the public use test if there is a clear showing that its purpose is “to favor a particular private party, with only incidental or pretextual public benefits...”.

Discussion: This jurisprudence has long recognized the needs of society vary greatly between different parts of the Nation. Earlier cases embodied a strong theme of federalism, emphasizing the “great respect” owed to state legislatures and state courts in discerning local public needs. Public needs used to be according to rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justified the use of the takings power. The court must look to the entire Plan’s importance and the City’s overall interest in the economic benefits derived from the development.

Just Compensation (1093-1096, 1142-1143)

Fair Market Value

Makes the check on state power meaningful. This seems only fair. They typically only get fair market value. Fair market value is how much a willing buyer would pay a willing seller. This doesn't include potential income from the land. FMV typically doesn't put the owner in the position he was in before the taking. We use FMV because it's easier to determine, discourages 'holding-out' against the government, applies across the board.

Interest on Lawyer Trust Accounts (IOLTAs)

Many states require lawyer accounts that are pooled together to provide legal financing to the poor. The plaintiff says that's my interest - the defendant said you wouldn't have principal interest without this trust fund. Is the trust fund private property to which this applies. Are these programs therefore prohibited by takings clause?

Supreme court holds that there is no violation of the takings clause, because it's a taking with just compensation. Just compensation=0 because there is no actual loss. The proper measure is the property owner's loss, not the government's gain.

Regulatory Takings and the Penn. Central Balancing Test (1103-1126)

Miller v. Schoene

Plaintiff has several cedar trees infected with a disease. A new statute says that any cedars within 2 miles of any apple orchards must be cut down. Plaintiff contends that this is a taking and that they should be compensated. Apple orchards are a large economy in VA. Apple orchards are more of a public benefit than cedars, so this is a legitimate state interest. The state doesn't exceed its police powers.

This is similar to the nuisance doctrine. Here, a tree isn't inherently destructive, but if it is infected, it is very destructive. The court holds that there is a public concern in the preservation of one interest over the other. The exercise is not a denial of due process.

This is similar to the Florida Orange Case (1118) - the difference here is that the destruction of the healthy trees benefited the entire citrus industry - this confers a public benefit rather than preventing a public harm.

Who should bare the loss here? If it's just a common burden of citizenship, the citizen has to bare the loss.

Historical Bases for Distinguishing Takings

1. Efficiency? - state can choose to protect one form of property over another
2. Tradition? - honor precedent - common law nuisance - no one has the right to harm their neighbors
3. Distributive? - the rights based and distributional fairness - could allow purchased injunction (put the cost on those who would most benefit)

Penn Central Transportation Co. v. New York City

Penn central acquired this land in 1913. It was designated as a historical landmark in 1967. They did not like this because they were already entering a lease to build a 50-story building on top of the building. The landmark preservation law designated that no changes could be made, and they had to take care of the building. They allowed transfer of building rights to nearby parcels to cash in on. NYC's defense is that this is a public benefit (improving the quality of life as a whole). They are preserving something important to the public and we're protecting the owners.

What's not in dispute here?

1. Objective of preserving historical and cultural resources is within police power
2. Restrictions imposed by LML are a valid means of accomplishing that goal
3. In present state, GCT earns a reasonable return on O's investment
4. TDRs are valuable, even if not as valuable as a new office building

Applying the Ad Hoc Test:

1. Economic Impact of Regulation on Owner
 - a. There is a decent amount of value remaining in the terminal itself. They could also build the building elsewhere.
 - b. Further, they have been given transferable development rights that they could sell to buildings around them.

- c. Here, the owner still has the ability to collect a reasonable return on its investment.
 - d. Further, the impact might be justified because this would be a nuisance - are we preventing a use the owner never had a right to engage in the first place?
2. Interference with Reasonable Investment-Backed Expectations
 - a. Vested Rights in the Restricted use?
 - i. The regulation doesn't interfere with existing use.
 - ii. Does not interfere with primary expectation of use.
 - iii. Does interfere with opportunity for future use - not much sympathy here; clearly could be used as a future office tower, but the court is more sympathetic with an existing use.
 - b. Was the owner's reliance on old law reasonable?
 - i. The investments made on notice of change - not that reasonable
 - ii. Could or should the owner have foreseen the change?
 3. Character of the Government Action
 - a. Nature of the regulation: was this more like a use restriction or an invasion? It would be more defensible if it's a restriction rather than an invasion. This is not an invasion because they can still use it. It would be more defensible if it is choice between incompatible uses.
 - b. Benefits and burdens of the regulation: Is the burden too individualized? Is there reciprocity of advantage? It wouldn't be possible to historically preserve if we can't do this.
 - c. Purpose of the regulation: to prevent a harm or extract a benefit? There isn't much distinction between these since most things can be considered either. The majority thinks there is a distinction and if the police power is preventing a harm there is no taking even if there's lots of loss.

The SCOTUS finds that this is NOT a taking.

Pruneyard Case

Students asked to leave Pruneyard shopping center after setting up a table to petition against a UN resolution. The CA SCT says that state construction protects free speech in mall.

Students were protesting in a private mall. The CA constitution protected the student's rights to protest on private malls. The mall claims that this is a 'taking'. He says that his right to include protestors has been taken and therefore I should be compensated under the fifth amendment. Here the CA Const. itself is doing the 'taking'. The SCOTUS holds that this is not a constitutional 'taking' because there is no reasonable reduction in value of the property. Also, the Mall has the ability to place reasonable restrictions on the the property. This does not impair the use of the property as a mall. Here, they're applying the "Ad Hoc" test. The dispositive factor seems to be the lack of an economic impact. Also, the character of the government action.

Loretto v. Teleprompter Manhattan CATV Corp.

Takeaway: A permanent physical occupation authorized by government is a taking without regard to the public interests it may serve.

Background: A New York law authorized a cable television company to install its components on the property of a landlord, who may not interfere with the installation and may not demand payment from any tenant for permitting CATV, or demand payment from any CATV company in excess of an amount found to be reasonable by the state, which is set at \$1. The landlord may require the CATV company or the tenant to bear the cost of the installation and to indemnify for any damage caused.

Issue: Did the actions of the CATV company, taken under the authority of the New York law, amount to a taking which requires just compensation?

Holding: Yes. Judgment of New York Court of Appeals is reversed and case remanded.

A permanent physical occupation authorized by government is a taking without regard to the public interests it may serve.

The historical rule that a permanent physical occupation of another's property is a taking has more than tradition to commend it. Such an appropriation is a serious invasion of a property owner's interest.

The size of the area occupied under the taking is not important in this context.

Lucas v. South Carolina Coastal Council

Takeaway: When the state seeks to sustain regulation that deprives a landowner from all economic use, the state may resist compensation 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.

Background: Lucas (Petitioner) bought two residential lots on the Isle of Palms in Charleston County, South Carolina, upon which he intended to build single-family homes. In 1988, the South Carolina Legislature enacted the Beachfront Management Act (Act), barred Petitioner from erecting any permanent structures on the two lots.

Issue: Has Petitioner's property been "taken" in a way that requires "just compensation"?

Holding: Yes. Judgment reversed. There are two categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint: (1) when the property owner has suffered a physical invasion of his property; and (2) when the regulation denies all economically beneficial or productive use of land.

The Court finds that there are good reasons for the belief that when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

The Supreme Court of South Carolina based its opinion on the fact that there was a line of cases, which state that the government can proscribe "harmful or noxious uses" without paying compensation. The Court here states that the more contemporary standard is that land use regulation does not constitute taking if it "substantially advances legitimate state interests."

However, when the state seeks to sustain regulation that deprives a landowner from all economic use, the state may resist compensation 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.

Thus, the burden is on South Carolina to identify background principles of nuisance and property law, that prohibit the uses intended by Petitioner in the circumstances the property is now found.

Categorical Exception: Physical Invasions (1128-1138)

When the character of the government action is a permanent physical occupation of real property, then there is a taking to extent of the occupation without regard to the extent of the economic impact on the owner or whether it achieves important public benefits. There are two criteria:

1. Physical Occupation?
 - a. If it requires free installation of cable lines outside building is a taking, why is ok for state law to require landlords to install mailboxes inside the building at their own expense? Majority: there's an affront to the autonomy of ownership to require owner to allow 3rd party rather than require the owners to install mailboxes on their own? Ryan notes - from the owner's perspective, which is worse?
2. Permanent?
 - a. What makes this a permanent occupation?
 - b. In Pruneyard, the protesters were temporary.
 - c. In Loretto, the TV cables were permanent.

The Conceptual Severance Problem

If flexibility for permanency, why not for other elements too? When there is a permanent physical invasion, we'll sever the property's use stick.

1. A taking when regulation obliterates one stick in bundle - a taking of that stick, even if others left?
2. How thinly can you slice (define) sticks in the bundle?
3. Can you spell a fully accomplished taking in ANY regulation that interferes with some use of the property just by casting that use as a discrete property interest severable from the whole?

Recall Stick Flux: Sticks are often added, subtracted and modified by valid property legislation.

Recent examples of statutory stick flux in laws protecting:

1. Public air and water supply (new sticks for community)
2. Rights to farm in existing locations (for landowner)
3. Endangered species (for community)
4. Against tax increases for long-term owners (for landowner)
5. Is ANY stick flux a taking?
6. How much stick flux goes too far?

Why isn't the degree of economic harm the more compelling criteria?

1. From the owner's perspective, what's worse: this or zoning that eliminates 75% of property value?
2. From the landlord's perspective, what's worse: this, or rent control more expensive forced occupation (Yee)

Categorical Exception: Deprivations of Economic Use (1144-1157, skim 1158-1162, 1165-1166)

When the owner called upon to sacrifice all economically beneficial uses in the name of the common good, a total wipeout of economic value, this is considered a taking UNLESS it prevents the owner from a use he never had right to in the first place according to background principles of state property law and common law nuisance doctrines.

Lucas v. SC Coastal Commission

Facts? State passed a statute that barred construction on beachfront property.

Purpose of Beachfront Management Act?

SC SCT result? What rationale? There was no taking because this was okay because this was a huge public harm concern. The construction damaged beach front property. The economic harm was great, but the public harm was greater.

US SCT result? What rationale? They want to get rid of the indistinguishable (public benefit vs harm). The new rule that they announce is that they don't want to apply the ad hoc test and they want to use a categorical rule that if the regulation removes 100% of the economic value of the land, it's a taking.

Here, the economic harm is so huge. The idea is fundamental fairness (unfair to totally deprive the economic use of the property).

The majority's rationale: Fairness and Good Government

1. Total wipeouts are like expropriation and should treat them the same under takings law.
2. Limit on state role in redefining property rights - preserve the takings law limit on government authority here.
3. Economic efficiency: incentivizes good land use policy - if the state must pay for the actual costs of its decisions.

Dissent's Objections: It's just not that simple:

1. Effectively freezes common law to 1789 - we constantly redefine property as knowledge and morality progresses. We must regulate new harms (erosion in this case). Kennedy mentions:
 - a. Our background principles of state law must be broader than just common law of nuisance.
 - b. Or the taxpayers must pay off owners to prevent them from harming the public if the type of harm is newly recognized. Cumulative impacts (like coastal erosion) that may not sound in common law nuisance.
 - c. Don't restrict land use regulation to the judicial consensus of the 18 century!
2. Unwisely shifts power from legislature to judiciary - this inevitable requires tradeoffs between incompatible values; rule just shifts the problem to long dead judges who are no better at it. Blackmun says:
 - a. Was no total wipeout - is not a long understanding
 - b. Supreme Court's quest for a values-free takings jurisprudence is hopeless. This just shifts the same kind of decision-making from legislatures to dead judges.
3. Bright line rule is arbitrary and unworkable: 100% loss is a taking, but a 95% loss is not? Also - a 100% wipeout of what? What denominator for determining 100% wipeout of value? Horizontally? Vertically? Or over time? Stevens says:
 - a. The denominator problem makes the per se rule unworkable: what is the right denominator for determining 100% wipeout of value?

Questions after Lucas

Denominator Problem: What do we use when determining 100%? Horizontally? Vertically? Over time? P.B. Isles, Norman - Small owners losing all versus big owners losing some?

Background Principles Problem: What counts? Anything other than a common law nuisance in 1789? Can it continue to grow them by designating statutory nuisances? If so will later claims fail for lack of expectations? (Hunziker

If not, how should the state deal with cumulative impact problems?

Palazzolo v. Rhode Island

Plaintiff couldn't use 80% of the property because of wetlands. Here the denominator problem? Are we talking about the whole land or just the 80% that is wetlands? They held that no, there was no taking here because they aren't going to do horizontal severance. The bigger question is the background principals question. RI wants to argue that this isn't a taking because he acquired the property after the regulation that restricted wetlands property construction. The SCOTUS held that the right to improve property is not excluded from the state enacting before. It further suggests only what would be an original CLN when the original title took shape in 1789. Case was finally remanded and there was no investment backed - the public trust doctrine analysis.

Tahoe-Sierra Preservation Association

Here the court is swinging into mushy standards. The court says we're not going to rely on Lucas. We are back to deal with conceptual severance. Not horizontally or over time. Compensating all temp. deprivations would be unjust for the public. The court says we are resisting categorical rules in specific cases - go talk to the legislature instead.