What is Property

A.) Penner: The Idea of Property in Law (Traditional / Essentialist): Property as a right to a thing good against the world. Right to exclude.


C.) Definitions:
   a. Property: the legal relations among people in regard to a thing,
   b. Res: the thing itself
   c. In rem: rights forcibly recognized by general population (tort and property)
   d. In personam: rights imposing duties on small number of people (contract)
   e. Real Prop: real estate
   f. Personal Prop: everything else (tangible and intangible)
   g. Trespass: invasion of land by large objects or persons
   h. Nuisance: interference with use and enjoyment of land by activity on neighboring land
   i. Exclusion: use of prop is sole authority of owner; can’t violate right to exclude, period.
   j. Governance: Focus on uses of prop and prescribes rules for permitted and prohibited uses
   k. The Coase Theorem: if contracting is costless, parties will keep contracting to modify initial assignmnt of prop rts to their mutual benefit until they maximize value for both.
   l. Property Rule: Court assigns initial entitlement, nothing else. (mandatory relief)
   m. Liability Rule: Court protects entitlement by dmgs if taken/destroyed. (compensatory)
   n. Inalienable Entitlements: State determines initial entitlement, compensation if taken/destroyed, and also forbids sale under all/some circumstances.
   o. Ex ante: before conflict arises
   p. Ex-post: after conflict has occurred

1.) Trespass to Land
   a. Intentional trespass is strict liability tort – no inquiry into balance of P and D’s interests and no question of reasonability.
   b. Jacque v. Steenberg: Landowner sues mobile home co. for trespassing despite repeatedly being denied permission to cross. Trespass does little damage so jury only awards nominal damages, but ct upholds large punitive dmg award to protect individual (immeasurable harm in violating right to exclude) and societal (prevent landowners from taking law into own hands) interest in deterring trespass.
   c. Hinman v. Pacific Air Transport (airspace): Landowner sues airline co. who repeatedly flew within 100 ft above his land. Ct holds that
      i. Though we own from earth to sky (ad coelum), won’t get damages for trespass of sky b/c harm outweighed by benefit.
      ii. policy arg. that the airspace use is mutually beneficial – a small harm in exchange for everyone’s (including P) benefit of air travel, and
iii. **high transaction costs of negotiating consent with every prop owner would prohibit beneficial service** (Google tried to use this reasoning to say it should be allowed to have full text database of books).

iv. **Note:** another case found constant low flights over farm was “taking” but no just compensation b/c of same policy arg of common benefits of air travel.

2.) **Nuisance**

a. *Hendricks v. Stalnaker* (**septic tank/well**): Septic tank seeker sues well builder claiming well is a private nuisance because it interferes with P’s ability to build septic tank. Both parties can only use one location for their needs. Court finds:

i. **private nuisance is interference with use of another’s land through**

   1. intentional and unreasonable use of land, or

   2. negligent, reckless, or abnormally dangerous use of land. Here, water well is interference and intentional but not unreasonable so no private nuisance.

ii. Court determines reasonableness by balancing landowners’ interests: here both septic system and well equally beneficial to owners and each cause other harm so no nuisance.

Original Acquisition

1. **First Possession:** First to actually possess unclaimed thing creates right. Differs based on type of prop being pursued

   a. **Wild Animals**

      i. *Pierson v. Post* (**fox**): One hunter sues the other for trespass for killing and taking a fox that D was pursuing. The question the court asks is: when did possession actually occur? Court finds that property in wild animals is acquired by occupancy only. Pursuit is not enough for possession; One must manifest intent to appropriate (pursuit), deprive the animal of its natural liberty, and control it. In dicta court suggests if D had mortally wounded or trapped fox, might be enough for possession. Also by ratione soli, if fox was on D's land, it might already be in D’s possession. Dissent says that court should rule according to custom of fox hunting – possession occurs in pursuit with reasonable expectation of capture.

      ii. *Ghen v. Rich* (**whale**): P sues D for unlawfully taking whale, violating local custom where finders of whales let orig. hunter claim by shot marks. Court finds that custom does not override first possession, but as here, it may define first possession. Even w/out custom, P did everything he could to make animal his own (can’t help that whales sink). Custom doesn’t always apply - must consider universality and length of custom – also if it was illegal, it wouldn’t hold in court.

      iii. *Keeble v. Hickeringill* (**duck pond**): Similar to modern nuisance case. P sues D for frightening ducks away from P’s duck decoy pond with gunshots (no actual trespass). Court finds for P – says you can’t interfere with another’s use and profitability of land.

b. **Open Access vs. the Commons**

   i. **Definitions** (Lots of prop have aspects of each):
a. **Open access**: open to all / no one has right to exclude. People may withdraw resource units but do not invest in resource itself (ex: fisheries).

b. **Common property**: selective group of insiders control use and mgmt of resource and hold exclusive user rights (ex: condos).

c. **Tragedy of the commons**: open access can lead to inefficiency b/c people don’t internalize costs and benefits, but can be efficient when costs of establishing / enforcing exclusive rights is greater than benefit gained from rts (ex: one price for all movie seats vs. numbered seats).

d. **Supply side effects**: depletion and divestment b/c users have little incentive to invest/maintain/improve resource.

e. **Demand-side effects**: overuse and perverse timing b/c race to use resource before it runs out.

f. **Anticommons**: too many people have rt to exclude so drives up transactions costs and rts to larger resource are never assembled.

g. **Semi-commons**: exclusive rights to part of thing, open access to other (ex: fair use in copyrights – open access to academics but not others).

<table>
<thead>
<tr>
<th></th>
<th>Open Access</th>
<th>Common Prop</th>
<th>Private Prop</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exclusion</td>
<td>None</td>
<td>Non-members excluded</td>
<td>Everyone except owner excluded</td>
</tr>
<tr>
<td>Governance</td>
<td>None</td>
<td>Social Norms / Regulations</td>
<td>Owner / Contractors of owners</td>
</tr>
</tbody>
</table>

c. **Other Applications of First Possession**

i. **Abandoned, Lost, Mislaid, or Treasure Trove?**: depends on intent of TO

a. **Abandoned**: TO intentionally relinquishes with no intent to reclaim.

i. **Finders** of abandoned prop becomes TO.

b. **Lost**: TO unintentionally relinquishes.

i. **Landowners** of place where prop found generally have best claim by ratione sole and to maximize chances of return to TO.

ii. **Finders** (called *salvors* for lost prop) may also have claim, esp if act in good faith (turn into police, etc) or if long-term tenant. If no landowner claim, finder has rt good against all but TO.

a. **Unless finder is acting as agent** – then may go to employer.

iii. **Note**: standard for salvor is lower than finder of abandoned prop b/c salvors don’t acquire full ownership (possession occurs when P marks prop in such a way to warn other potential salvors and exercises due diligence / exhibits present ability to salvage.

c. **Mislaid**: TO intentionally relinquished possession with intent to reclaim later but forgets to return and pick it up.

iv. **Landowners** generally have superior rt to good in order to maximize chances of return to TO / higher chance than lost.

v. But same arguments for finder or employer as w/ lost prop.
d. **Treasure Trove**: TO intentionally buries or hides gold, currency, or silver underground with intent to reclaim later
   a. Treasure troves treated like lost or abandoned
   ii. *Eads v. Brazelton* (*ship wreck*): P sues D for taking cargo from abandoned wrecked ship which P had found and marked with trees/temporary buoys. Court says legal possession/occupation of property lost, abandoned, or w/out owner must depend on actual taking + intent to possess (intentional actual possession). Here, P never had actual possession, only intent, so no legal possession. In dicta, court says that if P had placed his boat over wreck with means to raise cargo, may have been enough for actual possession, but marking with trees/temp buoys not enough.
   iii. *Home-run Baseballs*: P was in midst of catching baseball (in glove) when mobbed – not clear if P had control of ball before mob. D, not part of mob, ended up with ball. Court said both men had equally superior claim to ball (P had prepossessory interest so had rt to finish catching ball with no interference and D had first unambiguous possession) so split the value b/t P and D (a rare decision).

2. **Discovery**: Right to possess (no actual possession needed / a broader claim to rt)
   a. *Johnson v. M’Intosh* (*Native Americans*): Dispute over land b/t Native Indians and US govt – both claimed title to land and transferred title by sale to successors. Court holds Conqueror of land has absolute title to land and courts of conqueror cannot question validity of this title. Conquered subjects may be given rt of occupancy (and should be) but no rt to sell/transfer absolute title to others.
      i. To decide b/t conflicting claims to single prop, cts recreate “chains of title” tracing each back to root to decide who has better claim.
      ii. Here, though Indians had first possession by occupancy from “time immemorial, they lost dominion when America was conquered so lost sovereign rights.
      iii. This is the case that puts Indian law under authority of US fed govt by common law rule that Indians can bargain for prop rts only w/ US govt.

3. **Creation**: Right to exclude information you create (usually intellectual prop).
   a. **Novelty**: In creation (unlike first possession or discovery), owner must not only be first in time but must have some novelty.
      i. Different levels of novelty give rise to diff levels of rights.
      ii. *Trenton Industries v. AE Peterson Manf* (*High Chair*): High chair designer sues manf co for infringement of patent and unjust enrichment for using design before patent issued. Court decides 2 thresholds for novelty:
         a. **Enough to issue patent?** P’s novelty (attaching legs in new way to make easier to fold) was product of mechanical skill rather than inventive faculty and so not patentable – patent invalid.
         b. **Enough to make unjust enrichment claim?** Lack of patent is immaterial if P made even tacit (if not express) understanding that expected to be compensated for idea if used by person communicated to. If so, P entitled to royalties for unjust enrichment before patent issued (not after b/c that would be patent infringement requiring valid patent).
iii. *Diamond v. Chakrabarty* (Bacteria): Opens up patenting for biotech industry by saying can patent genetically modified bacteria (what about genetically modified humans?). Also allows courts to rule on validity of patents.

b. Misappropriation and the Quasi-Property Right in Hot News

i. *Int’l News Service v. AP* (News): AP sues INS for copying news from bulletin boards and selling for profit. Court holds news is not copyrighted but is quasi-property. **The real issue is unfair competition in trade** – *D cannot reap benefits of P’s work without expending any resources* – OK to have healthy competition but can’t maliciously interfere with another’s profitability of prop. (think *Keeble*).

   a. Dissents (including Holmes) say courts should not give news prop rights, legislature should. – *But* sometimes technology moves faster than legislature and cts must make new law (think P2P file sharing).

c. Right of Publicity

i. *Midler v. Ford Motor Co* (Bette): Bette sues car co for commercial exploitation of her near perfect voice-alike without her consent. Court holds that the distinctive voice of a well known professional singer is a protectable property right and when it is deliberately imitated for profit (as opposed to fair use / parody), sellers are liable for appropriating P’s identity.

   a. **Right to publicity is new area of law** and cts have given it more broad or narrow construction.

d. Copyright and Term-limited Intellectual Property

i. Intellectual Property rights are created by specific statutory schemes.

ii. Patents and Copyrights (as opposed to trademark) are term-limited in order to balance public good / avoidance of monopoly with desire to incentivize creation / promote progress of science.

iii. In 1998, Congress made last in series of extensions to copyright terms, increasing 20 yrs (to life + 70 yrs with no renewals needed) and applying retroactively.

iv. *Eldred v. Ashcroft*: Petitioners using copyrighted works already in public domain seek determination that 1998 Copyright Term Extension Act (CTEA) as applies to existing copyrights is unconstitutional. Court decides constitutionality on two grounds using rational basis review (as opposed to intermediate or strict scrutiny):

   a. **Copyright Clause of Constitution “Limited Times” prescription:**

      i. Majority: Not unconstitutional b/c leg history has always applied CTEA extensions to both existing and future copyrights, “limited” doesn’t mean fixed, 1998 act simply extended ’76 act by 20 yrs, and though this is first impression, court finds no constitutional barrier.

      ii. Dissent: Though leg history applied extensions to both, this is first time challenged in court so not valid precedent.

   b. **First Amendment free speech:**
i. Majority uses rational basis review (lowest level – defer to leg as long as acted rationally): Congress acted rationally, with valid concern to incentivize artists to keep creating and promote progress of science. Besides, copyright law has built-in 1st amend protections (fair use, idea/expression dichotomy, etc) so as long as leg didn’t alter traditional copyright law, no need for intermediate scrutiny.

ii. Dissent uses intermediate scrutiny (middle level b/c 1st amend.): intent of leg was not to promote private monopoly, besides add’l incentive to create is negligible by a 20-yr extension when CTEA extends so far anyway.

4. Principle of Accession: Family of doctrines sharing common feature – ownership of unclaimed / contested resource is assigned to owner of more prominent resource related to unclaimed resource (without regard to any voluntary conveyance of unclaimed resource or possession).

a. Doctrine of Increase: offspring of owned female animals belong to owner, ad infinitum, with no exceptions.

b. Doctrine of Accession: mixing your labor with someone else’s prop. Person owns labor so if labor prominent (wine) while orig prop is insignificant (grapes), then title may pass to improver but must pay dmgs for orig object value! – liability rule; P entitled to dmgs.

i. Wetherbee v. Green (barrel hoop): Tree owner sues barrel hoop maker in replevin for unlawfully taking P’s trees though D acted in good faith (believed had permission). P sues for value of hoops. Court looks to 3 factors to decide whether doctrine of accession applies:

1. Mental state of improver: whether willful or good faith (though this is arguably in dicta) – if good faith, may go to improver.


3. Diff in value b/t orig and improved prop: Has value increased disproportionately? – if so, may go to improver.

c. Fixtures: thing which, though ordinarily a moveable chattel is, by reason of annexation to or association in use w/ land, regarded as part of land.

i. Strain v. Green (fixture): Home buyer sues seller for “fixtures” removed from house. Ques to determine if something is a fixture:

1. Is class of goods a necessity?: while fancy chandelier is a luxury, it is a type of lighting, which is a necessity and so a fixture.

2. Is article “merged” with prop / how is it fixed?: a mirror physically attached to wall may be fixture while detached mirror may not.

3. Note: Secret intent of owner who affixed article does not matter, but since seller has better idea of what will stay with house, burden is on seller to specify what questionable fixture will not be included.

5. Adverse Possession: When owner fails to exclude and state Statute of Limitations expires, adverse possessor (AP) becomes new true owner (TO) with rt to exclude good against world.

a. Lessee of Ewing v. Burnett: Five elements to adverse poss. AP’s possession must be:
i. Actual
   ii. Exclusive (AP only one using rts)
   iii. Open and Notorious (TO had notice)
   iv. Continuous (for statutory period)
   v. Adverse (without permission)
     vi. Note: though here, AP did not build on land, was using it in only way it could be used (not liveable – only good for sand deposits).

b. Difference between AP and trespasser: trespasser not interested in protecting land, just gets what he needs and gets out. AP protects land like owner so perhaps law wants to protect for Lockean reasons or to deter sleeping owners. **Purposes of Adverse Possession:**
   i. Protect reliance interests of long-standing possessor
   ii. Discourage TOs from neglecting their gatekeeper role
   iii. Reduce transaction costs of investigating old titles/claims.
     iv. Note: usually no adverse possession against govt (to preserve nat’l parks etc).

c. **Carpenter v. Ruperto:** *Minority rule* that changes element #5 (adverse/no permission) to a good faith requirement that AP must possess land in **good faith / under claim of right**.

d. **Howard v. Kunto:** Court lays out **two more rules for “continuous element”** of AP:
   i. Seasonal use is OK as long as nature of land is for seasonal use and AP uses continuously every season and otherwise maintains prop for use throughout yr.
   ii. **AP may tack on predecessor’s possession** to count toward length of time for Statute of Limitations as long as there is conveyance/privity b/t parties.
     iii. Also note: **Quit claim deed**: a deed with no warranty for the land contained – basically saying “I’ll give you what I have, but no guarantee I have anything!”

e. **Seasonal AP Hypo:** Ms. Summers, TO, comes to NW corner of wooded lot and every summer and leaves no trace for 20 yrs. Ms. Winter comes to NE corner every winter, to ski, also leaving no trace, and knowing no rt to be there but no one kicked her off for 10 yrs. Ms. Winter gave Mr. Cross quit claim deed 7 years ago. Mr. Cross claims adverse possession. **Why no adverse poss:**
   i. Not exclusive – Ms. Summers also possesses.
   ii. Not really continuous – nature of land is that it can be used anytime not just meant for seasonal use like Howard.
   iii. Not really open and notorious – Ms. Winters leaves no trace so Ms. Summers had no notice.
   iv. Depending on jurisdiction – minority rule may apply that no good faith/no claim of right so no AP. Could say that quit claim deed is bad faith by nature.
   v. Tacking? – Mr. Cross got quit claim deed – only what Ms. Winters had, which if anything, was NE corner by AP, most def not whole land.

6. **Sequential Possession: Finders vs. Converters**
a. Armory v. Delamirie (chimney sweep jewel): Jewel finder sues goldsmith converter. Court finds **1st Finder wins over all converters, no matter who had first possession!** Court says 1st finder has title good against all but TO, including 1st converter – not exactly true / if finder finds on private prop, owner of prop usually prevails to protect TO’s expectations and deter trespass.

i. But **remember you can’t give or sell more rights than you have** so if finder sells to B, B still has rt against all but TO (If B didn’t know this @ purchase, can sue finder for fraud, etc.)

b. Clark v. Maloney (logs get loose): P finds pine logs ties them up at mouth of river. They get loose and D finds downriver. **1st finder wins over 2nd finder** – P gained title good against all but TO which he never abandoned. Just as TO claims over P, P claims over D.

c. Anderson v. Gouldberg (two thieves): **1st converter wins over 2nd convertor** – title can only transfer from 1st converter to someone showing superior title, not just another converter b/c otherwise would lead to endless series of thefts.

d. **Note:** in any sequential possession case, D may not use as a defense the original prop right in TO for two reasons:

i. Substantive – the object of law is to protect peaceful possession so can’t let wrongdoer off the hook by invoking superior rights of third party.

ii. Procedural – jury looks at proof of only the two parties involved.

7. Competing Original Acquisition Principles: Finders vs. Landowners

a. Fisher v. Steward (bees): P finds bees on D’s land and marks trees / notifies D. D cuts down tree and keeps honey. Court says ownership of bees goes to owner of land and **When finder is a trespasser, landowner wins.**

i. **Note:** Some courts say if P was chasing wild animal onto D’s land, P could claim animals even though technically trespassing (custom?), but in this case, bees make hives in fixed locations – P could not have discovered bees w/out trespass.

b. Goddard v. Winchell (meteorite): Landowner of where meteorite fell sues meteorite finder for its value. Court awards meteorite to landowner, saying no matter where it came from, **if meteorite comes by natural forces to be buried in P’s land, it becomes part of land and belongs to him.**

i. Though finder was not trespasser, rule is: **Landowner beats finder even when no trespass when object is natural and can become part of land.**

b. Hannah v. Peel (brooch): P finds brooch in window pane and gives to police. No owner found so police give to D landowner who never really occupied house and did not know of brooch. D sells. **Note:** usually mislaid prop goes to owner of land to maximize chances of being returned to TO.

i. **But here, court awards to finder b/c:**

ii. finder is not employee or trespasser

iii. Prop is not attached to land (buried in ground, for ex)

iv. landowner is unaware of prop’s existence / doesn’t even occupy land

v. and esp. b/c finder acted in good faith to turn prop into police!

Values Subject to Ownership
1. **Personhood**: Interests too closely associated with personhood should not be treated as prop.

   a. **Property and the Human Body**
      
      i. **Demsetz view of property is based on costs and benefits** – property rights emerge when a demand for them emerges and the type of right we choose is the most cost-efficient one (cheaper to exclude than to police commons).
      
      ii. **Radin view** sees property rights in personhood and fungible property as very different b/c of **intrinsic value of personhood**.
      
      iii. **Newman v. Sathyavagiswaran (corneas)**: Parents of deceased children claim CA statute unconstitutional which allowed for taking of corneas from dead bodies as long as no knowledge of objection. **Can a dead body be subject to prop rights?**
          
          1. Majority says next of kin’s duty to dispose of dead bodies gives rise to property rights.
          
          2. Dissent says duty gives rise to some rights, but not enough to make property rights.

      iv. **Moore v. Regents of Univ of CA (cells/organs)**: Patient sues physician for conversion of cells for use in medical research (and profit!) without consent. **Is there prop rt in cells/organs after P consents to removal from body?**
          
          1. Majority: no property right in cells/organs after removal b/c of policy arg -don’t want burden on scientists to investigate source of cells, but patient rights are still protected by informed consent so P might have claim for lack of informed consent.
          
          2. Dissent(s): yes prop right in cells/organs after removal b/c patients have rt to control future use of organs before removal, and have some rts to sell (blood, hair, etc).

   3. **Prop rts to body parts today:**
      
      a. After death, next of kin have prop rt to decide disposal – while alive, most rts to body covered by informed consent.
      
      b. Renewable body parts (blood, hair, etc) have prop rt to donate/sell while alive.
      
      c. Nonrenewable body parts have rt to donate after death.

2. **Water**: Water unique from other prop b/c fugitive/somewhat unpredictable flow, replenishable, and has aspects of both public and private rts.
   
   a. Law distinguishes water in two ways:
      
      i. **Surface Water**
         
         a. **Diffuse** surface water
         
         b. **Watercourses**/surface streams (defined channel/body)
      
      ii. **Groundwater**
         
         a. **Percolating** underground water (diffuse)
         
         b. **Underground stream** (defined channel/body)
b. **Watercourses**: surface streams.
   i. **Riparian rights**: rights to land encompasses rights to use surface water on land.
      a. **Old English law for Watercourses: Natural Flow Theory**: Any disturbance of surface stream required consent of downstream owner.
      b. **Modern US law: Reasonable Use or First Appropriation**
   ii. *Evans v. Merriweather*: Steam mill owner diverts watercourse by building dam to direct all water to his mill and prevent it from running downstream to P’s mill.
      a. **Reasonable Use rule**: each riparian owner may use water so as not to injure another’s use – nuisance arg to balance rts of owners.
         a. **Reasonable use rule more likely in fertile Eastern states**.
      b. Where water is limited and can’t fulfill all owners’ needs, one may never use *all* for artificial needs (business / commercial uses) – must leave enough for others w/ natural needs (domestic, household uses).
   iii. *Coffin v. Left Hand Ditch Co*: a first possession approach to watercourses:
      a. **First appropriation of natural stream for beneficial purpose has prior right / can use all** – still a governance arg (not absolute ownership).
         a. **First appropriation rule more likely in dry Western states** where irrigation is a necessity not an artificial need
   c. **Diffuse Surface Water**: landowners have right to repel inflow of diffuse surface water, even if causes flooding in another landowner’s prop. Neither can sue the other.
   d. **Groundwater**
      i. **Old English rule for Groundwater**: Absolute Ownership (exclusion) to landowner – take as much groundwater as you want.
      ii. *Higday v. Nickolaus*: The **American rule for both types of groundwater**:
         a. **Reasonable Use (governance)**: one has right to use water so as not to injure another’s beneficial enjoyment of land.
         b. But b/c in this case D is city which wants to sell water to public (great public interest), court hints will prob not award injunction but give landowner damages (based on cost of water or dim in FMV of land).

**Protecting the Right to Exclude**

1. **Civil Actions Protecting Real Prop**: protected by money damages and injunction
   a. **Trespass**: protect person in actual possession to ensure has exclusive possession
   b. **Ejectment**: protect person with title against person wrongfully in possession
   c. **Nuisance**: protect interest in use and enjoyment of land

2. **Civil Actions Protecting Personal Prop**
   a. **Replevin**: encompasses wrongful taking (*trespass d.b.a.*) and detention (*detinue*) of goods
   b. **Conversion**: unlawful conversion of goods for D’s own use (formerly *trover*)
   c. **Trespass to chattels**: unlawful injury/interference with goods.
3. **Self-Help**: reasonable force may be used to prevent/terminate trespass – more controversial is self-help to recover property after already been taken.
   
a. *Berg v. Wiley* (eviction/restaurant owner): Lessor used self-help to repossess prop by locking lessee out *Rule for Landlords* (*note this has changed now*): May use self-help to retake property from tenant w/out liability for wrongful eviction when:
   i. Landlord legally entitled to possession (b/c lease ended or, in K with reentry clause, tenant breached) and
   ii. Landlord’s means of reentry are peaceable (to discourage breach of peace). Here, #1 not even considered b/c jury found reentry was forcible.
   
   iii. *After this case, New Rule for Landlords (in most states)*:
      a. **Landlords may never use self-help!** – this is b/c no need for self-help now with speedy judicial procedures so only remedy for landlord to dispossess tenant is judicial process.
   
   b. *Williams v. Ford Motor Credit Co* (repo at night/single mom): Credit co repossessed car of single mom in middle of night but was polite and allowed P to get stuff from inside.
   
   Rule for Personal Prop:
   i. Self-help to repossess personal prop OK if done with no breach of peace (diff than rule for real prop/landlords).
   ii. Majority finds no breach of peace b/c D polite, gave P belongings, and P did not forcibly object / no potential for violence.
   iii. Dissent says just b/c P is not aggressive doesn’t mean she did not object as much as she could – not peaceable to take from single mom in middle of night!

**Exceptions to the Right to Exclude**

1. For general principle that owner does not have unlimited right to exclude:
   
   i. **Landowners cannot impede aid to human on land** b/c of policy considerations – balance to right exclude with right of third parties on land. Here, aid to migrant workers require positive efforts to reach (necessity trumps exclusion).
      a. *Rule applies only when third parties’ involved* – if landowner himself was in trouble, he could exclude anyone who came on land to aid him.
      b. *In dicta* court hints rule could extend further to prevent landowner from excluding charity workers, visitors, and press who enter with migrants’ consent – but could require them to sign in (so some rt to exclude).

2. **Necessity**
   
a. *Ploof v. Putnam*: Dock owner refuses to allow trespass of boat owner in storm. Court finds *Necessity is exception to trespass*:
      i. **Doctrine of necessity applies with special force when human life is threatened but also when can’t help trespass b/c of natural force.**
      ii. **Necessity creates liability rule** – doesn’t give P any rt to prop – just allows trespass but orders P to compensate D for dmgs done to prop after necessity over.
iii. *Note:* not only necessity b/c of danger – also applies when trespass b/c can’t control your animal or really need to get somewhere for very imp reason.

3. **Custom**
   a. *McConico v. Singleton (rt to hunt):* D hunts on P’s unenclosed/unimproved land despite P’s express orders not to (trespass). *McConico Rule:* Hunting on unenclosed/unimproved land is too important a custom to be excluded by caprice of owner – no trespass!
      i. **Law today: Fence Out – Unenclosed land is free for hunting unless owner posts signs or makes known hunting is not allowed.**
         a. Though rationale is no longer applicable (sustenance), custom still stands, prob b/c lower transaction costs than fence in rule.
         b. Distinguish from custom in *Ghen v. Rich/whale* where used narrowly to get first possession – here, custom carve out exception to rt to exclude.

4. **Anti-Discrimination Laws**
   a. *Shelley v. Kraemer:* Private landowners can have discriminatory covenants if they want but *judicial enforcement of discriminatory covenants is unconstitutional.*
      i. A subsequent case extended rule to say *no judicial awards of damages based on discriminatory private agreements either.*
      ii. *Note: Shelley* has no effect on private right to exclude nor state enforcement of individual’s right to exclude – only applies to state enforcement of discriminatory covenants extending to all future buyers and sellers.
   b. *Fair Housing Act:* No discrimination in sale or rental of housing. Unlawful to discriminate by race, color, religion, sex, familial status, or national origin in:
      i. offers of sale/rent, terms/conditions, advertising (publishers of such ads are also liable), availability
      ii. also can’t discriminate by handicap of buyer/renter or person associated in:
         a. advertising of sale/rent, availability, offer, terms/conditions
         b. and must make “reasonable accommodations” for handicapped (*Pet Therapy* – is allowing pets reasonable to accommodate mental / emotional disorders?)
   iii. Exemptions (first two do not apply to advertising):
      a. Single-fam house provided owner does not own more than 3 such houses
      b. “Mrs. Murphy” exception - rooms/units in dwellings for up to 4 families if owner lives in one unit
      c. Older persons housing, private clubs, and religious organizations unless religion is restricted by race/nat’t origin
   iv. Sometimes, P need not show discriminatory intent – discriminatory effect is enough.
   c. *Attorney General v. Desilets* (refusal to rent to unmarrieds): Landlord refused to rent to unmarried couples b/c of religious beliefs. State fair housing statute (not fed FHA) prohibited housing discrimination by marital status. Court says must remand to ask jury to balance burden on D’s exercise of free religion w/ state interest in preventing
discrimination based on marital status – but court strongly suggests that marital status disc not compelling enough to limit free exercise of religion.

i. State law may afford more (but not less) protection than fed FHA.

5. **Public Accommodations**: owners of prop open to public have much more qualified right to exclude – general duty of nondiscrimination of any kind among customers

   a. **Title II of Civil Rts Act (Public Accommodations)**: All persons entitled to full and equal enjoyment of accommodations of inns/hotels, restaurants/gas stations, and entertainment places (not private clubs), without discrimination by race, color, religion, or nat’l origin.

**Other Powers of the Sovereign Owner**: basic powers of inclusion/exclusion beyond basic rt to exclude

1. **Licenses**: power to give permission to someone to access prop / temp waiver of owner’s right to exclude. Less secure and permanent waiver than lease or easement.
   
   a. **Marrone v. Washington Jockey Club of DC**: Ticket-holder excluded from race even though bought ticket. **Majority Rule**: Ticket alone is license, and licenses by nature is revocable unless comes with a grant (given orally or by deed). Because paid for ticket/license, P can get money damages but not spec perf.
      
      i. Rule comes from **Wood v. Leadbitter**: There, license to hunt came with grant to take what you kill – license was revocable, but once hunter killed, became irrevocable until grant completed/kill taken.
      
      ii. Perhaps if P in **Marrone** had lease on skybox, license plus grant to skybox prop rt would make license irrevocable.
   
   b. **Hurst v. Picture Theatres, Ltd**: Ticket-holder excluded from movie theatre. **Minority rule**: Ticket gives plus grant to see show so irrevocable and P entitled to spec perf – court may have decided this way b/c now cts of law and equity merged (not true in **Wood**).
      
      i. Dissent says all licenses are Ks so no spec perf but get money damages – this is not exactly true. **Ticket is a K and a license – license to access** (always revocable) and **K when paid for** (so money dmgs if revoked).

2. **Bailments**: power to transfer temporary custody to someone else, usually by K (ex: bailment of clothes to cleaner, car to valet).
   
   a. **Nondelivery**: lost or stolen
   
   b. **Misdelyery**: mistakenly delivered to third party
   
   c. **Bailee’s Duty of Care**
      
      i. **Usual Standard**: reasonable care and presumed neg if nondelivery, **strict liability for misdelivery** (in situations where bailment benefits both parties)
      
      ii. If only for benefit of bailee: great care / liability for even slight neg
      
      iii. If for benefit of bailor: slight care, liability for gross neg
      
      iv. **Note**: Standard of care may be disclaimed in K term, but disclaimer may not stand up in court b/c of fine print/Ks of adhesion (**Allen**)
   
   d. **Allen v. Hyatt Regency-Nashville Hotel**: Is operator of “park and lock” garage liable for theft of vehicle? If bailment, neg presumed by nondelivery; if merely license of parking space, burden on P car owner to prove neg.
i. States differ on whether park-and-locks are bailments. This court **test to determine if bailment is**:
   a. Reasonable expectation of P to create bailment?
   b. Actual delivery of custody (possession and control) of prop to D?

ii. Dissent says in self-park-and-lock, D never has possession/control b/c can’t move car – only there to take payment.

e. **Cowen v. Pressprich**: Parties did not contract to create bailment (no voluntary bailment) but owner mistakenly gave security bond to D. D misdelivered bond to third party.
   i. This is a situation of an **involuntary bailment – mistaken receivers or finders become involuntary bailees**.
      a. Rule (though it comes from the dissent in this case): **Involuntary bailees have no duty to guard / no liability for nondelivery or misdelivery unless commit overt act of interference** (honest attempt to return even if misdelivery is *not* overt act of interference.

f. **The Winkfield** (Postmaster Gen): Postmaster Gen as bailee of mail sues D another ship for loss of prop after collision. **Though bailee is not liable to bailor (TO), as to D wrongdoer, bailee has claim to prop and can sue wrongdoer for loss of prop.**
   i. **Like finders and convertors, bailee has more right than neg D and D can’t bring up third party bailor for same reasons.**
   ii. Also, maybe this keeps with idea that giving bailee superior rt to neg D **maximizes chances that TO will recover** – once D pays dmgs to bailee, real interests must be examined and bailee must return value of orig prop to bailor.

3. **Abandonment and Destruction**: power to abandon/destroy prop
   a. **Pocono Springs Civic Association Inc. v. MacKenzie**: Landowner attempts to abandon land b/c worthless and wants to get out of paying owner association fees. **Real Property can’t be abandoned** b/c can’t abandon perfect title to land!
      i. **Most personal prop can be abandoned** (though not garbage/litter, toxic waste, etc). To **determine abandonment for personal prop, need**:
         a. Intent to terminate ownership – either express or implied by conduct
         b. Voluntary relinquishment of title, rights, claim, and possession
         c. Without vesting in another, and
         d. Without reclaiming
   b. **Eyerman v. Mercantile Trust Co**: Old lady’s will orders house to be destroyed after death. Neighbors seek injunction and win b/c vacant lot is nuisance to subdivision and mostly **public policy arg limits owner’s power of destruction** – public policy here is that b/c owner dead, don’t want to impair rts of neighbors with no benefit to the deceased.

4. **Transfer**: power to transfer prop to someone else **by sale or gift**
   a. **Restraints on Alienation**: restraints on future transfers are generally unfavored
      i. **Absolute restraint is always void.**
      ii. **Partial restraint is held to reasonableness standard.** Orig owner can’t *unreasonably* restrict rt of future transfers
iii. **Lauderbaugh v. Williams**: Homeowners association where original owner can prohibit buyer from selling to anyone not HOA. Normally HOAs are okay but prob here is members can reject for no reason / no way to challenge.
   a. *Note*: If membership just required paying dues – prob reasonable.
      Required no criminal record or certain credit score – maybe reasonable.
   b. *Note also*: condos and cooperatives have more flexibility with restraints – maybe b/c more intimate sharing of facilities.

b. **Gifts**
   i. Gifts given during life are irrevocable
   ii. Gifts given in contemplation of death are revocable
   iii. Elements of both gifts during life and before death:
      a. Intent
      b. Acceptance
      c. Delivery
         a. could be symbolic: deed to land, passbook to savings account
         b. could be constructive: keys to car or desk (but doesn’t apply to things inside until actual delivery of car/desk is complete)
   c. **Delivery Requirement**: to complete transfer, prop must be delivered (by deed if land)
      i. *Irons v. Smallpiece*: Father promised gift of colts to son but never delivered. **No gift because no delivery / no change of possession.**
      ii. *Foster v. Reiss*: Wife before surgery (in contemplation of death) writes letter noting objects in house she wanted to give husband and where to find. After death, will reveals all stuff goes to children. **Letter establishes intent but not delivery – need actual delivery by donor.**
         a. Majority says D was not authorized to take possession while P still alive and P never delivered before death. *Note*: even though prop in D’s house, ct says still no possession b/c D didn’t know of objects’ existence or location.
         b. *Dissent says P did everything could reasonably do to complete gift so should be enough.*
         c. *Note*: If P did not have real will, some cts allow handwritten wills to be enforceable (holographic wills).

**Estates**: type of prop right that measures person’s interest in land by duration

1. **Remember**: 1) you can’t have heirs until you die! 2) you can only sell/give/transfer away the rights you have
2. **Estates in Land**: who has present possessory estate? Future interest? What type?
   a. **Possessory Estates**: FSA, LE, FT, LH, FSD, FSC, FSE
   b. **Non-possessory estates**: Easements and Covenants
   c. **Note about Trusts**: Trusts much more common than estates –*equitable* rather than legal interests, but use the same terminology (life estate, remainder, etc)
3. **Future Interests**

   a. **Vested vs. Contingent Remainders**: following LE, FT, and LH
      
      i. **Vested remainders are those who are**:
         
         a. **Born** – if not, contingent
         
         b. **Ascertainable** – if not, contingent
         
         c. **No Express Condition Precedent** – if not, contingent
            
            i. **Express**: not just inherent (like life estate has inherent condition that A has to die, but this is not an express condition)
            
            ii. **Condition Precedent**: “if” is condition precedent not condition subsequent (FSA not FSD) - something that must happen before taking possession, not after.

         d. If lang could be both but not specified, assume **contingent**

   b. **Indefeasible vs. Defeasible Vested Remainders**
      
      ii. **Indefeasibly Vested**: remainder is identifiable

   iii. **Defeasibly Vested**:

      a. **Vested Subject to Complete Defeasance**: remainders in FSC / FSE – condition subsequent takes away remainder

      b. **Vested Subject to Open**: remainders are open class (ex: to B’s kids when B is still living and could have more kids)

   c. **Shifting vs. Springing Executory Interests**

      iv. **Shifting executory interest**: follows interest created in 3rd party (usually this)

      v. **Springing executory interest**: follows interest retained by O (to A when A marries)

<table>
<thead>
<tr>
<th>Present Possessory Interest</th>
<th>Examples (C=condition)</th>
<th>Typical Future Interest (*=subject to RAP)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fee Simple Absolute (FSA)</td>
<td>to A [and his heirs]</td>
<td>None – A owns all, no limitation</td>
</tr>
<tr>
<td>Life Estate (LE)</td>
<td>to A for life – if A transfers, still only for A’s life.</td>
<td>Reversion (to O)</td>
</tr>
<tr>
<td></td>
<td>to A for life, then to B</td>
<td>Vested Remainder in B</td>
</tr>
<tr>
<td></td>
<td>to A for life, then to B if C occurs</td>
<td>Contingent Remainder in B*</td>
</tr>
<tr>
<td></td>
<td>to A for life, then to her adult children</td>
<td>Contingent remainder in adult children*</td>
</tr>
<tr>
<td></td>
<td>to A for life, then to B, but if C, then to I</td>
<td>Vested remainder in B subject to complete defeasance</td>
</tr>
<tr>
<td></td>
<td>to A for life, then to her children (B was the only child at the grant)</td>
<td>Vested remainder in B subject to open*</td>
</tr>
<tr>
<td>Feetail (FT)</td>
<td>to A and heirs of A’s body (rarely used)</td>
<td>Same as above. Reversion or vested/contingent remainder</td>
</tr>
</tbody>
</table>
Leasehold (LH) | to A for # years | Same as above. Reversion or vested/contingent remainder
--- | --- | ---
Fee Simple Determinable (FSD) | to A so long as/while/until C occurs, | Possibility of Reverter in O
Fee Simple Subject to Condition Subsequent (FSC) | to A but if C occurs, | Right of entry by O
Fee Simple Subject to Executory Limitation (FSE) | to A so long as or but if C occurs (FSD or FSC), then to B | Shifting executory interest in B* to A if A graduates from college | Springing executory interest in A

4. **Conservation of Estates:** When a transfer is made, all of what the grantor had must be accounted for, even if this implies a reversion.

   a. **Interests granted and retained must add up to what O had to begin with – if started with FSA, must always end with FSA**

   b. **If holder in FSA dies, interest goes to estate/heirs.**
      
      i. **If holder has no heirs, interest would escheat to state.**

   c. **Williams v. Estate of Williams:** When is holographic/handwritten or otherwise not written correctly court will look to language to determine intent of testator. Here, O willed land to three daughters in LE with remainder in other two daughters if one marries. Question was whether remainder was in LE or FSA. Ct looked to lang and determined intent was LE. By principle of conservation of estate, if daughters have LE, O must have reversion and since O is dead, reversion goes to estate (the rest of O’s children) in FSA.

   d. **City of Klamath Falls v. Bell:** Corporation seeks to grant land to P city “so long as” used for library, then get it back for D heirs of company shareholders. O grants P FSE, but ct must take away exec interest in D b/c RAP prevents it. P claims getting rid of exec interest converts FSE into FSA, but ct says nope only to FSD, with the corporation having possibility of reverter. Since corp is dead, possibility of reverter goes to estate – in this case, still D heirs. **Rule: Possibility of Reverter is descendable – can pass to estate to conserve estate.**
      
      i. Rule applies only to Possibility of Reverter (FSD) – Rt of Entry (for FSC) may or may not be descendable – we don’t know from this case.

   e. **Disclaimer:** allows potential recipient to refuse property

5. **Flexibility of the Estate System:** forms of ownership are fixed and finite (*one may not create new form of ownership*). But also recursive – capture infinite possible outcomes.

6. **Mediating Conflicts Over Time**

   a. **Waste:** Conflicts arise when multiple people hold interests in single property (ex: life estate holder or tenant may favor quick consumption whereas remainder holder may prefer conservation). *Not limited to LE* – applies to co-owners, landlord/tenants, etc.
      
      i. **Affirmative Waste:** Life tenant takes affirmative action (beyond normal use) on property that is unreasonable and causes excess damage to reversionary or remainder interest.

      a. **Open Mines Doctrine:** Any extraction of minerals from property is waste unless mining was already occurring at the beginning of the LE. *Any time life tenant uses diff than O used, could be waste argument.*
ii. **Permissive Waste**: Life tenant fails to take action, and this is unreasonable / causes excess damage (ex: failing to repair roof, not paying taxes, allowing AP)

iii. **Ameliorative Waste**: Affirmative act by life tenant that significantly changes property but increases market value rather than decreasing it
   a. **Majority View**: ameliorative waste is **unallowed** – just a type of affirmative waste. *(Brokaw v. Fairchild).*
   b. **Minority View**: ameliorative waste is **permitted when justified by changed circumstances**. *(Melms v. Pabst* where prop was isolated, surrounded by factories, and absolutely undesirable as residence)*

iv. *Brokaw v. Fairchild*: LE holder wants to remove present structure (mansion) and erect new structure (apt bdlg) b/c present structure is loss to him (expensive to upkeep) and apt building will increase FMV of prop. Remainder holders object. If tenant materially changes nature and character of prop, it is waste even if increases value of prop – tenant cannot do so without permission.

b. **Restraints on Alienation in Grants**: restraints on transferability generally unfavored and courts will void such restrictions in grants and defeasible fees/executory limitations, enforcing only the part of the grant which does not have restraint.
   i. *Mountain Brothers Lodge v. Toscono*: O grants to lodge but “in event fails to be used as lodge or in event sold/transferred, reverts to heirs.” Court *looks at clauses separately and voids “in event sold/transferred” as absolute restraint but keeps “in event fails to be used.”* **Rule:** Restrictions on use as opposed to transferability do not count as restraint on alientation.
      a. **Note:** Because language of the use restriction was unclear, court looked to intent of testator and determined FSC. Could also be FSD, but in doubtful cases, FSC is default over FSD – to give right of entry rather than possibility of reverter (to avoid automatic forfeiture).

c. **Rule Against Perpetuities (RAP)**: no interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest. **Only applies to:**
   i. **Contingent Remainders**: vest by ascertainment of identity of taker and satisfaction of all conditions precedent.
   ii. **Executory Interests**: vest by taking of possession (by cutting short of prior interest of conversion of executory interest into vested remainder)
   iii. **Vested remainder subject to open**: vest by closing of the class.
   iv. **Does not apply to other future interests** (poss of reverter, reversion, rt of entry)
   v. **Note:** most states have abolished or reformed RAP – reforms include wait-and-see approach for RAP period or for 90 years, or reforming clauses to comply with RAP and still closely approximate grantor’s intent.
   vi. **How to do RAP Problems**: For each clause,
      a. **Determine future interest**: if contingent remainder, executory interest, or vested subject to open, continue. (otherwise RAP doesn’t apply)
      b. **Create unborn child**
      c. **Kill off everyone named in grant and see if you can still get interest to vest over 21 years later.** If so, clause is void by RAP.
d. **Vestigial Maintenance Doctrines**
   
i. **Merger Rule**: any combination of transfers that grant single person a series of interests that add up to larger estate will be merged by courts to the large estate.
   
ii. **Rule in Shelley’s Case**: if single instrument is used to create life estate in A and separate remainder in A’s heirs (or heirs of A’s body), the interest becomes a FSA or FT in A. *Note*: this rule is now abolished in most states.

**Co-Ownership**

1. **Concurrent and Marital Estates**:
   
a. **Tenancy in Common**: Each tenant in common (TC) has separate but undivided interest. *Tenancy in Common is presumed unless express intent to create Joint Tenancy or Tenancy by Entirety.*
      
i. **Separate**: each has rt to sell, give, grant interest / do whatever he wants.
   
      ii. **Undivided**: each tenant has right to possess whole property but can own unequal share of interest (diff share of rent, profit, and other obligations).
   
b. **Joint Tenancy**: Like tenancy in common + *survivorship* – surviving joint tenant (JT) automatically acquires interest of other JT when he dies (deceased tenant’s interest is extinguished). *Note*: JT gives lots of rights to tenants – only appropriate for intimate/trusting relationships.
      
i. **Requires four unities**
         
a. **Time**: each interest must be acquired/vest at same time
         
b. **Title**: must acquire title by same instrument or joint AP, *never by intestate succession or other act of law*
         
c. **Interest**: must have same legal interest in property, but not necessarily identical fractional shares
         
d. **Possession**: must each have right to possess whole
         
e. If any of these doesn’t exist, estate becomes a tenancy in common, which only requires possession.
         
f. **Each JT can sever by selling/giving away interest** – becomes tenancy in common b/t other tenant and new owner.
         
g. **But one JT cannot grant interest in will b/c when dies, other JT gets all automatically.**
   
c. **Tenancy by the Entirety**: Available only for married couples. Like joint tenancy (separate and undivided interest + survivorship), but *no unilateral exit option* - neither spouse can unilaterally transfer share of prop without consent of other.
      
i. **Requires Four Unities + Marriage**
      
      ii. *Cannot* be severed by unilateral action (no sale, gift, or will by one) as long as couple married.
      
      iii. Can only be severed while married if both convey to straw (3rd party) who reconveys to grantors – creates tenancy in common.
d. **Community Property**: not really a way to hold property in deed, just idea that all property acquired during marriage becomes community prop, requiring consent of both spouses to transfer (applies only in very few states).

2. **Mediating Conflicts between Co-tenants**: 4 ways to resolve disputes

   a. **Partition**

      i. **Partition by Sale**: court sells prop and splits proceeds according to interests. *Majority of partitions are by sale.*

      ii. **Partition in Kind**: court physically divides prop according to interests. *Favored but much less common – usually only used for large tracts.*

      iii. **Delfino v. Vealencis**: Tenants in common. P wants partition by sale. D wants partition in kind b/c actually lived on small corner of prop and used for garbage business. **Partition in kind is favored, so partition by sale only if:**

         a. **In kind is impractical/inequitable** (*b/c of physical attributes of land*): here, in kind for large plot of land with only little development (D’s small corner) is not impractical.

         b. **Overall interests of parties better served by sale**: here, P and D’s uses might be incompatible b/c P wanted to build subdivision and D has (smelly?) garbage business. *But court looks at who has greater hardship* – here D b/c would have to give up actual possession and possibly jeopardize business.

   b. **Accounting**: Rents and profits made by one TC to exclusion of other. Excluded TC may recover share of this money after an **ouster**.

      i. **Ouster**: TC has right to use all but *cannot* exclude other TC. For ouster, there must be affirmative action by one TC to possess and rejection / exclusion by other TC (if first TC never tries to possess – no ouster).

   c. **Contribution**: Expenditures for repairs / upkeep essential for maintenance of estate. TC who made these repairs/upkeep can recover reasonable expenditures and still may solely retain any excess profits resulting from increased value (*note*: must also solely bear any excess loss if somehow decreases value).

      i. **Gillmor v. Gillmor**: Tenants in common. P sues D for obstructing her from occupying land to graze sheep. *Mere exclusive use by one TC is not sufficient for ouster, but when TC out of possession makes a clear, unequivocal demand to use land in possession of other TC and he refuses to accommodate, this is an ouster.*

      ii. **But TC who is liable for accounting damages is entitled to recover contribution for reasonable expenditures.**

   d. **Severance**: either JT can sever and convert to TC by destroying one of 4 unities. For JT, used to need straw but now can convey to self to destroy unity of title.

      i. **Harms v. Sprague**: Joint tenants. One JT grants mortgage to D, 3rd party, and then dies. P other JT claims right of survivorship. D claims JT destroyed by mortgage and now TC.

         a. This jurisdiction says mortgage is lien not transfer of title so implicitly preserves unity of title.
Note: jurisdictions differ as to whether mortgage is prop interest or merely security interest.

If JT not severed, mortgage interests do not survive death of mortgager b/c prop right of JT extinguishes upon death, along with any liens b/c no prop right for lien to attach to.

3. **Equitable Division of Property upon Divorce:** in common-law states, property is equitably divided, but questions arise as to what things can rise to level of property in marriage and how to distribute that value.

   a. **O’Brien v. O’Brien:** Divorce. Is a medical license marital property which is subject to equitable distribution? **Marital property is all property acquired by one of both during marriage and before separation agreement.** Some stuff not typically “prop” is considered marital prop by state statute (pension rights, interest in career potential, etc) if spouse contributed financially or domestically.

      i. **Court decides medical license is marital property b/c** wife contributed financially and domestically, made sacrifices for purposes of marriage/family, and prof licenses are like prop b/c of money/effort required to obtain and increased earning capacity it provides.

      ii. Concurring opinion said should be possible to revise if circumstances change (D does not or cannot use medical license to practice/earn $$).

Leases: Leases have *roots in both property and contract* and are one of most common forms of prop interest – leases aka leaseholds, tenancies, term of years, or landlord-tenant interests.

1. **Lease Types**

   a. **Term of years:** Lease with fixed time (# of months, years, etc). Neither tenant nor landlord required to give notice before terminating on designated day of term.

   b. **Periodic tenancy:** Lease automatically rolls over for stated period of time, usually month or year. Requires notice from both parties if either decides to terminate – usually notice period for month over month is one month / year over year is six months.

   c. **Tenancy at will:** Tenancy lasts only so long as both parties wish it to. Either party may terminate at any time for any reason. Statutes may require notice equal to period of time @ which rent payments are made.

   d. **Tenancy at sufferance:** Not true tenancy. Refers to when individual who was once rightful tenant holds over after right as ended. Sometimes, landlords not allowed to use self-help to evict tenants at sufferance as they would trespassers (*Berg v. Wiley*). Also, if evicted tenant sends landlord rent check and landlord cashes, some cts imply renewal.

   e. **If no category applies:** when time to give notice, courts look to intention of parties.

2. **Independent Covenants Model:** Property theory of lease – lease is transfer of property rights

   a. Two separate covenants: L conveys right of quiet enjoyment of land to T. T conveys payment of rent to L.

   b. **Paradine v. Jane:** L sues T for unpaid rent even though T never occupied land (held away by “alien armies”). Court says **Covenants to convey property and pay rent are independent and T must assume all risk just as he is able to assume all profits.**

      1. Under ind cov model, risk accompanies conveyance, and right to possess is independent of obligation to pay rent.
i. If hole in roof and L did not repair, T would still have to pay rent but could sue later for dmgs.

ii. If T does not pay rent, L could sue for dmgs but could not evict.

3. **Dependent Covenants Model**: Contract theory of lease – L and T obligations dep on each other.
   a. *Medico-Dental Bdlg Co of Los Angeles v. Horton & Converse*: Lease of office space for pharmacy. Two covenants at stake: L conveys to T promise not to lease to competitors. T conveys to L payment of rent. **To determine if covenants are dependent, ask:**
      1. **Do they run to consideration of K?** If the covenants are induced by each other, they are dependent and mutual.
      2. **Did D breach covenant?** Here, though L did not violate covenant himself, by not taking immediate action to abate the violation, he breached.
      3. **Did the breach defeat the entire purpose of the lease?** Here, the covenant not to lease to competitors was one of main reasons T entered into lease, so yes.
   b. **Eviction grew out of switch to Dependent Model**
      1. **Actual Eviction**: L can evict T for nonpayment
      2. **Constructive Eviction**: L breaches implied warranty of quiet enjoyment of land b/c his actions so severely depresses value of tenancy that T has no reasonable option but to vacate – excuses T from lease. L can do this in 2 ways:
         i. Affirmative act with intent, or
         ii. Natural and probable consequence of what L did, failed to do, or permitted, regardless of his intent.
         iii. **Note**: T need not actually vacate. Also, no constructive eviction for acts of 3rd parties which L cannot control.
   c. *Blackett v. Olanoff*: L leases nearby land to lounge w/ loud music causing T to vacate apt. L sues for unpaid rents. T claims constructive eviction. **Landlords conduct not his intent is controlling here** – L had control to correct condition and did not do so successfully so constructive eviction.
   d. *Javins v. First Nat’l Realty Corp*: L violated housing code regulations during term of lease. T wants to use violations as defense to nonpayment of rent. **Implied warranty of habituality (IWH), measured by standards set out in Housing Code, exists for urban dwelling units covered by Code – breach of warranty = breach of K and excuses T’s obligation to pay rent.**
      1. Matter of fact to decide extent of violations – i.e. **whether violation so great as to excuse T’s obligation to pay** (maybe not for minor violations).
      2. Also consider whether stuff not in code could also be breach of IWC – i.e. no a.c. in a heat wave.
      3. Policy arg that T’s have unequal bargaining power – take it or leave it situation.
4. **Assignments and Subleases**: two types of transfer of tenant interests
   a. **Assignments**: Landlord starts with FSA → carves out prime lease to prime tenant → prime tenant alienates prime lease to 1st assignee → 1st assignee alienates to 2nd assignee, etc.
      1. **After initial prime lease, lease transferred as whole** – no more carving out
      2. Each assignee deals w/ orig. L
      3. Same rights and obligations w/ each transfer
   b. **Sublease**: Landlord starts with FSA → carves out prime lease to prime tenant → prime tenant carves out sublease for subtenant → subtenant carves out sub-sublease for sub-subtenant, etc.
      1. Each carving out creates somewhat lesser interest than one taken from
      2. Each subtenant deals w/ tenant above
      3. Each chain has sep lease w/ diff rights and obligations b/t parties

5. **Landlord/Tenant Obligations: Privity of K vs. Privity of Estate**
   a. **Privity of K**:
      1. Obligations created from lease – for parties to K.
         i. **Subleases**: Landlord and subtenant have no privity of K b/c no K b/t them, but prime tenant and subtenant do.
         ii. **Assignments**: Landlord and 1st assignee have no privity of K b/c no K, but prime tenant and 1st assignee do.
   b. **Privity of Estate**: two conditions to create:
      1. One party’s interest **directly carved out of** other’s interest
      2. One of parties is in **actual possession** of prop
         i. **Subleases**: Landlord and subtenant have no privity of estate b/c sublease not directly carved out of fee simple, but prime tenant and subtenant do.
         ii. **Assignments**: Landlord and all assignees do have privity of estate b/c prime lease directly carved out of fee simple and assignee in possession, but landlord and prime tenant do not b/c prime tenant not in possession.
            a. As a result, assignees have duty to landlord to perf obligations that run w/ land (rent, etc).
            b. But, b/c no privity of K with landlord, prime tenant is on hook if assignee defaults. (prime tenant acts as surety for ob of assignee)
   c. **2 Ways to Address Privity Probs of Assignees**:
      1. **Assumption**: Assignee agrees to be bound by privity of K with landlord (as well as priv of estate) so now both prime tenant and assignee in priv of K w/ L.
      2. **Novation**: Parties, including L, agree to erase priv of K liability for prime tenant so prime tenant has no priv of K or estate, and assignee has priv of estate (and maybe of K if agrees to assumption).
         i. **Note**: **Assumption and Novation are independent** – can have one w/out other (or both or neither).
The Law of Neighbors: Devices to control conflicts among neighbors over incompatible uses of land

1. **Nuisance**: governs use and enjoyment of land / “nontrespassory” invasions of land
   a. Courts often **balance utility of conflicting issues** (Hendricks septic system vs. well)
   b. *Adams v. Cleveland-Cliffs Iron Co*: Intrusions of dust, noise, and vibrations from mining co onto land of neighbors. **This ct says Recovery for trespass is not available for intangible agents (particulate matters, noise, vibrations)** – trespass only available for unauthorized direct or immediate intrusion of physical, tangible objects.
      1. **Recovery in trespass requires only any appreciable intrusion of land** – no need to prove actual dmgs b/c invasion of rt to exclude entitled to nominal dmgs
      2. **Recovery in nuisance requires substantial and unreasonable interference with use / enjoyment of land**, and P must prove both.
         i. To determine whether substantial interference – balance social utility of D’s activity w/ harm to P.
   3. **Note**: some jurisdictions will treat very serious nuisances as trespass, using 4 tests to draw line b/t trespass and nuisance:
      i. Was D’s action on P’s land or outside P’s land?
      ii. Harm to P’s land direct or indirect?
      iii. Invasion by tangible or intangible matter?
      iv. Deprive P of possession or merely use/enjmt of land?
   c. *St. Helen’s Smelting Co v. Tipping*: Intrusion of noxious gases from smelting works, damaging P’s trees and crops. Prob is whole community had manufacturing / smoky.
      1. **Action for nuisance from noxious vapors must be sensibly diminishing value of prop and enjoyment of it** – all circumstances must be considered (time, manner, and locality).
         i. **Locality rule takes into account community standards** – if particular use is relatively uniform in an area, might be considered to determine liability, but prob not where intrusion causes physical damage to land. Community standards might play role in assessing damages though.
   d. *Luensmann v. Zimmer-Zampese & Associates*: Intrusion of noise, lights, and smoke only at night from race track. P alleges nuisance per se b/c D’s conduct violated statute prohibiting drag racing.
      1. **Nuisance per se is only available when P can prove activity constitutes nuisance wherever and whenever it occurs** – here, activity was only at night.
      2. **Nuisance per se can also be proved by violation at law but only when prohibited activity is categorized as nuisance at common law**. Here, drag racing is not common law nuisance.
   e. *Boomer v. Atlantic Cement Co*: Intrusion of smoke, dirt, and vibrations from cement co. polluting air. P sued in equity, wanting to enjoin D from conducting business. **Court awarded damages for loss in value of land, but refused to grant injunction to stop D from conducting business**. Older rule was preference for injunctions for nuisance.
1. Cost to D from injunction was disproportionate to loss to P, also prob of high transaction costs and holdouts w/ single polluter and multiple residents means damages/liability rule is preferable to injunction/prop rule.

f. *Spur Industries Inc. v. Del Webb Development Co*: Intrusion of flies and odor from feedlot made P developer’s land unfit for sale. P seeks injunction. **Private nuisance affects a small # of people whereas public nuisance affects dense population or public health, safety & comfort.** Govt officials and private parties with special injury can sue for public nuisance. Here, P’s special injury was loss of sales.

1. **Where injury is slight / outweighed by cost of removal of nuisance – dmgs**
2. **Where injury is substantial / affects public health/safety or a dense pop – injunction.** Here, flies danger to public health and affects populous neighborhood of seniors, so injunction allowed.
   i. But where P foreseeably brings population to nuisance and causes injunction, P may be required to indemnify D for removing nuisance. Here, P took advantage of low prices of rural area to build residences and attract seniors – knew of nuisance.
      a. This is like Rule #4 of prop rules/liability rules, where polluter has entitlement to pollute protected *only* by liability rule (residents could sue to enjoin pollution but would have to pay polluter’s cost of abating or shutting down)
      b. *Note:* ct says if P had been only partly injured, “coming to nuisance” may have barred injunction. Or if D built near city / had indication that city would grow, may not get relief from P.

2. **Servitudes:** agreements between owners respecting *use of land.*
   a. **Easements:** Conveyance of property *rt to use* (not possess) *another’s land* - Irrevocable (for term granted).
   b. **Covenants:** K in which owner agrees to abide by certain *restrictions on use of own land* for benefit of other(s).

1. **Differences b/t Easements and Covenants:**
   i. Easements = Property Right; Covenants = Promise respecting use of land
   ii. Easements = *in rem* rts against all; Covenants = *in personam* no rts against 3rd parties other than successors.
   iii. Covenants are more of a governance mechanism and more than easements prescribe *affirmative* behavior for landowners.
   iv. Easements *always* run with the land (covenants only sometimes)
   a. **Easements: Types**
      i. **Appurtenant vs. In Gross**
         1. **Appurtenant:** involves two tracts of land - dominant (benefitted) and servient (burdened) tract. Easement for one tract carved out of other.
            a. Transfers to future owners of *both* tracts.
         2. **In Gross:** Involves one tract of land and one or more persons – easement for person carved out of one tract of land.
a. Easements in gross for *commercial* purposes (railroads, billboards, etc) are transferrable and inheritable.

b. For *purely recreational* purposes (hunting, camping, boating, etc) are *not* transferrable or inheritable.

3. **Profit a preandre (Profit):** Like easement in gross (rt to enter land of another) but only to extract something of value (minerals timber, fish)
   a. Implied license which is irrevocable as long as profit lasts.

ii. **Affirmative vs. Negative**
   1. **Affirmative:** easement to do something (*most easements are affirmative*)
   2. **Negative:** easement to prevent someone from doing something. (*rare – courts don’t like neg easements, prefer covenants to impose neg duties*)
      a. In Eng (*not US*), neg easements to block sun, air, or water from dominant land, or block removal of lateral support for bdlg

iii. **Private vs. Public**
   1. **Private:** authorize *specific parties* to use for specific purposes
   2. **Public:** authorize *general public* to use for specific purposes (i.e. beaches, bike trails, historic conservation, etc).

b. **Ways to Create Easements**
   i. **Grant:** written deed
      1. *Baseball Publishing Co. v. Bruton:* Contract to give P exclusive right to maintain sign on D’s building. Writing had word “lease” but Doesn’t matter what title says, courts could interpret it differently.
         a. Here, ct said more like a license which unlike lease does not transfer possession just temp access – license is revocable at will subject to rt of licensee to remove chattels in reasonable time.
         b. But writing is really easement in gross – an irrevocable property right for the term of years granted.
         c. Since it involves land – need writing (Statute of Frauds)
   ii. **Reservation:** in grant to self or sometimes to 3rd person
   iii. **Implication:** No writing needed, but requires:
      1. **Common owner** severs land
      2. **Use before separation** so obvious , apparent, and continuous to show it was meant to be permanent.
      3. **Reasonably necessary** for beneficial enjoyment of land
   iv. **Necessity:** No writing, but requires:
      1. **Common owner**
      2. **Severs landlocked parcel** of land
3. **Strict necessity** for ben enjmt of land (higher req than implication)
   a. *Schwab v. Timmons*: P requests easement by implication or by necessity to access public road. US govt was common owner. Ct says *no implication b/c no use before separation* (P never had access to road) – but notes easement *might be reasonably necessary* b/c P was on landlocked parcel. Also *no necessity b/c common owner’s severance did not give rise to landlocked parcel* (P’s action to sell part of land gave rise to landlocked) – also *no strict necessity b/c access to road not impossible / P could access road by building stairs into a bluff*.

v. **Prescription**: similar to AP (without “actual” and “exclusive”). Actual is implied, but exclusive may not make list b/c if P had exclusive possession, could get whole land (not just use) by AP. Requires:

1. **Open and notorious**
2. **Continuous**
3. **Adverse (w/out permission)**
4. **Definite and certain line of travel** (slight deviations OK but no substantial changes which would break continuity)
5. For longer than Stat of Limitations.
   a. Prescription is *preventable* (like AP deters sleepy owners) – can be prevented by putting up sign (some statutes say this is enough), giving permission so no longer adverse but revocable license (if no improvements), call police, etc.
   b. *Warsaw v. Chicago Metallic Ceilings, Inc*: P used D’s prop for 7 years to maneuver trucks b/c driveway too narrow. D started to build bdlg on part of prop used – P tried to get preliminary injunction to stop bdlg but failed. D completed building. P sued in equity. **Prescriptive easement** b/c open/notorious, continuous for 7 yrs (stat was 5), adverse b/c (use continued without D’s interference and D refused to negotiate for use) and definite/certain line of travel (only slight deviations).
      i. **Injunction to remove already erected obstruction** is determined by whether harm to D outweighs benefit to P but not when D willfully erected w/ knowledge of claimed easement. Destruction ordered.
      ii. Prescriptive easements are given with *no liability to P* – P has title good against all, including D. Maybe if D *innocently* erected and removal was costly, ct would not order injunction or would order P to contribute costs.

vi. **Estoppel**: License is normally revocable but becomes irrevocable so long as nature of license calls for / so long as needed for use if:

   1. **P makes improvements** (usually improvements must related to type of use being claimed by estoppels)
   2. **With D’s knowledge and no objection**
a. *Holbrook v. Taylor*: P used D’s roadway w/ consent (creating license) to get to public road to transport construction supplies. Also w/ consent P repaired and improved/widened road. When licensee exercises privilege given through license to erect improvements or make substantial expenditures on faith of license, license becomes irrevocable for so long as use continuous – becomes *grant through estoppel*.

   i. *Note*: this was easement in appurtenant – license to go on land to fish, if P cleaned up water, could become easement in gross through estoppel.

c. “Solar Easements” and Right to Light

   i. US common law doesn’t recognize prescriptive easements to use solar light (hard to measure when “adverse” use begins anyway). England does though by “ancient lights’ law.” Many state statutes say solar easements can be created but only by written agreement, usually not by implication or prescription (MO goes further than most states to say use of solar energy is a *prop rt* separate from use of land). Some states also say use of sun can be acquired through first appropriation (like Western states with water – who uses first gets).

   ii. *Fontainebleau Hotel Corp v. Forty-five Twenty-five Inc*: Miami hotel wants to enjoin neighboring hotel from constructing tower which would block sun/cast shadow on P’s prop, making pool unfit for enjoyment. P claims easement to light. US common law does not recognize blockage of sun as nuisance – no legal right to enjoyment of light.

      1. *Note*: probably also no implied easement anyway b/c prior use is questionable – just light on undeveloped plot of land, and prob not reasonably necessary b/c P could just move pool.

d. Termination of Easements

   i. *By Deed* releasing or extinguishing easements

   ii. *Merger* of easement into larger fee simple under common ownership (easement no longer needed).

   iii. *Adverse Possession*: servient owner blocks easement without interference for statutory period.

   iv. *Abandonment*: prolonged nonuse – not just changed circumstances unless easements for particular use and use has become obsolete (in easements by implication circumstances aren’t usually written so changed circ doesn’t matter).

e. *Covenants*: Covenants more like contract: require writing (no implication, necessity, prescription or estoppel) – unlike easements, don’t always run with land.

f. *Requirements for Covenants to Run w/ Land*: Two theories allow covenants to run with land, rather than person – only diff is type of relief:

   i. *Equitable Servitude* – equity.

      1. To run for burdened owner:

         a. *Intent*: orig owners intend for it to run
b. **Touch/Concern Land** – cov has to do w/ upkeep of land, or affects adv/burdens of land use (matter of degree)

c. **Notice**: either actual (in deed), record (filed in land record), or inquiry (facts making reasonable person inquire further) notice

2. **To run for benefitted owner**: no need for notice b/c only affirmative obligation/affects prop price for burdened owner

   a. **Intent**

   b. **Touch/Concern Land**

3. **More on Notice**

   a. *Tulk v. Moxhay*: P sold land to man w/ covenant to restrict use to maintain open garden. Man sold land to D. Cov was not mentioned in deed, but D had notice of cov. D wants to build over garden. **When future owner has notice of cov, should not be permitted to use land in manner inconsistent with cov.** Idea that price of land is affected by cov and unfair/inequitable to allow someone to buy at lower price b/c of cov and resell w/out cov for higher price –makes the orig cov useless.

      i. Court leaves open what is req for notice (unclear whether need writing or not). Also here orig owners intended for it to run, and cov touched/concerned land b/c was about upkeep of land itself.

   b. **Notice and the Common Plan**

      i. *Sanborn v. McLean*: Common owner creates subdivision. P claims all lots have reciprocal neg covenant not to build anything but residences. D claims no notice (not in deed) and wants to build gas station. **To get “common plan” cov, need common owner who subdivides plots and sells at least 1st plot w/ cov beneficial to common owner (some jurisdictions require 1st plus several more sold w/cov).**

         1. Despite no actual notice, **Once D saw strict uniformity of subdivision, he is put to inquiry notice**– had he inquired, would have found out cov.

         2. **Note**: not all jurisdictions use common plan and inquiry notice b/c now w/ zoning, may not even notice a “common plan” around you. Instead, rely on actual or record notice.

   ii. **Real Covenant** – common law

      1. **To run for burdened owner**:

         a. **Intent**: of original owners by language or context

         b. **Touch/Concern Land**: 
c. **Privity of estate:** Vertical (successor holds entire durational interest as orig owner – i.e. assignment but not sublease) and Horizontal (common interest b/t burdened and benefitted owners)

2. **To run for benefitted owner:**
   a. Intent
   b. Touch/concern
   c. **Vertical privity of estate**

3. *Note:* Restatement III abolishes requirements of privity and touch/concern for both Real Cov and Eq Serv. Makes running default instead of exception – requires only intent, limited only by no writing or violation of public policy (like K law).

4. *Neponsit Prop Owners Ass'n v. Emigrant Industrial Savings Bank:* HOA with covenant that fees were to be paid for maintenance of roads, parks, and beach. Deed said cov were to run with land. Providing that cov run w/ land in deed is enough for intent but still need touch/concern and privity. Here, cov is affirmative to pay money. *Old English rule was that affirmative covs never touch land.* New rule: **Even if cov is affirmative, if it substantially affects legal relations (adv and burdens) of use, it touches/concerns land.** Here, enough that cov allows parties adv of common enjoyment of roads, parks, and beaches as landowners.
   a. Compare to affirmative cov to pay dues to live in gated community (adv of security might relate to adv of land use) or dues for upkeep of golf course (maybe if came w/ common enjmt of golf course but not if have to pay to use golf course).
   b. Just affecting FMV of land may not be enough to affect adv/buden of land use but if increased FMV + some other effect, may be enough.
   c. **Regarding privity req:** HOA formed by neighbors getting tog may not be enough for horizontal priv but could get equitable serv. Here, ct doesn’t look at privity in formal sense – says HOA can stand in as agent of orig owner so horizontal priv can be kind of transferred.

5. *Eagle enterprises Inc. v. Gross:* Cov to purchase and supply water. D refuses to pay for water. Here, both owners burdened and benefitted. Ct found intent (express in deed) and priv of estate, but no touch/concern b/c **Cov did not substantially affect burdens/adv of land use b/c**
   a. Cov was seasonal – not year-round.
   b. D had own water supply – if not, maybe would substantially affect adv of land ownership b/c need water.
   c. D dropping out of cov would not force price of water too high – if would, would substantially affect adv/burden of land use
   d. *Note:* another prob was no limit on cov – courts don’t like unlimited restrictions on future owners (think RAP, etc).
g. Termination of Covenants
   i. Merger back to common ownership
   ii. Written agreement by all owners
   iii. Changed circumstances: allowed w/ cov not easement b/c easements only involve 2 parties, whereas cov involves several owners – holdout prob
      1. Inequitable and oppressive to P with
      2. No benefit to adjoining owners
         a. Bolotin v. Rindge: Cov to build only homes. P’s land has no value as house but would have high value as commercial prop as result of changed circumstances – growth of commercial dev around it. Cov takes away all value for P’s land, so oppressive to P. But, though terminating cov and allowing commercial dev will prob increase FMV of prop for adjoining owners, might also increase traffic, noise, etc. Can’t say no benefit to adjoining owners – non-economical benefit (reduced traffic, noise) is enough so no termination by changed circumstances.
   iv. Abandonment: Requires:
      1. Habitual and substantial violations have eroded cov (few not enough)
   v. Laches:
      1. P’s knowledge or reasonable opportunity to discover claim against D
      2. Unreasonable delay by P in bringing claim
      3. Damage to D resulting from delay
   vi. Estoppel:
      1. Admission/act (or silence) by P inconsistent w/ later claim
      2. Reliance by D induced by P’s act
      3. Injury to D as result of P’s contradiction
   vii. Public Policy: violating purpose of some statute or policy for public good (used broadly for going against public good – discriminatory, unreasonable, etc).
      1. Peckham v. Milroy: Neighborhood cov prohibiting home businesses. D wants to build day care to objection of neighbor P. No abandonment b/c only 4 violations out of 160 owners (fact-specific finding). No laches b/c P had no knowledge of daycare center, no unreasonable delay/only a yr during which P complained and took other steps, and dmg claimed (remodeling of home) had nothing to do with cov or claim. No estoppel b/c P never made action and wasn’t even silent – objected from beginning. Finally, no public policy b/c statute in question was only to protect day cares from govt restriction not private restrictions.

Takings: “nor shall private prop be taken for public use without just compensation” – 5th amend
   1. Eminent Domain: Needed b/c of prob of holdouts (jack up prices and transaction costs leading to inefficiency) and weighing interests of individual against good of society. Transforms property rule to liability rule – govt can compel transfer of prop rts if meet two requirements of 5th amend:
public use and just compensation. \textit{(Note: also must allow due process before taking and state
govts may be restricted by statutory limits on ED). (ED for IP – takings clause doesn’t apply to IP – 
govt can take now and figure out compensation later, maybe b/c with IP owners can still use).}

\textbf{a. Public Use:} traditionally meant “actual use by public” – now more “for public benefit”
and courts give great deference to legislation to determine what qualifies.

1. \textit{Kelo v. City of New London, CT:} Govt takes nonblighted prop for purpose of
economic dev of “distressed municipality.” A few owners object. Court looks to
plan as \textit{whole} to decide \textit{whether economic benefit alone is a “public use”?}

\begin{enumerate}
\item \textit{Private}→\textit{public use always OK} (public ownership - road, park, etc.)
\item \textit{Private}→\textit{private}→\textit{public use by common carrier always OK}
(railroads, utilities, etc).
\item \textit{Private}→\textit{private}→\textit{public benefit} – majority says OK, O’Connor
dissent says OK \textit{only} in certain cases to eliminate existing public harm
/removing blight or breaking up oligarchy), Thomas says \textit{never ok}:
  \begin{enumerate}
  \item Taking from A and giving to B solely for private benefit or just
  pretext of pub benefit / no real benefit is \textit{never} ok (for all judges)
  \item Majority says \textit{future use} must provide benefit— econ dev is
  similar to other pub benefits (job growth, revitalization, etc)
    \begin{enumerate}
    \item Kennedy concur but advocates a heightened rational-
    basis review (what majority uses) to look more closely at
    pub benefit but not as much as intermediate scrutiny.
    \item O’Connor dissent says \textit{present taking} must be benefit in itself by
    remeding existing harm. Otherwise slippery slope to letting
    govt take any private prop believes could be put to more
    profitable use. Also rational basis review won’t make it past the
    stupid staffer – anyone can say “yeah its for pub benefit”
    \item Thomas dissent would \textit{never even consider pub benefit} so no
    review necessary. Only actual pub use. Period.
    \end{enumerate}
  \end{enumerate}
\end{enumerate}

\textit{Note:} since \textit{Kelo}, most states passed leg narrowing ED.

\textbf{b. Just Compensation}

1. \textit{United States v. Miller:} Two questions: 1) How and when do we value land for
JC? 2) What happens when govt overestimates JC?

\begin{enumerate}
\item JC is usually \textbf{FMV of prop} (what willing buyer would pay) \textit{at time of}
taking, \textit{without incremental value} added by \textit{subjective value} to owner,
govt need, or increased value \textit{b/c} of \textit{ED project itself} \textit{unless prop not}
part of \textit{original ED plan} added subsequently. Here, no increased value
\textit{b/c} of \textit{ED project b/c} P’s prop was part of \textit{ED plan} from beginning (and
P had \textit{notice} of this – govt not just claiming it was part of plan).
\begin{enumerate}
\item \textit{Note:} If \textit{partial taking} (govt takes only part of one parcel of
land), owner will be made whole: \textbf{FMV of whole before taking}
– \textbf{FMV of part after taking} (if whole worth $100, and by taking
prop worth $75, owner gets $25 to be made whole). But here, not
partial taking, govt took whole parcel.
\end{enumerate}
\end{enumerate}
ii. Govt puts deposit with court to give govt immediate possession and owner immediate cash compensation while court figures out exact JC (and to avoid big interest if litigation takes awhile). **If govt underestimates, must pay excess w/ interest, if govt overestimates, owner must return excess w/ interest.** This incentivizes govt to make accurate estimate and avoids windfalls to owners.

2. **Quick Take Statutes:** Alter bargaining power more in favor of govt, allowing govt to obtain title before final judgment of exact amt of JC w/out due process violations if it 1) deposits estimated value of prop w/ ct, and 2) ct satisfied govt has legal authority to condemn for valid public use. But if states respond to *Kelo* by narrowing pub use requirement, may be more challenges to quick-take statutes.

3. **Regulatory Takings:** Police powers to regulate crimes, public nuisances, and threats to public health, safety, and welafare are an implied attribute of sovereign. Normally police powers / regulations do not require just compensation. *But Regulatory Takings Doctrine says if govt regulates prop too severely, the regulation may be a “taking” and govt must pay just compensation as if formal ED proceeding.*

   a. **Two per se regulatory takings – otherwise, go through 6 factors**

   1. **Permanent physical occupation?** – if yes, taking *per se*

   2. **100% deprivation of economic use (considering denominator prob) provided that use was not already prohibited as public nuisance** – if yes, taking *per se*

3. **If neither of above, go through factor analysis:**

   i. Factors: first three (*Penn Coal*), second three (*Penn Central*)

   a. **Dim in FMV**

   b. **Public Nuisance**

   c. **Average Reciprocity of Advantage**

   d. **Economic Impact** (similar to dim in FMV)

   e. **Interference w/ Investment-Backed Expectations**

   f. **Character of Govt Action**

b. **Penn Coal Co. v. Mahon:** Prop right being “taken” is mineral rights / rt to mine. Regulation is statute preventing mining which causes subsidence of houses (must leave pillars of coal). **How much regulation makes it rise to a taking? 3 factors:**

   1. **Dim in FMV:** Majority looks at dim in FMV of pillars of coal (prop being “taken”) – 100%, dissent looks at dim in FMV of whole prop rt to coal – very small %. This is the denominator problem.

   2. **Public Nuisance:** Majority sees coal mining as private nuisance affecting one owner who bargained for it and assumed risk (freedom of K argument) – says public safety issue can be fixed w/ notice of mining/collapse. Dissent sees as a public nuisance affecting public safety, and *cannot* contract away safety or other regulations.

   3. **Reciprocity of Advantage:** Majority says there must be average reciprocity of advantage as b/t the owner of prop restricted and the rest of the community – shared burden for shared benefit / not burden disproportionately on ind. owners. Dissent dismisses this factor b/c there is a pub nuisance which trumps it.
c. *Penn Central Transp Co v. City of NY*: Prop rt being “taken” is rt to build upwards (P calls these “air rts” [compared to mineral rts]). Regulation is NYC Landmarks Preservation Law (for public use – protecting landmarks for everyone to enjoy). **3 more factors (these are considered main ones):**

1. **Econ Impact**: here, it’s denial of ability to make profit – majority says P can still sell/transfer air rights to another prop so some value is left; dissent looks at whether this value is just compensation and says its not b/c P would have made much more $$ if could build upwards than from sale of air rts to another prop.

2. **Interference with Investment-Backed Expectations**: Can P still use prop for intention / purpose for which it was bought. Here, P can still use prop as train terminal for which it was intended.

3. **Character of Govt Action**: Ask how invasive? Is govt making profit or acting purely for public benefit?

d. *Loretto v. Teleprompter Manhattan CATV*: Prop rt being “taken” is roof space and space cables take up. Regulation is state statute requiring owners of apt bdgs to have cable installation fixtures and owners get payment of $1 (prior to statute, owners got paid 5% commission). Ct says regulations that result in **Permanent physical occupation of property = taking per se.**

1. Majority focuses on character of govt action to make per se rule – says this regulations takes from each strand in bundle of sticks (rt to exclude, use, possess, destroy – rt to exclude is most imp).

2. Dissent worries about tenant’s rights to cable (like rt to water, utilities) but gas and elec lines require easements – gotten through takings so supports majority arg that cable lines should also be takings. Plus, dissent compares cables to mailboxes/fire extinguishers which are not takings – but owners have control over these and can move them unlike cables which are owned by cable co.

e. *Lucas v. South Carolina Coastal Council*: Prop rt being “taken” is right to use land in way P intended. Regulation is an ecological conservation statute (Beachfront Mgmt Act) which banned P from building any residences even though surrounding area was full of residences. **100% deprivation of economic use = taking per se. But property right being taken must be a right owner already had – if use was public nuisance or otherwise illegal, no taking.**

1. Majority seems to suggest “denominator” to measure deprivation of econ use is the investment-backed expectations (1005 deprivation of use intended at purchase). Dissent thinks proper “denominator” is any possible use of land/whole value of land (P can still use land in natural state or sell to neighbors, etc).

2. Dissent also considered about 95% or other near complete deprivation – majority says this is still likely taking using factor analysis, just not per se taking.

3. *Miller v. Schoene*: Regulation called for cutting down of cedar trees which might be infected with disease that kills apple trees in order to save the more commercially valuable apple trees (rather than the purely ornamental cedar trees). **Statute declares infected cedar trees a public nuisance so no taking as matter of law – even if 100% deprivation of value of cedar trees – Lucas** (but prob here cedar trees retain some value anyway as timber).

4. *Palazzolo v. Rhode Island*: Regulation was ecological conservation statute to preserve wetlands. Denied P ability to fill 18 acres of wetlands to build beach
club, but allowed him to build on portion of parcel which was uplands (enough for residence). Court did not consider parcels separately for procedural reasons, just said Not 100% deprivation of economic use b/c can still develop portion of parcel, so no taking per se.

i. Note: could still be taking by factor analysis. Also, if regulation came about after P purchased land, could be a stronger arg to consider parcels separately (whereas since regulation existed before, D has arg that land was priced lower based on regulation so P cannot now claim parcels should be considered separate) – but P still bought land as whole.

f. Means of “Property” for Regulatory Takings: Takings Clause probably refers to identifiable, discrete assets or rights taken by govt but not when govt imposes general liability or tax that can be satisfied from any source of wealth (note: cts haven’t said this explicitly).

1. Phillips v. Washington Legal Foundation: Interest on IOLTA accounts (accts of client funds held by lawyers in connection w/ practice) can only be earned through IOLTA progs where interest goes to charity. Rule: Interest on IOLTA accts is “private property” of client b/c interest follows principal (doctrine of increase). Though court does not comment whether IOLTA prog is taking, important that it categorizes interest as a separate “property” than principal – now court could say IOLTA prog is a taking per se because deprives all value (whereas if interest was just piece of whole prop of acct, would have to go through factor analysis)

i. Note: later case said IOLTA prog are taking per se b/c deprive all econ value but no just compensation b/c interest could not be earned but for IOLTA prog to begin with.

g. Exactions: Demands of conditions that zoning authorities place on developers to approve bdlg permits, reasoning that condition will offset burdens placed on community by dev. Two-part test to determine if an exaction is a taking – if yes to both – no taking:

1. Essential nexus exists b/t state interest and exaction?

2. Does the degree of relationship b/t exaction and projected impact of proposed development amount to a rough proportionality?

i. Dolan v. City of Tigard: State interests were flood control and traffic reduction. Exaction was condition on P’s reconstruction permit that P dedicate portion of prop w/in floodplain for improvement of city’s storm drainage system and additional strip for pedestrian bike path. Court took more affirmative steps to narrow rule for exactions (rather than deferring to legislature like in Kelo).

a. Essential Nexus: Ask whether state interests are legitimate and exaction at least remotely relates. Here, flood control and traffic reduction are legit, and obvious nexus b/t flood control and limiting dev on floodplain, and traffic reduction and bike paths.

b. Rough Proportionality: No precise mathematical calculation is required, but state must make some individualized determination that the exaction is related in both nature and extent to the impact of the proposed dev. Here, city has not made ind determination why a public easement taking away all of P’s right to exclude
(rather than just a limit on development) for portion of floodplain is needed for flood control. Also city just said “pathways could offset traffic” – not sufficient. City must make some effort to quantify relation.

h. **Temporary Takings:** Regulatory taking that is *not* permanent, either because started as temporary or because invalidated by courts and dropped by govt after takings proceeding.

1. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency:* Regulation was a temporary 2-year moratorium on development while council drafted plan to control future development on Lake Tahoe shoreline. Two issues: 1) what’s the denominator to measure loss of econ use? 2) Does *per se* rule of Lucas apply to temporary regulations?

   i. Majority says **Denominator is whole prop (for temp takings: perpetuity)** because otherwise every delay in development would be a “taking”. **Dissent says denominator question is still unsettled and should be the part (for temp takings: temporal slice).**

      a. **Note:** if P had a 1-year lease rather than fee simple, then even a temporary 2-year regulation would be a “taking” of the whole / 100% deprivation of economic use.

   ii. **The *per se* rule of Lucas does not apply to temporary regulations – must only use factor analysis** because taking “one strand” (time of reg) of bundle of rights (perpetuity) can never be 100% deprivation.

      a. If by factor analysis, the temporary regulation is a taking, then govt must compensate for period before regulation is invalidated / repealed (*First Eng*).

2. *First English Evangelical Lutheran Church v. County of Los Angeles:* Assume there is a taking. **Govt must pay compensation for period of trial before court determines whether a regulation is a taking.**

   i. Invalidation of a regulation after trial may convert it from a permanent to a temporary taking but does not relieve govt of the duty to provide compensation during which taking was effective.

   ii. **Rule applies to where the temporary regulation had in fact constituted a “taking”** – not simply delay in obtaining permit, etc.