TRESPASS

**Elements**
- unprivileged (no consent, not justified by necessity or public policy)
- intentional (not to violate, but to be there; must be voluntary)
- intrusion
- on property
- possessed by another

**Remedies**
- damages
- injunction/enjoinment
- ejectment (if a squatter)
- declaratory judgment

**Rules**
- use property so as not to injure others rights (*sic utere tuo ut alienum non laedas*)
- SCOTUS: there is an absolute right to exclude, esp. regarding free speech (*Lloyd*)
- NJ: states can grant more rights re: free speech on private property (*NJ Coalition*)
- public policy may trump this right (*State v Shack*)
- right to exclude may be subject to reasonableness (*Uston, Schmid*)
- more open to the public, more difficult to exclude people (*Marsh*)

**Cases (most rights to least rights to exclude)**
- *Lloyd v Tanner* (SCOTUS): free speech not protected by Constitution on private property, concern that forcing businesses open would be a taking, control
  - followed by *United Food/AFL-CIO; Hudgens v NLRB*
- *Madden v Queens Co*: absolute right to exclude anyone, even arbitrarily
- *Uston, Schmid*: reasonableness
- *State v Shack*: limited by public policy
- *NJ Coalition*: NJ extended rights beyond *Lloyd*
- *Marsh v Alabama*: company owned town is a public place

EASEMENTS/LICENSES

**Licenses**: generally are revocable at will of owner, except when reliance/investment has occurred

**Express easements**:
- Appurtenant: connected to the actual parcel, runs with the land (*Green v. Lupo*)
- In gross: connected to person, may or may not be transferrable depending on grantor intent (*Green*)
- Exclusive & apportionable: usually in commercial situations, grantor gives up right (*Cable*)
- Modifications: only to extent that follows grantor’s intent, servient has undue burden claim (*Cox*)

**Implied easements (equitable exceptions to SOF)**
- Prior use: easement reasonably necessary for use/enjoyment of dominant estate from previously unified parcels (*Granite Properties*) ←think easements by reservation or by grant
- By necessity: grantor impliedly conveys/reserves that which is necessary to put property to beneficial use in spite of express provision (*Finn*)
- Prescriptive easement: fulfilled by adverse possession elements (*Community Feed*)
- By estoppel: license granted leads to investment and reliance upon continued access (*Holbrook*)
TYPES OF NOTICE:
Actual: you are told about it
Inquiry: you have asked or should have asked about it, investigated in local registry of deeds
Constructive: you can see it for yourself

ADVERSE POSSESSION
elements:
ACTUAL POSSESSION: as an average owner would occupy
OPEN/NOTORIOUS: notice to reasonably diligent owner, quick investigation (fence, structures)
EXCLUSIVE: cannot be shared with owner or public, access granted consistent with average owner
CONTINUOUS: uninterrupted, as average owner (can be seasonal) \( \rightarrow \) can use TACKING
ADVERSE/HOSTILE: non-permissive, claim of ownership \( \rightarrow \) killed by permission
FOR STATUROTY PERIOD

cases:
Brown v. Gobble: tacking case, only need to show land was conveyed by previous AP owner
Nome 2000: actual use/continuity case, got AP and potentially prescriptive easement

PRESCRIPTIVE EASEMENT
Actual use (possession not required)
OPEN/NOTORIOUS
CONTINUOUS
ADVERSE USE
STATUTORY PERIOD

cases
Community Feed: exact parameters of easement not required, acquiescence can mean no permission

REAL COVENANTS/EQUITABLE SERVITUDES
elements:
RC: -writing
- intent to run with land
- touch and concerns land
- privity of estate
- damages: money or injunction

ES: -writing
- intent to run with land
- touch and concerns land
- notice
- damages: injunction ONLY

terms
changed conditions: restatement 3rd provides that covenants will not be enforced if drastic changed conditionals render the benefit to the dominant state insignificant.
relative hardship: covenant will not be enforced if harm caused by burden to servient estate considerable outweighs the benefit to the dominant estate.
how to terminate: acquiescence, abandonment, unclean hands (\( \Pi \) also violates), estoppel, laches (ignored for less than period needed for prescriptive rights), marketable title acts, language in instrument, merger (parcels become one), release, or prescription.

rules
- Writing/intent to run with the land
  - Separate analysis for both burden and benefit – both intended to run?
- Touch and concern
  - Traditional: had to relate to land use (ex: size and placement of structures)
  - Modern: REASONABLENESS, not literal (covenant to pay homeowner’s fee)
  - Separate analysis for burden and benefit – both T&C, still flowing?
  - Is either burden or benefit held in gross (then likely no T&C)
• Privity (RC)
  o Horizontal: occurs between original covenanter accompany with land conveyance
    ▪ Can be got around with a straw person
  o Strict vertical: covenanted land interest transfers, original party has no retainer
  o Relaxed vertical: ownership rights transferred but grantor retains future interest

cases
- Davidson v. Katz: non-compete covenant can fulfill T&C, becomes one factor in larger
  “reasonableness” analysis (intent of parties, time/scope, public policy, changes conditions)
- Whitinsville v. Plaza: part of K’s parcel sold to T with covenant not to compete, T sells to P and K
  leases to C, C contemplates competing and P sues to enforce. Preval: T&C, K also bound as landlord
- Blevins v. Barry-Lawrence: courts interpret ambiguous covenant to include group home as
  “residential use,” had characteristics of a family, public policy argument towards alienability
- El Di v. Bethany Beach: changed conditions doctrine; nature of town is such that it no longer benefits
  by burdening land not to sell alcohol (dissent: landowners with notice to covenants should abide)

HOAs and CONDOS

terms
HOAS: created by developer filing declaration prior to sale of first lot, enforces covenants, has bylaws
condos: units owned in fee simple, common areas collectively, creation/enforcement similar to HOA
coops: entire building owned by nonprofit corp, units leased, shared mortgage by all

rules
- balance importance of HOA/condo rules with importance of interest infringed upon (reasonable?)
- owners must give up degree of freedom of choice otherwise enjoyed by privately owned property
- racially discriminatory covenants not allowed (judicial enforcement is state action, violates USCon)

cases
- Appel v Presley: amendments to covenants must be reasonable, can’t destroy development plan
  relied upon by buyers; clauses reserving absolute right to amend are inconsistent
- O’Buck: bylaws governing common areas/external aesthetics are reasonable even if infringe upon
  rights of lessees no multiple TVs); bylaws do not have to predict everything that is prohibited
- Neuman: Statutory right to assemble not protected unless state action, enforcement of bylaws to
  prevent divisive effect on condo community is reasonable, especially if held to a vote
- Shelley v Kramer: racially discriminatory covenant violated 14th amendment rights because
  enforcement constituted state action, even though covenant was privately owned

advocacy
support covenants:
- fits with general community plan
- within boundaries of public policy
- increases property value
- passes reasonableness test (protects aesthetics, common areas, not arbitrary)

strike covenants:
- does not fit with general community plan
- contravenes public policy
- overbroad/overly infringes upon rights of members
- serves interest of majority to strike

RIGHTS TO USE

general liability frameworks
- A’s privilege (damnum absque injuria or absolute right to use): Acton/East precedent for free use of
  water without subjacent support. Friendswood majority for absolute water rights absent malice, negligence or wastefulness; common enemy rule to deal with diffuse water
- Reasonableness (A’s activity allowed as long as resulting harm does not outweigh): Armstrong rule
regarding water damage from developers; Page Co unreasonable nuisance; Prah light; spite fences

- Π’s freedom from harm (strict liability): Noone absolute right to lateral support (natural state not including buildings); natural flow/civil law water rule
- Prior use: Page Co, whether Π came to the nuisance

nuisance: substantial and unreasonable interference with use and enjoyment of land
- consider nature of land, social utility, impracticality of harm, sensitive Π, coming to nuisance
- consider difference with trespass (invasion of possession) and negligence (unreasonable conduct)
- public nuisance: unreasonable interference with public health/morals/peace
- case: Page Co: lack of intent to injure does not bar claim, balanced harm with social utility, prior use

light/air: no absolute right to light and air (see Prah exception for public policy arguments)
- Cujus est solum, ejus est usque ad coelum et ad inferos: “the owner of land owns up to the sky and down to the center of the earth.” Implies a right to build as high as one wishes (no negative easements)
- doctrine of ancient lights allowed prescriptive rights to sunlight, not adopted by US to allow development
- case: Fontainebleau: as long as offending structure serves a useful/beneficial purpose (even if also built out of spite), aggrieved party has no claim; sic utere only means don’t injure lawful rights of another
- case: Prah v. Maretti: public policy reasons to no longer consider sunlight an aesthetic enjoyment, remanded to hold ∆ to reasonableness standard (dissent: Π is sensitive, obligation to protect investment)

lateral support: absolute right to lateral support for weight of land in natural state, not buildings
- obligation to maintain retaining walls to support land runs with the land (not buildings)
- withdrawal of support can’t be negligent, must give neighbor notice (otherwise strictly liable)
- case: Noone v Price: ∆ only had obligation to maintain wall if deterioration was causing natural land slippage, Π had to prove land slippage was not due to weight of house
- case: Friendswood dissent: depletion of groundwater led to loss of lateral support, ∆ should be liable

subjacent support: traditional rule provides absolute right to withdraw water even to point of neighbor’s subsidence; statutory law may regulate well spacing, liability for malice/negligence/waste
- case: Friendswood upheld ∆’s privilege, but in future no absolute immunity from liability

diffuse surface water: reasonable test weighs traditional common enemy rule with natural flow rule
- common enemy rule: possessor can get rid of water in any manner even if results in neighbors harm
- natural flow: liability for damages resulting from interference with natural flow of water
- reasonableness: utility of ∆’s action vs. disutility caused to Π’s property, foreseeability of harm, and purpose of expelling the water (general fairness/justice approach)
- case: Armstrong weighed utility of development vs damage to neighboring property; while developer has high social utility, they are making profit, should compensate for neighbors damage

remedies
- dismissal of complaint (∆ wins, Π must bargain out of court to obtain relief)
- damages: compensation for harm already done (∆ continues if willing to pay)
- injunction: ∆ must stop doing activity (∆ must bargain for right to continue outside of court)
- purchased injunction: Π may be asked to compensate for ∆’s financial loss from injunction
- strict liability: ∆ has absolute right activity and injunction would be unjust OR Π has absolute right to freedom from harm and no injunction would be unjust

LEASEHOLDS

RENT: landlord has right to receive rent, to receive premises intact, and to reversion
- tenant breaches and stays: sue for back rent/possession; accept holdover as periodic or sue for possession; self-help; summary process to evict
- tenant breaches and leaves: accept surrender, sue for back rent, re-let; send notice, re-let, sue for
reasonable difference in rent; wait until end of term to sue for back rent; **duty to mitigate damages**
- **cases:** Sommer v Kridel: landlord had notice from tenant, duty to mitigate damages to tenant
  Brachi v Stahl: rent control-based eviction expanded to prevent gay couples from losing tenancy

**OCCUPANCY:** must deliver premises, landlord transfer does not dispossess tenant, sublet/assigning
- right to refuse subletting/assigning subject to reasonableness in commercial leases, not residential
  - **cases:** Kendall v Pestana: follows minority that consent can only be refused for commercially reasonable objection, can’t be arbitrary or attempt to profit from lessee (dissent: parties K as see fit)
  Slavin: residential landlords still have absolute right to refuse consent to sublettors (promote alienability, should not impose an unbargained for reasonableness requirement)

**HABITABILITY:** leases include implied covenant of quiet enjoyment
- **constructive eviction:** landlord’s violation of quiet enjoyment can allow tenant to move out free from liability for rent (traditional: had to move out within reasonable amount of time; modern: do not have to vacate premises, can also claim partial construction eviction (pub pol: housing shortage)
  - **cases:** Minjak: partial constructive eviction claim due to water leaks/construction/sand blasting, court allowed for partial vacancy to count, punitive damages to deter morally culpable conduct
  Blackett: within landlord’s control to noise even if it not their creation, was a consequence of landlord decision to permit bar where it was (no duty to deal with tenants annoying each other)
  - **implied warranty of habitability:** traditionally landlords had no duty to repair/maintain premises, tenant would have to bargain for right to habitable premises. **Modern:** duty to repair and maintain premises (pub pol: tenant does not have long term connection to property, no skills to repairs).
  Landlord must have notice/time to repair; otherwise tenant has variety of remedies (rescission, rent abatement, self-repair and rent deduction, injunctive relief, damages)
- **cases:** Javins: first landmark case, parties obligations should be dependent on their K performance, lessee should be entitled to same premises since they are paying the same rent, housing code

**ZONING rules**
- **rational basis test:** goal in enacting the law is the promotion of a legitimate interest, the law is rationally related to the promotion of that interest (Belle Terre)
  - **strict scrutiny test:** substantially related to a compelling state interest; burden imposed on citizens represents clear government interest (Dinofolo)
  - **5th/14th amendments** provide that private property shall not be taken for public use without just compensation; when ordinances threaten this, must bear substantial relation to public interest
  - **prior nonconforming use:** allowed, unless there is a substantial change in premises (Parillo)

**cases**
- **Belle Terre:** restriction of “family” to no more than two unrelated people in a household was rationally related to desire to keep the neighborhood family oriented (Disset: overinclusive [three unrelated people might cause no harm] and underinclusive [large family could cause same problems ordinance was designed to avoid] – did not fall equally on all members of community
- **Dinofolo:** similar ordinance struck down, states can offer more (but not less) rights than SCOTUS
- **Parillo:**

**ZONING**
**Euclid (US 1926):** 75% loss of economic value not a taking; an ordinance that serves a legitimate public interest and thus does not unconstitutionally deprive plaintiff of protected property rights under 14th amendment, despite substantial diminution in land

**Nectow (US 1928):** lot bisected by zoning ordinance, held that statute impermissibly infringed on constitutionally protected right (does not promote health, safety, convenience; government power to zone is not unlimited, must bear substantial relation to public interest.

**Belle Terre (US 1974):** court adopts rational basis test, found that definition of “family” was rationally related to the goal of the ordinance to keep the neighborhood family oriented; did not involve any fundamental rights of the constitution. **DISSENT:** yes, strict scrutiny was justified, zoning
ordinance infringed upon freedom of association

**Dinolfo (MI 1984):** Christian living group violating a similar “family” ordinance, MI SC disagreed with SCOTUS and said that under MI’s due process clause such restrictions were arbitrary and capricious (although still must be roughly a “family”) – appear to apply strict scrutiny

**PRIOR NONCONFORMING USE**

**Belleville v. Parillo (NJ 1980):** Parillo’s was a restaurant prior to zoning ordinance that made it residential, allowed to stay until it makes renovations to become a disco. Nonconforming uses are LIMITED, courts like to make them conform as soon as possible, against changing that use (even amount of time that something is allowed to be a nonconforming use can be too long)

**VARIANCES**

Three VA cases (Cochran, BZA only has authority to grant variance to avoid an unconstitutional result, no variance shall be authorized unless it finds strict application would produce an undue hardship (strict, no economically viable use of property) OR would interfere with all reasonable beneficial uses of the property *taken as a whole*.

**TAKING:**

*elements:*
1) Taking
2) for the public use (SCOTUS: some public purpose)
3) without just compensation

*terms:*

**police power:** when the state acts within the legitimate interest of police power, infringement on private property is *damnum absque injuria* – damage without redress

**eminent domain power:** power to take or condemn private property, paying owner just compensation, when property is then transferred to some use designed to further the public welfare

**spot zoning:** where land use decisions arbitrarily single out a particular parcel for less favorable treatment than surrounding parcels

**per se test**
1) has all economic value been lost?
2) is there a permanent physical invasion?

**ad hoc (Penn Central) test**
1) character of government action
2) protection of reasonable, investment-backed expectations
3) economic impact of the regulation on the particular owner (weigh private/public interests)

**regulatory taking vs. legitimate gov’t use**
- efficiency: weigh gains from public project against cost (*Kelo*)
- consider costs of settlement, “demoralization costs” if victims think no compensation is unjust
- distributive justice: whether regulation causes a loss that individual should bear as a member of society for the good of the community as a whole

**PER SE takings**

**PruneYard (US 1980):** CA SC interpreted state constitution to entitle citizen to exercise free expression on private property (more rights than granted in *Lloyd*). *Not every government action that causes an injury is a taking.* Dissent: gov’t is limited, cannot abolish rights to exclude, violates 5th Amendment. Concurring: state can’t force a person to affirm belief he doesn’t hold.

**Loretto (US 1982):** NY statute provides that landlord must permit installing of cable in a building; Loretto has purchased building whereby previous owner granted such permission; holds that it is a taking no matter how small; permanent physical intrusions by government are a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit
- denies owner right to posses occupied space
- no power to exclude from possession/use of that space
-denies owner power to control use of property
-qualitatively more severe than regulation of use of property

**Pumpelly (1872):** statute authorized canal company to build dam, which flooded Π's land; per se taking of property. State must compensate when it destroys all value of property or inflicts irreparable/permanent injury.

**Causby (1946):** military aircraft flew so close to ground that Π's house was uninhabitable, impossible to operate farm; per se taking, even though airspace is a public highway, "landowner must have exclusive control of immediate reaches enveloping atmosphere."

**Yee (1992):** anti-eviction law allowing mobile home owners to continue renting land in mobile home park even after end of lease terms is not a per se taking, hinged on initial invitation to occupy land, when you voluntarily open up property to occupation of others there is no forced physical invasion

**DEPRIVATION OF ALL ECONOMICALLY VIABLE USE**

**LUCAS (1992):** Per se taking. 5th amendment violated when land use regulation does not substantially advance legitimate state interests OR denies an owner all use of land. If state seeks to sustain a regulation that deprives all viable use of land but wants to avoid compensation, must show that prohibited use of land was not part of owner’s title anyway (nuclear facility on fault line)

**PALAZZOLO (2001):** case discusses what the denominator is when determining whether all economically viable use has been lost (Π will argue for fraction, court more likely to consider the whole). The fact that the owner has notice of a regulation upon the purchase of a parcel does not bar a takings claim (would absolve state from compensating for unreasonable statutes)

**TAHOE (2002):** temporary moratorium is not a per se taking, only a 100% diminution in value can be a taking, everything else is subject to the ad hoc test

**AD HOC takings**

**Miller v Schoene (US 1928)** state made a choice between preservation of two classes of property rights, weighed which one was of greater value to the public, did not exceed constitutional powers; *where public interest is involved, courts prefer that interest over individual property interests*

**PENN CENTRAL (US 1978)**
-government actions that are characterized as acquisitions of resources to permit or facilitate uniquely public functions are often been held as takings.
-NOT TAKING by showing there has been a denial of ability to exploit a property interest heretofore believed available for development, diminution in property value alone is not a taking
-landmark laws are not spot zoning, they can still sell air rights and can build on other buildings
-DISSENT: relatively few buildings separated from one another, are singled out and treated differently from surround buildings, no reciprocity or common benefits flowing to/from property

**Keystone v. Bituminous (US 1987):** PA statute required miners leave 50% of coal undisturbed to support public buildings, not a taking even though it deprived miners of all value of the support estate they had purchased (only affected 2% of coal overall, was to preserve public safety by preventing land collapse and preserving drainage (Dissent: should require compensation where government has physically taken identifiable segment of property)

**Kaiser Aetna (1979):** lagoon owner invested money in developing property and connecting it to navigable ocean waters, marina was only open to fee-paying members. Gov’t tried to force public access, would have precluded right to exclude, must compensate or not force public easement

**Nolan (1987):** reg commission trying to force beach front owner to grant public easement across beach as condition of obtaining variance to expand house, found that state could not condition a forced public easement as part of an exaction

**Heart of ATL (1964):** CRA requires no discrimination against race, this is not a taking

**Block (1921):** upheld tenants right to stay in apartment after termination of lease at rents set by rent control (not a taking); statute guaranteed owner rent and eviction controls, justified by emergency housing conditions (legitimate public interest, not a taking, no compensation)
<table>
<thead>
<tr>
<th>Ad Hoc factors</th>
<th>Probably a taking requiring compensation</th>
<th>Probably a legitimate application of police power not requiring compensation</th>
</tr>
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<tbody>
<tr>
<td>Character of government action</td>
<td>-forced <strong>permanent physical invasion</strong> of property <em>(LORETTO, CAUSBY)</em> -<strong>extraction of benefit</strong> for the food of the community of a forced transfer of property rights from A to B <em>(Bannitt, Hodel)</em></td>
<td>--<strong>regulation of property use</strong> in a manner that achieves an <strong>average reciprocity of advantage</strong> <em>(Euclid)</em> --limitation on property use designed to <strong>protect the community from harm</strong> or to respond from negative externalities <em>(Keystone, Hadacheck, Goldblatt, Mugler)</em> --a choice between incompatible property interests <em>(Schoene, Keystone)</em></td>
</tr>
<tr>
<td>Economic impact</td>
<td>-regulation denies owner <strong>all economically viable use</strong> of land <em>(Lucas)</em> -the regulation <strong>destroys almost all the value of the property</strong> in a manner unjustified by the public interest</td>
<td>-regulation leaves owner with an economically viable use of the land or a reasonable return on the owner’s investment <em>(Keystone, Penn Central, Pennell, PruneYard)</em> -diminution in value, even if great, is justified by a sufficiently strong public interest in protecting the public from harm <em>(Keystone, Hadacheck, Goldblatt, Mugler)</em></td>
</tr>
<tr>
<td>Interference with reasonable investment-backed expectations</td>
<td>-interferes with <strong>vested rights</strong>, like investments based on reasonable regulatory approvals or laws unless those regulations can be justified as preventing a nuisance or other harm caused by the property use <em>(Kaiser Aetna)</em> -interferes with an existing <strong>present use of the property</strong> <em>(Wilton)</em></td>
<td>-<strong>imposes an opportunity loss</strong>, prevents owner from realizing the benefits of contemplated future use <em>(Penn Central)</em> -change in law is one that could or should have been anticipated such that the owner’s <strong>reliance</strong> on the continuation of prior law was unreasonable -regulation of a contractual relationship rather than a forced transfer of property interests from one person to another <em>(Yee, Pennell, Block)</em></td>
</tr>
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**EXACTIONS**

**DOLAN (1994):** government may not require a person to give up a constitutional right (i.e. right to
receive just compensation when property is taken for public use) in exchange for a discretionary benefit conferred by government.

- **Essential nexus test**: between legitimate state interests and condition exacted by city
  - **generalized test**: a general proportionality as to connection between interest and condition
  - **specifically attributable**: if no direct proportionality, exaction becomes eminent domain
  - **must have rough proportionality** between condition and impact on land use

**PUBLIC USE**

**KELO (2005)**: state may transfer property from one private party to another if future use by public is the purpose of the taking. *Broad deference* to legislative determination of public use. Promoting economic developing is a long accepted function of government. Once public purpose is determined, legislature can decide amount and character of land to be used.

**Parker (1954)**: court holds community redevelopment plans need not be on a piecemeal basis, can be construed as a whole; evaluate entire plan to see if it is in public interest.

**Midkiff (1984)**: purpose of eliminating social and economic evils of land oligopoly qualified as a valid public purpose

**TEST:**
- public benefits substantially outweigh private nature of land's use
- property cannot be taken unless nature of property justifies the taking
- public purpose could not be achieved in any other way than by taking owner's property
- public use = public ownership OR used by public