Property Outline

Generally
Rules will be over & under inclusive
Majority Rule - required
Default Rule - can be contracted around (assumed general intention)
Penalty Default Rule - penalize the party that in a better position to make the agreement clear
Sympathetic dfs shld be treated the same as unsympathetic dfs, but there s always some amt of prejudice
Past practice sets a precedent that can be relied on (unless done w/ a disclaimer)
Legislature is better situated to make some rules - public policy
  • representatively elected
  • can consider an issue as a whole (form a committee)

Property Rights
Property rights promote peaceful society, certainty & investment & efficiency
The most basic right is the right to exclude (followed by right to possess)
Factors of ownership: First in Time, Possession, Might, Authority, Need
Bona Fide Purchaser (for value) - creates good title from voidable title if doesn t know/hrkt it not good
Property rts (at least the right to sell) are not extended to body parts (Moore v. Regents)
First in Time - certainty, consistency, efficiency, favors entrenched interests, not inherently right
  • may defer to local customs, but they have problems of externalities & notice

Externalities - inefficient by definition, can be positive or negative (more common)
Coase Theorem - efficiency is maximized no matter who the right is allocated to (if no TC/BC)
  • free rider - no one wants to pay if it s free
  • holdout - everyone wants to get the best deal
  • bilateral monopoly - both parties try to extract more value at the expense of agreeing
  • efficiency is not the only concern - issues of fairness

Locke - property rights come from mixing labor w/ things, as long as there s no scarcity
Demsetz - communal property (no one has the rt to exclude) - works fine unless there s scarcity
  • more likely to work in a small, tight knit community (enforceable thru community pressure)
  • private property ensures the owner bares (more of) the full cost of his decisions
Hardin - tragedy of the commons - communal property doesn t internalize externalities
  • leads to over consumption (overpopulation)
  • tragedy of the anti-commons - too many people have the right to exclude, leads to deadlock
    • efficient uses can be denied for non-efficiency reasons
Goffman - property helps define personhood
Radin - property as personhood
  • personal (part of one s being) v. fungible (easily monetized) - a continuum
  • personal property shld be protected even to the extent of redistributing fungible property
**Friedman** - political pwr is concentrated; econ pwr is diversified (acts as a check on pol pwr)
**Sunstein** - no freedom w/o economic independence (can’t go against the gvt if you depend on it for your livelihood)

**Estate in Land**
New estates cannot be created
Restraints on alienation (other than the fact of the contingency in defeasible fees) are prohibited
- except for charitable donations (non-commercial motive)
- alienability & ^efficiency (sold to who will use it best)
  - but the owner might not transfer if he can’t put a limit on alienation

**Fee Simple Absolute** - absolute ownership, potentially limitless
- DDA no FI
- if not specified, cts will presume a FSA
  - efficiency - don’t have to worry about waste, don’t have to share profits w/ future interest holders

**Life Estate** - measured by a life (not nec the tenant≠)
- Alienable only
- From O to A for life, then to B if B survives A@ A has a LE; B has a cont remainder; O has a reversion

**Reversion** - grantor retained, automatically vested

**Remainders** - other retained
- **Vested** - other is known/ascertainable at the time of transfer
  - indefeasibly vested - *certain* to become vested upon A≠death
  - subject to open - class may expand (eg A≠children@ B has a child at conveyance)
    - **Rule of Convenience** - class will close as soon as any member can take possession
      - efficiency - don’t let land lay idle b/c class still open
    - subject to divestment - remainderman may be divested on a condition *subsequent*
- **Contingent** - others are unascertainable, or it will vest on some event (other than A≠death - a condition *precedent*)
  - if still contingent at the time of transfer, grantor will hold title until the contingency is satisfied
    - efficiency - don’t let land lay idle b/c contingency hasn’t been satisfied yet

### Deferable Fees

<table>
<thead>
<tr>
<th>Deferable Fees</th>
<th>Grantor</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Automatic</strong></td>
<td>FSD (PoR) - To A as long as...</td>
<td>FSEL (EI) - To A, but if... then to B</td>
</tr>
<tr>
<td></td>
<td>LE (Reversion) - To A for life</td>
<td>LE (Remainder) - To A for life then to B</td>
</tr>
<tr>
<td><strong>Possible</strong></td>
<td>FSCS (RoR) - To A, but if... O will have the rt of reentry</td>
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</tbody>
</table>
FS Determinable (Possibility of Reverter); FS subject to an Executory Limitation (Executory Interest); FS subject to a Condition Subsequent (Right of Re-entry/to Retake)
All Deferable fees are DDA
Watch out for **language indicative of purpose** (v. language of limitation)
Rule in Shelley v. Case - an present estate transferred to A and a remainder transferred to A's heirs = a FSA for A

- *efficiency* - greatest incentive to be productive if owner doesn't have to worry about future interest holders

### Concurrent Ownership
Each cotenant has the right to possess the whole

- *efficiency* - land will not be idle if either owner can use it

**Ouster** - one cotenant wrongfully excludes the other

- can be remedied by damages (rent) or partition, but not by ejection
- *rights* - enforces cotenant's right to exclude

Rents from 3rd parties must be split between cotenants (according to % share of the property)

- *equity at the expense of efficiency* - less incentive to rent if cotenant doesn't get all the rent

A cotenant is only liable for rent to the other cotenants if there's an agreement between them, or if he ousted them

- *efficiency* - land will not be idle if either owner can use it
- *rights* - protects the right to contract

Each cotenant must pay his % share of mtg/RE taxes, etc

- *equity* - no free riders (rents received are shared)

Cotenants cannot demand contribution for repairs/improvements, but they will be considered when property is partitioned

- *efficiency* - cotenant must sufficiently value the improvement - can shift part of the cost to other cotenants

**Partition** - in kind or by sale by the owners' % interest

- ct w/ decide by finding which gives the best overall result
- in kind is favored, by sale is more common
  - *rights* - protects personal property at the expense of alienation
  - *efficiency* - lower TC, but sale wld ensure land gets to those who value it most

### Tenancy in Common (TiC)
- joint tenants w/o right of survivorship

- DDA
- each owner has a fractional share (of the whole)
- TiC is presumed unless otherwise stated
  - *alienability* - JT limits inheritability

### Joint Tenancy (JT)
- w/ right of survivorship

- *Alienable only*
  - passes to remaining tenants when owner dies (% share is divided between JTs)
  - passes as TiC when transferred (can be done unilaterally w/o a straw; remaining tenants are still JTs; a lease doesn't count as a transfer)
  - *efficiency* - allows inheritance w/ minimal TC
• **Four unities** (mostly just a formality)
  • must take in the *same instrument*
  • at the same *time*
  • with equal, *undivided shares* and
  • the *right to possess* the whole,

**Tenancy by the Entirety** (TbE) - w/ right of survivorship
• RoS can≠be severed unilaterally (can be severed by alienation (same as JT))
  • *rights - restricted rights in return for certainty abt the status of the cotenancy*
  • can≠be taken by the creditors of one spouse

**Landlord Tenant Law**
T must pay rent & cannot commit waste (including removing fixtures)
• *efficiency - L has to know that T won≠destroy the premises*

L≠remedies when T abandons the property:
• sue T for rent as it comes due
• relet the premises & hold T accountable for any loss
• sue T for damages & unpaid future rent
• accept the abandonment as a surrender

L cannot:
• use self help (unless T abandons), **must** use summary proceedings
• evict in retaliation (mandatory rule)
• *rights restricted to ensure peaceful community; Ls are usu better able to use the courts*

L has a duty to mitigate (assumed not a lost volume - RE is unique)
• *efficiency - T shld be allowed to breach w/o fear of excessive penalty; don≠want to let land lay idle; L is better suited to find a new T*

If L sells the property, the sale must be subject to any existing leases
• *efficiency - T must have assurance that he won≠be kicked out on a whim*

If L requires his consent for sublease/assignment, he will be held to an RP std, unless otherwise stated (default rule)
• *efficiency at the expense of rights - make sure the land is not idle; L is least cost avoider*

Modern trend toward seeing covenants as dependant obligations - T stops if L stops
• *equity - not fair to make T pay for uninhabitable premises*

**Surrender** - T & L agree to end the lease (and all obligations under it)

**Abandonment** -
1. T vacates
2. with no intent to return
3. and doesn≠pay rent

**Term of Years** - termination date is set by the lease (no notice required)
• can be a set date or a formula to calculate a date

**Periodic Tenancy** - continuous (must give notice equal to one period, or 6mos if period ≥ 1 yr)
generally, 30 days notice is now acceptable

**Tenancy at Will** - no fixed period, terminates when either T or L wants (or dies)
- not transferrable
- it’s possible that only one party has the right to terminate

**Tenancy at Sufferance** - **holdover** tenant who hasn’t been held to a new term yet
- may be at double/triple rent
  - rights - T is hindering L’s right to exclude & shld have to pay for it
- if rent is accepted by L, T is bound to a new term (same as previous term, up to 1 yr)

**Assignments** - T transfers his entire interest
- A is in privity of estate but not contract w/ L
- T is in privity of contract, but not estate w/ L
  - all covenants of the lease (inc. rent) are enforceable by L on T & A or by T & A on L
- A can enter side agreement w/ L to establish privity of contract (**belts & suspenders**)

**Subleases** - T keeps some interest - acts as a new L to S
- S is not in privity of estate or contract w/ L
- T is in privity of estate & contract w/ L
  - L can only enforce covenants on T, not S, but T can then sue S
  - unless L can prove he’s a 3rd party beneficiary of the lease from T to S
  - **efficiency** - T shld be allowed to alienate & shld be held accountable for that alienation

**Implied Warranty of Habitability** - L must keep premises in habitable condition
- mandatory rule (CQE is too)
- often goes by housing code
- usually have to provide: **heat, running water, plumbing, safe kitchen appliances & sound structural conditions**
- applies to residential leases only - concern abt equal bargaining position, not externalities
- Ls are in a better position to repair the premises
- T’s remedies:
  - move out & terminate the lease
  - repair & deduct the cost of repair from rent
  - get an injunction to force L to repair
  - stay & sue (can sue for punitive damages also)
  - withhold rent (entirely or partially)
    - if T withholds entirely & doesn’t vacate, cld be showing there is some value in the property
  - **equity** - T isn’t as able to renovate/repair as L; T is probably in a worse bargaining position than L; L is least cost avoider; limits L’s externalities

**Covenant of Quiet Enjoyment** - L can’t interfere w/ T’s use/enjoyment of the premises
- interference has to be substantial (regularly occurring, not nec permanent)
- T must give L notice & time to fix
- T must vacate (modern trend is against this) - **constructive eviction**
  - applies to residential and commercial leases - concern abt externalities, not bargaining positions
  - efficiency - T shld be able to use property w/o fear of L internalizing interference; limits L externalities

**Rent Control** - ceiling on amt of rent that can be charged & limits on when it can be changed
- main goal - affordable housing
- main problem - often results in a housing shortage (makes it less profitable to be a landlord)
  - also hinders Ls to exclude & forces Ls to subsidize housing
  - personal - allows Ts to keep personal property (at the expense of L fungible property)

**Waste** - a co-owner cannot interfere w/ another co-owner’s expected value of the land
**Voluntary/affirmative** - overt conduct that diminishes value
**Permissive** - neglect - lack of maintenance
**Ameliorative** - increases value, but goes against cotenant’s expectation of value
Can’t unreasonably use up the resources
- efficiency - L must be able to know that T won’t destroy the property; forces T to internalize an externality

**Nuisance**
- Public - interference w/ general community interests or the comfort of the public at large
  - doesn’t necessarily involve land use
- Private - owner’s land use substantially & unreasonably interferes w/ a neighbor’s land use
  - reasonableness determined by balancing competing interests, including:
    - extent & character of the activity, the harm, & the interference
    - suitability of pl’s & df’s uses to the area/community
    - relative burden on pl v. on df to avoid the harm
    - social value of df’s conduct
    - first in time
  - efficiency - internalizes externalities
Injunction is more likely to be issued when cost of stopping activity (to society overall (includes cost to df)) is less than the amt required to compensate pl
- efficiency - overall benefit to society is maximized
First in time - if nuisance was already there, pl shld have paid less for the property & shldn’t be awarded a windfall (balance equities Spur Industries - S had to leave, but D indemnified)

**Property Rule** protection - rt may be for sale - injunctive relief
- rights - most efficient outcome is possible, but not guaranteed
**Liability Rule** protection - forced sale of rt - damages
- efficiency - reduces TC, eliminates holdouts/bilateral monopolies

<table>
<thead>
<tr>
<th>Protection given to pl</th>
<th>Protection given to df</th>
</tr>
</thead>
<tbody>
<tr>
<td>Property Rule</td>
<td>injunction - df has to buy pl out to</td>
</tr>
<tr>
<td>continue</td>
<td>buy df out to get him to stop</td>
</tr>
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<tr>
<td>Liability Rule</td>
<td>damages - df can continue if he pays damages (must stop if he doesn’t)</td>
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</tbody>
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Factors in deciding which remedy to use:
- TC
- distributional concerns
- budget concerns
- least cost avoider
- the ability to calculate damages

**Servitudes**

**Easements** - property rights that allow the holder to use another’s land
- *efficiency - both sides get value*

**Appurtenant** - benefits the holder in the enjoyment of his land
- transfers automatically w/ the dominant estate
  - *efficiency - transferees don’t have to renegotiate - allows certainty in the sale*
  - if dom est is subdivided, the easement is transferred w/ each parcel
  - unless it overburdens the serv est

**In gross** - benefits the holder directly
- not transferrable unless for a commercial purpose

**Licenses** - permission to go on land, can be revoked at will

**Location** of the easement can usually be changed (by serv owner) unless no harm done to dom owner

**Scope** of the easement can change as long as it doesn’t unreasonably change the burden on the servient owner
- usually turns on the expectations of the parties at formation
- *rights - protects dom owner’s interest in the easement*

If created expressly, can be any duration (similar to estates in land)

Easements (other than by necessity) can **terminate**:
- by agreement
- by the terms of the conveyance (can be conditional)
- by merger (serv & dom estate become owned by the same person)
- by abandonment (clear indication required - more than just the failure to use)
  - balances efficiency & rights

**Implied easements** - enforce parties’ reasonable expectations at the time of severance
- *rights - only limited by what the original parties intended anyway*
- efficiency - allows best use of the land

**Implied by Prior Use:**
12. the use existed at time of conveyance
13. unity of ownership severed in the conveyance
14. use was apparent at the time of severance (gave notice) and continuously apparent thereafter
15. the easement is necessary for enjoyment of the dom est

**Implied by Necessity** (lasts only as long as the necessity lasts):
1. unity of ownership severed by the conveyance,
2. necessity (for egress & ingress) existed at the time of severance and has continued since
3. the easement is *strictly* necessary (for access to the landlocked parcel)

**Easement by Estoppel** (irrevocable license):
4. servient owner consented to the use and
5. knew/hrkt dominant owner would invest in the land in reliance on that consent, and
6. dominant owner actually invested in the land

**Prescription** (AP for easements, recognizes TO as TO):
7. Actual (& exclusive in some jurisdictions),
8. Hostile,
9. Open & notorious, and
10. Continuous use
11. for the relevant Time limit (statute of limitations)

**Covenants** - contractual agreements that run w/ the land
- *efficiency* - allow parties to contract away their rights & their successors' rights to enhance the value of the property
- *certainty* - subsequent purchasers don’t have to wonder what the restrictions could be

Covenants are never implied - have to arise out of a written agreement

**Requirements** for covenants to run:
1. intent to bind successors
2. touch & concern
3. horizontal privity (A to B (grantor-grantee, L-T, not just neighbors)), and
4. vertical privity (A to A1 (not AP)) - not needed for a *benefit* to run

**Equitable Servitudes** - same as covenants, but no privity is required for it to run, only *notice*
- notice can be actual, constructive or inquiry
- *negative reciprocal easement* - implied b/c was contained in all other (similar) grants in a common scheme & owner had notice

Covenants can be *terminated* by:
- merger (common ownership)
- release - agreed by both parties
- the terms of the covenant (restrictive durations)
- abandonment
- widespread noncompliance (unclean hands)
- estoppel
- changed circumstances that reduce/eliminate value of the covenant (frustration of purpose)
  - but it doesn’t matter that the land is more valuable if the covenant is broken
  - *efficiency* - promotes best use

**Zoning**
- *efficiency* - controls externalities

Arises from police pwr transferred to th municipality by the state’s enabling act
- *Public welfare* - very broad

Unlike nuisance, zoning allows parties to accurately predict the outcome of their behavior
Can be a taking if it deprives use/frustrates investment-backed expectations w/o compensation

Cumulative zoning - higher uses allowed in lower zones

**Nonconforming uses** - uses that are made illegal by the passing of a zoning ordinance
- not allowed at all, or
- grandfathered in
  - permanently, or
  - limited by **amortization** - (not a taking if amortized over a reasonable amt of time)
    - reasonable determined by: type of use, amt of investment, useful life of the asset, harm/benefit to community, other possible uses
- ability to continue runs w/ the land - can act as a monopoly
- must be an existing use, **not just a potential use**
- terminated by abandonment/disuse

**Variance** - individual exception (**area** or **use**) - can be conditional
- allowed if there is an undue hardship on the owner & no public harm in granting
  - **undue hardship** - inability to use/need to change for health reasons
- won’t be allowed if hardship is self-imposed (purchase or sale for area variance)
- runs with the land
- efficiency - allows flexibility to increase overall benefit to society; allows owner to keep the value of the property

**Special Exceptions** - exceptions built into the zoning ordinance
- efficiency - reduces TC (don’t have to apply for a variance)

**Zoning Amendments** - one parcel rezoned - doesn’t have to be the petitioner’s parcel
- have to show there was a mistake in the ordinance or that circumstances have changed
  Cts will be deferential to board’s decision if it sees the board as having acted legislatively (not judicially)

*Developing* communities have an **affirmative** obligation to ensure adequate low & moderate income housing - general welfare of the community/state as a whole
- personhood property protected at the expense of lower taxes

**Takings**
Gvt can take private property for public good if it gives just compensation
- efficiency - gvt is able to get around TC & holdouts

Public use - a use to promote the general welfare - justified by police pwr
  Cts will be deferential to legislature’s determination of public use, unless it’s an egregious error

**Just Compensation** - usu defined by FMV
- distributes the loss incurred for a public good to the public at large
- restrains the gvt - ensures gvt values the property (**efficiency**)
- doesn’t include idiosyncratic value (too difficult to determine, cld be too expensive)
- efficiency - owners are compensated for their investments, but
- fungible may trump personal

Takings clause protects the interests of owners (shield)
- and can be used to limit regulation (sword)

**Categorical Takings:**
- **Condemnation** - actual taking of title
• **Permanent Physical Occupation** (of any degree)
  • **Total Wipeout** - elimination of all economic value
    • can≠conceptually sever a part of the property & say its entire value was eliminated
    • gvt can≠leave a token value & say its not a total wipeout
  • certainty - don≠have to resort to a balancing test

**Regulatory Taking** - when regulations go Aoo far@s/t gvt can≠justify not compensating)
  • Decided by balancing the diminution in value of the property against the public value in the regulation, and considering:
    • **average reciprocity of advantage** (an owner may suffer harm for this regulation, but he gets the benefit of this and all other regulations)
    • **suling out** of owner to shoulder the burden of the public good
    • reasonable owner≠**investment-backed expectations** (what rights are left?)
    • whether the use was a **nuisance** that owner didn≠have a right to do in the first place
      • no right, no taking
      • contentious - almost anything can be defined as a nuisance
    • **efficiency** - maximizes benefit to society
  • owner can sue for inverse condemnation even though he took title after the regulation was enacted

**Adverse Possession**

Requirements:
1. **Actual & exclusive** physical possession - can≠share w/ TO (wld argue for permission); can≠allow trespassers (other APs)
2. **Open & notorious** - gives notice; must be readily apparent (can≠require a survey)
3. **Hostile** - no permission (no tenants)
4. **Continuous** - transfers allowed, gaps/subsequent APs not
5. for the proscribed **Time** limit - won≠run if owner is incapable at the time of inception.
6. **Claim of Right** - AP must believe he owns, or not or its irrelevant

Use must be same as a typical owner (applies to O, C & A)
Transfers by TO don≠break the time limit (purchaser shld inspect)
Doesn≠apply to gvt lands
Doesn≠apply to incapacitated owners (unless incapacitated after AP started)
**efficiency** - rewards AP ≠use, punishes TO for sleeping on his rights (rationale, but not a requirement)

**Law of Finders**

Finder has superior title to all others except true owner & any previous finders

$ efficiency - finders can use found property as their own

$ equity - TO still has a superior claim

Lost (unintentionally placed) - belongs to the finder (possibly to owner if found in a small private place)
**Mislaid** (intentionally placed) - belongs to the owner of the (public) place where it was found

$equity - facilitates TO finding the thing

**Abandoned** (intentionally given up) - TO has no rights, belongs to the finder

*efficiency - finder can use the property for productive use, but not to the exclusion of TO≠rights*

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Exam tips:

Look for additional (non-obvious) means to argue a position

Explore both sides of the argument - avoid conclusions

Detail your reasoning (inc. policy/theory)

Write a good thesis/roadmap paragraph