WHAT IS PROPERTY AND HOW IS IT ACQUIRED?

What is Property?
- Property defines the relationships between people and things
- A bundle of rights including the right to sell, use, destroy, and exclude others

How is Property Acquired?
- Discovery, Capture, Find, Creation

ACQUISITION BY DISCOVERY AND CAPTURE (AND TRAGEDY OF COMMONS)

Acquisition by Discovery or Conquest:
- The “sighting” or “finding” of hitherto unknown or uncharted territory
- Discovery is not that important today, but was in earlier times
  - Marshall wrote, “Discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or conquest.” JvM
- (EM) Johnson v. M’Intosh: S.Ct faced rival claims for ownership of land in Illinois, Johnson’s claim was the last link in a chain of title going back to the Piankeshaw Indians, the aboriginal inhabitants of the land. M’Intosh said his claim was better because it came from the US government, although after the Piankeshaw title conveyance to Johnson. The court held for M’Intosh because the Indians only held aboriginal title, a right of occupancy that could be cut off at any moment by the US, as the successor to the European discoverers of the land. This Eurocentric approach to discovery was supplemented by the idea that the U.S. also derived its ownership by conquest of the Indians.
  - Analysis: There may not be much land left to discover but there is still the same amount to conquer. The fact of conquest as a source of property rights is a reminder of the socially contingent nature of property” Property rights are defined by the society in which they are at issue. Because the Indians, and those who derived titled from the Indians were perceived as a conquered society, their rights were declared to be subservient to those of the dominant society.
  - Notes:
    - Europeans gave the Indians the right to occupy, but reserved for themselves the right to transfer.
- First-in-Time: FIT is a fundamental principle of property law. Efficiency arguments primarily support FIT as a basis for determining how property rights should be allocated. Prior possession or discovery of some “thing” is a specific example of the role FIT plays in property law.
  - Arguments in support of FIT:
    - You are first → You win
    - FIT provides for certainty and security
    - Minimizes conflict
    - Public Peace: not wasting resources trying to take or prevent others from taking something from someone else → resources are put to a more productive use.
    - Creates incentives to be productive:
      - We know we can keep what we have and our efforts will not be wasted.
• At some point, things just need to be settled
• Represents a uniform language for putting others on notice of your claim.

### Criticisms of FIT:
• There is nothing self-evident ethically about FIT. (Efficiency vs. Ethics, Justice)
• The fact that somebody grabs something first should not be recognized as a basis for a property claim (What about people who can’t grab?; What if one person grabs everything?)
• FIT favors those who presently possess (typically, the rule makers)
• FIT may not take into consideration certain distributional considerations among members of society and also elements of equity and fairness.

### Johnson v. M'Intosh & FIT:
• It might be the case that only certain kinds of possession matter, or only possession by certain people.
• It is arguable that the Indians did not possess the land in the “right” way—that is, they did not put the land to a sufficiently productive use or use it in a way that put everybody else on notice of their claim

### Other considerations in FIT:
• Notice?
• But, who gets to decide if the notice was effective?

### John Locke: Labor Desert Theory
- Because you own your own labor, when you mix that labor with something unowned by anyone, you own the resulting mixture
- A possessor, in order to vest in himself in title to some property, must be the first to use the property in a sufficiently productive way. The possessor must adequately “mix” his or her labor with the property. This is based on an efficiency ground (it creates incentives to put items to productive use) and a moral ground (a person owns her body and labor and accordingly owns those things with which she mixes her body and labor.)
- (TP) FIT to possess
- Johnson v M’Intosh: Indians did not mix their labor appropriately with the land, therefore they were not the rightful possessors.
- Radin would say: Property becomes constitutive of ourselves; we begin to associate ourselves with our property; property has a notion of personhood
- Economic Efficiency: Encourages people to be productive so that they see the fruits of their labor.
- Criticisms:
  - How do you know when you have done enough?
  - What about group efforts?
  - Person who labors but loses…
  - Person who labors a little but gets a lot…
  - What is the scope of the right?
  - What if we do not own our labor?

### Capture:
• (EM) Wild animals may be one of the few things that are unowned and susceptible to capture.
- **Actual Possession**: The usual method of acquiring a property right in a wile animal is actually to possess it—dead or alive.

- **Pierson v. Post**: Involved rival claims to a dead fox. For sport, Post chased a fox on a common, unowned land—a wild beach. Before Post had wounded or captured the fox, Pierson intervened, killing and taking the fox, although he knew of Post’s pursuit. The N.Y. Court declared Post did not own the fox until he had physical possession of it. Mere pursuit was not enough. Perhaps pursuit was the labor, but until pursuit produced capture, it wasn’t mixed enough with the fox to create property. The result was defended on the ground that a rule of actual possession would promote certainty and peace, and would spur people to kill foxes (a public benefit in a society that regarded foxes as vermin rather than an endangered species.)

  **Rule**: He who physically captures the animal (more than pursuit or wounding) wins.

  - **Dissent**: 1) it was better to adopt the customs of sportsmen to determine ownership of the fox, and 2) recognition of a property right in wild animals when there is a reasonable likelihood of capture would conduce to more rapid extermination of foxes.

  - **Rule**: He who physically captures the animal (more than pursuit or wounding) wins.

  - **Dissent**: Wanted to have the question submitted to an arbitration of sportsmen. What result, then? Likely that Post would have won because it appeared that all hunters in the region regarded hot pursuit as as giving rights to first possession.

  - **(TP) Locke on Post**: I invested my time and labor in the pursuit

  - **FIT**: FIT to do what? Kill? Capture? Pursue?

  - **Rules vs. Standards**:
    - **Rules**: clear-cut, brighter lines (If you speed, you get a ticket)...the benefit is certainty.
      - Parties can structure around rules
      - Rules are mandatory; cannot contract around them
      - Easier for courts to apply
      - Dark side: rigidity and inflexibility
    - **Standards**: Less certain, serve as guidelines. (You have to drive carefully).

  - **Should there be a rule of capture?**

- **What is Pursuit?**
  - Some kind of property interest in the object at hand
  - A reasonable likelihood that you will capture it
  - Dissent from Post: If there is pursuit and a reasonable likelihood of capture then an individual has a property right.

- **Custom**: When should customary rules pertaining to acquisition of ownership establish the legal doctrine? Customary rules often arise to maximize the well-being of the group creating the custom, to ensure that individuals do not grab benefits for themselves that impose net losses on the group as a whole. Individuals conform to customary rules out of self-interest: In the long run, they will be better off and in the short run deviation from the customs will result in substantial informal sanctions from the group.
(EM) Ghen v. Rich: In the Mass. Bay whaling community of the 19th century, the whalers used “bomb lances” to kill fin-back whales. Each lance was distinctively marked to denote a particular whaler. The whale carcasses sank at death but they floated again several days later. When the carcass washed ashore, notice would be sent to Provincetown of the location and description of the identifying lance. The whaler would then come, remove the animal’s oil and blubber and pay a small finders’ fee. Ghen brought suit against Rich, the successor in interest of the finder of a whale carcass killed by Ghen. The finder had defied custom by selling the carcass to Ghen, who in turn made a profit. The court held that custom determined ownership because the nature of the industry was such that the animals could only be killed without acquiring immediate possession, and that a first physical possessor rule would eliminate all incentive to hunt the animals, thus depriving society of the benefits arising from the industry. Rule: Custom, as long as it is reasonable and valid, is a proper way to establish property rights as law.

Notes:
- In this case, use of the lance serves as sufficient notice
- If actual capture and possession is the rule, people might be of the opinion that it’s not worth it to kill because capture is very difficult
- Custom may reduce cost to the court:
  - Court says custom solves the issue, people with settle matters with custom, instead of in court
- Other Benefits of relying on custom:
  - Institutional competency:
    - Who knows more about whaling? Whalers? Or The Judge?
  - Driving down the cost of litigation
  - Custom is more flexible and can adapt over time
  - Customs are customs because they work
- Drawbacks of Custom:
  - How do customs affect third parties?
    - Do whalers care about other people’s interests
    - What about future generations?
  - There is no overall sense of right and wrong
  - Even with custom, there must be legislation.

What is the role of possession and why does it matter?
- Serves instrumental functions, such as catching whales or foxes
- Notice Function: It must be a sufficiently clear act to put the world on notice
  - Others must have consented → everyone must know the starting position and what others are claiming
  - Facilitates trade and manifests efficiency (by asserting title)
- Reconcile the two
  - Clear Act principle: those acts that put the world on notice also require enough labor to satisfy Locke
  - The act of giving notice is labor in itself
- What is a sufficiently clear act?
- Who is the appropriate audience for notice?
  - Local industry → sufficiently clear act is determined by norms/customs
• Wild Animals
  o Constructive Possession: Wild animals on someone’s land, therefore owner of the land has constructive possession of the animal.
    ▪ This discourages trespassing because trespasser will not get title to an animal that he hunted on owner’s property
  o Why should trespassing be discouraged?
    ▪ Trespassing can lead to violence
    ▪ Incentive: if you put something to productive use, you should have security
    ▪ Protects a sense of privacy
    ▪ Prevents rewards of wrong-doing
  o Relativity of Title: property is a set of relationships among people relative to things
  o Notion of self-help: If Trespasser steals from owner, can owner just go take it back?

• Externalities:
  o Whenever some person makes a decision about how to use resources without taking full account of the effects of using the resources
  o Those costs or benefits that occur when a person engages in some activity that fall on or benefit another party.
    ▪ It is only externality if the actor that causes them does not taken them into account
  o Some negative externalities:
    ▪ Pollution
    ▪ Noisy neighbor
    ▪ If negative externalities are not taken into account, there will be inefficiency
  o Some positive externalities:
    ▪ Actor engages in an activity that benefits outsiders
    ▪ Positive externalities create a situation where people benefit more form doing nothing and under-production results.
  o What is the concern with Externalities?
    ▪ They lead to inefficiencies & an inefficient allocation of resources
  o What do we do about inefficiencies?
    ▪ Try to find a way such that actors internalize the externalities that they create
    ▪ Allocate Property Rights:
      • Give factory owners the right to pollute
      • Give neighbors the right to clean air, non-polluted environment
      • Neighbor buys from factory owner the right to pollute
      • Neighbor will pay as much as he values to clean air
      • As soon s neighbor makes an offer to buy, externalities are eliminated
        o Pollution is taken into account, cost is internalized even before decision is made.
  o Coase Theorem:
    ▪ The initial allocation of property rights does not matter to the ultimate outcome unless there are transactions costs.
    ▪ The ultimate allocation of rights/entitlement does not depend on the initial allocation, so long as there are no transactions costs
    ▪ If the right to clean air belongs to the community and owner values polluting he will be willing to pay community as much as it costs, without impinging on his profits (if he
makes $1000, he is willing to pay up to $999). If Owner has a right to pollute and the value of clean air is worth $500 to the community, owner will not stop polluting because it is worth $1000 to him.

- **From practice problem: Damages to neighbors are less than profits to Farmer Joe**
  - If the neighbors were allocated a right to clean air, then Farmer Joe could offer to pay them for the right to ranch (he could, in effect, buy their right to clean air, etc.) Farmer Joe would presumably end up paying the Neighbors, in aggregate, between the $ of damages to the neighbors and the $ of his profits for the right to pollute. **Result: Farmer Joe pollutes.** What if Farmer Joe were allocated a right to ranch? Then the neighbors might try to pay Farmer Joe for his right to ranch. However, the Neighbors would only be willing to pay up to $ of their damages, but Farmer Joe presumably wouldn’t take less than $ of his profits (in this case higher). **Result: Farmer Joe ranches.** In both cases, Farmer Joe will have internalized the cost of his ranching on the neighbors.
  - **HOWEVER,** This bargaining will never take place if the transaction costs are too high.

- **Transaction Costs:** Costs incurred as a result of organizing a group to fight externalities
- **Free Rider Problem:** Everyone enjoys the benefit of buying the right, even if only one person pays for it.
- **Hold-Out Problem:** The last person to agree to fight externalities (or buy a right) has leverage over the rest of the parties.
- **Bi-Lateral Monopoly:** Everybody wants the best deal

- **Tragedy of The Commons (Hardin)**
  - Things we own in common as distinguished from state-owned property
  - There is some resource to which no one has private property rights. The resources are owned in common by some community and there is no right to exclude or to be excluded from using the commons as you might desire
  - Individual gets all the benefit by sharing a portion of the cost.
  - **Example:** There is a communal forest owned in common by a tribe. X is a member of the tribe and decides to chop down a tree. X gets all the benefit from chopping down the tree, but only bears 1/00 of the cost. As long as there is no scarcity of trees, there is enough to accommodate everyone’s interest.
    - **What happens when the resource becomes scarce?**
      - Individuals are compelled to use the resource in a rush
      - Chopping down of trees will occur at a rate greater than can be replenished
      - One person deciding not to cut down trees does not matter
      - Inefficient overuse of the resource—**Tragedy of the Commons.**
  - Community ownership will lead to exploitation of materials
  - Everything should be subject to the market
  - **Anti-commons:** What if everybody had property rights, who do you negotiate with, who has veto power? Transactions costs?
  - The problem is overpopulation
    - Why? No incentive to not have children.
### Lobster Gangs of Maine:
- Everyone should work together to preserve the resource
  - Makes for high transactions costs
  - May negatively impact the larger community

### Demsetz: Toward a Theory of Property Rights:
- As in the forest example, there are likely to be many externalities, most neg.
- In a commons, each person enjoys the benefits of using it but only shares a portion of the costs. Costs spread over a large pool.
- Results in overuse of the resource

#### What can we do?
- Community members get together and agree to protect the resource under common management
  - High transactions costs: getting everyone together
  - Works best in small communities
- Allocate property rights to each individual (Private Property rights)
  - Each member gets a certain amount
  - A way of internalizing externalities
- Legislation or regulation: gov’t decides what can and cannot be done
  - Gov’t owns the resource and allocates rights to its use.

### ALTERNATIVE THEORIES OF PROPERTY

#### Goffman: Essay on the Social Situation of Mental Patients and Other Inmates.
- Owning a piece of property shows a degree of control, autonomy, self-determination—more than a possession
- People self-identify with their things
- **Having the capacity to own relates to a sense of autonomy**
  - It doesn’t matter what you have, it is just the ability to have
  - Autonomy, self-worth, dignity

#### Radin: Property as Personhood
- Personal property vs. fungible property
- Types of property derive different benefits
- Some property (like money) is a fetish → fungible
- Personal property (like a home) defines our sense of personhood and should not be interfered with.
  - What about welfare, should we guarantee a certain amount of personal property?
  - Rent control: good because it guarantees a home, therefore personhood.

#### Friedman: Diffusion of Political Power
- Competitive capitalism promotes political freedom by splitting power in the political and economic spheres
- Enables one kind of power to offset the other
- Believes everything can be solved by the market and any gov. regs will mess up the market and therefore society in general therefore
- Freedom of property or their transaction is essential to society
Sunstein: On Property and Constitutionalism

- Power of the socialist gov’t comes from right to give and take away property
- When citizens are dependant on good will of gov’t everything they have is privilege, not a right
- Right to property free from gov’t interference is necessary for democracy.
- Economic freedom makes people less dependant on the state.

PROPERTY IN ONE’S PERSON

- (EM) Moore v. Regents of University of California: pits first possession against creation in the context of property claims to body parts. Moore’s cancerous spleen was removed and, without his knowledge or consent, a valuable patented cell line was developed using Moore’s unique “hairy leukemia” cells. The California Supreme Court that there was no cause of action for conversion. The majority said Moore had no ownership because he never expected to retain possession of the spleen. The court’s reasons for refusing to extend conversion to the waster tissue from surgery were that it would chill medical research, the moral issue involved ought to be left to the politically accountable legislature, and Moore still had available to him claims on asserted breach of fiduciary duty by his medical care providers. Moore poses a conflict between Moore’s right of first possession of his body parts and the scientist’s right to own the unique cells developed from Moore’s voluntarily discarded spleen. In concluding that Moore’s spleen was not his property the court was saying only that Moore didn’t own it in a limited sense of having the right to exclusively possess and use. But did he ever have the right to transfer it by sale, as opposed to giving it away? We tolerate a great many limitations on transfer rights by sale; e.g., you can give away your baby, but you can sell her. Presents a conflict between efficiency, fairness, and evolving cultural mores and expectations about commercial profit from one’s body.

- (TP) Rule: Physician is legally required to disclose facts material to patient’s consent; liability based on existing disclosure obligations, rather than an unprecedented extension of the conversion theory, protects patient’s rights of privacy and autonomy without necessarily hindering research. Body parts are not subject to conversion: 1) public policy; 2) it’s a legislative question; 3) The rights due under a fiduciary duty.

- Moore’s Basic Point: Moore has a property interest in his cells and should have the right to control them. It is wrong for his cells to be taken from him and used for profit without his consent.

- Doctor’s work on the cell line: As John Locke would say, I mixed my labor with the line to have it arrive at the point where it is, therefore I have the property right.

- Majority Opinion: Plaintiff could recover for breach of fiduciary duty and breach of informed consent, but not conversion

- Role of legislature: Legislature should provide clarity as to how situations like this should be handled.

- Concurring opinion: Has a problem with the idea of body property rights from a for profit standpoint

- Dissenting opinion: Moore has the right to do with his tissue what the defendants did with it—he could have contracted out to other agencies

- Beginning Questions of Right to Exclude
  - Is it an absolute right?
  - What should the limitations be?

- BUNDLE OF RIGHTS: THE RIGHT TO EXCLUDE
(EM) Jacque v. Steenberg Homes: Court held that a landowner has a right to bar an unwanted trespasser from moving a mobile home across Jacque’s land, declaring that person has a right to “exclusive enjoyment” of his own land “for any purpose that does not invade the rights of another person.”

State v. Shack: Court held that a landowner had no right to bar a poverty agency worker and legal services lawyer from his farm, where they sought to visit a migrant worker who was an employee and tenant of the farmer. Farmer’s right to exclude ended where the tenant’s need for reasonable access by visitors began.

- **Rule (TP):** There is no right to exclude in this case. Title to property cannot impinge in the civil liberties of those on your land (esp in this case because the workers could not effectively leave the land.) *Necessity, private or public, justifies entry on the land of another (trespass).*

- **Importance (TP):**
  - Cannot bar access to government services
  - Farmer does not lose anything by not excluding the service men; he never had a reasonable expectation of the ability to exclude the aids.
  - *The rights at stake for the migrant workers trumps the owner’s property rights
  - “Property rights serve human values. They are recognized to that end, and are limited by it. Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises. The well-being of the workers is the paramount concern of the legal system.”

- **Right to Exclude (TP):** Allowing the people on the land does not undermine property owner’s rights, it simply educates others as to their rights under the law.

- **ACQUISITION BY FIND**

  (EM) The finder’s claim to property depends on whether the property was *lost, mislaid, or abandoned* by the true owner. The policy objectives in finder’s law are to restore property to the true owner; reward honest finders; deliver the reasonable expectations of landowners; discourage trespassers and wrongdoers; encourage the productive use of found property.

  (TP) **General Rule:** Owners who lose their property retain their ownership rights unless the intentionally relinquish them.

  **Lost Property:** Owner unintentionally parts with his property and has no idea where it might be.

  **General Rule:** Finders have a right to possess lost objects with reference to everyone but true owner.

  (TP) **Why is this the rule?**
  - Allocation of resources—don’t want to waste resources on the protection of property
  - FIT: Original owner is FIT compared to everyone else
  - Sense of security in possessions

  **If an item is lost on premises, what right, if any, does the owner of the premises have on the property, as opposed to the finder?**
  - Finder generally trumps over premises owner: Landowner may not have had any control over the item just because he owns the land…may not even know it existed.
  - **EXCEPTION:** Items lost on private as opposed to public area
If lost item is found in a PUBLIC place, the finder trumps the owner of the premises, but if it was a PRIVATE place, the owner of the premises trumps.

**Distinction between private and public:**
- Private: my house, etc.
- Public: Disneyland

**Arguments for Landowner’s Claim**
- He has control of premises and everything on it
- He has a reasonable expectation that he owns his land and all attached to it

**Abandoned Property**
- **General Rule:** True owner of property intentionally relinquishes the item.
  - Look for evidence of intent
- **Between Finder and True Owner, who wins?** Finder wins.
- **(EM):** Rule that finder trumps is not invariable: Trespassers are not rewarded with the fruits of their wrongful behavior, and owners of land where property is abandoned may sometimes have strong and reasonable expectations of ownership of such abandoned property.
- **(TP) How do we know if something is abandoned?**
  - Owner intends to relinquish ownership and demonstrates that intent

**Mislaid property**
- **General Rule:** Something intentionally placed in a particular place and then mistakenly left there
- **Between finder, true owner, and premises owner, who wins?** True owners rights trump all; then premises owners because the true owner is likely to return for his mislaid property to the place it was left.
  - If the goal is to facilitate return to the true owner, premises owner would be the best choice in case of both mislaid and lost property.
- **Distinction** between lost and mislaid property: Property is more likely to be mislaid in a nonpublic place.

**Armory v. Delamirie:** A chimney sweep found a gem in a setting and took it to a jeweler for appraisal. The jeweler’s apprentice removed the gem and refused to return it. The sweep was awarded damages, measured by the value of the finest stones that would fit in the setting, unless the master produced the stone.

**Prior Finders:** Prior finders prevail over later finders.

**McAvoy v. Medina:** If a wallet id found on a barber shop counter it was probably placed there by customer and then forgotten. As mislaid property, it goes to the barbershop owner. But if the wallet is found on the barber’s floor, it was probably dropped there unintentionally by a customer. As lost property it goes to the finder. What about Abandoned Property?

**ADVERSE POSSESSION**

**If the true owner of land fails to start legal proceedings to remove a person who adversely possesses his land within the period of the statute of limitations, the true owner is forever barred from removing the adverse possessor. Because there is no other owner, the adverse possessor has taken title and can obtain a judgment to that effect. The adverse possessor acquires whatever title to the**
property the owner had. The doctrine has two broad requirements: 1) Expiration of the relevant statute of limitations; 2) adverse possession during the limitations period.

- **Elements of Adverse Possession:**
  - **Actual and exclusive possession:** The possessor must actually, physically take possession of owner’s land. Exclusivity means that the possessor has excluded the public and the owner. Adverse possessors occupying without “color of title” must prove that they had “substantially enclosed” or “usually cultivated or improved” the property.
  - **Open and Notorious Possession:** The adverse possession must be visible to any inspector of the property. The true owner would know of the possession if he made a regular visit to his property. Open and notorious occupation serves a *notice* function to the owner that his rights are being violated. It is open and notorious if it is the type that a true owner would make.
    - Some jurisdictions hold that encroachments by one neighbor onto the land of another are not open and notorious if the encroachment is of a small area and is not clearly and self-evidently an encroachment. In such situations, the statute of limitations does not begin to run unless and until the owner has actual knowledge of the encroachment.
  - **Adverse or Hostile:** An adverse possessor must occupy the land without the consent of the owner and with an intention to remain. This means that adverse possessor cannot be there with permission.
  - **Continuous Possession:** An adverse possessor must occupy continuously—without interruption—during the statute of limitations period. This means that the adverse possessor must occupy the land as continuously as would a reasonable and average true owner of the property. If the possessor ever abandons the property, continuity is destroyed
    - **Endowment Effect:** The longer and more continuous my possession, the more I start to value the property as my own.

- **State of Mind of Adverse Possessor (TP):**
  - **Objective Standard:** State of Mind is Irrelevant
  - **Good Faith Standard:** “I thought I owned it.”
  - **Bad Faith Standard:** “I thought that I didn’t own it, but I intended to make it mine.”

- **What Can a Landowner do?**
  - Kick the adverse possessor off
  - Give permission/eliminate hostility
  - Sue adverse possessor
  - Take possession yourself

- **Why Do We Have Adverse Possession?**
  - **Efficiency:** Want property to be used productively/we do not want unused property
  - **Sleeping on their rights:** An owner sleeping on his rights (right to assert ownership and clarify title) should bear the risk of losing his title.
  - The owner may have **ABANDONED** his claim
  - **Radin:** Property is personhood:
    - **Adverse possessor’s claim becomes more personal**
    - When you possess the land for a significantly long period of time, there is justification on the grounds that personal property trumps fungible property.
    - **In Van v. Lutz:** Property is personal to Van; Fungible to Lutz
  - **Endowment Effect** → **Value gained**
**Property Outline**

- **Reward:** Rewards adverse possessor for putting the land to good use

- **How does AP relate to FIT?**
  - Makes property more productive?
  - Provides notice
  - True owner can assert: *I was here first, therefore land is mine.*

- **Van Valkenburgh v. Lutz:**
  - **Rule of Law:** To acquire land by adverse possession, it must be shown by clear and convincing proof that for at least 15 years, there was an actual occupation under a claim of title, for it is only the premises so actually occupied “and no others” that are deemed to have been held adversely. The essential elements of proof being either that the premises 1) are protected by substantial inclosure or are 2) usually cultivated or improved.
  - **Lockean?**
  - Adverse possessors occupying without color of title must prove that they had “substantially enclosed” or “usually cultivated or improved” the property.

- **Manillo v. Gorski:** Adverse possession must be open and notorious (even in boundary disputes) and clear and unequivocal. Owner must have actual notice before statute of limitations can run.

- **Howard v. Kunto:** Kunto occupied a summer residence under color of title (a defective deed). When Howard, the record owner, sought to eject Kunto, Kunto countered that the limitations period had expired. Howard argued that Kunto had failed to occupy continuously. Kunto argued that he was there every summer. The property was intended for summer housing, as were the surrounding properties. A reasonable owner would use the property as a summer home.
  - **Sub-Issue:** Validity of Tacking:
    - There must be privity of estate to permit tacking to establish adverse possession.
      - **Privity of Estate:** The voluntary transfer from the first possessor to the second possessor of either an estate in the land or actual possession of it.
    - Where several successive purchasers received record title to tract A under the mistaken belief that they were acquiring tract B, immediately contiguous, and where possession of tract B is transferred and occupied in a continuous manner for more than 10 years, tacking is permitted.
    - **Tacking—Owner:** Tacking follows automatically on the owner’s side.

**II. THE SYSTEM OF ESTATES (EXCLUDING LEASEHOLDS)**

- **POSSESSORY ESTATES**
  - **Estates in Land:**
    - Interest in land being divided over time
    - Rights of current possession and future estates (which give rise to future possession)
      - **Present estates:** Right to current or present possession—fee simple, defeasible fee, life estate, and leaseholds
      - **Future estates:** Right to future interests is presently existing—possibility of reverter, reversion, right of entry, executor interest
  - **Leases:** A tenant has a right to possess property for a specified period of time, when the lease expires, owner comes in to gather the residual

- **Background Principles and Policies**
  - A goal of promoting ownership in property
  - A policy of protecting the economy of owners to use their land as they see fit
o Promoting alienability (transfer) of land.

**Four Major Categories of Interest** (all present interest holder had present right to occupy the interest, as opposed to future interest) (Fee simple, Defeasible fees, Life estates, Leaseholds)

- **Fee Simple**: Largest estate and ownership can last forever. It is absolute ownership.
  - Owner determines who gets the property when he dies.
    - **Fee Simple Absolute**: Largest aggregation in rights in land; can last forever; can be inherited or pass through will; alienable; restrictions on alienability are typically void; if conveyed conveys as a fee simple.
      - **Example**: “I, A transfer Blackacre to O.”

- **Defeasible fees**: A defeasible fee simple is one that may last forever or may come to an end upon the happening of an event in the future.
  - Inheritable, divisible, can be given away by will, alienable if the conveyance event happens at some point, defeasible fee terminates and ownership will transfer to whomever holds the future interest.
  - **Types of Defeasible fees**:
    - **Fee Simple Determinable**: Fee simple limited such that it will end automatically when a stated event happens.
      - **Example**: O conveys Blackacre “to the Hartford School Board, its successors and assigns, so long as the premises are used for school purposes.”
        - Reverts back to O, or if O is dead, O’s heirs.
      - **Future Interest**: Possibility of Reverter: Ends and transfers automatically in the happening of a stated event and transfers automatically.
      - **Words to look for**: “So long as”; “During”, “While”, “Unless.”
      - **Example**: O to A for school purposes NOT A FEE SIMPLE DETERMINABLE, wording indicates a desire or motive for the purpose of the land, is actually a fee simple absolute.
    - **Fee Simple Subject to Condition Subsequent**: Fee simple that does not automatically terminate but may be cut short or divested at the transferor’s election when a stated condition happens.
      - **Example**: O conveys Whitacre “to the Hartford School Board, its successors and assigns, but if the premises are not used for school purposes, the grantor has a right to re-enter and retake the premises.”
      - Fee simple may be cut short if O elects to exercise the right of entry, but it is not automatically terminated when the stated event happens. Unless and until entry is made, the fee simple continues.
      - **Future Interest**: Right of Re-Entry” Grantor must assert his right to reclaim to property after the said event occurs.
      - **Words to look for**: “If”; “I can retake…”
    - **Fee Simple Subject to Executory Limitation**: If condition occurs, property interest invests in a third party.
      - **Example**: From O to A, but if the property ceases to be used as a baseball field, then to B
      - Same as fee simple determinable with possibility of reverter EXCEPT that future interests belongs to some third party.
      - Third party’s executory interest becomes possessory automatically.
Future Interest: Executory interest held by some third person.

- **Mahrenholz v. County Board of School Trustees:** Huttons had conveyed an acre or so of their farm to the school district under an ambiguous grant “this land to be used for school purposes only; otherwise to revert to Grantors.” and the school district built the Hutton School on the land. Later, the Huttons conveyed their farm and whatever interests they had in the Hutton School land to the Jacqmains, who then conveyed the same interests to Mahrenholz. Under Illinois Law, however, neither a possibility of reverter nor a right of re-entry may be conveyed during life or pass by will; such interests may only be inherited. Thus, when Jennie Hutton died (she was already widowed) her interest in the Hutton School land passed to her son Harry. The school stopped holding class in the Hutton School in 1973 but used the building for storage. In 1977, Harry Hutton conveyed to Mahrenholz his interest in the Hutton School land. Mahrenholz then sought to quiet title to the Hutton School land in his name. If the original granted created a fee simple determinable in the school district and a possibility of reverter in the Huttons (as the court decided), and if cessation of classes in the Hutton School in 1973 terminated the fee simple determinable, then Harry owned a fee simple absolute in the land when he conveyed his interest to Mahrenholz, and Mahrenholz should prevail. This is because a possibility of reverter automatically becomes possessory upon breach of the condition. BUT, if the original grant had created a fee simple subject to condition subsequent in the school board and a right of entry in the Huttons, and even if the ending of classes was a breach of the condition, Harry would only have held of right of entry in the land and he cannot convey that interest to Mahrenholz, so the school board should prevail.

- **Rule:** A fee simple determinable comes to an end automatically upon breach of the condition while a fee simple subject to condition subsequent comes to an end only when the holder of the right of entry asserts his right to recover possession.

- **Mountain Brow Lodge v. Toscano:** Toscano gave to the Old Fellows Lodge a lot adjacent to its existing building. By the deed, he restricted its use to the Odd Fellows Lodge only, and stipulated that in the event of a “sale or transfer” of the property or a failure by the Odd Fellows to use the property, title would revert to Toscano. The California appellate court voided the no-sale-or-transfer restriction as an invalid restraint on alienation but upheld the use restriction, on the theory that because Toscano meant to convey a determinable fee to the Odd Fellows rather than merely restrict alienability, the use restriction was valid.

- **(TP) Rule:** This restriction is allowable, though practically, it might have the exact same effect as a restraint on alienation.

  - **Life Estates:** (EM) A possessory estate that expires upon the death of a specified person, usually the life estate holder.

  - (TP) When holder of the estate dies, property passes on to the grantor (future interest is a reversion) OR, grantor may specify a third party who will get the property (future interest is a remainder)

  - **Can a life estate be transferred?**

    - Yes, but the life estate still terminates when the holder of the life estate dies
Transferee can only keep the land for the duration of the life of the life estate holder, cannot transfer it again.

- **Reversion**: Exists in the grantor or his heirs
- **Remainder**: Exists in some third party
- **Example #1**: O to A for life
  - **Future Interest**: Reversion in O
  - **If O predeceases A**, future interest goes to O’s heirs
- **Example #2**: O to A for life, then to B
  - **Life Estate** in A
  - **Remainder** in B
- **Example #3**: O to A for life, then to B (if B survives A)
  - **Future Interest**: B has a contingent remainder
  - **If B does not survive A**, property reverts to O upon A’s death

**Types of Remainders**:

- **Vested**: Remainder belongs to ascertainable person or persons and there are no conditions that must be satisfied before remainder becomes possessory, besides the death of the holder of the life estate.
  - **Absolutely or Indefeasibly Vested**: Certain to become possessory in the future; one that will not change, it is certain to divest in the future. Holder of the remainder will certainly get it.
    - O to A for life, then to B
  - **Vested Remainder Subject to Open/Partial Divestment**: Remainder is held by a class that can increase in size, such as later born children who hold a remainder
    - O to A for life, then to the children of B (assuming B has at least one child at the time of conveyance)
      - Vested, because the children are ascertainable (he has at least one); Open, because it is possible B may have more children down the road.
      - If B has no children at the time of conveyance, it would be a contingent remainder
    - Rule of Convenience: Court reserves the right to close the class when any member becomes entitled to distribution (B has one child alive at time of A’s death, court can grant B’s one child the title and close the class to any future children of B).
  - **Vested Remainder Subject to Divestment**: The property interest can be lost by the happening (or not happening) of a later event.
    - O to A for life, then to B, but if B drops out of law school, then to C.
      - C has an executory interest.

- **Contingent**: Remainder belongs to an unascertained person or it is made contingent upon some event occurring other than the natural termination of the preceding estates.
  - O to A for life, then to the first child of B
    - Contingent Remainder exists if B had no children at the time of grant.
o **White v. Brown:** Jesse Lide’s handwritten will stated: “I wish Evelyn White to have my home to live in and not to be sold,” The Court relied on three statutes to presume that Jessie meant to give Evelyn fee simple absolute, there being no “clear evidence” to the contrary. One statute held the common presumption that every grant or devise of real estate shall pass the entire interest of the grantor unless there is clear evidence to the contrary. The second statute stated a presumption that a will conveys the entire interest of the testator in the testator’s real property unless there is a contrary intention in the will. The third statute created a presumption against partial intestacy, which is what would happen if Jesse Lide’s will was read as creating a life estate in Evelyn, because Lide did not devise the remainder that would then exist; such remainder would pass to her heirs in intestacy. The court treated the “no sale” restriction as an invalid attempt to restrain alienation of a fee simple absolute rather than clear evidence of a life estate.

o **Waste:** (EM): Waste is the term used to describe actions of the life tenant that permanently impair the property’s value or the interest of the future interest holders.
  - **(TP) Main Idea:** A, present holder of a life estate, should not be able to use property in a way that interferes with the expectations of future interest holders on the land.
  - Arises any time multiple people have a right to possession of property (tragedy of the commons)
    - **Bilateral Monopoly:** Only two people (holder of present estate and holder of future estate). These parties bargaining with no competition, both people are locked in and try to extract the maximum value for concession \(\rightarrow\) inefficiency.
    - **Affirmative Waste:** Injurious acts cause liability; ruining the land by some act (ie: pollution)
    - **Permissive (Negative Waste):** Failure to take reasonable care of the property (ie: neglecting the land)

o **Additional Rules (TP):**
  - Additional rules focus on promotion of alienability because it is consistent with respecting the autonomy of present landholders and promotes social welfare.
  - There is a general prohibition against creation of new estates in land because making more and more complicated estates may undercut the notion of alienability, which results in a loss of efficiency.
  - There is a general prohibition on unreasonable restraints on alienation.
    - Restrictions on transfers or sales are generally void when they apply to fee simple interests
  - Some additional restrictions are allowed on life estates.
    - **Ex-ante effect:** How will this rule affect future generations?

- **Concurrent Estates (Co-Ownership)**
- Concurrent interests refers to two or more people owning the same property interest at the same time
- **Types:**
  - **Tenancy in Common:** Separate but undivided interests in the property; the interests of each are descendible and may be conveyed by deed or will.
(TP): Each tenant has an undivided interest in the whole. Each tenant in common owns the right to possess the entire property, but their ownership interest is fractional
- Fractional interest refers to rents, proceeds, expenses, etc.
- By contract, parties have flexibility to order their affairs as desired
- Right to alienate, transfer, etc. Transferee then becomes tenant in common
- **No Rights of Survivorship**
  - **Example:** O transfers her property interest to A and B, A and B becomes tenants in common. If B dies, B’s heirs become tenants in common with A.

**Joint Tenancy:** (EM): Joint tenants own an undivided share in the same interest in either real or personal property, but the surviving joint tenant owns the entire estate. The outstanding characteristic of a joint tenancy as opposed to a tenancy in common is **The Right of Survivorship.**
- In theory, each owns the undivided whole of the property, such that when one joint tenant dies, nothing passes to the surviving joint tenant or tenants. Rather, the estate simply continues in survivors freed from the participation of the decedent, whose interest is extinguished.
- (TP): The main benefit of a joint tenancy is avoidance of the probate:
  - **Avoidance of the Probate:** Joint tenancies are popular, particularly between a husband and wife, because a joint tenancy is the practical equivalent of a will but at the joint tenant’s death, probate of the property is avoided. Probate is the judicial supervision of the administration of the decedent’s property that passes to others at the decedent’s death: The probate court appoints an administrator or executor who collects the decedent’s assets, pays debts and taxes, and distributes or changes title to the property to the beneficiaries.
- Each tenant owns the undivided whole but when one tenant dies, nothing passes to the heirs. Rather, the estate passes to the remaining owner(s).
- Four unities required (but rarely enforced):
  - **Time:** Interest of each tenant has to be acquired at the same time
  - **Title:** Both tenants had to acquire the title by the same conveyance
  - **Interest:** All must have equal undivided shares and identical interests measure by duration.
  - **Possession:** Each tenant must have a right to possess the whole of the property.

**Tenancy By the Entirety:** Can be created only in husband and wife. The tenancy by entirety is like the joint tenancy in that the four unities (plus an additional unity: marriage) are required, and the surviving tenant has the right of survivorship. Neither husband or wife can defeat the right of survivorship of the other by a conveyance to a third party. Only a conveyance by husband and wife together can do so. Neither husband nor wife, acting alone has a right to judicial partition of property held as tenants by the entirety.
- (TP): Relevance of the fifth unity: Severance upon divorce, for loss of unity

**Example 1:**
- O transfers interest to A, B, & C as joint tenants. A then transfers interest to D.
  - A joint tenant can sever the joint tenancy by transfer when alive, but not by will.
The effect of A’s transfer to D severed the joint tenancy, with a resulting tenancy in common

- B and C continue to hold interest as joint tenants with eachother
- D becomes tenants in common with B & C (as one)
  - D holds 1/3, B & C collectively hold 2/3

B dies (with H as an heir)
- C retains the entire interest of B & C, the entire 2/3
- Left with D (1/3) and B (2/3), as tenants in common

D dies
- His interests will go to his heir

**Example 2:**
- A & B are joint tenants. A decides to convey a six-year lease to C, and after three years, A dies, devising all of her property to D.
  - D will argue that the 6 year lease severed the joint tenancy agreement, making it a tenancy in common.
  - However, it is generally held that a lease does not sever a joint tenancy and the lease expires at death of A. B, as surviving joint tenant, would declare the lease as no longer valid and kick C off. B’s interests beat D’s, to whom A devised her property.
  - Some courts have held that B would be subject to the remaining term of the lease, others have said that B does not have to honor the lease.

**Severance: When a Joint Tenancy is Severed:**
- Technically occurs when one of the unities cease to exist
- Parties can also agree to sever joint tenancy
- What happens if one party severs the joint tenancy unbeknownst to the other, who still assumes the joint tenancy and right of survivorship still exists?
  - Should there be a requirement to give notice?
    - Will this cause a deterrent effect?
- Is it necessary to use a straw to transfer from joint tenancy to tenant in common?
  - No, just transfer to yourself as a tenant in common (think transaction costs)

**Riddle v. Harmon: Conveyance to oneself:** (EM): Common law regarded a conveyance of an interest to oneself as an empty act, devoid of legal effect. Thus, to convert a joint tenancy into a tenancy in common, the joint tenant would have to employ a straw man, wow home the severance would be made and from whom a reconveyance would be made. The court held that Frances Riddle could validly sever the joint tenancy with her husband by a conveyance from herself as joint tenant to herself as tenant in common with her husband. It was clear that her intention was to sever the joint tenancy. Some injustices that may arise from this case: Husband probably never knew that the joint tenancy was severed.

**Sharing of Benefits and Burdens:**
- In general, cotenants share all of the benefits and burdens of the property
  - Rents and Profits; taxes, mortgage payments and other carrying charges—Deserve a right of contribution from all co-tenants
  - Repairs and Improvements: In the absence of a specific agreement, co-tenant has no affirmative right to contribution from the others.
- **Ouster?**
• What happens when one cotenant is essentially ousted from occupying the property:
  • Constructive ouster: Are the premises being used in such a way that it is impractical for the other owners to use the property?
  • Emotional ouster: Worry or emotional abuse results from trying to use the property
  • Remedy for an ouster is payment of rent.

Partition:
  • A way to resolve disputes among the tenants and to dissolve tenancies
  • Two Types:
    • Partition in Kind: Arises when one tenant seeks (and court orders) that the property be physically divided among the tenants.
    • Partition by Sale: Arises when the court order forces the sale of the property to some 3rd party, and the proceeds of the sale are split among the tenants according to fractional interests.
  • Courts say that they prefer a partition in kind, but partition by sale is the general practice
  • A Partition By Sale should be ordered only when two conditions are satisfied:
    • The physical attributes of the land are such that a partition in kind is impractical or inequitable, and
    • The interests of the owners would be better promoted by a partition by sale.

Reasons why “in kind” is better than “by sale”:
  • Radin: We should be very hesitant to do a partition by sale because it forces someone away from their personal property
  • Possession should always be respected and protected if possible
  • In partition in kind, the party that wanted partition by sale usually tries to buy the interest of the other party…transaction takes place, subdivision occurs…everyone is happy

Delfino v. Valencis: Partition in kind v. Partition by sale: D and P were tenants in common to a parcel of land in Connecticut. D lived on the land and operated her business, a rubbish collection business from there. Ps wished to develop the property into single family residences and therefore asked the court for an order of partition by sale, although partition in kind was possible. Although the evidence suggested that the total value of the property would be maximized by sale and development, the court held that it was not in the best interest of all parties to sell the property. The value of the property to Helen was sufficient to convince the court that there should be a partition in kind.

Other issues:
  • Disparity of wealth between the parties→P may be able to afford to buy D out
  • Value of D of the property because of property is personhood (RADIN)
  • Equity and Fairness v. Economic use

Mackareth v. Spiller: Spiller and Mackareth owned a commercial building as tenants in common. Spiller took possession of the entire building and used it as a warehouse. Mackareth demaded that Spiller vacate half of the building or pay rent. Spiller did nothing and Mackareth sued for payment of rent. The court reversed the award of rent reasoning that Spiller had neither deined that Mackareth was an owner of the building nor prevented
him from taking possession. In order to prove ouster, she had to either prove that she actually sought to occupy the building but was prevented by Spiller.

**LEASEHOLDS: LANDLORD-TENANT LAW**

- **Leasehold Estates:** Tenancies, or leaseholds—the term of years, periodic tenancy, and tenancy at will—are nonfreehold estates.
  - *(TP): Leases* are more and more being treated like contracts, rather than property
  - As a contract, leases are arranged such that parties have an opportunity to arrange the lease on their own terms.

- **4 Principle Tenancies:**
  - **Term of years:**
    - Term for a fixed or specific period of time, or some time frame determined by a formula
    - Terminate automatically at the expiration of the term
    - If tenant does not leave, they can be served with an eviction
    - **Example:** O to A for 37 years
  - **Periodic Tenancy:**
    - Fixed period of time but is renewed for consecutive periods
    - Notice must be given by one party for termination to occur
    - Termination:
      - For a term less than a year, notice has to be the same as the term of the lease
      - In no event, does notice exceed 6 months.
  - **Tenancy At Will:**
    - Tenancy for no fixed period, endures as long as both parties want it to
    - Notice is now required, at time interval equal to years determinable
    - Terminates upon death of one party.
  - **Tenancy At Sufferance:**
    - Arises when a tenant remains in possession after the termination of the tenancy and the tenant has not been evicted

- **Landlord’s Options:**
  - **Eviction** and recovery for damages for the lost possession
  - Binding the tenant to a *new term.*
  - *New term* is either month-to-month, quarter-to-quarter, or the same terms and time period of the previous lease.

- **Garner v. Gerrish: (EM):** Donovan leased a house to Gerrish from May 1 until Gerrish decides to terminate. Donovan then died, and is executor attempted to terminate the lease. The court ruled that this created a determinable leasehold life estate that Gerrish alone had the right to terminate. **Rule:** Unless it is expressly written into a contract, landlord does not have the right to terminate the lease (evict) but the tenant does.

- **Crechale v. Smith: (EM):** P leased certain premises to Smith for a 5-year term, ending February 7, 1969. Before expiration of that term, P and D discussed a short-term extension of the term to accommodate Smith’s relocation. Smith wrote a letter to Crechale confirming his understanding of the extension agreement. Crechale replied
by letter denying the existence of any such agreement and insisting that Smith vacate on schedule. Smith stayed and tendered rent for one month, which was accepted by P (thus creating a new periodic tenancy), and then vacated after giving sufficient notice to terminate the new periodic tenancy. At that point, P declared that he was electing to renew the old tenancy for a term of years. The court ruled that the letter constituted his election to “terminate the lease and treat Smith as a trespasser. P’s acceptance of the tendered rent created a new periodic tenancy. **Rule: Once a landlord elects to terminate, he cannot later ask for back rent and damages when the tenant does not vacate immediately.**

- **Notes:** In stead of what he did, landlord could have elected to evict but noted in his letter that IF tenant does not leave immediately, the he will be considered a holdover tenant for one more year and responsible for all associated rental costs.

○ **The Lease**

- Leases are more and more being treated like contracts
- Landlord has the right to transfer property to some third party; obligation goes to new landlord subject to lease terms
- **Alienability:** Extent to which a tenant can transfer his interest in the property.
- **Subleases & Assignments (EM):** An assignment of a leasehold places the assignee in *privity of estate* with the landlord, meaning that the assignee and landlord are liable to eachother for performance of the lease obligations that run with the leasehold estate—carry over from one estate holder to the next. An assignment of the landlord’s reversion similarly places the assignee and the tenant in privity of estate. Assignment, by itself, does not destroy privity of contract, which means that the contractual duties created by a lease continue to be personal obligations of the original parties to the lease even after the assignment.

- **By contrast,** a sublease by the tenant does not created *privity of estate* between the landlord and the subtenant. *The subtenant is liable only to the tenant for the sublease obligations, and the subtenant has no claim against the landlord for failure to perform his lease obligations. There is generally no privity of contract either because only the tenant and subtenant have a contractual relationship.*

- **ASSIGNMENTS:** The original tenant assigns all of her interest under the lease for the entire unexpired term. All of the original terms of the lease now bind the assignee.
  - **Example:** Original tenant and landlord were in privity of estate and contract. T1 has now assigned his lease to someone else.
  - T1 and landlord are no longer in privity of estate, but are in privity of contract.
  - T2 and landlord are now in privity of estate, but nor privity of contract, so the burden of the lease goes to T2, who is now directly liable to the landlord
  - T1 is no longer in privity of estate, but remains in privity of contract, therefore landlord can sue original tenant for any default on the lease.
• If the assignee, T2, fails to pay rent landlord can still sue T1 under the contract and T1 can go after T2. Since T2 and landlord are in privity of estate, landlord can go after him. If T2 assumes all obligations of the lease, he may be in privity of contract as well.
• For T1 to not to be responsible at all, there must be an express provision where T2 takes all responsibility and landlord releases T1.

**SUBLEASES:** Transfer of something less than the entire lease to tenant 2.
• T2 is in neither in privity of estate, nor privity of contract with the landlord. T1 still has privity of estate and contract.
• Most states hold that the retention of a right of re-entry is sufficient for a sublease
• The sublessor and the sublessee are in privity of estate and privity of contract with respect to their sublease.

**Restrants on transfer:**
• Transfer is generally allowed unless there is a provision which prevents it without landlord’s consent; Promotion of alienation is good, but recognize that landlords have an interest in who lives in their property

**Ernst v. Conditt:** In June 1960, Ernst leased some land to Rogers for 53 weeks under a lease that required Ernst’s consent for any sublease or assignment. Rogers took possession, built a Go-Kart track on the premises, and then in July 1960 agreed to sell the business to Conditt. In August 1960, Ernst and Rogers signed an agreement by which the term of the lease was extended to July 21, 1962, and Ernst consented to the subletting of the premises to Conditt upon the express condition that Rogers would remain in personally liable for performance on the lease. Rogers signed a statement on the same agreement by which he “sublet the premises” to Conditt and Conditt signed another document whereby he the subletting of the premises. Conidtt ceased rent payments in November 1960 and, after the extended term expired, Ernst sued Conditt for the for the unpaid on the theory that the lease had been assigned from Rogers to Conditt, and thus Conditt was in privity of estate with Ernst. Conditt denied liability to Ernst because the written agreement characterized the transaction as a sublease. The court applied the principle that the parties’ intentions control this question, and concluded that the parties intended an assignment. The evidence that the court relied on to reach this decision about intentions, however, was much the same as would be used under the common law test of substance: Rogers parted with his entire interest in the lease; Conditt acquired every iota of Roger’s interest and paid rent directly to Ernst.

**Kendall v. Pestana:** Pestana was the lessor of 14,000 square feet of hangar space at the San Jose municipal airport, under a master lease that required his consent to any assignment or sublease of the leasehold. Bixler, the tenant, agreed to sell his entire airplane maintenance business to Kendall, including assignment to Kendall of Bixler’s leasehold. Kendall was financially stronger and richer than Bixler and was willing to assume all the leasehold obligations. Nevertheless, Pestana refused to consent to the assignment to the assignment unless the rent was increased and other more onerous terms were imposed. Kendall sued Pestana claiming that its refusal to consent to assignment was
unreasonable and an unlawful restraint on alienation. The court held that in a commercial lease a landlord may withhold consent to transfer only when the landlord has a commercially reasonable objection to the transfer.

- **Notes:**
  - This rule is also generally applicable to residential leases
  - Mandatory rules vs. Default rules (Mandatory cannot be contracted around; Default exists if you don’t contract around.)
  - Favors free alienability
  - This is not so much about alienability and efficiency but about bargaining power, relative sophistication of parties, information available, etc.
  - How are landlords likely to respond to all of the rights/protections afforded to tenants?
    - Increased rents, larger security deposits, larger finders fees
    - Draft provisions in lease agreements that say “you cannot assign without consent, and consent can be refused for any reason”
    - Outright prohibition of subleasing.

- **The Tenant who Defaults**
  - *Default by tenant in possession: Berg v. Wiley:* Wiley leased premises to Berg for use as a restaurant, under a lease that required Berg to obtain written permission from Wiley to alter the structure, obligated Berg to operate her restaurant lawfully and gave Wiley the right to retake possession upon default. Berg’s restaurant was cited for health code violations and she began to remodel the premises without permission from Wiley. Wiley told Berg that she had two weeks to correct the violations of the lease or he would retake possession. Berg did not make the corrections and Wiley changed the locks while Berg was not on premises. **Rule:** Court held that Self-help is never available to dispossess a tenant who is in possession and has not abandoned or voluntarily surrendered premises. The only lawful means to dispossess a tenant who has not abandoned nor voluntarily surrendered but who claims possession adversely to a landlord’s claim of breach of a written lease is by resort to judicial process. Self-help always carries with it the risk of violence.
  - *Old Common Law:* The landlord could exercise some self-help remedies, so long as landlord had a legal right to re-enter and the landlord did so in a peaceful manner.
  - *Modern trend:* To disallow self-help remedies, even if the landlord was able to do so and dis so in a peaceful manner.
  - *Summary Proceedings:* Intended to be a quick and efficient means by which to recover possession after termination of a tenancy. To promote quickeness, the typical statute requires only a few days’ notice to tenant prior to bringing an eviction action, and the range of issues subject to litigation is kept narrow
    - The concern is that it may take a very long time to get the summary proceedings and tenant may remain on and alter the premises in violation of the lease perhaps in hostility
  - *Dependant Covenants v. Independent Covenants:*
    - *Independent:* Used to be that T’s obligations under the lease were independent of landlord’s duties under lease…if tenant breaches, L may sue for damages but he must continue with his obligations
- **Dependent:** Treat landlord and tenant’s obligations together—if one independently stops performing obligation, the other may stop.

- **Prohibition of self-help:**
  - Prevents breach of peace
  - Should tenant or beneficiary be able to waive prohibition of self-help?
    - T and L derive social benefits, which cannot be contracted around—these policies exist to protect the whole of society.
  - **Problem:** This rule makes it expensive for L to evict T (judicial proceedings are expensive)
    - **How will L respond?**
      - Raise rent
      - Require background and credit checks
      - Ask for bigger security deposits
      - Not rent to high-risk people.

- **Residential Leases:**
  - Self-help prohibition generally applies
  - Sanctity of the home and personhood (RADIN)
  - L and T may have more of an unequal bargaining relationship
  - Amplified emotions

- **Tenant who Abandons Property:** **Sommer v. Kridel:** Kridel leased an apartment from Sommer for a 2-year term beginning May 1, 1972. On May 19, Kridel wrote Sommer saying that his engagement was broken off and he would not be able to pay rent on the apartment. He offered to surrender the lease and forfeit the two months rent that he had already paid. Sommer did not reply to the letter. Sommer also did not allow other people who were interested in the apartment see it. He finally rented the apartment in September of 1973. Sommer sought unpaid rent from Kridel from May 1972 to September 1973. **Rule:** The court held that a landlord has duty to mitigate damages once a tenant has abandoned a lease. Imposes the burden of proof on the landlord to show that he had attempted to re-let the apartment and treated it as vacant.

- **Abandonment:** When a tenant leaves a premises without having the right to do so

- **Landlord’s options when this occurs:**
  - Landlord may accept surrender of premises, terminate the lease and hold tenant responsible for back rent
    - Tenant is responsible for back rent and damages for anticipatory breach
  - L can get a new tenant and hold original tenant liable for the discrepancy
  - L can do nothing and leave property vacant
    - Not feasible if there is a duty to mitigate
  - **Common Law Rule:** Landlord can, but is not required to mitigate
    - Now, courts require L to mitigate by using reasonable care to relet
    - If L relets for FMV, L can collect from tenant the difference between FMV and rent rate
    - Conflict arises as to what to do when L relets above original rental rate
    - Must use reasonable efforts to relet

- **If L fails to mitigate:**
- Some courts say L cannot recover at all
- Some say he can recover difference between original rent and FMV

- **Who bears burden of proof in “duty to mitigate” cases?**
  - Some courts say it is up to T to prove L did not mitigate

- **Why have a duty to mitigate?**
  - As long as landlord’s financial interests are covered, why would it matter if T1 or T2 is paying? L should help T1 cover his/her interest in moving out before lease is up. L is no worse off by mitigating.
  - Everyone is better off: T1 gets out, L’s property interest is still protected → efficient breach
  - Insures that property is on the market and not being wasted, it is productive

- **L’s argument against duty to mitigate:**
  - T should not be able to break the bargain between L and T for payment of rent. L has a right to expect enforcement and performance
  - You should not force upon me the obligation of spending my time and resources finding another tenant
  - Tenant cannot impose a duty on landlord by his wrongdoing
  - Tenant has purchased an interest in real estate
  - Landlord should not be forced into a personal relationship with a new tenant he does not wish to accept
  - Landlord should not be required to continually seek out new tenants
  - Restatements: Abandonment of property is an invitation to vandalism and the law should not encourage such conduct by putting a duty of mitigation of damages on the landlord

- **Is L worse off by having a duty to mitigate?**
  - Each apt. is unique → forcing L to re-let helps T1 and leaves L in no worse position (apt. will get rented again because of its uniqueness)
  - LOSS OF VOLUME: By re-letting, L loses the opportunity to rent another vacant apartment (only applies where apts. Are not unique.

- **Should this apply to commercial leases also?**
  - Commercial tenants tend to be more savvy—no reason to extend duty to mitigate
  - BUT, if the concern is to put productive assets to good use in the marketplace, then it seems this rule would apply EVEN MORE to commercial settings.

- **Landlord’s Duties**
  - **Quiet Enjoyment:** Every tenant has a right to quiet enjoyment of the leased premises. The obligation of the landlord to provide for quiet enjoyment is implied in the law.
    - Common law held that tenant was responsible for making sure premises was habitable
    - New laws are requiring an implied warranty of habitability, and the relationship and duties between landlord and tenant are now dependant upon eachother.
    - **Implied covenant of quiet enjoyment:**
      - L promises not to substantially interfere with the T’s possession, use and enjoyment of the property
- Related to concept of constructive eviction
  - **Actual Eviction**
    - L takes some measures that physically prevents T from occupying the premises
    - When there is an actual eviction, tenant is relieved of obligation to pay rent and can terminate the lease.
    - **OR,** tenant can sue landlord for damages and seek injunctive relief requiring L to stop keeping T off premises
      - **But,** L has it within his power to make T’s habitance miserable.
  - **Constructive Eviction** (Mandatory Rule):
    - If L substantially interferes with the tenant’s use and enjoyment of the leased property—so much so that the intended purposes of the tenant’s occupation is frustrated—a constructive eviction has occurred. Eviction is constructive because the tenant has not been physically ousted; instead the utility of physical possession has been virtually destroyed. The tenant may terminate the lease, move out, and thereafter will be excused from any further lease obligations.
    - **Reste Realty v. Cooper:** Cooper leased office space on the bottom floor of a building. A driveway was adjacent to the building and was maintained in such a way that after every rainstorm, Cooper’s office space was flooded by water running off the driveway. The problem was addressed from time to time by the building manager, but after his death, the situation got so severe that it interrupted with Cooper’s business, and she was forced to rent out other space for business meetings. **Court held that there was sufficient evidence of interference with the tenant’s use and enjoyment of the property to justify her departure and relieve her from obligations to pay further rent. Cooper did not waive her claim for constructive eviction by remaining in possession of the property because after each rainstorm, she would notify the landlord or his building manager of the problem. Cooper did not know of the problem before signing the lease. If she had, she would have been deemed to have waived any constructive eviction claim arising from the problem, the inspection at the time of signing the lease would not have revealed the problem.** Rule: Any act or omission of the landlord which renders the premises substantially unsuitable for the purposes for which they are leased, or which seriously interferes with the beneficial enjoyment of the premises is a breach of the covenant of quiet enjoyment and constitutes constructive eviction of T.
    - **THEORY:** Lease represents a transfer of right by L to T to use/enjoy property
  - What can T do?
    - Stop paying rent and move out
    - Sue for damages, such as cost of relocating and higher rent T may pay
      - Sue for damages: to spread of what place should be worth and what it is actually worth?
    - Stay on the premises and withhold rent
      - It is risky to leave the premises if you rely on breach of covenant of quiet enjoyment…what happens if there wasn’t a breach
      - May not be easy to find a new place.
• **Scope of Landlord’s Responsibility:** Not clear whether L is responsible for what other people do outside the premises or for what other tenants do or for what he does not know (or does know) about.

  • **Implied Warranty of Habitability (MANDATORY RULE)**
    • General rule of habitability: L must ensure suitability of premises they are leasing
      • Safe and healthy living conditions
      • Generally not extended to commercial leases
    • L & T Dependence: If L breaches warranty, T may withhold rent
    • **Warranty Specifics:**
      • Objective is a safe, happy, healthy person
      • L will deliver/maintain premises that are safe, clean, and fit for human habitation throughout the period of the tenancy
      • Non-waivable
    • **Remedies For Breach:**
      • Terminate the lease, stop paying, vacate
      • Withhold rent
      • Withhold rent and invoke the breach of implied warranty of habitability
      • Sue for damages, to person or property, or for discomfort, or for earlier rent (recover for the difference of rent already paid)
      • Sue for punitive damages
      • Repair the problem and deduct the repair costs from my rent
      • Sue landlord for injunction requiring landlord to repair
    • **Why have this warranty**
      • Protection of T
      • T generally expects habitable premises
      • Risk of negative externalities: uninhabitable premises is an economic concern
      • Better to use courts to maintain these things
      • Protection and facilitation of possession of property (RADIN)
    • **Difference between** quiet enjoyment and implied warranty of Habitability:
      • In constructive eviction, tenant has to leave the premises
      • In breach of implied warranty of habitability, tenant does not have to leave.
    • **Hilder v. St. Peter:** Hilder rented an apartment from St. Peter. The apartment was terribly dirty and in disrepair. In determining whether there has been breach of the implied warranty of habitability, courts should inquire whether the claimed defect has an impact on the safety or health of the tenant. *In order to bring a case based on breach of the implied warranty of habitability, the tenant must first show that he or she notified the landlord ‘of the deficiency or defect not known to the landlord and allowed a reasonable time for its correct.* The court held that these conditions resulted in a breach of the implied warranty of habitability.
**Rent Control:** Rent control consists of price controls (set at below-market rates), usually augmented by limitations on a landlord’s ability to evict tenants at the end of a lease term (thus curbing the landlord’s ability to lease to a new tenant at market rates).

- **Benefits:**
  - Helps people retain their housing by keeping prices low when market pressures might otherwise lead to price increases
  - Promotes personhood (RADIN)
  - Fosters community

- **Criticisms of Rent Control:**
  - Ultimately hurts the people it intends to help
  - Shrinks supply of available premises and the premises avail. are of poor quality
  - Many times, when current tenant moves out, rent may go back up
  - If L cannot charge higher rent, they may charge higher finder’s fees or high security deposits
  - No incentive to keep premises in good repair

- **Chicago Board v. City of Chicago:** Chicago enacted an ordinance that codified the implied warranty of habitability, required interest payments on tenant security deposits, permitted tenants to deduct the cost of minor repairs from rent and to withhold rent in an amount equal to the damages inflicted by a landlord’s violation of a lease term. The ordinance was upheld against a constitutional attack, but Judges Posner and Eaterbrook concurred separately, expressing the policy view that such requirements benefit in-place tenants at the expense of would-be tenants, provide an incentive for landlords to skimp on maintenance, deter construction of new rental housing, benefit landlords in neighboring jurisdictions that lack rent controls or similar regulations and produce an inefficient allocation of residential living space.

- **Margaret Radin:**
  - wonders whether economists have overlooked important non-utilitarian considerations that might trump the conventional analysis.
  - knows that existing tenants are usually the primary beneficiaries of most rent controls, but perhaps that’s the whole point: Rent controls “make it possible for existing tenants to stay where they are, with roughly the same proportion of their income going to rent as they have become used to,” a result that may become more justified in some circumstances than in others.
  - from a moral point of view, then, judgments about rent controls must turn very much on context. They might be justified in the easy case where a landlord is earning monopoly rents but not where a landlord lives on the premises and rent a portion to commercial tenants or transients who are not maintaining a home.

**NUISANCE (JUDICIAL LAND USE CONTROLS)**

- **Judicial restriction: Nuisance:**
  - Interference with use and enjoyment of land in order to give rise to liability must be substantial; must be intentional and unreasonable or the intentional result of negligence or reckless or abnormally reckless behavior.
  - Involves a situation where one party is using their land in such a way that it interferes with your use of the land.
o No harm is being caused unless someone complains

o **Private nuisance:**
  - An unreasonable interference by one party to the use and enjoyment of the other party’s land.
  - What is an unreasonable interference?
    - The notion of reasonableness requires some sort of balancing act, considering both parties’ interests

o **Public nuisance:**
  - Act that interferes with general community interest of the public at large. Need not necessarily include land.
  - Must be substantial (air pollution, loud animals)
  - Public nuisances can give rise to private nuisance
  - Unreasonable conduct:
    - Long-lasting, ongoing, illegal, or public health, peace, comfort, or convenience is put at risk.

o **Reasonableness Inquiry (first approach):** if it is reasonable, there is no nuisance
  - **Balancing the equities**
  - Distinction between intentional and unintentional
  - May reflect an ultimate policy of the courts
  - Does the act generate more harm than good?

o **Balancing the competing interests: Things to consider**
  - Besides the interests of the parties, take into consideration some social interests
    - The extent and character of the activity (loud stereo—what time of day?)
    - The extent and character of the harm (oil refinery means you can’t grow orchids?—we don’t care. If it makes you ill—we do care.)
    - Social value of the plaintiff’s use of his land (We don’t care if D interferes with P’s use of his house in the Hamptons, but we do care if D interferes with P’s home for abused children)
    - Suitability of the use given locality (pig farm in rural area vs. Clayton)
    - Burden on P of avoiding the nuisance (can P just close a window?)
    - Who was there first?
  - **Balancing approach:** Substantial approach—Burden of compensating either party for the harm would not make the continuation infeasible, then nuisance should be found.

- **Competing views:**
  - Social balancing does not matter; one party caused a nuisance to the other party, he should pay
  - Restatements: interference constitutes a nuisance if the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation infeasible.

- **Remedies:**
  - What is appropriate? Damages or injunction?
    - Do damages allow D to buy his right to create a nuisance?

- **Coming to the nuisance:**
  - D can argue as a defense that P came to it (D was there first) and assumed the risk.
• P is actually interfering with D’s use of the land
• P has failed to mitigate damages by coming to the nuisance
• P, if second, arguably did not suffer any damages because the purchase price he paid for the property should reflect the nuisance, further compensation would be a windfall
• FIT: D was there first, so he should be able to use his property w/o having to pay damages

**Estancias v. Schultz:** Estancias constructed an apartment complex in Dallas adjacent to Schultz’s residence. To cut down costs, Estancias located its central air conditioning unit close to Schultz’s property line, home, and bedroom. The noise of the unit interfered with Shutz’s entertaining of guests, sleep, and conversation. It would cost Estancias between $150,000 and $200,000 to change the location of the unit, and he would be unable to rent the apartments in the heat of a Dallas summer. Schultz’s home was worth $25,000 at the time of purchase and declined to $12,500 with the noise of the unit. Defendant contends that the trial court erred in granting an injunction that permanently stopped Estacias from operating the air condition unit because the trial court failed to balance equities in its favor. **Court upheld the injunction on the basis that the gravity of the harm was outweighed by the social utility of the air conditioner.**

**Notes:**
- Should damages be awarded or an injunction?
  - Where the benefit to society caused by the conduct is less than the cost to the plaintiff, the court will award an injunction.
  - Damages could be so significant that even without the injunction issuing, the defendant is forced to shut down.
  - If the owner would suffer more by stopping the air conditioner, he should go to the neighbors and try to buy out their right. (THINK COASE)

**Boomer v. Atlantic Cement Co.:** Atlantic’s factory produced dirt, smoke, noise, and vibration that substantially interfered with the use and enjoyment of land owned by the neighbors. Neighbors complained that the factory should be enjoined to stop producing nuisance. Court held that the factory was a nuisance and awarded damages instead of an injunction because it is not feasible to cut off operation of the factory, plus the factory puts the land to better use.

**Dissent:** Doesn’t this tell polluters that they can pollute (or create nuisance) so long as they are willing to pay the price.

**Spur Industries v Del E Webb**
- Spur’s cattle causes nuisance to a nearby development company
- Court orders that Spur relocate but requires the developer to indemnify Spur for the cost that he incurs
- Liability rule for Spur: Del Webb has to pay you to stop or relocate
- Coming to the nuisance: Who was there first?
  - if plaintiff was second, they assumed the risk and should not be able to recover
  - person came to the nuisance and failed to mitigate the damages for themselves
if you come to the nuisance, you have already been compensated

the defendant was there first and there is sense that first in time matter

Considerations:

I moved into a home near a cement factory, the factory then expanded significantly after I moved in

What if the factory owner can foresee that the community is going to develop and expand?

What if homeowner bought the property, then the ranch moves in, then owner builds his house

Property Rules vs. Liability Rules

Property Rules: Permits violation of the right (right to pollute, to be free from pollution, etc.) only if you (person who wants to pollute) first get permission from the holder of the right.

Decision to sell a right is entirely voluntary

Property rules translate into an injunction:

An injunction requiring factory owner to abate pollution equates to neighbors being granted a right to clean air.

Liability Rule: Permits violation or taking of this right if violator pays some judicially determined sum to the property holder.

Damages as opposed to an injunction

Inalienable Entitlements:

Certain rights are inalienable: like, your body, IWH, right to vote, right to labor

Economic and legal theory of remedies of Nuisance:

(EM): Economic theory tells us that either user—the polluter or the receptor of the pollution—can hold the initial entitlement. Legal theory holds that any property right can be protected by a liability rule or a property rule. A property interest protected by a property rule cannot be taken away from its owner involuntarily. A property interest protected by a liability rule can be taken away involuntarily, but only upon payment of an award of damages. This suggests that there are four possible outcomes to a nuisance case:

Issue injunction and stop the nuisance: Property Rule

Neighbors get the right to clean air, protected by a property rule

Rule that there is no nuisance and the use continues: Property Rule

Polluter gets the right to pollute, protected by a property rule

Issue damages to the receptor and the use continues: Liability Rule

Neighbors get the right to clean air, protected by a liability rule

Issue damages to polluter and the use stops: Liability Rule

Polluter gets the right to pollute, protected by a liability rule.

What factors influence which rule we use?

Transaction costs: can there be post-injunction bargaining

Distribution costs: where will the money flow and how do we decide

Who is the least-cost avoider? (who can avoid their use most cheaply?)

Can we calculate damages?

Examples:

Eminent Domain: Gov’t can take your property so long as they give you just compensation (liability rule)

When might we favor liability rule?
When there are high transaction costs that might impede post-injunction bargaining
If there are larger social interests at stake (we don’t want to shut the factory down)
Distributional concerns (care for local economy)

When might we favor a property rule?
- Under liability, people might take others possessions
- We might expend too many resources trying to protect our things
- Difficulty in calculating damages
- People expect property rule protection

SERVITUDE (PRIVATE LAND USE CONTROLS)
- Servitudes arise from private agreements for land use arrangements. Usually the agreements involve two or more parcels of land and the purpose of the agreement is to maximize the total value of all parcels involved. Usually, one parcel of land is burdened for the benefit of another parcel of land.

Easements:
- An easement is an interest in land that entitles the holder to use the land owned by another person. It is NOT a freehold estate. An easement almost always gives its owner the right to use another person’s land.
- Generally, the right to use, typically a right of way
- Typically, some land owner grants another person the right to cross his property to get someplace else/do something else.

Types/Classification of Easements:
- Affirmative/Negative
- Appurtenant/In gross
  - Easement Appurtenant: An easement appurtenant is one that benefits the owner of another parcel of land. The benefited parcel is called the dominant estate and the burdened parcel is called the servient estate.
    - Easement is attached to the land, meaning successive owners of the dominant tenement get to keep the benefit
    - Successive owners of the servient tenement are burdened with the easement
    - Cannot be detached
    - The easement is attached to the land and passes in ownership, does not stay with the owner when he transfers his ownership interests.
  - Easement in Gross: Not the case that easement benefits the holder of the benefit in relation to the use of some parcel of land, rather benefits holder of easement without respect to the land.
    - Not attached to the land, simply a personal benefit
    - Moves with the holder of the easement: “Even if I move, I can still ride my bike across your lawn.”

How are they created?
- Express Agreement/ Some written instrument
  - Easements that arise by implication:
    - Easement by estoppel: If an easement is granted on which the user reasonably relies to make substantial improvements to the property, equity requires that the grantor be estopped from revoking the promise.
- **Easement by prescription:** Similar to adverse possession, but an easement cannot be acquired by adverse possession, only adverse use.
  - *Elements of prescriptive use:*
    - Adverse use under a claim of right
    - Open and notorious
    - Continuous
    - Note: exclusive use is eliminated
  - There is a similar statute of limitations
- **Easement by Prior Existing Use:**
  - *Requirements:*
    - *Common owner:* Prior to division, the quasi-servient estate and the quasi-dominant estate must be owned by the same person (in other words, used to be a single piece of land)
    - At the time the tracts were separated (part of the parcel sold), one part was used to benefit the other (quasi-easement).
    - The easement must be *reasonably necessary* for the owner of the dominant estate to use and enjoy her property.
    - The use must be continuous, not sporadic and there must be proof that the use must be such that both parties intended for it to continue (a permanent physical alteration).
    - The use must be apparent, something the buyer of the servient tract should have known about at the time of sale.
      - Not necessarily the same as visible.
- **Easement by Necessity:**
  - *Requirements:*
    - *Former unity of ownership of dominant and servient tracts under a common owner*
    - There must be *actual necessity*, not just convenience or usefulness
    - Necessity had to *arise at time of severance*
  - Typically arises when a common owner divides his property in such a way that one of the resulting parcels is left without access to a public roadway.
  - **Why have easement by necessity?**
    - *Public interest argument:* Public has a strong interest in having accessible land so that we can put it to productive use
    - *Communal reason:* Need to force people to work together.

**VanSandt v. Royster:** Bailey owned three adjoining lots. She built a house on one of the lots and ran an underground sewer line across the other two lots to a municipal sewer. Later, she sold all three lots to separate owners under deeds making no mention of the sewer line. However, later owners built a house on each of the two vacant lots and connected the plumbing in those houses to Bailey’s original sewer line. VanSandt, the downstream owner, sued to enjoin Royster, the upstream owner from using the sewer line after his basement flooded with 6 inches of sewage. He held that no easement had been validly created across his property. The court upheld a trial court ruling that an easement by reservation implied.
by prior use had been validly created by Bailey when she conveyed the downstream lots. The court rejected the old view that required strict necessity to make an easement by reservation valid. The court also held that the sewer line was apparent to the Van Sandts because it should have been inferred from inspection of the house which showed plumbing fixtures.

- **Othen v. Rosier:** Hill owned a large parcel of land in TX, which he sold in bits and pieces over time in the 1890s. One of these parcels was landlocked and title to that parcel was eventually acquired by Othen, who habitually used a roadway crossing Rosier’s land to reach a public road. To prevent erosion, Rosier built a levee that impounded water, making the roadway impassable at times. Other sued Rosier to enjoin further interference with his right of way, which Othen contended was implied by necessity. The court upheld a determination that no easement by necessity had been proven across Rosier’s land because there was no proof that the common owner had conveyed the Rosier property to Rosier’s predecessor in interest that it was a conveyance that had landlocked the Othen parcel. Rather, it appeared at the time Hill conveyed the Rosier parcel, Hill owned other land that was contiguous to the Othen parcel and a public roadway. Othen had an easement implied by necessity across some property, but not necessarily Rosier’s.

- **Licenses:**
  - A license is an oral or written agreement given by the occupant of land allowing the licensee to do some act that otherwise would be a trespass. This resembles and easement, but licenses are generally revocable, as easements are not.
    - A license coupled with an interest cannot be revoked
    - A license becomes irrevocable under the rules of estoppel. A license that cannot be revoked is treated as an easement by the Restatements.

- **Holbrook v. Taylor:** Holbrook permitted Taylor to use a roadway across his property in order for Taylor to reach his own property. With Holbrook’s knowledge, and without objection, Taylor used the road to construct a substantial single-family residence. Holbrook later blocked the road with a steel cable. The court held that Holbrook was equitably estopped from revoking the license.

  - Equitable Estoppel: If a licensor grants a license on which the licensee reasonably relies to make substantial improvements to property, equity requires that the licensor be estopped from revoking the license.
  - Rule: If an individual has been given permission to use land for purposes of erecting constructions/improvements, the licensor cannot revoke the license given after the individual had already begun to erect the improvements.
  - Another option: Have the licensee pay for a right protected by a liability rule

- **Scope of Easements:**
  - Generally, easements are supposed to be used for the original use they were intended for, but sometimes courts will allow a reasonable alteration of use
    - What’s reasonable?
      - Kind of use to which the easement is being out
      - Intensity and burden of use
What did the parties foresee, what did the parties intend?
- If changing the use would create some burden on the servient estate or change the way the servient owner uses his land (disrupts his enjoyment), it is not within the scope.

**Brown v. Voss:** Voss owned a wooded tract in a rural residential area of Washington State overlooking the Hood Canal (Parcel A). Parcel A was burdened by an easement for right of way benefiting Parcel B. Brown purchased Parcel B and an adjacent Parcel C, which was not benefited by the easement for access crossing parcel A. Brown began to construct a residence that straddled parcels B & C, both of which he owned and used the easement through Parcel A to bring in construction materials. Voss subsequently obstructed the easement and Brown sued for enforcement. Voss countered to enjoin Brown from using the easement to benefit parcel C. The trial court denied Voss’s injunction on the theory that Brown’s use was reasonable, even though he was using the easement to benefit a non-dominant estate. Intermediate court reversed and issued injunction, applying the traditional rule that an easement may not be used for the benefit of property that it is not appurtenant to. *S.Ct. reversed, reasoning that although the appeals court was correct to conclude that any physical enlargement of the dominant estate is wrongful, an injunction should not be issued because there was no irreparable harm to Voss from the enlargement.*

**Location of Easement:**
- Does the owner of the estate ever have the right to relocate the easement?
  - Not without permission from dominant owner
  - Restatements grants servient owner the right to change the location of the easement if the change does not significantly lessen the utility of the easement or disadvantage the dominant estate holder.

**Termination of Easements:**
- Eternal use unless terminated
- Can be terminated by one of five ways:
  - Agreement in writing
  - By own terms—there was deed saying easement only lasts for some period of time or conditioned on some event
  - Merger—owner of the dominant estate also becomes owner of the servient estate and when the holder of the easement owns both pieces of property, the easement ends. Can come back if the party sells off a parcel later
  - Abandonment—non-use is not abandonment; owner actually has to abandoned it and say he does not want it anymore.
  - Adverse possession or prescription

**Negative Easements:**
- Blocking windows
- Interfering with airflow
- Interfering with flow of water
- Removing of support for a structure
- Possibly, blocking a view
- Development in spite of a conservation easement

**Covenants:**
- The goal of covenants is not only to benefit the present promisor, but also subsequent owners.
- **Key Difference** between covenants and equitable servitudes: The difference is in the remedies: real covenants are enforced at law (damages) and equitable servitudes are enforced in equity (injunction).

- **Real Covenants:**
  - A real covenant is a promise about land usage that run with an estate in land meaning that it binds or benefits subsequent owners of the estate. A real covenant may be affirmative or negative.
    - **Affirmative:** I promise to do a certain thing with my land
    - **Negative:** I promise not to do a certain thing with my land
  - **Requirements for a real covenant:**
    - **Intent:** Original contracting parties must intend for their successors to be bound by the covenant
    - **Touch & Concern:** Covenant must actually touch and concern the property
      - NOT personal promises
    - **Privity of Estate:** There must be privity of estate for there to be a real covenant that binds future owners.

- **Analytical Model:**
  - Suppose that B, owner of Blackacre, has promised A, owner of Whiteacre that Blackacre shall not be used for industrial purposes. B sells Blackacre to C, and A sells Whiteacre to D. C constructs a factory on Blackacre, D sues C for damages. Will the covenant run to C and D?
  - If A, before any assignment sues B, A is suing on the contract. There is privity of contract between A and B, and the law of contracts governs. The question of whether a covenant runs arises only when a person who is not a party to the covenant is suing or being sued.
Note that there are two ends of the covenant, the benefit end originally held by A and the burden end originally held by B. If A conveys Whiteacre to D, and B still owns Blackacre and constructs the factory, and D sues B, D must allege that the benefit runs to D. The burden remains with B, the original promisor. If B conveys Blackacre to C, who constructs a factory, and A, still owning Whiteacre sues C, A must allege that burden runs to C.

If Both Whiteacre and Blackacre are conveyed to D and C respectively and D sues C, D must allege both the burden and the benefit run. It is important to keep in mind whether the running of the benefit or the running of the burden is involved in the case because the test for the running of the burden is traditionally more onerous than the test for the running of the benefit.

- **Horizontal privity:** Privity between original parties (A and B)
  - A and B must have mutual interests in the land
  - No horizontal privity between neighbors
- **Vertical privity:** When there are successors in interest, privity of estate between one of the covenanting parties and some successor in interest; successor must take the original parties’ entire interest.

For the Burden to run...Need horizontal and vertical privity
For the Benefit to run...Only need vertical privity

- **Equitable Servitudes:**
  - Like a real covenant, interest in land is binding on subsequent owners
  - Implied in equity and not enforced at law (enforced in injunction)
  - Arise out of a promise and can arise from prescription
  - Requirements:
    - Intent to bind successors
    - Touch and concern
    - Instead of privity, it requires notice (actual, constructive, inquiry)
- **Covenants by a Common Scheme:**
  - Ex: Landowner has 16 lots and sells 9 of them restricting use for single-family homes
  - **Doctrine of Implied Reciprocal Servitudes:**
    - Where a common grantor develops land for sale in lots and includes a common scheme or plan of restrictions on each of the parcels for the benefit of all the parcels. Grantees acquire by implication a right to enforce the same restrictions on the lots retained by the grantor or subsequently sold without the restriction to a purchaser without notice of the restrictions.
    - Must have intent: landowner must have intended to create this common scheme and for the restrictions on the early parcels to carry over to the later parcels
    - Must touch and concern
    - Must be notice
- **Sanborn v. McLean:** In the 1890s McLaughin subdivided a tract of land in Detroit into building lots and started to sell them under deeds that restricted use to single family residences. Later, McLaughlins sold some of the lots with restrictions, including Lot86, eventually acquire by McLean.
McLean wanted to construct a filling station on Lot 86. His neighbors sought to enjoin this use as a violation of an implied negative equitable servitude. The court agreed that an injunction was proper, reasoning that because the initial restriction imposed by McLaughlin, were intended to carry out a scheme of a residential district, an implied reciprocal servitude burdened the property and that servitude was equitably enforced against McLean who had CONSTRUCTIVE NOTICE from the “uniform residence character given the lots by the expensive dwellings thereon” that Lot 86 might be burdened.

- **Evidence that courts look for:**
  - Is there a plan or detailed drawing that shows the restrictions?
  - Advertising or real estate brochures
  - Oral representations
  - Restrictions imposed in neighboring deeds.

- **Why do we have this doctrine?**
  - Protects owners in the area
  - Property values
  - What the parties intended
  - What the parties would negotiate for
  - For the person who wants to build, one of the requirements is notice and if he has any questions, he can ask (inquiry notice) He is not forced to buy.

- **Neponsit v. Emigrant:** As part of a planned development, a developer sold lots subject to a covenant to pay money annually to a homeowner’s association for the purpose of maintaining private roads and sidewalks owned in common by all lot owners. The court held that a homeowner’s association that did not succeed to any estate of the benefited promise was able to enforce the benefit if such a covenant on the theory that it was the corporate agent of the owners of the benefited estates.
  - (TP): Generally, obligation to pay money do not run with the land, but in this case, the interest sufficiently relates to the land and significantly touches and concerns the land (maintenance of land).
  - Importance of T & C
    - Personal covenants do not touch and concern the land
    - Issue of expectations—what this party wants and what successors will want
    - Does it increase the value of related land?
    - Affect use and quiet enjoyment of the land?
    - Transaction costs reducing method: Deal does not have to be struck every time the land is transferred.

- **Termination of Covenants:**
  - Common ownership: benefited and burdened land come into common ownership
  - Release: mutual agreement that covenant no longer applies
  - Restriction on duration (by its own terms)
  - Abandonment: widespread nonconformance
  - Statute of limitations: bringing suits in a timely manner
- Estoppel: if others have been violating it, or P has been violating it
- Changed circumstances
- **Western Land v. Truskolaski:** In 1941, WL subdivided 40 acres of rural land, burdening all of the lots with restrictive covenants limiting use to single-family dwellings. By 1969, Reno had grown up around the subdivision, bracketing it with high traffic volume boulevards. WL proposed to use a 3.5 acre undeveloped site at one of the busy intersections for a shopping center, but the homeowners sought and obtained a trial court injunction preventing WL from violating the covenant. The court upheld the injunction, reasoning that because the covenant continued to of “real and substantial value to the residents,” the doctrine of changed circumstances did not operate to terminate the covenant. *Does not matter that the land may be put to better use a commercial outpost, this is not a balancing of equities question.*
- **Rick v. West:** Rick subdivided 62 acres in 1946, restricting land use to single-family dwellings. West purchased a lot and built a house, but not many others followed suit. In 1959, Rick sought to sell 45 acres of the subdivision for industrial use, but West refused to release the covenant. In 1961, Rick agreed to sell 15 acres for the development of a much needed hospital. The court agreed that the site was desirable for a hospital, and implicitly that the social loss resulting from issuing an injunction was greater than the benefits produced, however, the court enjoined the proposed use.
  - Personhood issues here?
  - **Liability rules and property rules:**
    - Enjoin breaches of the covenant: protect the property rights of landowners
    - Refuse to enforce and grant damages to landowners (give her the right to enforce the covenant, but only protect with a liability rule)
    - Deny all relief against breach of covenant → developer would have right to breach covenant and it would be enforced by a property rule
    - You have a right to build (as developer) but you have to stop if the neighbors pay you your damages for stopping (protect right to breach under a liability rule. (I can build a hospital unless you pay me not to.)

**ZONING**

- **What is zoning?**
  - Zoning is the use of governmental power to regulate land use. Zoning laws divide a political jurisdiction into specific separate geographic areas and impose limits on the permissible uses of land within each area.
  - Zoning is the use of public power to impose uniform results that might otherwise be accomplished in more piecemeal and selective fashion by private bargains.
  - Primarily based within the local government
  - **Background:**
    - Government has the authority to regulate what uses you can and cannot put your land to
    - In Village of Euclid case, court held that zoning is a constitutional exercise of state’s police power to maintain public health, safety, and welfare.
• Districts are graded from highest (single-family residences) to lowest (worst kind of industry)
• Under this doctrine, the uses permitted in each district are cumulative, higher uses are permitted in areas zoned for lower uses, but not vice versa
  ▪ City of Houston has no zoning ordinance
  ▪ Theory is that private covenants will regulate use
  ▪ What’s the problem with this?
    o For one thing, externalities

  o Specifics:
    ▪ There are no statutes, all decisions are left to the local community
    ▪ Local governments and administrative agencies are “the powers that be.”
    ▪ Zoning board divvy up area into residential, commercial, industrial
    ▪ Cumulative: In a given zone, a lighter use that that which it is zoned for is allowable.
    ▪ Also regulates things such as space, size, density, etc. of buildings.

  o Arguments against zoning:
    ▪ It’s a taking of property without just compensation
    ▪ May raise constitutional problems
    ▪ Problems with private companies?

  o Some arguments for zoning:
    ▪ Prevents incompatible uses from occurring
    ▪ Generally increase property values by reducing conflicts
    ▪ Channels development into patterns that may serve larger social goals

  o How zoning ordinances are adopted:
    ▪ Granted from higher forms of authority down to local authorities, pursuant to which, they adopt the ordinances
    ▪ (1) Some enabling act from the legislature
      o Authorizes that cities can zone
      o Authorizes cities to create local administrative agencies to create zoning
    ▪ (2) Local (city) Government passes some zoning ordinance which says what the property can be used for and creates a planning commission to administer the ordinance
    ▪ (3) Planning commission has the ability to approve or disapprove of the ordinance and creates a “comprehensive plan” with maps and descriptions of what is permitted.
    ▪ (4) Courts provide judgment on planning commission decisions, people can appeal to the courts and get administrative remedies.

  o Why can’t nuisance just handle land use consideration?
    ▪ Nuisance is after the fact, zoning plans are laid out before
    ▪ Need a plaintiff for a nuisance suit to go forward
    ▪ Administrative/ judicial efficiency→putting an undue strain on enforcement mechanisms
    ▪ Provides certainty/reduces risks
    ▪ General welfare and safety
    ▪ Does not rely on court’s efforts in balancing the equities
- Not everything we want to prevent is a nuisance
- We might want to permit some things that could be considered nuisance.

**The Non-conforming Use:**
- Lawful, preexisting use used prior to adoption of zoning ordinance that does not comply with the subsequently adopted zoning requirements
- *Amortization:* The use can continue for some time but the use has to stop at some point
  - This may give rise to a takings claim
  - We give you a reasonable time over which to discontinue your use after which the use has been terminated→solve constitutional concerns over takings. You have reasonable amount of time to get your investment back, which is all you are entitled to.
  - How long is reasonable?
    - Nature of use
    - How much is already invested?
    - Improvements?
    - Alternative uses?
    - Public detriment caused by the use?
    - Character of surrounding neighborhood?
    - Best and highest use of the property?
  - To get the benefit of amortization, the use must already be inexistence.
  - In terms of amortization, distinction are made between non-conforming uses, and non-conforming buildings…buildings usually have longer amortization periods.

- *PA Northwestern v. Zoning Hearing Board:* Moon Township, PA adopted a zoning ordinance extensively regulating the location of stores vending pornography, the effect of which was to make illegal the store operated by PA Northwestern. The ordinance permitted Northwestern 90 days in which to cease operations. The court held that the “amortization and discontinuance of a lawful pre-existing nonconforming use is per se confiscatory and violative of the PA constitution.” A concurring justice thought that the ordinance was void because the amortization period was unreasonable—it did not “provide adequate time for elimination of the non-conforming use.”

- **Alternative bases on which to argue for right to continue nonconforming use**
  - *Vested Right:* Once a right has become vested, govt cannot take it away
  - *Estoppel:* gov’t should be estopped from prohibiting me or my use once I have made reasonable investments on reliance (permission to build, etc.)
  - *Diff. b/t vested rights and estoppel:*
    - Estoppel may be stronger when it comes to planning because individual may have a vested right based on some pre-existing use that applies to everyone. It is different when the gov’t acts specifically for you.

- **Mechanics of Non-conforming use:**
  - Right to engage in non-conforming use runs with the land
  - Non-conforming use cannot be expanded or changed
  - Non-conforming use can or will be terminated upon abandonment

- **Flexibility in Zoning:** *Variances*
  - Variance is permission to vary from what the zoning board normally allows
  - Use Variance: Relax restrictions on your use of the land
  - Area Variance: Build house on a smaller lot size than is allowed
**Special Exceptions:** Uses permitted by zoning ordinance in which a zone in which it is not necessarily incompatible but where it might cause harm if not monitored—they are generally built into the ordinance
- Authorized under conditions when they are compatible with surrounding uses.
- Deal with anticipated changes up front and contemplate when making the ordinance.

**Zoning amendments or spot zoning:** When there is not an exception, apply to zoning board and try to get an exception or try to get the use of just your property rezoned
- **Requirements for Re-zoning:**
  - Demonstration of mistake in original ordinance
  - Show some sort of change in circumstances

**Two ways that zoning takes place:**
- Landowner gets the parcel rezoned so he can do something
- Someone else’s property is zone such that they are prevented from doing something
- Variance should be granted when the strict application of the zoning ordinance would result in undue hardship on the developer of the land—most effective use of the land
- Property owner must make an effort to help himself
- Market-based alternative: Might be denied on the condition that neighbors buy property from the owner at FMV.

**Commons v. Westwood:** Commons owned a residential lot, 50 feet wide with a total area short of the current zoning law. His lot was created before the current zoning law was enacted. Commons builder proposed to construct a residence conforming to setback requirements that would be the same value as the existing surrounding homes. In the past, Commons had attempted to sell the lot to a neighbor and to acquire additional lots adjacent to his lot, but both attempts had been unsuccessful. **Court held that a variance could be issued because “undue hardship” means that absent variance, the property may not be effectively used, a condition that Commons had established by his efforts to either sell the land to his neighbors or acquire more land to conform to standards.**

**Exclusionary Zoning:**
- Method of restricting or barring certain uses of property, but has the effects of excluding certain people.
- Sometimes excludes certain people of certain races or with certain resources
- Some fiscal explanations:
  - Tax purposes
    - More children create higher tax costs
  - Take the form of minimum house costs, square footage, lot sizes, minimum setback, barring of mobile homes.

**Southern Burlington NAACP v. Township of Mt. Laurel:**
- **Facts:** The township of Mt. Laurel developed rapidly from 1950 to 1975. The zoning law in effect excluded all multi-family residential dwellings and mobiles homes, and required minimum lot dwelling sizes for single-family
residences that were sufficiently large and therefore excluded low income families from Mt. Laurel.

- **Holding:** The Supreme Court ruled that the NJ constitution and the state’s zoning enabling act both required that local zoning further the “general welfare”, and that Mt. Laurel’s failure to accommodate the sounding needs of lower income families was contrary to general welfare. The court’s opinion was that a developing community that is expanding in population and size and thus taking shape could not adopt land use regulations that make it “physically and economically impossible to provide low to moderate income housing in the municipality,” but must “make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who may want to live there.”

- **Court Analysis:**
  - Land use regulation has to meet the constitutional requirements of upholding promotion of public welfare: health, morals, etc.
  - We have fundamental rights that cannot be abridged
  - There are certain fundamental rights that cannot be abridged
  - Housing involves questions of fundamental import
  - Local zoning measures must serve not only local welfare but the welfare of all state’s citizens, in other words, regional needs must be taken into consideration
  - In order to promote general welfare, it is critical to provide adequate housing for state citizens, you are excluding a segment of the state’s citizens
  - Fiscal considerations are not enough to justify these types of considerations
  - Environmental considerations might be enough

- **Mount Laurel I** was extended in 1983 to include all communities in NJ, not just developing ones, thus increasing the scope of the duty to require all communities to accommodate the needs of the poor.

- **Mount Laurel II** was created to extend the requirements into statutory form

- **Benefits:** Vote with your feet—Go to the community that offer what you want

- **Why might developed communities be different from developing communities?**
  - Developing communities may have more flexibility
  - Endowment affect: property as personhood in developed community (RADIN)
  - Expectations already ingrained in developed community

**TAKINGS**

- **Eminent Domain:** The power of the government to take property from citizens for public use, in which the citizens are given just compensation.
  - **Liability Rule:** Compensation is given and the government is protecting the property by the liability rule.
  - Comes out of 5th Amendment: “Nor shall private property be taken for public use without just compensation.”
Posner: Eminent domain is needed to avoid transaction costs
  - Gov’t must be able to abrogate property that is needed for some purpose; this is a way for the gov’t to solve land assembly problems in a high transactions costs environment.

Public use requirements: May not condemn property for private purposes, even if willing to pay; need only be some advantage or benefit to the public; actual use, or right to use, is by the public; SC has settled this question by adopting broader view.
  - Alternate views: Public use test should require that there be a real, pressing need as opposed to a mere convenience.
    - Transaction costs: Tests should formulated so that public use should be applied only in such a way to endorse condemnation in such a way when transactions costs are sufficiently high to thwart those costs.
  - Leading cases on Public Use:
    - Hawaii Housing Authority v. Midkiff: Land redistribution program in Hawaii where land was transferred to tenants upon payment to landlord
      - Court held that it is a public use, that taking was part of state’s police power, falling to the decision of the state
      - Test: Whether the exercise of eminent domain power is rationally related to some conceivable public purpose
    - Polltown v. City of Detroit: Taking by city of homes in a residential neighborhood for transfer to GM so GM could build a new plant
      - Court held that promotion of the economy (GM would create jobs, etc.) was sufficient public use even though GM was a private company.
  - Just Compensation:
    - Efficiency: ensures that gov’t values the property it is taking more than the person it is taking property form
    - Incentives to be productive: if there is no compensation requirement, people may be afraid to make investments in property b/c gov’t can just take it
    - Restrains the state: Requiring gov’t to compensate property owners can have effect of restraining owners from just coming around and taking property at will.
    - Fairness/justice concerns
    - Might protect the powerless. wealthy
  - Problems with Just Compensation:
    - Does not consider property owner’s subjective value
    - Inherently unjust; regardless of compensation
  - Why might someone value property more than market?
    - Endowment effect
    - Special uses
    - Relocation costs
    - RADIN: personhood
  - Why not award personal value?
    - Too hard to calculate
    - How do we know what they say is true?
• **Loretto v. Teleprompter:**
  o When action is permanent physical occupation authorized by the
gov’t it is considered a taking, regardless of the minor extent of
the taking or the public interest is serves, level of taking affects
amount of compensation not whether or not it is a taking:
temporary occupations of the land may or may not be a taking.
  o Should rent control be considered a permanent physical
occupation?
    ▪ Could be physical b/c people are there who may not have
      wanted to rent to
    ▪ Not a taking: just a regulation; still have right to sell,
      change land, etc/
  o **Regulatory Takings:** The govt imposes regulation on your property that is not just
regulation and rises to the level of being a taking.
    ▪ **Denominator Problem:** How do we measure diminution in value?
    ▪ **Examples:**
      • Zoning ordinances
      • Landlord-tenant law and rent control
      • Environmental regulations
    ▪ **Takings Middle Ground:**
      • Some regulation constitutes a taking
      • When regulation goes too far, we draw the line and regulation becomes
        a taking
      • When regulation diminishes value to the point where it would be unjust
        not to compensate.
  ▪ **Pennsylvania Coal v. Mahon:**
    • **Facts:** Pennsylvania’s Kohler Act prohibited underground coal mining
that would cause surface subsidence, but only where the surface and the
underground coal were owned by two different people. Mahon, owner
of the surface, had expressly assumed the risk of subsidence but invoked
the Kohler Act to restrain the owner of the underground coal,
Pennsylvania Coal Company, from further mining underground.
    • **Holding:** Property may be regulated to a certain extent but if regulation
goes too far it will be recognized as a taking. The court voided the
Kohler Act because it went “too far”—it destroyed the economic
viability of Pennsylvania Coal’s property, the underground coal that the
Kohler Act required to be left in place. The law made it commercially
impracticable to mine coal, a result with very nearly the same effect for
constitutional purposes as appropriating or destroying the right to mine
coal.
    • **Dissent:** The Kohler Act prohibited a noxious use and the diminution
in value was not absolute—the appropriate measure should not be the
decline in value “of coal alone, but the value of the whole property.”
    • **Conceptual severance test:** What is the denominator? Holmes and
Brandeis→all that you have in bundle as compared to what we take.
• **Extent of diminution of value:** How much property has been taken from the property owner

• **“Average reciprocity of Advantage”:** The property owner is burdened but also benefited

• **Brandeis:** Dissent:
  - Interests in property should not be carved up
  - Govt takes away sticks in the bundle—property owner only has so many sticks in the bundle, what happens if they are all taken away?

**Keystone v. DeBenedictis:**
- Look at the character of the govt action→govt showed a large public benefit in the form of health, environment and fiscal, more meaningful than Penn Coal; although everyone is burdened, they benefit greatly from restrictions also.
- Court ruled that there was no takings because the legislation protects not only private interests of property owners but also the broader interests of the public.

**Penn Central v. City of NY**
- **Facts:** The Supreme Court upheld New York’s Landmark Preservation law, which prevented Penn Central from building an office tower over Grand Central Terminal but left Penn Central with the economic return of from the terminal building and “transferable development rights” — the right to develop other properties within the vicinity owned by Penn Central that would not normally be allowed by New York zoning laws.
- The Court applied a balancing test, calling it an “essentially ad hoc, factual inquiry” that relied on a number of factors:
  a. The nature of the government regulation (the more like a physical invasion, the more likely to be a taking)
  b. The reasonable expectations of the property owner (the stronger the investment-backed expectations” and the more thoroughly frustrated they are by the regulation the more likely there is a taking).
  c. The degree to which the regulation is designed to stop uses that cause “substantial individualized harm” but are not common law nuisances
  d. The degree to which the regulation enables the government actually to use the property for “uniquely public functions.”
- The Landmarks Law posed no threat of physical invasion, left Penn Central with the ability to earn a “reasonable return” on its “investment backed expectations” and did not raise issues of government use.

**Notes:**
- **TDRs (Transferable Development Rights):** The TDR approach severs development rights from other rights in land and treats them as a separate item. The right to develop is restricted at particular sites or in so-called conservation areas, but owners of the restricted land are given TDRs that can be used for
development, beyond that which would otherwise be permitted, on receiving lots or in so-called transfer areas. Depending on the method used, recipients of TDRs may sell their rights or use them on land they own.

- Variety of uses:
  - preserve historic sites as in *Penn Central*
  - preserve farmland and open space
  - to create incentives for low-income housing
  - to regulate land use generally

- **Distinct Investment Backd Expectations**
  - Why weren’t P’s rights interfered with?
    - Can still use property for original purpose
    - P can still profit
    - Some development is okay, as long as it complies
    - P can transfer air rights to other property
  - Dissent: Avg, reciprocity of advantage: only a few buildings were singled out to bear responsibility without a benefit.

- **What are DIBEs?**
  - What does owner have before and after regulation?
  - What has the owner already done in form of investment?

- **Lucas v. South Carolina Coastal Council**

  - **Facts:** South Carolina law prohibited any development of Lucas’s beachfront property on the Isle Palms in order to protect the ecological interests of the barrier islands. The South Carolina Supreme Court ruled that the legislation was not a taking.

  - **Holding:** The US Supreme Court reversed and remanded the case to determine whether the law simply abated a common law nuisance. Regulation of private property is no taking if the regulations do no more than duplicate the result under the state’s law of private nuisance, or by the State under its complementary power to abate nuisances. Even if a regulation forbids the only economically viable use of the property, it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles. A government desire to prevent harm is not by itself enough to trigger per se validity because the distinction between harm-preventing and benefit-conferring is in the eye of the beholder.

- **Categorical Takings:** When the value of the land is essentially wiped out so there is no economically viable use of the land as a result of the regulation is a takings.

  - **total wipeout**
    - Does a regulation that denies total economically viable use of the property constitute a taking?
    - When you have been denied of all economic use, there is a takings
    - Even though you still have title, but you have lost all value, you still have a taking.
    - the government has to compensate in order to regulate in this way
• It is rarely going to be the case that you will be denied all economic use
• Is a total wipe-out really a total wipe-out
• There is a conceptual severance problem
• If there is not a total wipe-out, does that mean that there is no takings
• no, the total wipe-put question gets at per se takings, there still may be a regulatory takings

Solutions:
  o -leave some value, then it cannot be called a categorical taking
  o -say that it is just a regulation

Palazzolo v. Rhode Island
• Facts: SGI owned a 20-acre parcel of a salt marsh wetland from 1959-1978. During that period, various new regulations were adopted that effectively barred development of the wetland, but permitted construction of one large residence on an upland portion of the property. Palazzolo took sole possession and sought approval to develop the parcel more intensively. Upon denial of his plans, Palazzolo brought suit, contending that Rhode Island had taken his property. The Rhode Island Supreme Court ruled that the use restrictions in place in 1978, when Palazzolo acquired title, were part of the “background title” he had acquired and thus he could not assert that they constituted a taking.

• Holding: US Supreme Court reversed that ruling, reasoning that such a rule would immunize extreme and unreasonable regulations against future attack, would be capricious, and would deny to in-place owners the ability to transfer to others the same title they had. The Rhode Island Supreme Court also ruled that the use regulations did not deprive Palazzolo of all economically viable use of his land because he could still build a large residence. On that point, the US Supreme Court affirmed. The court concluded that the regulation did not deny to Palazzolo all economically viable use of his land because he could still build a large residence. On that point, the US Supreme Court affirmed. The court concluded that the regulation did not deny to Palazzolo all economically viable use of his land but remanded the case for a determination of whether, under the Penn Central test, the regulations constitute a taking.

• Concurrence: The regulations in place at the time an owner acquires property are relevant to the Penn Central issue of the owner’s reasonable investment-backed expectations.

• Notes:
  o -just because the government is getting rid of some harm, there is no justification
  o -need more than a remaining token interest
  o -just because you took title post-regulation does not mean that you do not have a takings.
  o -Is any and all regulation part of the background principles that an owner is subject to?
  o -S.Ct. says that the property still has value, therefore there is no categorical taking under Lucas, plus you knew the regulation was there/
o Court holds that a token interest is not enough to avoid a Lucas claim.
o The logic for saying that even if you are a post-regulation acquirer of your interest in property, you may still be able to make a takings claim.
o The court suggests that background principles are narrow and the law does not become background principle by enactment itself.
o Palazzolo was a beneficial owner throughout the entire period, even before regulation—a change in legal title will not undercut your right to make a takings claim.
o if we do worry about post-regulation takings claims—when you buy the property, you buy the prior owner’s takings claims.
o prior owner may also take advantage of a takings claim
o Instead of all of this, Court says after regulations title holders may bring a takings claim
o Designs takings clause so that landowners get just compensation if something is taken. The takings clause can be used as a device limiting government regulation, in which case, Palazzolo makes sense.
o at some point regulation goes too far and the government has done too much